



PLATFORM TRANSPARENCY AND THE FIRST AMENDMENT

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I. INTRODUCTION

Major U.S. platforms can powerfully influence public discourse by removing, promoting, and otherwise moderating users’ online speech. Better information about their content moderation would help policymakers enact better laws. It would also serve Internet users’ interests as readers, speakers, and participants in democracy.

A recent wave of “platform transparency laws” around the world now require such disclosures. The EU, for example, adopted transparency laws following extensive consultation with experts, and continues to take public comments on implementation issues. The U.S. approach has instead followed an increasingly familiar and depressing pattern: State lawmakers enact hastily-drafted laws, and platforms try to get those laws struck down as First Amendment violations. The Supreme Court recently agreed to hear cases about two such state laws, from Texas and Florida. Its review will encompass only portions of those states’ sweeping transparency mandates: the provisions concerning notice and appeal for individual users affected by content moderation. Its ruling on those questions, however, may effectively determine the constitutionality of the states’ other transparency mandates.¹

¹ FLA. STAT. § 501.2041 (2021); Social Media Platforms Bill of 2021 History, Fla. S.B. 7072 (2021), <https://perma.cc/YHK2-WVWS> (bill introduced Apr. 1, 2021 and signed by governor May 24, 2021); H.B. 20 § 120.052, 87th Leg., 2d Spec. Sess. (Tex. 2021) (codified at TEX. BUS. & COM.

Judicial analysis of Texas’s and Florida’s transparency mandates has, to date, been quite superficial. We should hope for better from the Supreme Court. Precedent does not provide clear answers to important constitutional questions about platform transparency, though. Platforms’ and states’ legal arguments both rely on flawed analogies: Platforms compare themselves to newspapers, and states compare them to food vendors or hospitals. Both analogies give short shrift to the rights and interests of Internet users.

Advocates and courts in platform transparency cases can find plenty of loose analogies, and few or no precise ones. They can also find precedent to support almost any standard of First Amendment review, which leaves them free to be as outcome-oriented as they wish in advancing their preferred policies. With the Supreme Court having granted review in the *NetChoice* cases, now is the time to think much harder about what those preferred policies should actually be, and what doctrinal framework will best achieve it.

This Article discusses First Amendment concerns with platform transparency laws generally, and the Texas and Florida laws in particular. I will argue that the laws have major problems that were scarcely addressed in the rulings so far—and that there are arguments and framings in favor of transparency that have also been insufficiently considered. I will also identify concrete ways in which the laws might be improved.

* * *

The Texas and Florida transparency laws are part of broader “must-carry” legislation enacted by Texas and Florida in 2021. Platforms challenged the laws in two cases, *NetChoice v. Moody* and *NetChoice v. Paxton* (collectively called “*NetChoice*” here).² To date, the parties’ and courts’ attention has mostly focused on the states’ must-carry rules, which compel platforms to change their editorial policies. Florida’s law, for example, would require platforms to carry all speech—even hate speech or disinformation—as long as it was posted by a political candidate. Texas’s

CODE §§ 120.001–.151 and TEX. CIV. PRAC. & REMEDIES CODE §§ 143A.001–.008); Bill History, Tex. H.B. 20 (2021), <https://perma.cc/B2WU-M3CK> (bill introduced Aug. 10, 2021 and signed by governor Sept. 9, 2021).

² *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021), *aff’d, vacated, and remanded*, 34 F.4th 1196 (11th Cir. 2022); *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092 (W.D. Tex. 2021), *vacated and remanded*, 49 F.4th 439 (5th Cir. 2022).

law would require platforms' policies on hate speech, disinformation, and other topics to be neutral as to speakers' viewpoint.

The major problem with the Texas and Florida transparency laws is that they will powerfully incentivize platforms to change their editorial rules for online speech. Both platforms and their users will suffer First Amendment harms as a result. Transparency laws—including the provisions under review by the Supreme Court—can be expected to change platforms' speech rules in two very predictable ways. The first is by imposing new documentation burdens, which can affect every step of platforms' industrial-scale editorial operations. Platforms can reduce those burdens by changing their policies. They may take down fewer offensive or harmful posts, or apply blunter rules like simply prohibiting all discussions of racism or prohibiting all nudity regardless of artistic or medical context. They may also simply shut down speech-supporting features like comments on videos.

Even the biggest platforms may have sound economic reasons to forfeit editorial control in these ways. But this state-imposed burden will pose an even bigger problem for the mid-sized platforms caught up in Texas's and Florida's laws, and held to standards designed for incumbent giants like YouTube.³ Platforms with fewer resources will have more reason to change their editorial policies or even cease competing with incumbents in offering particular features. Texas and Florida lawmakers say that their laws are intended to curb the biggest platforms' concentrated power over online speech. But their laws' poorly-calibrated burdens are likelier to do the opposite—reducing the diversity of forums for online speech, and increasing state influence on the platforms that remain.

The second way that transparency laws will cause platforms to change their speech policies is through state coercion. The *NetChoice* transparency laws will give the Texas and Florida Attorneys General (AGs) powerful new tools to influence platforms' speech policies. This problem is easy to foresee because it is happening already. Even with their current, more limited authority to investigate “deceptive” representations to consumers, AGs have pressured platforms to align their speech rules with enforcers' political preferences.

³ I have consulted for one mid-sized platform, Pinterest, and represented another, Internet Archive, in litigation. I previously worked for a very large platform, Google. My husband works for another mid-sized platform, Roblox.

Texas AG Ken Paxton brought such an investigation against Twitter in express retaliation for its ouster of former President Trump, for example.⁴ He demanded that the platform turn over what one expert called “every document regarding every editorial decision that Twitter has ever prepared”—an expense the company could presumably have avoided by quietly adopting the AG’s preferred speech rules.⁵ Indiana’s AG similarly investigated whether Twitter’s posted rules violated consumer protection laws when the company removed his jocular tweet questioning the outcome of the 2020 Presidential election. That inquiry has since led him to subpoena civil rights leaders, including the head of the NAACP, about their conversations with platforms.⁶

An Office of the AG (OAG) investigation in Washington, D.C. provides an example with a different political valence. Because it led to litigation over the OAG’s subpoena to Facebook, it also provides an unusual amount of public detail about the real-world dynamic between platforms and enforcers. That case arose from the OAG’s concerns about anti-Covid-vaccine posts—speech that may endanger public health, but is also often lawful. The OAG told reporters that its goal was to “make sure Facebook is truly taking all steps possible to minimize vaccine misinformation on its site,” presumably by taking down users’ posts.⁷ The OAG’s subpoena de-

⁴ @KenPaxtonTX, TWITTER (Jan. 9, 2021, 11:58 AM), <https://twitter.com/KenPaxtonTX/status/1347996281461989376> (explaining Paxton’s intention to prevent Twitter from “closing conservative acc[oun]ts”); Benjamin Din, *Twitter Sues Texas Attorney General Over Investigation Into Content Moderation Practices*, POLITICO, (Mar. 08, 2021, 9:39 PM), <https://www.politico.com/news/2021/03/08/twitter-texas-ken-paxton-trump-474568>; Caitlin Vogus, *CDT Leads Brief in Support of Rehearing in Twitter v. Paxton*, CTR. FOR DEMOCRACY & TECH. (Apr. 11, 2022), <https://cdt.org/insights/cdt-leads-brief-in-support-of-rehearing-in-twitter-v-paxton/>.

⁵ Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203, 1226 (2022).

⁶ Lawrence Andrea, *AG Todd Rokita Investigating Big Tech over What He Says is Conservative ‘Censorship’*, INDYSTAR (Apr. 7, 2021); Office of Indiana Attorney General, *Attorney General Todd Rokita Takes Further Action in Big Tech Censorship Investigation* (May 13, 2021), https://events.in.gov/event/Attorney_General_Todd_Rokita_takes_further_action_in_Big_Tech_censorship_investigation.

⁷ Cristiano Lima, *D.C. AG Subpoenas Facebook in Escalating Probe of Covid-19 Misinformation*, POLITICO (July 1, 2021), <https://www.politico.com/news/2021/07/01/dc-ag-subpoenas-facebook-497705>.

mandated that Facebook disclose the identities of users who had posted misinformation.⁸ Learning the names of individual speakers was necessary, the OAG said, in order to assess whether the platform had adequately penalized people who repeatedly violated the platform’s rules.

Laws like the ones in Texas and Florida will require a massive number of new disclosures, and empower AGs to investigate the truth of each compelled statement. AGs enforcing the laws could easily believe they are acting within their statutory authority, while effectively pressuring platforms to change their speech policies on culture war flashpoint issues ranging from LGBTQ+ rights to hate speech. Rational platforms will likely choose to appease those AGs or other enforcers at least some of the time. Affected Internet users may never know about concessions negotiated by platforms and state enforcers, or be aware of government actors’ roles in shaping the information they can see and share online.

Transparency laws don’t have to work this way. It is possible to expand platform transparency without simultaneously expanding states’ influence over online speech—or, at least without doing so to the dramatic degree that the Texas and Florida have. In this Article, I list many alternative approaches, as well as ways in which the Texas and Florida laws themselves could be amended to reduce their most obvious threats to online speech. None of these improvements will happen, though, if courts do not scrutinize transparency laws more closely. The basic questions of First Amendment analysis—what state interests the laws advance, at what cost to speech, and with what possibilities for better tailoring by legislative drafters—deserve careful attention in the transparency context.

Such attention was sorely lacking in the lower court *NetChoice* litigation. Both the Fifth and Eleventh Circuits applied what the latter called “relatively permissive” review under *Zauderer v. Office of Disciplinary Counsel*, a 1985 Supreme Court case about deceptive attorney advertising.⁹ Their rulings did not meaningfully examine the ways in which mandatory disclosures about speech and editorial policies might vary from disclosures about the tobacco, sugary beverages, or hospital prices. The

⁸ *Meta Platforms, Inc. v. D.C.*, ___ A.3d ___, 2023 WL 5964764 (D.C. Sept. 14, 2023). The named defendant in that case was Meta, Facebook’s parent company. To avoid confusion about name changes over time, this Article will use “Facebook” to refer to that platform and its parent, and “Twitter” to refer to the platform recently renamed as “X Corp.”

⁹ 471 U.S. 626 (1985); *Moody*, 34 F.4th at 23; *Paxton*, 49 F.4th at 485–90.

Fifth Circuit upheld all of Texas’s transparency mandates. The Eleventh Circuit upheld most of Florida’s, though it rejected as unconstitutional the user notification provisions at issue before the Supreme Court.

The courts’ cursory analysis is understandable given the scant briefing to date—the platforms’ brief to the Eleventh Circuit, for example, spent just one of its 67 pages on transparency.¹⁰ But the transparency issues in *NetChoice* are complex and weighty. Like other questions in *NetChoice*, they are also truly novel. As one Fifth Circuit judge put it, “[t]hese activities native to the digital age have no clear ancestral home within our First Amendment precedent.”¹¹

The job of the parties’ lawyers, of course, is to make the questions look easy, like something resolved long ago in another context. Platforms attempt to do this by arguing that they are basically like newspapers.¹² They compare transparency mandates to laws requiring the *Wall Street Journal* to publicly explain every detail of its editorial policies and publication decisions.¹³ Such mandates, they argue, are obviously counter to the First Amendment, and prohibited by a case about litigation discovery against newspapers, *Herbert v. Lando*.¹⁴ Texas and Florida, on the other hand, insist that their rules are basic consumer protection measures, to be reviewed under *Zauderer* and lower court cases applying its standard of review.¹⁵ Their arguments frame compelled speech about editorial policies as constitutionally indistinguishable from labels on food or warnings in advertisements for commercial services. Both the “platforms are newspapers” and “platforms are ordinary

¹⁰ Brief of Appellees at 44–45, *Moody*, <https://netchoice.org/wp-content/uploads/2021/11/11.8.2021-FILED-NetChoice-Brief.pdf>. A more recent brief from the Solicitor General’s office, filed almost a full year after the parties’ petitions, spent about four of its twenty-five pages on transparency and the First Amendment. Brief of Solicitor General in Support of Certiorari, Att’y Gen. v. Netchoice, LLC, 34 F.4th 116, at 18–22 (11th Cir. 2022). Developments in *NetChoice* after October 11, 2023 were not reviewed for this Article.

¹¹ *Paxton*, 49 F.4th at 497.

¹² Conditional Cross-Petition for Writ of Certiorari, *NetChoice, LLC v. Moody*, No. 22-393, at 32 (U.S. Oct. 24, 2022).

¹³ *Id.* at 31.

¹⁴ Brief of Appellees, *Paxton*, at 50; see *Herbert v. Lando*, 441 U.S. 153, 174 (1979) (permitting discovery against newspaper defendant but noting that First Amendment would prohibit “subject[ing] the editorial process to private or official examination merely to satisfy curiosity or to serve some general end”).

¹⁵ 471 U.S. 626 (1985); see, e.g., Opening Brief for Appellants, *Moody*, at 44–47.

sellers of goods and services” arguments usefully illuminate some aspects of platform transparency laws. But both are also incomplete, whether as analogies for the function of today’s platforms or as pointers to relevant case law.

Following this Introduction, Part II of this Article will describe the specific transparency mandates at issue in the *NetChoice* cases, and briefly outline major relevant precedent. Part III will then describe the concrete ways in which poorly-tailored transparency mandates may cause platforms to change the editorial policies that they apply to Internet users’ speech. This burden on speech is fundamentally different from the burdens created by transparency mandates for commercial offerings in areas like food safety. Case law addressing analogous speech-related problems exists, but is scant.

Part IV will explore the potential state interests and First Amendment framings for platform transparency laws, and delve more deeply into the case law. Subpart IV.A begins with the consumer protection interests advanced by the states in *NetChoice*, and critiques *Zauderer* as a basis for upholding the Texas and Florida laws. Subpart IV.B then considers precedent involving more complex disclosures from regulated industries like banking or pharmaceutical production. It flags what I believe is a major lurking issue in *NetChoice*: A ruling on platform transparency issues will likely be relevant for future cases in which businesses seek to “weaponize” the First Amendment as a legal tool against the regulatory state. That issue is far bigger than platform regulation. Its gravitational pull will likely shape the choices of advocates and Justices in *NetChoice*.

Finally, in Subpart IV.C, I discuss a fundamentally different basis for transparency mandates, as a tool to advance democratic self-governance goals. This foundation is underexplored in case law and academic literature about platform transparency. But it is, I will argue, profoundly important as a basis for future, better transparency laws. It also provides a potential constitutional framing that avoids many of the pitfalls of *Zauderer*.

Like many First Amendment cases, the outcome of this one will likely turn on the standard of review. Unlike in many First Amendment cases, the right standard of review is highly indeterminate. Advocates and judges can effectively pick the outcome they want, and find an argument to support it. Platforms’ arguments in *NetChoice* would lead to strict scrutiny, effectively killing most possible transparency laws. The states’ arguments have led to review so lax as to disregard major constitutional issues.

A better standard of review would lie in between. In principle, it might be found in intermediate scrutiny. Or the exacting scrutiny standard from election law cases might be a fit, in recognition of states' democratic interests in platform transparency laws. That would be a stretch from existing precedent. But so is applying *Zauderer*, or much of anything else. Perhaps even *Zauderer* itself could be interpreted as the source of a sufficiently robust standard—though given the analysis in the Fifth and Eleventh Circuits so far, I am skeptical.

Whatever analysis the Supreme Court adopts, it should insist on a clear connection between states' goals and the laws' consequences, and require meaningful tailoring. The First Amendment problems with badly-drafted platform transparency mandates are far too real for hasty analysis and unduly permissive standards of review.

II. THE *NETCHOICE* TRANSPARENCY RULES AND KEY PRECEDENT

A. *The Texas and Florida Transparency Laws*

The *NetChoice* litigation is not about “platform transparency” in the abstract. Before the Supreme Court, it is about specific provisions establishing what the Solicitor General, in a brief to the Court, called an “individualized-explanation requirement.”¹⁶ These provisions compel platforms to notify individual users affected by content moderation actions and—under Texas's law—provide an opportunity for appeal. The Court's ruling on those mandates could also effectively determine the constitutionality of the remaining and widely varying set of disclosures, for example by establishing the legal standard of review or by considering burdens that would arise from the transparency mandates that are not before the Court. That said, First Amendment analysis should not be identical for all of these distinct rules. Different mandates may advance different state interests; they may achieve states' goals to greater or lesser degrees; they may burden speech in different ways; and they may be more or less amenable to improvements that reduce harms to speech.

¹⁶ Order Granting Certiorari, *Moody & Paxton* (Sept. 29, 2023), <https://s3.documentcloud.org/documents/23999282/sept-29-orders.pdf>; Brief of Solicitor General at 18–20.

The Texas and Florida laws should be understood against a backdrop of platform transparency practices, and public demands for improved transparency, going back a decade or more.¹⁷ The ideas that platforms should publish clear rules for online speech and data about enforcement practices, or that users should be notified of content removal and allowed to appeal platforms' decisions, for example, are widely supported by public interest groups. Few lawmakers have attempted to specify concrete rules until very recently, however.

Both Texas and Florida apply their laws only to platforms over a certain size. Florida's covers platforms with over 100 million monthly global users, and \$100 million in annual gross revenues. Texas's law covers platforms with 50 million monthly active users in the U.S. That seems likely to include smaller companies like Reddit or Quora, and the district court said the law covered Vimeo and Pinterest.¹⁸ Texas nonetheless maintains that its law "covers only Facebook, YouTube, and Twitter," and the Fifth Circuit relied on information about only those three companies in concluding—inaccurately—that platforms "already largely" complied with the Texas law's sweeping requirements, including the notice and appeal requirements.¹⁹

¹⁷ See, e.g., Daphne Keller & Paddy Leerssen, *Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation*, in *SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM 220* (Nathaniel Persily & Joshua A. Tucker eds., 2020) (describing demands for sources of data about platform content moderation); Heidi Tworek, *Time for Transparency From Digital Platforms, But What Does That Really Mean?*, *LAWFARE BLOG* (Jan. 20, 2022, 8:01AM), <https://www.lawfareblog.com/time-transparency-digital-platforms-what-does-really-mean>; Mark MacCarthy, *Transparency is Essential For Effective Social Media Regulation*, *BROOKINGS* (Nov. 1, 2022), <https://www.brookings.edu/blog/techtank/2022/11/01/transparency-is-essential-for-effective-social-media-regulation/>.

¹⁸ Eric Goldman, *The 5th Circuit Puts the 1st Amendment in a Blender & Whips Up a Terrible #MAGA Kool-Aid—NetChoice v. Paxton*, *TECH. & MKTG. L. BLOG* (Sep. 20, 2022), <https://blog.ericgoldman.org/archives/2022/09/the-5th-circuit-puts-the-1st-amendment-in-a-blender-whips-up-a-terrible-maga-kool-aid-netchoice-v-paxton.htm>; *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021).

¹⁹ Response to Petition for Writ of Certiorari, *Netchoice, LLC v. Paxton*, No. 22-555, at 6–7 (Dec. 20, 2022); *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 486–87 (5th Cir. 2022) (stating that "platforms" "already track" the data necessary for transparency reports and "already largely comply" with other transparency obligations, and that variation between platforms would cut against validity of facial, pre-enforcement challenge). See discussion below at note 94 and accompanying text for a discussion of the statement's accuracy.

The specific requirements in *NetChoice* are as follows. I begin this list with the mandates that most resemble common policy proposals, and assign each requirement a capitalized, defined name for consistent use in this Article.²⁰ I will also identify which mandates are likely within the scope of the Supreme Court’s pending review. Unless otherwise noted, these requirements were all upheld in the circuit court rulings.

1. *Published Speech Rules*: Platforms in both Florida and Texas must publish detailed explanations of their rules for users’ speech—often called “content policies” or “community guidelines.”²¹ Florida’s law requires “detailed definitions” of standards used for any form of content moderation, ranging from removing content to demoting it in algorithmically ranked newsfeeds.²² The states have declined to state whether current published community standards—like Facebook’s, which runs about 100 pages—are sufficiently detailed.
2. *Rule Change Notices*: Platforms in Florida must notify users of changes to Published Speech Rules before they come into effect.²³ Depending on what counts as a “change,” and how detailed or intrusive the “notice” to users must be, this rule might require anything from daily emails to periodic webpage updates. Platforms’ internal practices can evolve on a daily basis, and sometimes change abruptly in response to emerging and unanticipated forms of online abuse, ranging from the Tide Pod Challenge to new terminology used by terrorists.²⁴ Florida’s Rule Change Notice provision was partially upheld. But the Eleventh Circuit struck down one provision which said that platforms could update rules only every thirty days, and which

²⁰ The Eleventh Circuit also upheld a Florida provision allowing de-platformed users to export stored data, concluding that it did not trigger any First Amendment scrutiny. *Moody*, 34 F.4th at 1223. “Data portability” rules such as FLA. STAT. § 501.2041 are legally distinct enough that I will not include them in this discussion of transparency. I will note, though, that Florida’s rule shows its drafters’ overall haste and imprecision. They appear to mandate distribution of content even if it violates copyright law or criminal laws governing child abuse material.

²¹ FLA. STAT. § 501.2041(2)(a) (upheld); Tex. H.B. 20 § 120.052 (upheld).

²² FLA. STAT. § 501.2041(2)(a) (upheld).

²³ FLA. STAT. § 501.2041(2)(c) (upheld other than provision permitting updates only every thirty days).

²⁴ Lindsey Bever, *Teens Are Daring Each Other to Eat Tide Pods. We Don’t Need to Tell You That’s a Bad Idea.*, WASH. POST (Jan. 17, 2018).

would effectively have prevented timely updates to editorial policies in response to new developments.²⁵

3. *Individual Notices*: Platforms in both states must notify users affected by content moderation decisions, and provide detailed explanations.²⁶ These provisions are at issue before the Supreme Court. In principle, such notices function like a notification of criminal charges or service of process for civil litigation. In practice, this rule would lead to billions of individualized notifications every year. Many would likely provide information that users don't care about. In Florida, platforms face up to \$100,000 in statutory damages for any notice deemed insufficiently "thorough" or "precise."²⁷ The Eleventh Circuit held that Florida's Individual Notice requirement likely violated the platforms' First Amendment rights, given its burden and threat of damages.²⁸ The Fifth Circuit upheld Texas's.²⁹
4. *Appeals*: In Texas, platforms must allow users to appeal platform content moderation decisions and must inform users of the outcome.³⁰ This requirement, too, will be reviewed by the Supreme Court. The Fifth Circuit

²⁵ See FLA. STAT. § 501.2041(2)(c); *Moody*, 34 F.4th at 1228–29.

²⁶ FLA. STAT. § 501.2041(2)(d) (requiring notice), § 501.2041(3) (specifying details of notice); Tex. H.B. 20 §§ 120.101–104 (upheld). The Eleventh Circuit references only § 501.2041(2)(d) in a chart summarizing its ruling, but references the details of § 501.2041(3) in the written ruling. *Moody*, 34 F.4th at 1230.

²⁷ FLA. STAT. § 501.2041(6)(a).

²⁸ *Moody*, 34 F.4th at 1230–31.

²⁹ *Paxton*, 49 F.4th at 485. The Individual Notice rules in *NetChoice* lack carveouts that practitioners might consider standard. Florida's Individual Notice mandate has no exception for purveyors of clearly unlawful material other than obscenity, including in the context of ongoing law enforcement investigations—meaning that platforms are required to send notifications that may tip off the investigations' targets. Neither state provides an exception for commercial spammers, who are likely to use information from notices to more effectively game platforms' rules and deceive or defraud users. These are not clearly First Amendment issues, but do show the laws' generally scattershot design.

³⁰ Tex. H.B. 20 §§ 120.101–.104 (upheld). Platforms' challenge to the Appeals requirement is a little unclear, but the law arguably compels speech in the form of (1) exercising editorial judgment for a second time by re-assessing an earlier decision, (2) notifying users of the outcome, and (3) building and maintaining the portal.

asserted, inaccurately, that the covered platforms “already provide an appeals process substantially similar” to that required by Texas law.³¹ Platforms must also build a remarkable (and as far as I know unprecedented) new “complaint system” portal to “track the status” of appeals, as well as tracking and responding to notices alleging that posts are unlawful.³² It is unclear whether this part of the law is within the scope of the Court’s review.³³

5. *Statistical Transparency Reports*: Platforms in Texas must periodically publish aggregate, statistical data about their content moderation.³⁴ Such reports are relatively common from larger platforms, offering varying degrees of detail.³⁵ As I’ve discussed elsewhere, designing content moderation systems *ex ante* to track specific data is a major undertaking. Lawmakers that require collection of the wrong data will impose substantial burdens without necessarily advancing the state’s interests.³⁶ Texas’s law requires platforms to track and disclose how many items of content the platform took any form of action against, and for each of those actions (1) what rule was being enforced, (2) the source of the notice (or what internal tools caused the platform to review the content), (3) what action was taken, (4) whether the user appealed the action, (5) whether that appeal succeeded, and (6) the country of the affected user.

³¹ *Paxton*, 49 F.4th at 487; see *infra* note 94 and accompanying text.

³² Tex. H.B. 20 § 120.101.

³³ The Court agreed to review the provisions identified as “individualized-explanation” requirements by the Solicitor General, in her brief recommending that the Court grant certiorari with respect to those requirements. Brief of Solicitor General, *Netchoice, LLC v. Paxton*, No. 22-555, at 18–20 (Aug. 14, 2023). Her brief did not explicitly cite or discuss § 120.101, which spells out the portal requirement. But the brief argued that the states’ notice and appeal provisions violated the First Amendment by burdening platforms’ editorial processes, and maintaining the portal would certainly increase the burden for each appeal.

³⁴ Tex. H.B. 20 § 120.053 (upheld).

³⁵ See ACCESS NOW, TRANSPARENCY REPORTING INDEX, <https://www.accessnow.org/transparency-reporting-index/>.

³⁶ Daphne Keller, *Some Humility About Transparency*, MEDIUM (Mar. 19, 2021), <https://medium.com/freeman-spoli-institute-for-international-studies/some-humility-about-transparency-5814cbbb1a72>.

6. *Systemic Explanations*: Platforms in Texas must publish explanations of specified content moderation practices.³⁷ Texas’s requirements are sprawling by contrast to the other major law requiring similar explanations, such as the European Union’s (EU) new Digital Services Act (DSA). Texas requires “a description of each tool, practice, action, or technique used in enforcing the acceptable use policy,” and “accurate information regarding . . . content management, data management, and business practices . . . sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform ” with “specific information” on five enumerated topics, such as how the platform “curates and targets content to users.”³⁸
7. *View Count Disclosures*: For any user whose content has been moderated, platforms in Florida must, upon request, disclose how many people saw that user’s posts.³⁹ This mandate may have been intended to help users identify when they have been “shadowbanned”—although if so, it is over-inclusive, since it applies to users who have already been informed of platforms’ adverse actions, and to users who were not “shadowbanned” in any conventional sense. This rule effectively requires platforms to offer free versions of features that have in the past often been offered commercially to advertisers, marketers, businesses, and would-be influencers.⁴⁰
8. *Candidate Notices*: Platforms in Florida must tell a political candidate if the platform “willfully provides free advertising” for that candidate.⁴¹ The purpose of this provision is unclear, including to the Eleventh Circuit—which

³⁷ Tex. H.B. 20 §§ 120.051(a) & 120.053(7) (both upheld).

³⁸ *Id.*

³⁹ FLA. STAT. § 501.2041(2)(e) (upheld).

⁴⁰ Twitter added a feature of this sort once Elon Musk acquired the company. See Mitchell Clark, *Twitter Is Now Showing Everyone How Many Views Your Tweets Get*, VERGE (Dec. 22, 2022), <https://www.theverge.com/2022/12/21/23522064/twitter-view-count-roll-out-personal-info>; see also FLICKR, *flickr pro*, <https://www.flickr.com/account/upgrade/pro> (allowing users to purchase “advanced stats” to see which photos are trending and which have performed best).

⁴¹ FLA. STAT. § 106.072(4) (upheld).

upheld the mandate while speculating that it might help candidates “make better ad-purchasing decisions.”⁴²

9. *Enforcement Mechanisms*: Both laws allow some civil suits, with high damage awards available to plaintiffs in Florida.⁴³ Those cases could, presumably, lead to additional compulsory disclosures in discovery. Neither this civil enforcement mechanism nor the enforcement powers of Attorneys General were explicitly mentioned as part of the “individualized-explanation requirement” accepted for Supreme Court review. However, the Eleventh Circuit did cite the risk of high civil damages as one basis for striking down Florida’s Individual Notice mandate.⁴⁴ Attorneys General also have broad enforcement powers, and can compel platforms to share internal documents and information about content moderation. Florida’s social media law appears to expand its AG’s investigative toolkit, authorizing her to investigate and “subpoena any algorithms” if she “suspects” that any violation is occurring or “imminent.”⁴⁵ Since almost any content moderation decision could potentially violate the states’ must-carry laws, as well as transparency rules like the Individual Notice requirement, this power appears to be quite broad.

The Texas and Florida laws may also be notable for the mandates they did *not* include. Their laws do not require disclosures about enforcement of speech rules on state-specified topics, for example. As Subpart IV.A.2 will discuss, that approach—taken by New York and California in their transparency laws—may raise

⁴² *Moody, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1230 n.14 (11th Cir. 2022). The court did not expand on the state interest this might serve. The Candidate Notice rule might also help with candidates’ record-keeping and campaign finance law compliance. Or it may relate to the theory, expressed in a since-rejected FEC complaint, that platform moderation of stories about Hunter Biden’s laptop constituted political advertising. Mychael Schnell, *FEC Finds Twitter Didn’t Break Law by Blocking Spread of Hunter Biden Story*, THE HILL (Sept. 13, 2021, 4:02 PM), <https://thehill.com/policy/technology/572024-fec-finds-twitter-didnt-break-law-by-blocking-spread-of-hunter-biden-story/>.

⁴³ FLA. STAT. § 501.2041(6).

⁴⁴ *Moody*, 34 F.4th at 1230–31.

⁴⁵ FLA. STAT. §§ 501.2041(3)(c)(5) & 501.2041(8). The platforms’ briefs below did not seem to call out Florida’s Enforcement Mechanism for separate challenge. Nor did they address § 501.2041(2)(g) (annual notices about algorithms) or § 501.2041(f)(1) (requiring platforms to “[c]ategorize algorithms”), both of which appear to be transparency mandates.

separate First Amendment questions. The laws at issue in *NetChoice* are also mostly not designed to facilitate research or investigative reporting about platform practices. The draft federal Platform Accountability and Transparency Act (PATA) does take this approach.⁴⁶ As Subpart IV.C.1 will explain, PATA includes provisions expanding researchers' ability to extract public information available on platforms' websites and apps, or to obtain access to internally held data.

Finally, while the Texas and Florida laws have some overlap with the EU's expansive new platform transparency requirements, the EU law is much narrower in some respects (such as in its equivalent of Texas's Systemic Explanations requirement) and broader in others (such as its establishment of a public database tracking platform content moderation).⁴⁷ Some of the EU's mandates will provide valuable information to platform users around the world, but its requirements for Individual Notice and Appeal do not apply outside the EU, and vary in operational detail from the laws in Texas and Florida. European lawmakers can, of course, compel these disclosures without the First Amendment constraints that apply in the U.S.

B. Case History and Key Precedent

Texas and Florida both enacted their laws in 2021. Platforms sued and obtained orders, currently still in place, enjoining enforcement of the laws. The platforms initially raised arguments based on the Dormant Commerce Clause, the federal immunity statute known as Section 230, and their own First Amendment rights to set editorial policy without state interference.⁴⁸ At the appellate stage, both the Fifth

⁴⁶ Platform Accountability and Transparency Act, S. 1876, 118th Cong., 1st Sess. (introduced June 8, 2023), <https://www.govinfo.gov/content/pkg/BILLS-118s1876is/pdf/BILLS-118s1876is.pdf>.

⁴⁷ See *Understanding the Impact of Social Media: Hearing on Platform Transparency Before the Subcomm. on Priv., Tech. and the L. of the S. Comm. on the Judiciary*, 117th Cong., 2d Sess., at 13–14 (2022) (statement of Daphne Keller, Director, Prog. Platform Reg., Stan. Univ. Cyber Pol'y Ctr.) (listing DSA transparency requirements), <https://www.judiciary.senate.gov/imo/media/doc/Keller%20Testimony1.pdf>; Daphne Keller, *The EU's New Digital Services Act and the Rest of the World*, VERFASSUNGSBLOG (Nov. 7, 2022), <https://verfassungsblog.de/dsa-rest-of-world/> (discussing EU transparency requirements with global implications).

⁴⁸ See Daphne Keller, *Who Do You Sue?*, HOOVER INST., AEGIS SERIES PAPER NO. 1902, at 8 (Jan. 29, 2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf, for a take on these First Amendment issues. See also Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, 6/28/2022 U. CHI. L. REV. ONLINE 1, for a more recent assessment of the Texas and

and Eleventh Circuits ruled primarily on First Amendment grounds.⁴⁹ The Fifth Circuit upheld both the must-carry and transparency provisions of Texas’s law. The Eleventh Circuit struck down Florida’s must-carry provisions and some transparency provisions, but left other transparency rules intact. The platforms and Florida sought Supreme Court review on all of these decisions, and many expected the Court to review the cases in the 2022–23 term. Instead, it will now review the laws’ must-carry rules and requirements for Individual Notice and Appeals in the 2023–24 term.

Two key cases heavily relied upon by the *NetChoice* parties illustrate their divergent approaches to transparency and the First Amendment. They also show the relative antiquity of key Supreme Court cases.

- The states argued for, and both courts of appeals granted, permissive First Amendment review under 1985’s *Zauderer v. Office of Disciplinary Counsel*.⁵⁰ *Zauderer* involved an attorney who advertised that clients would pay “no legal fees” if they did not recover damages, and was disciplined by a state bar association for failing to disclose that clients would nonetheless owe legal costs.⁵¹ The Supreme Court rejected the attorney’s argument that the rule unconstitutionally compelled him to speak, reasoning that the clients might otherwise be misled about the financial arrangement being offered.⁵² Lower courts have interpreted *Zauderer*’s rule in a number of ways. At its simplest, though, it permits compelled disclosures of “purely factual and uncontroversial information” about the terms on which a company offers its services, unless the disclosures are unjustified or unduly burden speech.
- Platforms and some *amici* argue that requiring platforms to explain editorial decisions would be like requiring a newspaper to do so. This builds on

Florida carriage requirements. A document tracking arguments raised and resolved in the *NetChoice* cases to date is at <https://tinyurl.com/2drudbz5>.

⁴⁹ *Paxton*, 49 F.4th 439; *Moody*, 34 F.4th 1196.

⁵⁰ 471 U.S. 626 (1985).

⁵¹ *Id.* at 652.

⁵² *Id.* (“The State’s application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster. . .”).

the overall centerpiece of their challenge to must-carry mandates, analogizing platforms' editorial roles and First Amendment rights to those of newspapers or other publishers. A key case for them is *Herbert v. Lando*, a 1979 Supreme Court ruling about civil discovery against a newspaper defendant in a defamation case. The Court in that case permitted judicially supervised and limited discovery into the paper's editorial process. But it noted that disclosures "merely to satisfy curiosity or to serve some general end such as the public interest . . . would not survive constitutional scrutiny."⁵³

As I will discuss throughout this Article, I think both of these cases are imperfect matches for *NetChoice*. *Zauderer* and cases applying it almost never involve the key issue in *NetChoice*: the risk that transparency laws will change platforms' editorial policies, reshaping users' ability to speak and access information online. Instead, cases in the *Zauderer* line typically involve vastly simpler disclosures about products like food or medicine, and attributes like price or calorie count. The analogies to newspapers and *Lando* are also flawed, because platforms play much broader roles in individual consumers' lives than newspapers do.

A small but growing list of cases from lower courts address platform transparency specifically. This list may grow while *NetChoice* is pending.

- The only circuit court decision to date (other than the *NetChoice* rulings themselves) is *Washington Post v. McManus*.⁵⁴ Until 2023, it was the only federal case about platform transparency mandates at all. That case concerned a Maryland law requiring both platforms and online newspapers to make disclosures about online campaign ads. The Fourth Circuit resoundingly rejected the law as a "compendium of traditional First Amendment infirmities," upholding online news sources' as-applied challenge.
- A Washington state case also involving a campaign ad transparency law seemingly reached the opposite conclusion.⁵⁵ The state court judge rejected

⁵³ *Herbert v. Lando*, 441 U.S. 153, 174 (1979).

⁵⁴ *Wash. Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019).

⁵⁵ *State v. Meta Platforms, Inc.*, No. 20-2-07774-7 SEA, 2022 WL 20697994 (Wash. Super. Ct. Oct. 26, 2022), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Penalties%20judgment.pdf; Amended Appellant's Opening Brief at 15, *Meta Platforms, Inc. v. State*, No. 84661-2 (Wash. Ct. App. Apr. 17, 2023), <https://www.courts.wa.gov/content/Briefs/a01/846612%20Amended%20Appellant%20's.pdf>.

Facebook’s First Amendment challenge to that law, stating in an oral ruling that the Washington state law survived strict scrutiny based in part on the court’s belief, contested by Facebook, that the company already collected the relevant data and could “essentially press a button” to disclose it.

- In February of 2023, a district court struck down New York’s platform transparency law, which required specific disclosures about hate speech policies.⁵⁶ Like the *McManus* court, it reasoned in part that the requirements made it more costly to host some speech based on its content.
- California’s new platform transparency law, which also requires disclosures about particular speech policies, has now faced two challenges. A case brought by publishers including the Babylon Bee, arguing that the law threatened their freedom as users to post controversial speech on platforms, was dismissed for lack of standing in August of 2023.⁵⁷ Twitter filed a new challenge to the law a few weeks later.⁵⁸

As Part IV.A.2 will discuss, all of these laws differ from the ones in *NetChoice* in important ways. The Maryland, Washington, New York, and California laws all required disclosure only about online speech or platform policies regarding particular content or viewpoints. That made the laws far less burdensome, and far more targeted to address particular harms, compared to the sweeping obligations enacted in Texas and Florida. At the same time, it made them more clearly content-based, and thus more vulnerable to First Amendment challenge.

The Texas and Florida requirements are in some ways more akin to the power asserted by some Attorneys General under existing consumer protection law to demand broad disclosures from platforms about *all* content moderation, in order to assess whether the platforms’ public representations are misleading. This authority has been disputed in several cases, including ongoing ones.⁵⁹

⁵⁶ *Volokh v. James*, No. 22-CV-10195, 2023 WL 1991435, at *11 (S.D.N.Y. 2023).

⁵⁷ *Minds, Inc. v. Bonta*, 2023 U.S. Dist. LEXIS 146729 (C.D. Cal. Aug. 18, 2023).

⁵⁸ Complaint, *X Corp. v. Bonta*, No. 2:23-at-00903 (E.D. Cal. Sept. 8, 2023); *see also* *NetChoice v. Bonta*, No. 5:22-cv-08861-BLF, 2023 WL 6135551, at *13–*14 (N.D. Cal. Sept. 18, 2023) (upholding First Amendment challenge to law requiring platforms to create written risk assessments and provide users with specified information about services).

⁵⁹ *Twitter, Inc. v. Paxton*, 56 F.4th 1170 (9th Cir. 2022) (rejecting on ripeness grounds Twitter’s First Amendment challenge to sweeping disclosure demands from the Texas Attorney General); *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016) (rejecting on ripeness grounds Google’s challenge

III. THE THREAT: STATE INFLUENCE ON PLATFORMS' CONTENT MODERATION

The transparency laws in *NetChoice*, including the specific Notice and Appeal rules being reviewed by the Supreme Court, are likely to cause platforms to change their rules for online speech. That is a matter of First Amendment concern for platforms, whose ability to set editorial policy will be curtailed. It is an even bigger concern for Internet users: The speech that users are permitted to share and read online will be shaped by state influences which are largely hidden to them. And unlike platforms, users will have few or no opportunities to challenge states' actions or defend their rights.⁶⁰

This threat to speech is fundamentally different from the threat in ordinary cases about labels or consumer-facing disclosures, including *Zauderer*. Those cases are about forcing businesses to say things they prefer not to say. The mandates may also impair businesses' ability to shape their own messages, for example by requiring safety warnings that take up space on packaging or billboards. *NetChoice* involves some of those issues, but its most fundamental problem is different. The state action in *NetChoice* threatens platforms' ongoing creation and enforcement of their editorial rules. That threat to platform rights, like the related threat to individual consumers' First Amendment rights, has no analog in cases about things like food or hospital pricing.⁶¹

There is room for disagreement about how substantial this threat is as a practical matter. I believe it is quite significant.⁶² But even if the threat were modest—if transparency laws would only occasionally create the problems I describe here—that would still be a qualitatively different problem from the one in cases like *Zau-*

to disclosure demands from the Mississippi Attorney General); *Meta Platforms, Inc. v. D.C.*, __ A.3d __, 2023 WL 5964764 (D.C. Sept. 14, 2023).

⁶⁰ Daphne Keller, *The Three-Body Problem: Platform Litigation and Absent Parties*, LAWFARE (May 4, 2023), <https://perma.cc/78LJ-3YBE> (detailing lack of representation for user speech interests in most platform liability litigation).

⁶¹ These examples have come up, for example, in *N.Y.S. Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding requirement for some restaurants to disclose calories in menu items), and *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 542 (D.C. Cir. 2020) (upholding requirement for hospitals to publicly list prices of services).

⁶² I say this as a lawyer with two decades of experience in both platform transparency and state/platform relationships. So far, I have found no one with experience in these areas who disagrees.

derer. And, realistically, our expectations about platform behavior under transparency laws like the ones in Texas and Florida should be shaped by real-world experience with platform behavior under intermediary liability laws, like the Digital Millennium Copyright Act (DMCA) in the U.S. or the DSA in the EU. Those laws expose platforms to costly litigation and potential liability, which they can avoid by simply taking user speech down. Platforms' pattern of over-removal in order to avoid risk and streamline compliance under such laws is very well documented.⁶³ Erring on the side of silencing users is often the economically rational choice in individual cases or even for entire classes of speech, like political parodies or celebrity gossip. Similar pressures to remove users' speech based on its content (or to carry specific state-favored speech based on its content) will arise under transparency laws like the ones in Texas and Florida. Just as happens under the DMCA and similar laws, platforms will find that simply doing what state enforcers or litigants demand—changing individual editorial decisions or overall rules for online speech—is the cheapest and safest choice.

As I will discuss in later Parts, I do not think this risk should be a constitutional death knell for platform transparency laws. But it should cause courts to insist on much more careful legislative drafting. This Part will describe two major sets of practical problems with transparency laws and speech, and list some ways the laws could be improved. The first set of problems involves the enforcement process, and the power granted to state actors like Attorneys General. The second involves the burdens the laws create for platforms, and likely resulting changes to individual platforms' speech rules and the overall online speech ecosystem.

Lawmakers won't bother avoiding those problems if courts are willing to uphold sloppily drafted laws like the ones in Texas and Florida, though. More stringent First Amendment review is needed. There is only scant precedent about speech compulsions that, like the ones in *NetChoice*, affect commercial entities' exercise of speech and editorial rights in their overall businesses. This Part will end

⁶³ See Daphne Keller, *Empirical Evidence of Over-Removal by Internet Companies Under Intermediary Liability Laws: An Updated List*, THE CENTER FOR INTERNET AND SOCIETY (Feb. 8, 2021), <https://cyberlaw.stanford.edu/blog/2021/02/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws> for a list of studies. The extensive procedural requirements for legal “notice and takedown” processes under the DMCA and DSA are intended to address this problem.

with a review of the few—but nonetheless illuminating—areas of precedent that appear relevant.

A. Enforcement Problems

State AGs and other enforcers can easily, and even inadvertently, use transparency laws to make platforms change their speech policies. Mandates like those in Texas and Florida for Published Speech Rules or Individual Notices will predictably and consistently create situations in which enforcers believe or can assert that platforms have misrepresented their policies. The easiest way for platforms to come into compliance will be by changing their editorial practices to match enforcers' preferences. The question is not *whether* this dynamic will arise. It is how often, and which speech will be affected.

Platform disclosures about their speech policies will have limited value unless enforcers can vet the disclosures' accuracy and penalize misrepresentations. But the process for doing so creates direct channels for state influence on platforms' underlying editorial operations, as Eric Goldman has pointed out.⁶⁴

This could happen through deliberate abuse of power, as when an AG pressures platforms to favor her political allies or disfavor her adversaries. But an AG who tries in good faith to enforce the law as she understands it can easily have the same coercive effect. This makes the state influence under transparency laws very different from classic “jawboning” situations, in which state actors assert authority that they actually lack under law, or try to coerce speech by leveraging power over non-speech areas of law, such as taxation.⁶⁵ Under transparency laws, the state actor would seemingly be exercising power expressly granted in legislation.

This risk can arise any time an AG inquires whether platforms' actual editorial practices match descriptions in sources like the Published Speech Rules, Rule Change Notices, Individual Notices, or Systemic Explanations mandated by Texas

⁶⁴ Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203 (2022).

⁶⁵ *Backpage.com, LLC v. Dart*, 127 F. Supp. 3d 919 (N.D. Ill. 2015) (upholding First Amendment claim where Sheriff implicitly overstated his legal authority); *Missouri v. Biden*, ___ F.4th ___, 2023 WL 6425697, at *20 (5th Cir. Oct. 3, 2023) (upholding portions of an injunction based in part on officials' “promises of legal regime changes, enforcement actions, and other unspoken threats”); Genevieve Lakier, *Informal Government Coercion and The Problem of “Jawboning”*, LAWFARE BLOG (Jul. 26, 2021), <https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning>; Keller, *Who Do You Sue?*, supra note 48, at 5–7 (discussing jawboning).

and Florida. Any of these descriptions might be considered insufficiently detailed or inaccurate if it omits details the enforcer considers important—like what specific terms the platform considers to be racial slurs, or which experts and public interest groups the platform consulted in formulating its rules. Facts like those might change daily across numerous languages and cultural contexts. Perfect transparency about such a complex and dynamic system is impossible.

Opportunities for disagreement will be even more common for specific content moderation decisions and the Individual Notices describing them. That is in part because many decisions will, inevitably, not match platforms' published policies. Content moderation is rife with inconsistency and error. If Facebook were to achieve a remarkable 99.9% accuracy rate in moderating the over 350 million photos uploaded daily, that would still lead to at least 350,000 mistakes every day.⁶⁶ A large number of decisions also inevitably fall in gray areas—requiring moderators to interpret rules that do not expressly address the situation at hand. Platforms can no more draft rules to cover all future questions than legislatures or Restatement drafters can exhaustively document the rules about which future speech will be defamatory or violate copyright. And platforms can't, like courts, publish every new decision documenting an evolving "common law." Such publication would in many cases violate privacy laws, including by disclosing posts that a user shared only with friends. It would cause platforms to republish huge amounts of pornography, not to mention copyright infringement and defamation. And it would be so voluminous as to be useless to ordinary users as a source of guidance.

This ever-expanding universe of de facto platform speech rules, and the impossibility of capturing it in transparency disclosures, means that disclosures will likely strike many enforcers as incomplete or inaccurate. Any enforcer will be able to identify particular removal choices that, clearly or arguably, render published disclosures false. Elected officials, like most state AGs, may be particularly motivated to address transparency "failings" that involve media- and constituent-friendly culture war issues. Those will not be hard to find.

⁶⁶ Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), <https://www.techdirt.com/2019/11/20/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well/>; Daphne Keller, *State Abuse of Transparency Laws and How to Stop It*, THE CENTER FOR INTERNET AND SOCIETY (Sept. 19, 2022, 3:49 PM), <https://cyberlaw.stanford.edu/blog/2022/09/state-abuse-transparency-laws-and-how-stop-it>.

1. Examples

An AG that wanted platforms to change their speech policies could readily cite concerns about the accuracy of disclosures in Individual Notices and elsewhere as grounds for making the platform do so. The cases discussed in the Introduction to this article, brought by AGs in Texas, Indiana, and Washington, D.C., illustrate this problem.⁶⁷ Enforcers could find endless new grounds for disagreement about whether a platform’s disclosures are accurate. I describe five examples in a blog post, and offer another here.⁶⁸ This one happens to involve a politically conservative AG, but it could just as easily involve a liberal one. It happens to involve an individual post, but could easily involve broader platform policy changes. It happens to involve state pressure to keep user speech *up*, but could just as easily involve pressure to take it *down*.

Imagine that Floyd, a Facebook user in Florida, posts a comment saying that gay teachers should not be allowed to mention their sexual orientation in elementary school classes. Facebook has a posted policy against “homophobic comments,” and takes down Floyd’s post for violating it.

Floyd complains to the Florida AG, saying that his remark didn’t violate Facebook’s posted rule. As Floyd sees it, he did not express fear or hostility toward LGBTQ+ people—he simply stated his beliefs about whether children should be exposed to information about adult sexual behavior.

The AG agrees that nothing in Facebook’s Published Speech Rules adequately informed consumers that posts like this would be removed. The rules, she concludes, are misleading and violate Florida’s platform transparency laws. She contacts Facebook to say she is considering bringing an enforcement action. Her office wants the company to disclose a month’s worth of other posts removed under the “homophobia” policy, in order to identify any other discrepancies between the platform’s Published Speech Rules and its actual editorial practices. She also plans to hold a press conference to show her constituents how she is holding Facebook to account for its secret woke agenda.

Faced with pressure like this, Facebook has three main choices. First, it can litigate about whether the remark is “actually” homophobic. In the process, it will incur bad press, expenses, and ill-will from a powerful state enforcer. It will also

⁶⁷ See *supra* notes 4–8.

⁶⁸ Keller, *State Abuse*, *supra* note 66.

have to disclose more decisions, knowing that the AG will inevitably find some she considers improper for new and different reasons. Though litigation has a lot of downsides, I would expect bigger, better-resourced platforms would litigate some cases like this in the early days of transparency mandates: Both they and enforcers will want to clarify and test the new laws' limits. Longer term, platforms may also litigate when a dispute affects their revenue or reputation, or threatens values particularly important to executives. But platforms are not going to litigate every case, and potential new cases will arise constantly.

Second, Facebook could change its posted policies to make them more accurate and non-misleading. This is precisely what transparency laws are supposed to make them do. Platforms will surely do it in some cases.

But it is far from costless. For our Florida example, it might mean adding detail to the policy against homophobic posts, saying that it prohibits “endorsement of unequal employment conditions based on sexual orientation,” for example. The platform would then have to decide how much detail to add, and how many potential future scenarios to anticipate and prejudge. It could, for example, spell out an exception for relevant occupational qualifications. If it doesn't add that exception, the platform may run into trouble with the Florida AG later on if it fails to remove a post calling on schools to hire more LGBTQ+ counselors. If it does add that exception, it invites future disputes about what Facebook considers to be “relevant occupational qualifications.”

This ongoing, fractal emergence of questions not quite covered by a rule's last iteration is not unique to platform content moderation, of course. As litigators and parents of argumentative children everywhere will recognize, it can happen with almost any set of prescriptive rules for complex human speech and behavior.

Large platforms are unique, however, in the sheer speed and scale with which such new and debatable questions emerge and must be resolved. TikTok, for example, reportedly processed notices for almost 31 million content moderation choices affecting Europeans during a six week period in 2023. That's a rate of about 738,000 decisions about speech each day.⁶⁹ Many of these decisions may have been functionally the same—representing identical editorial judgment processes, and producing identical Individual Notices—since social media platforms often use filters

⁶⁹ European Commission, *DSA Transparency Database*, <https://transparency.dsa.ec.europa.eu/statement> (as of Oct. 11, 2023, reporting 30,921,595 notices sent by TikTok).

to remove duplicated content without examining contextual differences. As a very rough comparison to estimate how many platform moderation decisions might be truly novel, Google says 15% of its queries are new, and have never been seen by the company before.⁷⁰ For Google, that represents a global daily rate of around 1.2 million new inquiries submitted by users, each requiring a new response. At the same 15% novelty rate, TikTok's documented European reporting would amount to some 110,000 unprecedented content moderation decisions and Individual Notices each day.⁷¹

Once Facebook settles on its new publicly stated rule, the work in response to the Florida AG's investigation is not over. Now it must articulate the same rule in dozens of languages. This may require vetting the rule with local legal and policy experts who might flag, for example, conflicts with German employment law or with Facebook's position in ongoing litigation in Brazil.⁷² The final wording must then be added to webpages, user interfaces in apps, and communications like email messages used in Individual Notices and Appeals. The exercise may also involve updating training and tools for a distributed workforce of tens of thousands of moderators. This is all costly and cumbersome.

Facebook's third option is to concede that the Florida AG is correct and reinstate Floyd's post about LGBTQ+ teachers. That would be the easiest, cheapest, and safest course. It is the course we should expect platforms to take some of the time, and perhaps much of the time. We already know that platforms regularly remove

⁷⁰ Arooj Ahmed, *Google Is Still Not The All-Knowing Almighty Search Engine as 15 Percent of Queries Are "Never Seen Before" by Tech Giant*, DIGITAL INFORMATION WORLD (Aug. 31, 2020), <https://www.digitalinformationworld.com/2020/08/google-is-still-not-the-all-knowing-almighty-search-engine-as-15-percent-of-queries-are-never-seen-before-by-tech-giant.html#>. For Google, that represents a global daily rate of around 1.2 million new inquiries submitted by users, each requiring a new response.

⁷¹ Continuing with the arithmetic, the EU's population of 450 million people is about 15 times the size of Texas's population of about 29 million. So Texas's Individual Notice mandate might affect 49,000 daily decisions, with about 7,400 of them involving content that had not previously been assessed.

⁷² Platforms have strong reasons to maintain consistent policies around the world to the extent possible. See Keller, *Who Do You Sue?*, *supra* note 48, at 7–10 (discussing platforms' territorial restriction systems for compliance with local law, and incentives to standardize private speech rules to avoid such "geoblocking" systems).

users' legal speech in order to avoid litigation risk or expense to themselves.⁷³ They revise or reinterpret their own voluntarily enacted rules to appease politically powerful actors, both by removing more content and by leaving more content up.⁷⁴ Decisions like this overwhelmingly take place behind closed doors. Users and the public are unlikely to ever know what has happened, much less have the opportunity to challenge the rule changes before a court. Users who are silenced at state behest have obvious First Amendment concerns in this scenario. So do users whose online reading material is reshaped by invisible state influence.

Again, this scenario could just as easily involve AG pressure for a platform to *remove* speech. If Facebook left Floyd's post up, for example, an AG in a liberal state like California might argue that *that* choice showed the falsity of the company's stated policy against homophobia. In that case, the way to appease the AG might be to take the post down.

The Washington, D.C. case discussed above provides an example of an investigation that might prompt more speech restriction by platforms. The Office of the Attorney General (OAG) there subpoenaed Facebook as part of an investigation, under consumer protection law, of the platform's public statements about restricting Covid misinformation. The subpoena sought the identities of users who had posted misinformation, arguing that the OAG needed to know who those users were in order to determine whether Facebook was adequately penalizing repeat offenders. The D.C. Court of Appeals agreed that this information was relevant in determining the truthfulness of Facebook's public statements. It upheld the subpoena over the company's statutory, First Amendment, and Fourth Amendment objections.⁷⁵

⁷³ Keller, *Empirical Evidence*, *supra* note 63.

⁷⁴ Elizabeth Dwoskin, *Outside Audit Says Facebook Restricted Palestinian Posts During Gaza War*, WASH. POST (Sept. 23, 2022); Newley Purnell & Jeff Horwitz, *Facebook's Hate-Speech Rules Collide with Indian Politics*, WALL ST. J. (Aug. 14, 2020).

⁷⁵ *Meta Platforms, Inc. v. D.C.*, __ A.3d __, 2023 WL 5964764 (D.C. Sept. 14, 2023). In a pending case raising similar issues, bankers raise a First Amendment challenge to the Kentucky Attorney General's demands for sweeping disclosures about financial institutions' environmental policies and communications with environmental groups, calling the disclosure requirements a form of surveillance. *Complaint, Hope of Ky. v. Cameron*, 22-CI-00842 (Ky. Cir. Ct. Franklin Cty. Oct. 31, 2022), https://www.kybanks.com/kba-files/pdf/comleg/2022_10_31_HOPE_KBA_Complaint_vs_AGCameron_CIDs_22CI842_AsFiled.pdf.

Facebook argued that the investigation was, as the court put it, “really just an attempt to ‘pressure [Facebook] into changing how it exercises [its] protected editorial control,’” and thus a violation of both individual users’ and Facebook’s own First Amendment rights. The court disagreed, concluding that the OAG in fact sought only to determine

whether Meta’s *representations* regarding efforts to prevent and remove vaccine misinformation from the Facebook platform violate the District’s consumer protection statute, the CPPA. There is no suggestion that the District is investigating whether Meta’s moderation policies or efforts to police them were unlawful or insufficient in themselves⁷⁶

As the D.C. case illustrates, state enforcement of transparency requirements can easily implicate concerns about surveillance, as well as about restricting speech. The users most affected might not be the ones whose names are disclosed, but rather future users: People who have reason to fear state surveillance are often deterred from posting or inquiring about sensitive subjects online.⁷⁷ And of course, if Facebook quietly changed its enforcement practices, terminating users’ accounts more readily in the face of AG pressure, it would affect future users’ ability to post lawful speculation about vaccine efficacy.

In other hypothetical cases, like the ones described in my earlier blog post, the platform’s safest course might involve other adjustments in the development or enforcement of editorial policy.⁷⁸ A platform might, for example, decide not to consult organizations like the Anti-Defamation League for advice on domestic extremism, perhaps based on concerns about whether Individual Notices would need to spell out that background in order to be sufficiently thorough. Or it might forego updates to machine learning models, or go without nuanced and adaptable internal rules

⁷⁶ *Meta Platforms*, 2023 WL 5964764, at *36 (internal quotation marks omitted).

⁷⁷ Alex Marthews & Catherine E. Tucker, *Government Surveillance and Internet Search Behavior* 40 (Feb. 17, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412564; see also CHILLING EFFECTS: NSA SURVEILLANCE DRIVES U.S. WRITERS TO SELF-CENSOR, PEN AM. CTR. 6–7 (Nov. 12, 2013), <https://pen.org/chilling-effects> (journalists report avoiding writing about terrorism); Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J., 117, 172 (2016).

⁷⁸ Keller, *State Abuse*, *supra* note 66.

for new racist slang or cultural signifiers like Hawaiian shirts in the U.S.⁷⁹ The possibilities for state influence are as varied as the evolving speech culture of the Internet.

We should particularly worry about platform acquiescence to enforcers' speech preferences in two situations. One is when a change will not affect platforms' bottom line, because it will affect only users or topics that do not generate much revenue. The other is when an enforcer sees political advantage in pursuing disputes about politically polarizing culture war flashpoints, like what counts as hate speech or disinformation, or how users may speak about gender identity. We should worry about state actors determining what Internet users can see, say, and read online precisely as to the most contested and culturally or politically significant speech.

These First Amendment problems don't disappear when civil claimants, rather than AGs, enforce transparency laws. Civil claimants, too, can reshape platforms' speech policies. Indeed, almost all empirical data about platform over-removal comes from private claims of this sort. As the Supreme Court noted in *New York Times v. Sullivan*, the chilling effects from civil liability standards can violate the First Amendment as much as criminal liability rules do, and be "markedly more inhibiting."⁸⁰

In our hypothetical Florida case, Floyd could bring a claim saying that the User Notice he received was insufficiently "thorough" or "precise" and be awarded up to \$100,000 in statutory damages. If he wins, others could follow with similar claims about the same topic, giving platforms incentive to avoid or settle the initial case. Texas offers no such monetary bounty, but plaintiffs can recover fees and get injunctions. Platforms then face stiff fines if they fail to comply with Texas state court orders to change their practices or posted materials, even if different courts reach conflicting conclusions.

⁷⁹ *Id.*

⁸⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). As *Sullivan* makes clear, civil lawsuits are subject to First Amendment challenge for this very reason. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . ." *Id.* The issue is analogous to one the Supreme Court declined to review as to Texas's SB 8 abortion law, which awards plaintiffs up to \$10,000 for bringing civil claims against people who aid or abet abortions. *In re Whole Woman's Health*, 142 S. Ct. 701 (2022).

2. Tailoring possibilities

It does not seem possible to fully eliminate the First Amendment risks described so far. They can come up under any rule that requires platforms to explain editorial decisions or policies and allows enforcers to dispute those explanations' accuracy.

One response to this problem would be to cast a broader net in deciding which transparency laws to enact in the first place. Lawmakers could prioritize purely quantitative disclosure requirements, like Texas's requirement for Statistical Transparency Reports or Florida's for View Count Disclosures. (Those rules have other problems, though, as Subpart III.B will discuss.) Or they could streamline researchers' access to public but hard-to-access information, as discussed in Subpart IV.C. Those rules would take AGs out of the position of telling platforms how to apply or explain their rules.

If lawmakers do want to put AGs in that constitutionally risky position, there are still ways to at least somewhat tailor the laws to reduce state coercion risks. Some possibilities—all imperfect and in need of tire kicking, but worthy of further discussion—are:

- AGs themselves could be subject to more transparency requirements as a check on improper behavior. In particular, the law could require disclosures of relevant communications between AGs and platforms.⁸¹

⁸¹ Better transparency about AG activity, including pressure on platforms, is warranted in any case. It should not take the apparent intervention of North Korean hackers for Americans to learn what their AGs are up to. Emily St. James, *The 2014 Sony Hacks, Explained*, VOX (June 3, 2015), <https://www.vox.com/2015/1/20/18089084/sony-hack-north-korea> (explaining North Korea's likely role in hacking Sony); Nick Wingfield & Eric Lipton, *Google's Detractors Take Their Fight to the States*, N.Y. TIMES (Dec. 16, 2014) (publishing "menacing" letter, revealed in Sony hack, that was sent to Google by the Mississippi AG but "largely drafted by" movie industry lawyers); Mike Masnick, *Attorney General Downplays Ties to MPAA... Just as NYTimes Reveals MPAA Actually Wrote the Letter He Sent to Google*, TECHDIRT (Dec. 17, 2014, 9:48 AM), <https://www.techdirt.com/2014/12/17/attorney-general-downplays-ties-to-mpaa-despite-letter-he-sent-google-revealed-as-written-mpaa/> (noting Mississippi AG's insistence that the Motion Picture Association of America had "no major influence on [his] decision-making"); Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014) (reporting on investigation of AGs in two dozen states in which "routine lobbying and deal-making occur largely out of view" and noting lack of "disclosure requirements governing state attorneys general").

- Transparency statutes could set higher litigation burdens for AGs or plaintiffs to obtain discovery or prevail in cases that turn on disputed interpretation of Individual Notices or other explanations of speech rules.⁸² They could be required to show, for example, that no reasonable person would agree with platforms' interpretation of speech rules.
- Transparency statutes could set limits on the degree of granularity and additional detail required of platforms in explicating policies.
- Civil damages could be eliminated in favor of injunctive relief. Or damages could be reduced or made available only in certain cases involving, for example, economic harm to businesses or termination of entire user accounts.
- Transparency statutes could instruct judges in transparency cases to consider the rights and interests of absent third parties—much as courts might do under the public interest prong of some preliminary injunction standards.
- Third parties, such as user-rights organizations, could be given standing to bring cases or intervene in cases where state action will predictably harm the rights of current or future platform users.

B. Burden Problems

1. Generally

The second way that the *NetChoice* transparency rules may cause platforms to change their speech policies is more boring and technocratic. But it is no less important. The laws will create pervasive and ongoing burdens, requiring platforms to hire new employees, build new tools, and more heavily involve lawyers in daily Trust and Safety operations. That will make hosting and moderating speech more expensive—perhaps very significantly so.

Platforms can avoid these costs by eliminating features or editorial practices that are no longer cost-efficient in light of new transparency obligations. One way to do that is to simply edit less—in short, to do what lawmakers enacting must-carry rules wanted platforms to do.

⁸² A model for this might be found in cases following *Tattered Cover*, which held that law enforcement agents seeking access to bookstore purchase records must, in order to protect customers' First Amendment rights, make a stronger showing of need before obtaining a warrant. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1048 (Colo. 2002).

Alternately, platforms could avoid costs by adopting editorial policies that are simpler, blunter, and easier to explain in Individual Notices and elsewhere. One way to do that would be to yield to the already-meaningful pressure for different platforms to converge on standardized speech policies.⁸³ Platforms that do so can more easily avoid the spotlight and litigation challenges, and more readily rely on affordable off-the-shelf support from vendors in the burgeoning platform compliance industry.

A third option is to stop offering certain speech-enabling features, or even to avoid certain product markets entirely. A midsized social media platform that is considering an event invitations feature, for example, is less likely to do so if even modest experiments will immediately trigger heavy compliance costs for transparency.

Platforms' purely economic or operational burdens from transparency laws should not matter for First Amendment purposes under tests like *Zauderer*.⁸⁴ But the burdens Texas and Florida have created specifically affect editorial choices and speech.⁸⁵ Platforms face costly obligations if they choose to exercise editorial control, and can alleviate those burdens by eliminating or simplifying editorial control. Whatever burden-avoidance option platforms choose—be it removing more speech, removing less, or some combination—will affect both platforms' and users' First Amendment rights.

In addition to First Amendment harms to individual users or platforms, these burdens can have important cumulative effects for the overall ecosystem of online speech. Consolidation of users onto major platforms has already reduced the web's

⁸³ GLOBAL ALLIANCE FOR RESPONSIBLE MEDIA, ADJACENCY STANDARDS FRAMEWORK (June 17, 2022) (describing framework to “provide advertising industry participants with a common structure for evaluating the brand safety and suitability of . . . content”), <https://wfanet.org/leadership/garm/garm-resource-directory-%28weblog-detail-page%29/2022/06/17/GARM-Adjacency-Standards-Framework>; Keller, *Some Humility*, *supra* note 36 (noting pressure for platforms to change moderation practices in order to enable apples-to-apples comparison between platforms).

⁸⁴ Similarly, if they were burdens on the entire business—such as tax or labor and employment obligations—they might not raise concerns about free expression.

⁸⁵ By contrast, compelled speech arguments against disclosure requirements for non-speech industries often, in Rebecca Tushnet's words, just “translate[] cost-based objections into free speech arguments.” Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015).

once-raucous range of discursive communities, whittling away at what the Supreme Court in *Reno* called the “astoundingly diverse content” once available online.⁸⁶ Lawmakers, the public, and courts should be extremely wary of state action that makes this concentration worse, makes the remaining platforms’ speech rules more homogeneous, or generally lessens the online dissemination of information from diverse and antagonistic sources.⁸⁷

Lawmakers in Texas and Florida seem conflicted about this: They *cite* the concentration of power in platform hands as a basis for regulation, but *contribute* to that concentration with laws that make it harder for smaller platforms to thrive, and make it more likely that platforms will converge on homogeneous speech rules in order to avoid costs and legal exposure. This is a one-way ratchet, with the states’ own actions contributing to the concentration that can later be used to justify additional interference with platforms’ and users’ speech rights.⁸⁸

These burden-related First Amendment threats could easily be reduced. That would require policymakers to stop treating “platform transparency” as a single unalloyed good. Instead, they should choose carefully from the long menu of legislative options, and rigorously assess which transparency measures are actually appropriate for particular problems or particular kinds of platforms. I have written before about sensible, low-hanging fruit opportunities to improve burden-related problems with platform transparency laws, and will list just a few of these tailoring options below.⁸⁹

The Fifth Circuit ruling in *NetChoice* was particularly egregious in its disregard for burden concerns, calling some of Texas’s sweeping requirements “one-and-

⁸⁶ *ACLU v. Reno*, 521 U.S. 844, 846 n.30 (1997).

⁸⁷ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (noting that it “has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public” (internal quotation marks omitted)).

⁸⁸ This problem is most evident in the laws’ must-carry provisions, as I discuss in Keller, *Lawful*, *supra* note 48. But the transparency provisions also contribute to it, as discussed in the main text.

⁸⁹ Daphne Keller & Max Levy, *Getting Transparency Right*, *LAWFARE* (July 11, 2022), <https://www.lawfaremedia.org/article/getting-transparency-right>.

done” obligations.⁹⁰ Platforms, by contrast, described the requirements as “encompass[ing] everything platforms do.”⁹¹ This is also an exaggeration—but not by that much. The laws’ obligations are burdensome and ongoing. Platforms must track each of billions of content moderation decisions, produce individual justifications for each, review appeals, and issue reports tracking the results, broken down based on numerous statutorily enumerated factors. They must publicly document changes of speech rules that evolve and iterate constantly in response to changing human behavior in diverse cultures around the world. This is an undertaking of Borgesian scale.⁹²

The Fifth Circuit also claimed that platforms “already largely comply” with rules like the Individual Notice and Appeal obligations. This is clearly not the case.⁹³ The platforms’ brief described YouTube as an example. The video hosting platform currently moderates and provides Individual Notice and Appeal options for some 9 million videos per quarter.⁹⁴ Under the Texas law, it would have to offer Individual Notice and Appeal for users’ comments, which would bring it to over a billion such processes each quarter.

⁹⁰ *Netchoice, LLC v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022) (describing Texas’s requirements for Published Speech Rules and Systemic Explanations). The Washington state court similarly concluded, despite Facebook’s objections, that the company could “essentially press a button” to meet that state’s disclosure requirements. *See supra* note 55.

⁹¹ Brief of Appellees, *id.*, at 53.

⁹² *See generally* Jorge Luis Borges, *On Exactitude in Science*, in *COLLECTED FICTIONS* (Andrew Hurley trans., 1999) (describing a map the size of the territory depicted).

⁹³ *Paxton*, 49 F.4th at 485–87. Both the Fifth Circuit and Florida also cite the largest covered platforms’ endorsement of aspirational goals or principles as reasons to believe that all covered companies already meet these goals. *Id.* at 487 (citing former Twitter CEO Jack Dorsey’s testimony that platforms “should” be required to take on such burdens); *Petition for Writ of Certiorari, Att’y Gen. v. Netchoice, LLC*, No. 22-277, at 27 (Sept. 21, 2022) (noting largest platforms’ endorsement of a civil society statement of policy goals, the Santa Clara Principles). Since the circuit courts’ rulings, platforms with over 45 million European users have begun complying with expanded transparency obligations in that region, including under rules analogous to the *NetChoice* Individual Notice and Appeal requirements. Those very detailed European mandates are presumably not identical to the legal requirements under Texas and Florida law, and of course platforms must meet these European obligations only for European users. Platforms remain very far from “already” complying with the mandates in *NetChoice*. It would be perverse, in any case, for U.S. constitutional standards to yield based on new laws enacted by governments that are not hampered by First Amendment constraints.

⁹⁴ Brief of Appellees, *Paxton*, 49 F.4th 439, at 2.

Smaller platforms' increased burdens may not be as great as YouTube's in absolute terms, but those platforms' abilities to bear the new costs—and the states' justification for imposing them—are also very different. On its face, the Texas law's size requirements make the law likely to reach the likes of Reddit, Quora, Skype, Rumble, LinkedIn, Picsart, Pinterest, Discord, Twitch, Stack Exchange, Wikipedia, Glassdoor, Vimeo, Steam, and Minecraft.⁹⁵ Many of those companies have nothing like their enormous competitors' role in public discourse. They also have only a fraction of the large competitors' resources to provide cumbersome notice and appeal processes or maintain nuanced editorial rules once lawmakers make doing so costly. (Texas maintains that the law reaches only YouTube, Facebook, and Twitter, and the Fifth Circuit's analysis considered only those companies. Given the district court's contrary finding, this Article will continue on the assumption that the law means what it says.⁹⁶)

Justifications for applying identical mandates to such diverse platforms are unclear. The smaller platforms' relative lack of capacity for compliance, though, is obvious. Many of these platforms have only a few thousand employees in total. Facebook, by contrast, has reported hiring over 15,000 people to work on content moderation alone.⁹⁷ The Texas and Florida laws require these smaller platforms to shoulder transparency burdens that incumbents never took on until they were far larger, and far wealthier. Google, for example, released its first transparency report when the company had about 24,000 employees and was worth over \$300 billion.⁹⁸

⁹⁵ Goldman, *supra* note 18; DAPHNE KELLER, REPORTED MONTHLY ACTIVE USAGE DATA FOR CONTENT HOSTING PLATFORMS (2022) (listing reported data).

⁹⁶ See *supra* note 21 (citing Texas brief and Fifth Circuit discussion); NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021) (listing sites and apps that fall under HB 50).

⁹⁷ *Content Moderators for Meta Threaten to Stop Work Until Paid in Full*, BUS. INSIDER (Jan. 12, 2022), <https://www.businessinsider.in/tech/news/content-moderators-for-meta-threaten-to-stop-work-until-paid-in-full/articleshow/88848336.cms>.

⁹⁸ *Countries with GDP Below Google's \$332B Market Cap*, ABC NEWS (July 28, 2009), <https://abcnews.go.com/Business/slideshow/countries-gdp-googles-332b-market-cap-20617789/image-20617882>; Robert Young, *Insights from the Google Transparency Report*, SEARCH ENGINE WATCH (June 29, 2011), <https://www.searchenginewatch.com/2011/06/29/insights-from-the-google-transparency-report/>.

Facebook released its first transparency report when it was worth \$139 billion.⁹⁹ It first allowed users to appeal removals of photos, videos, and posts (but not comments) beginning in 2018, when the company was worth \$374 billion and had some 35,000 employees.¹⁰⁰ There may well be legitimate policy reasons to demand some transparency from smaller companies earlier in their growth cycle than their predecessors. But that does not mean it is wise to saddle them with transparency burdens identical to those of giant incumbents.

Differences between smaller and larger platforms are exacerbated by international developments. Companies that already have a foothold in foreign markets like China, India, or the EU are already being forced by those governments to invest in transparency measures similar to those required by Texas and Florida.¹⁰¹ That makes some transparency measures a sunk cost for major platforms, but not for their smaller rivals.

A cynic might speculate that this reduces the biggest platforms' opposition to transparency mandates in the U.S., and that it influenced the *NetChoice* plaintiffs' choice to spend only a few pages of their briefs on transparency issues. But mandates in foreign countries should not affect *courts'* thinking about the First Amendment. The Fifth Circuit's reasoning that Texas's mandates are not burdensome because platforms already meet some of the requirements is, in this way, quite troubling. Mandates in the EU and elsewhere—which need not comply with the First Amendment—should not reshape constitutional limits on compelled speech here in the U.S.

⁹⁹ Hayley Tsukayama, *Facebook Releases First Report on World Governments' Data Requests*, WASH. POST (Aug. 27, 2013); COMPANIES MARKET CAP, MARKET CAPITALIZATION OF META PLATFORMS (FACEBOOK) (META), <https://companiesmarketcap.com/meta-platforms/marketcap/>.

¹⁰⁰ *Facebook Unveils Appeal Process For When It Removes Posts*, YAHOO NEWS (Apr. 24, 2018), <https://sg.news.yahoo.com/facebook-unveils-appeal-process-removes-posts-092814445.html>; MACROTRENDS, META PLATFORMS: NUMBER OF EMPLOYEES 2010–2022 | META, <https://www.macrotrends.net/stocks/charts/META/meta-platforms/number-of-employees>.

¹⁰¹ David Nosák, *The DSA Introduces Important Transparency Obligations for Digital Services, but Key Questions Remain*, CTR. FOR DEMOCRACY & TECH. (June 18, 2021), <https://cdt.org/insights/the-dsa-introduces-important-transparency-obligations-for-digital-services-but-key-questions-remain/>; see also Senate Testimony, *supra* note 47 (listing DSA transparency obligations).

2. Examples

Miscalibrated burdens may cause platforms, particularly small ones, to simplify their speech rules or give up on speech-supporting features. Data illustrating this issue at smaller companies is hard to come by. But, as discussed above, the *NetChoice* briefs include compelling data about YouTube. By extending Individual Notice and Appeal obligations to comments as well as videos, the law would increase that company's Individual Notices and Appeals by 100 times—from about nine million to over a billion each quarter.

YouTube comments have mixed value to the platform. They can be very important to some video creators, like musical artists who are building a following. This in turn benefits YouTube, bringing more popular video content to the platform and making it a destination for users seeking content like music videos. But not all comments have economic value. Even academic researchers studying YouTube comments find many “trivial” and say that they are “tedious” to review—an assessment that YouTube's content moderators surely share.¹⁰²

A YouTube manager assessing the costs and benefits of issuing a billion additional Individual Notices per quarter would almost certainly consider ways to avoid that expense. One option would be to reduce the quantity of moderation, by setting more permissive standards for comments.

A second option would be to reduce the quality of moderation. YouTube could avoid paying human moderators to make and explain nuanced decisions by instead applying blunt standards that can easily be automated. It could, for example, explain in Published Speech Rules that its policy is to “remove any comment containing a term from our bad words list, regardless of context.” Such blocklists were common in the early days of the Internet, and are still used by companies with fewer resources. Critics have at times suspected today's major platforms of relying on them, as in the case of a Black woman whose Facebook post was removed after she described, verbatim, the “profanity-laced racist epithet” that a stranger in a grocery store whispered to her young children.¹⁰³ Lists of forbidden words are very easy to

¹⁰² Rhitabrat Pokharel & Dixit Bhatta, *Classifying YouTube Comments Based on Sentiment and Type of Sentence*, ARXIV (Oct. 31, 2021), <https://arxiv.org/abs/2111.01908>.

¹⁰³ Tracy Jan & Elizabeth Dvoskin, *A White Man Called Her Kids the N-Word. Facebook Stopped Her from Sharing It.*, WASH. POST (July 31, 2017).

explain, for transparency purposes. But as tools for assessing real human communications they are at best clumsy. As Wikipedia's entry explaining the "Scunthorpe Problem" and published examples of bad words lists illustrate, they can depart widely from the choices that a real-world editor would want to make.¹⁰⁴

By deploying simplistic, easily explained, and hard-to-dispute rules for comments, YouTube could simplify its Published Speech Rules and Individual Notices, and efficiently reject almost any Appeal using identical explanations. But it might lose, for example, nuanced comments about racial or sexual language in hip hop, or reclamation of words like "queer" as terms of pride. A simplified nudity policy for videos, similarly, could reduce transparency costs—at the likely cost of losing breastfeeding information, medical videos, or art history lectures.

Another option, if YouTube wanted to cut costs, would be to permit fewer comments. They could be allowed, for example, only on videos of a certain length or on high ad-revenue content like popular, professionally produced videos. Users might then be able to comment on Cardi B music videos or Marvel movie trailers, but not on videos by unsigned artists or ordinary people—including videos documenting police brutality and other non-commercial, publicly important information.

A giant like YouTube need not accept those options. If it sees a business interest in continuing to host comments and provide more nuanced moderation, it can likely afford to do so. Smaller companies may not have that freedom. For them—and their users—the economic burden created by transparency laws would also be a speech burden.

The video comments example discussed here is one of many. I have discussed others in publications and Congressional testimony.¹⁰⁵ Smaller platforms might also, for example, adopt standardized industry rules and blocking mechanisms instead of maintaining their own unique speech rules.¹⁰⁶ They might retain vendors

¹⁰⁴ *Scunthorpe Problem*, WIKIPEDIA, https://en.wikipedia.org/wiki/Scunthorpe_problem (last visited Sep. 7, 2023); LUIS VON AHN ET AL., OFFENSIVE/PROFANE WORD LIST, <https://www.cs.cmu.edu/~biglou/resources/bad-words.txt>; *Google Profanity Words*, GITHUB.COM, <https://github.com/coffee-and-fun/google-profanity-words/blob/9e55efc743313642298b578fa6fabd5dc529c2ea/data/en.txt>. (Unless you work in Trust and Safety, those lists are probably NSFW.)

¹⁰⁵ Senate Testimony, *supra* note 47; Keller & Levy, *supra*, note 89.

¹⁰⁶ This standardization problem already exists through content moderation tools developed and shared by major platforms for identifying things like pro-terrorist content. *See generally* evelyn

who can cheaply generate transparency data, as long as they can enforce a standard set of rules for all customers. They might minimize the number of changes made each year, forfeiting the ability to respond nimbly to changing user behavior or social norms. They might accept a higher rate of spam and coordinated inauthentic disinformation campaigns, because it is too expensive to fight these problems while constantly having to disclose the tools used to do so. The list of cost-saving but speech-sacrificing measures is very long—and many could be avoided through better legislative drafting.

3. Tailoring possibilities

We do not have to accept all of these burdens on speech as the unavoidable cost of platform transparency. Laws could be adjusted in numerous ways to ameliorate them. Most obviously, legislators could consult with economists and industry experts before deciding *which* platforms should bear particular burdens—based on size, technical function, revenue, social impact, market share, or other factors.¹⁰⁷ Smaller platforms might, for example, be required to produce Statistical Transparency Reports less frequently, or in less detail.

The lawmakers behind the *NetChoice* laws made no such effort. There is no indication that they even knew which companies they were regulating, beyond the few high-profile ones referenced repeatedly in legislative history. If Texas’s law was truly intended to have the scope the State’s lawyers described to the court—reaching only Twitter, YouTube, and Facebook—then amending the law to say that would be an obvious first step.¹⁰⁸

douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. COLUM. U. (Feb. 11, 2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels>.

¹⁰⁷ See generally Eric Goldman & Jess Miers, *Regulating Internet Services by Size*, SANTA CLARA U. L. STUD. RSCH. PAPER (2021) (noting difficulties in defining appropriate metrics).

¹⁰⁸ The platforms in *NetChoice* argue that regulating platforms differently based on their size is, itself, a First Amendment violation. If so, that would take many tailoring options off the table. Platform size and market share play complex roles in any argument about platforms’ editorial rights—including both the transparency and must-carry issues in *NetChoice*—given their relationship to constitutionally relevant inquiries about platforms’ degree of “bottleneck” control over channels for communication or the states’ competition-based justifications for imposing carriage requirements. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 222 (1997) (discussing cable companies’ “bottleneck” control); see also *id.* at 230 (identifying “promoting fair competition in the market for television programming” as one of three state interests served by carriage obligations).

Other refinements might be appropriate for platforms of all sizes. For example:

- Lawmakers could standardize required metrics across jurisdictions, so that platforms do not face a fifty-state patchwork of inconsistent reporting rules.¹⁰⁹ (Texas 120.053.)
- They could clarify the level of detail required in Individual Notices or Published Speech Rules so that new liability risks and reporting obligations are not potentially triggered by every new moderation decision about a novel slang term or risqué photo. (Florida 501.2041(2)(d), Texas 120.052.)
- They could require Rule Change Notices and updates to the language of Individual Notices or Published Speech Rules only for major changes, or permit aggregated disclosures on a quarterly basis for smaller changes. (Florida 501.2041(2)(c).)
- They could exempt platforms from Published Speech Rules requirements for rules that are deployed on a small scale for short-term tests. (Florida 501.2041(2)(c)-(d), Texas 120.052.)
- They could—and should—excuse platforms from mandatory disclosures in Individual Notices and elsewhere when those disclosures would effectively publicize the platforms’ techniques for finding spammers, scam artists, and other actors trying to game the system and evade detection while violating platforms’ rules. (Florida 501.2041(2)(c)-(d), Texas 120.051(a), 120.052, 120.053(7), 120.101–104.)

As a First Amendment matter, adjustments like these would better tailor platform transparency laws to advance states’ goals with less burden on speech. Many other improvements are possible and could likely be suggested by Trust and Safety professionals familiar with the mechanics of content moderation. Under the lenient First Amendment review applied by the Fifth and Eleventh Circuits in *NetChoice*, though, such improvements appear not to be necessary.

C. *Regulating Speech About Speech*

In *Zauderer* and many compelled speech cases, the problem is simple: the government is *making someone speak* when they don’t want to. The Texas and Florida laws create this relatively straightforward issue, too. But the First Amendment problem in *NetChoice* is more complex. Laws requiring platforms to speak about

¹⁰⁹ Susan Ness, *Modularity for International Internet Governance*, LAWFARE BLOG (July 19, 2022), <https://www.lawfareblog.com/modularity-international-internet-governance>.

their editorial policies and explain their decisions regarding particular user posts are fundamentally different from laws requiring labels on meat or sugary beverages. Mandates like the ones in *NetChoice* will likely cause platforms to change their editorial policies and decisions about speech, as discussed above. Relatively few cases address this unique issue, which arises from compulsions to engage in what I’ll call “speech about speech.”

This Part will begin by interrogating the platforms’ preferred comparison, to editorial disclosure mandates for newspapers. Such laws would clearly compel speech about speech, but the analogy between newspapers and platforms is imperfect. It will then review the relatively scant other areas of precedent addressing compelled speech about speech. This Part, and the Article overall, will not delve deeply into one important doctrinal question: whether and when transparency laws regulate commercial speech. The answer is likely to vary depending on the specifics of particular mandates, since some relevant communications are more arguably commercial (like platforms’ public statements describing their products) while others are much less so (like most individual users’ posts, or platforms’ deliberations in setting their editorial policies).¹¹⁰

1. Platforms as newspapers

The analogy between platforms and newspapers is central to the plaintiffs’ arguments about both the transparency and must-carry provisions in *NetChoice*. Laws compelling platforms to carry speech against their will, they argue, are no different from the newspaper right-of-reply law struck down in *Miami Herald v. Tornillo*.¹¹¹ By the same token, they say, lawmakers can no more compel transparency about editorial processes from YouTube or Facebook than they could from the *Miami Herald* or *Washington Post*.

The lead case about compelling newspapers to disclose records of their editorial process is *Lando*, which considered discovery obligations for a newspaper in a defamation case. As in the *NetChoice* cases, the primary First Amendment harm there did not arise in the moment of making the required disclosures. Rather, it came

¹¹⁰ See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988) (describing situations in which commercial and non-commercial speech are intertwined and rejecting compelled disclosures for charitable solicitors under “exacting” scrutiny).

¹¹¹ 418 U.S. 241 (1974).

from the resulting chill on newspapers' underlying editing and publishing practices.

Importantly, while the Supreme Court recognized this chill, it did not shield newspapers from all such disclosures. The *Lando* Court allowed limited, judicially supervised discovery to proceed for a plaintiff who had already survived court-supervised procedural hurdles in early motions practice.¹¹² That tells us that carefully calibrated disclosure mandates can be permissible, even when they may impose a burden on editorial freedom. But the limited discovery approved in *Lando* is dramatically different from Texas's and Florida's requirements for platforms to explain *every* editorial decision, just in case anyone wants to sue. And while *Lando* involved only newspapers' potential self-censorship, the laws at issue in *NetChoice* give platforms reason to change speech rules for other people: their users.¹¹³

Large platforms are not just like newspapers for must-carry purposes or for transparency purposes. The two have important similarities, of course. Both newspapers and platforms have their own editorial rights,¹¹⁴ and both are sometimes important conduits for third party speech.¹¹⁵ But platforms process far more infor-

¹¹² See generally *Herbert v. Lando*, 441 U.S. 153 (1979).

¹¹³ Laws that create this “censorship by proxy” effect by regulating intermediaries can violate the First Amendment rights of individual speakers. See, e.g., *Smith v. California*, 388 U.S. 913 (1967) (rejecting strict liability for booksellers in an obscenity case, citing threat to rights of readers and book publishers); *Bantam Books, Inc v. Sullivan*, 372 U.S. 58 (1963) (recognizing standing for publishers to challenge state action directed at book stores and upholding their First Amendment challenge); *ACLU v. Ashcroft*, 322 F.3d 240, 266 n.33 (3d Cir. 2003) (affirming ACLU “listener” standing to challenge law regulating online speakers), *aff'd as to other matters*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Woodhull Freedom Found. v. United States*, 948 F.3d 363 (D.C. Cir. 2020) (recognizing standing for Internet users to challenge law establishing platform liability); *Ctr. For Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004) (recognizing Internet users' standing to challenge law regulating ISPs, based on the law's interference with their right to receive information).

¹¹⁴ See, e.g., *Tornillo*; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557 (1995); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

¹¹⁵ In *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), for example, the newspaper was acting as a conduit for speech by civil rights activists in the form of paid advertising. See also David Greene &

mation at far greater speed than newspapers. They have far less commercial or editorial interest in defending any particular user’s posts than a newspaper has in defending its articles.¹¹⁶ In most cases, a rational platform’s motivation to keep lawful user speech online will be dwarfed by its motivation to avoid liability and to adopt streamlined, scalable, and automatable procedures for legal compliance. This is one reason why the U.S. and many other countries have had special content liability regimes for platforms—but not newspapers—for decades.¹¹⁷

Platforms like YouTube or TikTok also play a unique societal role, given their function in daily life—intermediating speech that might once have been communicated in the public square, via a news broadcast, from a concert hall stage, or over the phone. For users, platforms may combine attributes of all of these older forums for communication. Many platform users derive value *both* from the public-square-like freedom to speak instantaneously to a global audience, *and* from platforms’ newspaper-like editorial curation.

Giant platforms control access to a global audience of unprecedented size. For some speakers, that arguably means that there is no real substitute for presence on a major platform. The harm from being excluded after investing time and money to cultivate followers or build community can be significant.¹¹⁸

That said, different platform users have competing First Amendment interests. Users who go to platforms to read, listen, or participate in civil discourse are unlikely to welcome an unchecked free-for-all of “lawful but awful” speech. For them, platforms’ curation is part of their value proposition. Curation can benefit users in

Shahid Buttar, *The Inextricable Link Between Modern Free Speech Law and the Civil Rights Movement*, EFF BLOG (Mar. 18, 2022), <https://www.eff.org/deeplinks/2019/03/inextricable-link-between-modern-free-speech-law-and-civil-rights-movement>.

¹¹⁶ The Supreme Court observed an analogous disparity of interest between movie producers and theater owners in *Freedman v. Maryland*, noting that for the latter, “it may take very little to deter exhibition in a given locality” because the theater’s “stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation.” 380 U.S. 51, 59 (1965).

¹¹⁷ Digital Millennium Copyright Act, 17 U.S.C. § 512 (detailed notice and takedown system); 47 U.S.C. § 230 (broad immunity for many civil and state criminal claims); 18 U.S.C. § 2258A–C (special platform reporting regime and prohibition on monitoring requirement for child sexual abuse material); 21 U.S.C. § 841(h) (criminal drug laws specific to Internet).

¹¹⁸ Though many content creators in the analog world may feel a comparable lack of control in, for example, musician-label or author-publisher relationships. Some choose to distribute their work via Internet platforms for this very reason.

their capacity as speakers, as well as listeners. A YouTuber or Instagram influencer who reaches a large audience today would likely lose their ability to do so if state action led platforms to drown out their posts with offensive or scammy content. Speakers like the hip hop artists or breastfeeding rights advocates discussed above might also be silenced if platforms simplified their speech rules, applying crude word-blocking or nudity detection systems in order to reduce transparency burdens.

Platforms also differ from newspapers in ways that are specific to disclosure of information about company practices. Readers can tell what's in the newspaper by looking at it. (Though they don't know which stories got left out.) If they want to know what they'll get for their subscription fees in the future, they can make a good guess by looking at older editions of the paper. Researchers, too, can look at the paper itself to understand its political slant or gaps in coverage. The same kind of information about social media platforms is much harder to gather, since newsfeeds are ephemeral and personalized for each user.

2. Speech about speech

Imperfect analogies to older media or technologies bedevil platform regulation generally. Reliance on such precedent is particularly difficult in the transparency context. Analysis of laws compelling speech about editorial policies is sparse, though *Lando* provides one example. Cases in which a regulated party is compelled to speak about someone *else's* speech—as platforms must do in explaining decisions about individual posts—are also rare. This Part will review the case law I'm aware of. It is necessarily impressionistic, because the cases are mostly not in conversation with one another or even asking the same questions.

The Supreme Court has told us that laws governing speech distributors are constitutionally constrained, in ways that laws governing distributors of other goods are not. In *Smith v. California*, for example, the Court rejected strict liability for booksellers, reasoning that such liability would “tend to restrict *the public's* access to forms of the printed word which the State could not constitutionally suppress directly.”¹¹⁹ In other words, the relevant First Amendment rights were not only

¹¹⁹ 361 U.S. 147, 154 (1958) (emphasis added). The Court continued, “The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.” *Id.* at 153.

those of the *bookstore* (the analog of today’s platforms), but also the rights of the *readers* who depended on it.

The Court in *Smith* also rejected facile analogies between laws regulating information and laws regulating ordinary, non-speech consumer goods. There is, it explained, “no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise.”¹²⁰ But “the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller.”¹²¹

Texas’s and Florida’s consumer protection-related arguments in *NetChoice* depend on the same flawed analogy rejected in *Smith*. They equate disclosures about speech with disclosures about ordinary consumer goods or services, without examining speech-related differences. A transparency law that causes a business to change its underlying practices can be a good thing outside the speech context. If ingredient disclosure requirements incentivize Frito-Lay to make healthier food, or if inspections cause restaurants to improve hygiene, no First Amendment harm results. Indeed, prompting regulated companies to change their practices may be an acknowledged and legitimate goal of such laws.¹²² The same cannot be said of a law that incentivizes YouTube, Twitter, or Reddit to change its editorial rules.¹²³

One line of cases tells us that companies in the speech business cannot avoid *all* disclosure requirements simply by pointing to the likely chill on their underlying speech or editorial practices. *Lando* is of course one such case. The plaintiff’s discovery requests there were justified because he had plausibly alleged a violation of law—defamation.¹²⁴ Without discovery, he could not prove his claim or vindicate his legal rights. The Supreme Court has applied similar reasoning to disclosures

¹²⁰ *Id.* at 152.

¹²¹ *Id.* at 152–53.

¹²² Sarbanes-Oxley, for example, uses the threat of disclosures to incentivize compliance. Firms can avoid having negative audit results published by remediating defects within 12 months. Sarbanes-Oxley Act of 2002 Pub. L. No. 107-204 § 104(g)(2). See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURES* (2014).

¹²³ Somewhat analogously, *Bongo Productions, LLC v. Lawrence*, 603 F. Supp. 3d 584 (M.D. Tenn. 2022), struck down on First Amendment grounds a mandatory disclosure law designed to change businesses’ underlying practice of offering trans-friendly bathrooms.

¹²⁴ *Herbert v. Lando*, 441 U.S. 153, 154 (1979).

about universities' tenure decision-making and employment discrimination. Universities objected that disclosure of tenure discussion records would chill their underlying speech and academic freedom, by deterring frankness in peer reviews. The Court rejected their claim, reasoning that any such burden was justified as part of the Equal Employment Opportunity Commission's (EEOC's) authorized regulatory efforts to "detect and remedy instances of discrimination."¹²⁵

These cases are distinguishable from *NetChoice*, of course, in part because they involve targeted investigation into specific alleged violations of underlying laws, with procedural safeguards before authorities could compel disclosures. More importantly, the disclosures were necessary for enforcement of underlying laws against distinct harms: defamation and discrimination. *NetChoice*, by contrast, requires disclosures for their own sake. The "harm" that Texas and Florida seek to remedy is a circular one—platforms must publish information so that they may be punished if the information is false.

More systematic speech-about-speech mandates can be found in Communications regulation. The FCC requires broadcast, cable, and other regulated providers to make ongoing public disclosures, for example.¹²⁶ Many are technical, but some specifically cover political speech, "community issues" programming, and children's programming. These regulated entities' reports are much less burdensome than the ones at issue in *NetChoice*. And, importantly, congressional and FCC power to require these reports stems from constitutionally unique authority to regulate speech disseminated via broadcast and cable in the first place. No such authority exists for speech disseminated online—for now. The Court's longstanding holding on this point, from *Reno*, may of course be revisited as the Court resolves the must carry claims in *NetChoice*.¹²⁷

¹²⁵ *Univ. of Penn. v. EEOC*, 493 U.S. 182 (1990); see also *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (rejecting similar First Amendment arguments against compelling journalists to testify to grand juries). *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988), considered somewhat analogous arguments about disclosures' impact on underlying speech. It rejected compelled disclosures about charitable solicitors' compensation in part because the disclosures might cause potential donors to end the conversation, thus effectively discouraging charities and solicitors from speaking in the first place. *Id.* at 802.

¹²⁶ FCC, ABOUT PUBLIC INSPECTION FILES, <https://publicfiles.fcc.gov/about>.

¹²⁷ *Reno v. ACLU*, 521 U.S. 844 (1997). Cf. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (recognizing uniqueness of broadcast given factors like intrusiveness and spectrum scarcity); *Turner*

A more intriguing FCC-administered analog to the *NetChoice* transparency mandates is the V-Chip parental control system of the 1990s. The V-Chip laws required broadcasters to establish and implement a rating system for their content, and manufacturers to build control systems into digital televisions so that users could block content based on the ratings. Legal academics including Jack Balkin wrote extensively about the system's First Amendment ramifications.¹²⁸ These questions were never litigated, and the system itself never achieved much adoption or success. The compulsory V-Chip labels differed from Texas's and Florida's requirements in their connection to broadcast-specific First Amendment doctrine, of course, as well as in their child protection goals. The labeling system was also intended to let TV recipients themselves decide what content they wished to block. In other words, the goal was to *decentralize* power over speech and put it in the hands of individuals—not, like the Texas and Florida laws, to effectively centralize that control in government hands.¹²⁹

Lawmakers' attempts to require "speech about speech" or to regulate content labels in other contexts have run into constitutional difficulties. In *Entertainment Software Ass'n v. Blagojevich*, for example, the Seventh Circuit struck down a law requiring video game stores to put warning stickers on games if they met a statutory definition of "sexually explicit."¹³⁰ Like the Supreme Court in *Smith*, the *Blagojevich* court rejected comparisons between these labels and health warnings on consumer goods, noting that the State's definition of "sexually explicit" was "far more opinion-based than the question of whether a particular chemical is within any given product."¹³¹ It declined to apply *Zauderer*'s relaxed standard of review, noting that the labels were both "non-factual" and conveyed a "highly controversial message"

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994) (distinguishing cable companies from newspapers based on the latter's "bottleneck" control over consumers' access to television programming).

¹²⁸ Jack Balkin, *Media Filters and the V-Chip—Part I*, 45 DUKE L.J. 1133 (1996).

¹²⁹ Keller, *Lawful*, *supra* note 48 (identifying ways in which the Texas and Florida must-carry mandates set government preferences based on the content of speech or identity of speakers).

¹³⁰ 466 F.3d 641, 643 (7th Cir. 2006); see also *Book People v. Wong*, No. 1:23-CV-00858-ADA, 2023 WL 6060045 (W.D. Tex. Sept. 18, 2023), <https://perma.cc/GE9H-32QX> (striking down as unconstitutional a mandate for book vendors to classify books sold to schools based on state-defined "sexually explicit" and "sexually relevant" categories).

¹³¹ 466 F.3d at 652.

about what counts as “explicit” content.¹³² Following similar reasoning, it also rejected a separate requirement for stores to post signs about games’ age-appropriateness ratings from the private Entertainment Software Ratings Board (ESRB).¹³³

Private ratings systems like the ESRB’s, or like the Motion Picture Association’s more famous one for movies, provide a potentially valuable point of comparison with the platform systems in *NetChoice*. In each case, a private clearinghouse assesses and “rates” third party speech. The ratings meet an important public demand. They also create nominally voluntary speech restrictions that almost certainly could not survive First Amendment review if enacted by governments. Indeed, courts have struck down laws giving legal effect to MPA ratings, much as the *Blagojevich* court did with the ESRB’s.¹³⁴

MPA ratings, like platform decisions to remove, demote, “shadowban,” or demonetize content, can have very real consequences for the distribution and commercial viability of third-party speech. Movie makers who received an unwanted X rating, in the days before cable television and video cassette recorders, faced serious problems. They had far less chance of reaching an intended audience—or recouping the movie’s costs—than creators of videos removed from YouTube today.

This situation led to must-carry-like litigation about MPA ratings. At least two courts in the 1990s said that filmmakers harmed by inaccurate or unfair ratings could sue the ratings board.¹³⁵ Under the MPA system, no single company served

¹³² *Id.*

¹³³ *Id.* at 653.

¹³⁴ The former Motion Picture Association of America rebranded in 2019 and is referenced here with its current acronym: MPA. Jane Friedman’s excellent *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185 (1973), describes several cases, including failed lawmaker attempts to criminalize the screening of X-rated films.

¹³⁵ In a ruling reminiscent of the Ninth Circuit’s 2020 *Malwarebytes* case, the D.C. Circuit in 1995 said that if a plaintiff could prove that his X rating resulted from the MPA’s bias against independent filmmakers, he could proceed with a claim for violation of an implied covenant of good faith and fair dealing. *Maljack Prods. v. Motion Picture Ass’n of Am.*, 52 F.3d 373 (D.C. Cir. 1995); see also *Miramax Films Corp. v. Motion Picture Ass’n of Am.*, 560 N.Y.S.2d 730 (Sup. Ct. 1990) (“[T]he MPAA’s ability to affect a film’s profitability as a result of its evaluation based on [subjective] standards . . . makes it little more than a marketing tool to promote a given film to a target audience.”).

as a gatekeeper on speech, the way that Texas and Florida say today’s biggest platforms do. Instead, MPA ratings determined the willingness of theater owners, television station operators, and other intermediaries to distribute or exhibit films. That made the ratings highly effective private rules for cineplex monoculture—and in some critics’ eyes, an antitrust violation.¹³⁶

MPA ratings, like platforms’ content moderation choices, are speech about speech. The mechanics by which ratings are conveyed may be different—MPA raters issue a letter rating, while platform raters may simply take content down. But in both cases, raters or moderators are expressing editorial judgments about third party speech. Like platforms, the MPA uses pre-defined, value-laden editorial rules and standards. Like them, it often reaches debatable conclusions. And like them, its conclusions—its speech about third party speech—often make people mad.

A rare ruling assessing the “speechiness” of the editorial judgment underlying private ratings decisions can be found in the 2016 Forsyth case.¹³⁷ Plaintiff there sued the MPA for rating a film G, saying the film was in fact unsuitable for children. The MPA responded with an anti-SLAPP motion, which the district court granted.¹³⁸ Its ruling emphasized that the rating itself was an expression of opinion, and that “the underlying ‘product’—films—are not mere commercial products, but are expressive works.”¹³⁹ Even if the specific letter ratings themselves “could somehow be deemed not to constitute speech,” the court said, the raters’ “acts in applying the ratings to movies would constitute ‘conduct in furtherance of the exercise of the . . . constitutional right of free speech.’”¹⁴⁰

¹³⁶ See, e.g., Ian G. Henry, *The MPAA: A Script for an Antitrust Production*, 116 W. VA. L. REV. 385 (2013).

¹³⁷ Forsyth v. Motion Picture Ass’n of Am., No. 16-cv-00935-RS, 2016 WL 6650059 (N.D. Cal. Nov. 10, 2016).

¹³⁸ *Id.* at *1.

¹³⁹ *Id.* at *3.

¹⁴⁰ *Id.* at *4. Some other possible “speech about speech” examples include legally mandated accessibility mechanisms like closed captioning. Courts have rejected claims that simple transcription-based caption mandates unconstitutionally compel speech, since they just replicate audio content. Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414, 430 (9th Cir. 2014); Blake Reid, *Copyright and Disability*, 109 CALIF. L. REV. 2173 (2021). But the D.C. Circuit rejected, in part on constitutional avoidance grounds, an FCC regulation that would have required newly crafted descriptions of video content. Motion Picture Ass’n of Am., Inc. v. FCC, 309 F.3d 796 (D.C. Cir. 2002). Another broad analog is 18 U.S.C § 2257, which requires pornography producers

A 2023 case about a legally established rating mandate—Texas’s law requiring school book vendors to classify individual books as “sexually explicit” or “sexually relevant”—applied similar reasoning. The district court ruling in *Book People v. Wong* distinguished between the *rating itself* as speech and the *editorial process* required to arrive at a rating. In striking Texas’s law down, the court concluded that vendors’ decisions about which ratings to apply were a protected expressive activity, distinct from the speech involved in communicating the “sexually explicit” or “sexually relevant” label or rating for a particular book.¹⁴¹ It also compared the booksellers to platforms whose content moderation decisions were influenced by the government.¹⁴²

The distinction between laws compelling a regulated entity to *make* an editorial judgment and laws compelling it to *articulate* or apply a label conveying that editorial judgment may matter for *NetChoice*’s Individual Notice and Appeals analysis. The Court might recognize distinct First Amendment concerns arising at different steps in platforms’ content moderation processes. A platform’s first relevant action—identifying a post as a violation of its rules, and acting to remove or otherwise moderate that post—may pose no First Amendment issues at all. The platform at that stage may simply be making and enforcing an editorial judgment of its own volition. But beyond that, the law introduces several new speech compulsions. A platform must take a new mandatory step by articulating its judgment in the form of an Individual Notice. In order to process an Appeal, it must make a *new* editorial judgment, and also articulate that judgment to the user.

Book People and the older “speech about speech” cases do not add up to a single clear First Amendment rule. I would hazard, however, that some recurring lessons from other areas of platform regulation are also relevant here:

to maintain records of performers’ names and ages. The most recent of many constitutional rulings regarding these record-keeping requirements applied strict scrutiny and upheld some as-applied claims while rejecting a facial challenge. *Free Speech Coal., Inc. v. Att’y Gen.*, 974 F.3d 408, 419 (3d Cir. 2020).

¹⁴¹ *Book People*, 2023 WL 6060045, at *33 (noting plaintiffs’ argument that the law requires both “pure speech” in communicating a rating and the separate, expressive “subjective analysis” required to arrive at a rating), *36 (expressing concern about First Amendment harms from requiring vendors to both “perform a rating they would rather not perform” and “give ratings to books when they would wish to remain silent”).

¹⁴² *Id.* at n.12 (comparing *Missouri v. Biden*, 2023 WL 6425697).

- Laws that regulate intermediaries may indirectly harm the First Amendment rights of speakers and readers who depend on them for distribution of speech. As in *Smith*, an excessive burden on those speakers' and readers' rights can render a law unconstitutional.
- Analogies between laws governing distributors of speech and laws governing distributors of ordinary goods often fall short, given the unique constitutional dimension of speech distribution.
- Intermediaries' judgments about third party speech, and editorial decisions about whether and how to convey that speech, can themselves be speech. This can put intermediaries' First Amendment interests into conflict with the speech and information interests of some users (the ones who want to speak).¹⁴³ It can also put platforms' interests into alignment with the speech and information interests of other users (the ones who want a curated newsfeed or a space for civil discourse).
- Solutions that increase competition among platforms, support alternate channels of communication, or devolve control over speech to individual users may be less constitutionally suspect than solutions that centralize control in the hands of state actors.

None of this is new. All of these points have been discussed since at least the 1990s. But because the details of transparency mandates have been so little explored, scholars have not had the time to examine whether and how these points may apply to transparency, too.

IV. THE GOALS: WHAT ARE TRANSPARENCY LAWS SUPPOSED TO ACHIEVE?

The goals of transparency laws matter. Lawmakers are unlikely to design good laws if they don't know what they are trying to accomplish. And courts in First Amendment cases should, in principle, care what interest a state asserts and look closely at whether the law actually advances it.

For many advocates of platform transparency, a major goal is to advance users' real abilities to exercise First Amendment rights online, and to engage in democratic self-governance. Constitutional protections, even for commercial speech,

¹⁴³ *Forsyth*, 2016 WL 6650059, at *9.

share this animating goal.¹⁴⁴ Many lawmakers share versions of this goal—including in Texas and Florida. Legislators there made clear that an overriding purpose of their social media laws was to prevent censorship. Florida’s special carriage mandates for journalism and election-related speech very clearly relate to democratic concerns. Whatever other legal justifications the laws may have, the transparency mandates were clearly intended to support these goals.

The states’ lawyers in *NetChoice* have every reason to avoid admitting to any democracy-related interest, though. By maintaining that the transparency laws are ordinary consumer protection measures, they can more plausibly invoke *Zauderer* as a get-out-of-jail-free card and avoid strict scrutiny. That argument also helps them oppose platforms’ framing of the must-carry and transparency mandates as unified provisions, animated by the same impermissible state goals, and sharing the same constitutional infirmities.

Consumer protection is a legitimate framing for transparency rules. It is most obviously relevant for laws which, like the ones in Texas and Florida, seem particularly designed to protect the interests of platform users who invest in building an audience on social media, and fear losing it. But even for the Texas and Florida laws, applying *Zauderer* is a stretch. For other legislative approaches to platform transparency, arguments under *Zauderer* might simply fail. Research-oriented laws, like the draft federal Platform Accountability and Transparency Act (PATA) do not resemble traditional consumer protection measures and may be particularly hard to defend under *Zauderer*.

Debates and case law around platform transparency consistently raise, and often conflate, at least three major state interests. Each could matter in *NetChoice*, and each has significant implications for areas of law unrelated to Internet platforms. I will discuss each, and the relevant case law, in this Part.

- The first is the *consumer protection goal* of providing people with the information they need in order to make informed decisions in selecting goods or services. *Zauderer* and many cases applying involving point-of-sale warnings or on-product labels fall in this category.

¹⁴⁴ Va. State Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 766 (1976) (identifying “public decision making in a democracy” as a goal of First Amendment protections).

- The second is what I will call the *regulatory goal* of requiring companies to disclose information that is needed in order to enforce other laws. Disclosures made by companies that are not in the speech business (like pharmaceutical companies' filings with the FDA), or disclosures that serve non-speech regulatory purposes (like a newspaper's IRS filings) fall in this category.
- The third is what I'll call the *democratic goal* of providing information that lawmakers and individuals can use to shape their understanding of and participation in public discourse, elections, and other building blocks of democracy.

These categories can overlap in practice. For example, Internet users get the same benefit from learning about disinformation campaigns on major platforms, regardless of whether lawmakers view those users as consumers in need of state protection, or as sovereign citizens engaged in self-governance. Regulatory goals and consumer protection goals, too, often overlap. The Securities and Exchange Commission (SEC), for example, collects some information for its own regulatory purposes, but also requires public disclosures to investors as the "consumers" of stocks.

Case law does not always split neatly into these three categories, either. In particular, state actors increasingly point to *Zauderer* as the justification for disclosure mandates that I would call "regulatory."¹⁴⁵ Lower courts have also adopted this analysis in a few cases. But the Supreme Court has not adopted such a broad reading of *Zauderer*. And it *has* upheld regulatory compelled speech mandates on other grounds, with no mention of *Zauderer*.¹⁴⁶

As I will discuss in this Part, I think there are numerous reasons, ranging from the theoretical to the tactical, for transparency advocates to consider arguments beyond *Zauderer*. Some of these concerns are extremely important in themselves and deserve a closer examination than this article can provide. Perhaps most pressingly,

¹⁴⁵ Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33742 (May 27, 2016) (codified at 21 C.F.R. pt. 101). (citing *Zauderer* as basis for resolving First Amendment concerns in Food and Drug Administration rulemaking).

¹⁴⁶ See, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471–72 (1997) (upholding requirement for fruit producers to cover the expenses of collective fruit advertising).

NetChoice could have serious implications for cases in which non-speech businesses raise First Amendment claims to challenge a broad array of longstanding, non-speech-related laws.¹⁴⁷ That is particularly likely if the *NetChoice* resolution turns on consumer protection or regulatory goals, rather than democracy goals.

In this Part, Subpart A will assess consumer protection precedent, and argue that *Zauderer* is a poor fit for the *NetChoice* transparency mandates as a doctrinal matter. It will also briefly explore the constitutional differences between the *NetChoice* transparency rules and rules currently being litigated in more politically liberal states—New York and California.

Subpart B will examine the distinct, non-*Zauderer* line of Supreme Court cases supporting disclosure mandates in non-speech industries and argue that those cases do not support Texas and Florida in *NetChoice*, either. It will then discuss administrative law and the “Lochnerization” of the First Amendment as a weapon against ordinary, non-speech regulation. This is a highly important third-rail issue that has not been explicitly raised in the case to date but may nevertheless shape its outcome. Subpart B will also briefly explore regulatory models as a better source for well-tailored transparency rules.

Finally, Subpart C will examine what I think is actually the most relevant state goal advanced by platform transparency mandates: democratic self-governance. The *NetChoice* outcome could look very different—in good ways and bad—if advocates and courts rooted their analysis in this alternate foundation.

A. Consumer Protection Goals and Zauderer

Florida and Texas have told courts that their transparency mandates are intended to advance consumer protection interests. Parts of the Texas law reflect this, requiring disclosures to be “sufficient to enable users to make an informed choice” about platform usage.¹⁴⁸ Both the Fifth and Eleventh Circuits adopted this framing, with the latter calling Florida’s transparency rules a means for “preventing deception” of “consumers who engage in commercial transactions with platforms.” This all makes sense as a general matter. Consumers should know what they are going to get when they put their time, money, family photos, reputations, or safety in a

¹⁴⁷ See Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (2018).

¹⁴⁸ Tex. H.B. 20 § 120.051(b). The platforms’ cert petition says the Texas government and legislature did not assert a consumer protection interest during the legislative process, however. Petition for Writ of Certiorari, *Netchoice, LLC v. Paxton*, No. 22-555, at 30–31 (Dec. 15, 2022).

company's hands. The disclosures required by Texas and Florida make that more feasible.

The consumer protection framing is also a matter of litigation convenience. Calling transparency laws “consumer protection” measures makes it easier to rely on *Zauderer*. The Supreme Court (unlike some lower courts) has only ever held that case applicable to consumer-facing disclosure mandates. Falling under *Zauderer* means lawmakers can avoid the strict scrutiny that courts might otherwise apply. As I will discuss in this Part, I think *Zauderer* has only limited relevance, in part because it does not address the specific “speech about speech” issues raised in *NetChoice*.

Zauderer may prove problematic for transparency advocates on another basis, too. As I'll discuss in Subpart 1, the Supreme Court has never approved use of *Zauderer* for disclosures anywhere near as sweeping, pervasive, or untethered to immediate consumer need as the ones in *NetChoice*. Business-friendly Justices may be reluctant to do so. They may particularly resist the idea that such expansive mandates can be justified in the name of consumer protection, given the implications for non-speech businesses.

At the same time, as I'll discuss in Subpart 2, the vastness of the Texas and Florida mandates may, perhaps perversely, be an advantage in First Amendment litigation. States that have adopted narrower disclosure rules, targeted to specific harms, can run into their own distinct sets of constitutional problems.

1. Stretching *Zauderer* to cover systemic platform disclosures

In *Zauderer*, the Supreme Court upheld a rule requiring that an attorney advertising services with “no legal fees” disclose that clients might still owe litigation costs.¹⁴⁹ States may mandate such disclosures of “purely factual and uncontroversial information” about the terms of a commercial offer, the Court said, if lawmakers have sufficient justification and the disclosure does not unduly burden speech.¹⁵⁰ To date, the Supreme Court has only said that *Zauderer* is the correct test in cases involving advertising and the risk of consumer deception.¹⁵¹

¹⁴⁹ *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 652 (1985).

¹⁵⁰ *Id.* at 651.

¹⁵¹ Eric Goldman, *Zauderer and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE 80 (2023).

Lower courts have used *Zauderer* more expansively, including in situations that do not involve advertising or deception, and that fall outside traditional consumer protection contexts.¹⁵² But *Zauderer* and cases applying it are largely focused on speech harms caused by disclosures themselves. In assessing a law’s “speech burden,” courts typically consider questions like whether the company agrees with the message it must speak, or whether mandatory labels crowd out the company’s own speech in places like billboards or packaging.

Courts have rightly rejected arguments that the operational burdens created by disclosure laws are relevant for First Amendment purposes, in cases where the regulated companies’ underlying business did not involve speech. The D.C. Circuit held, for example, that meat-packing companies’ First Amendment rights were not harmed by the costly operational changes they had to make in order to keep track of meat’s country of origin for labeling purposes.¹⁵³ But compelled speech or disclosure mandates that may cause the regulated company to change its underlying editorial activity and speech practices are quite different. I am aware of no previous cases that recognize and discuss this kind of burden on speech and nonetheless conclude that *Zauderer* provides the right test.

Nothing in *Zauderer* precludes reinterpretation to cover more complex speech issues, of course. The Court could, in principle, use that case’s burden-on-speech prong to broadly consider the rights of platforms and the public, and balance competing First Amendment interests.¹⁵⁴ But Justices who are critical of *Zauderer* in the first place may be wary of that approach.

¹⁵² See, e.g., *CTIA—The Wireless Ass’n v. City of Berkeley*, 158 F. Supp. 3d 897 (2016), *aff’d*, 928 F.3d 832 (9th Cir. 2016) (holding that an ordinance requiring retailers to provide safety notice regarding radio frequency energy emissions from cell phones did not violate First Amendment, and citing other cases applying *Zauderer* outside the advertising and consumer deception context).

¹⁵³ *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 23 (D.C. Cir 2014). For example, “[i]n a matter of great concern to plaintiffs because of its cost implications,” the rule “eliminated the flexibility allowed in labeling commingled animals” in meat products. *Id.* at 21.

¹⁵⁴ See Ramya Krishnan, *How the Supreme Court Could Encourage Platform Transparency*, SLATE (Jan. 9, 2023), <https://slate.com/technology/2023/01/supreme-court-florida-texas-social-media-laws.html>, for an argument that the Court could draw on other precedent in adopting a sliding scale to analyze speech burdens under *Zauderer*,

with an eye toward protecting both the public interest and the platform’s core First Amendment right to make editorial decisions. Some disclosures will be seen to further public understanding of the platforms’ services while implicating editorial decisions only

Zauderer and lower court cases applying it also very rarely involve requirements for companies to systematically document their business operations or explain millions of distinct business decisions, as Texas and Florida require with their Individual Notice mandates. Such systemic disclosure regimes are more common in agency-administered regulatory systems—which are, I will argue in Subpart IV.B, justifiable based on precedent other than *Zauderer*. *Zauderer* itself required only a general disclosure about attorneys’ costs, not details about billing practices. Many lower courts cases applying its test involve short, consumer-facing labels and warnings, sometimes using generic language set forth by statute.¹⁵⁵ Courts have upheld requirements for health warnings on cigarettes,¹⁵⁶ for example, and country-of-origin labels on meat.¹⁵⁷ They have struck down requirements to label sugary beverages¹⁵⁸ and milk from cows treated with rBST.¹⁵⁹ As a practical matter, many of the upheld mandates required companies to track down only enough data to answer a yes/no question that legislators deemed uniquely important to consumers (like whether lightbulbs contain mercury),¹⁶⁰ or a single quantitative measurement (like the calories in a menu item).¹⁶¹

Even the most expansive recent applications of *Zauderer* by lower courts involve disclosures that are modest compared to the ones in *NetChoice*. Texas and Florida rely on the D.C. Circuit’s 2020 ruling in *American Hospital Association v. Azar*, for example, as a case applying *Zauderer* outside the context of deceptive advertising. But *Azar* upheld rules requiring hospitals to publicly disclose prices for

at the margins, if at all. But the more that a disclosure could chill platforms’ editorial decision making, the more clearly the government would need to show that it furthered an important interest.

¹⁵⁵ California generates a lot of these, like the 29-word disclosure struck down in *NIFLA* or the radiation and sugar-content disclosures in two Ninth Circuit cases. *Nat’l Inst. of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018); *CTIA—The Wireless Ass’n*, 158 F. Supp. 3d 897; *American Beverage Ass’n v. City & County of S.F.*, 916 F.3d 749 (9th Cir. 2019). A federal regulation requiring disclosure of GMOs in food products that came into effect in 2022 currently faces a similar First Amendment challenge. *Nat’l Grocers v. Vilsack*, 627 F. Supp. 3d 1130 (N.D. Cal. 2022).

¹⁵⁶ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

¹⁵⁷ *Am. Meat Inst.*, 760 F.3d 18.

¹⁵⁸ *Am. Beverage Ass’n*, 916 F.3d 749.

¹⁵⁹ *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

¹⁶⁰ *Nat. Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

¹⁶¹ *N.Y.S. Rest. Ass’n*, 556 F.3d 114.

medical procedures—an effort that was estimated to require just 150 employee work hours in the first year, and only 42 thereafter.¹⁶²

The mandates in *NetChoice* are also very different from those in *Zauderer* or *Azar* in the consumer risks that disclosures are intended to offset. *Azar*, like *Zauderer* itself, was about a classic consumer protection concern: making sure buyers understood the cost of services. Many other cases involve specific, legislatively-identified health risks. The Second Circuit, in striking down an rBST labeling requirement for milk, ruled in part because lawmakers had offered no evidence that the health risk existed—only that some consumers thought it might, and thus wanted the information.¹⁶³ The *NetChoice* laws generally lack even that kind of nexus with a specific perceived risk, other than the “risk” that users might have unanswered questions about platform content moderation.

Consumers may, of course, be quite *interested* in knowing all the information that Texas and Florida require about platforms’ enforcement of speech rules. But nothing in *Zauderer* suggests that such a generalized interest, untethered to any specific risk of harm, is enough to overcome businesses’ First Amendment objections.

¹⁶² One other federal case relied on *Zauderer* in upholding what I would call purely “regulatory” requirements to confidentially disclose pharmaceutical pricing information to a regulator. *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 307 (1st Cir. 2005). The California Supreme Court reached a similar conclusion about consumer-facing, public pricing disclosures, applying *Zauderer* under the state constitution. *Beeman v. Anthem*, 58 Cal. 4th 329 (2013) (noting that the lack of precedent “simply reflects the absence, over many years, of free speech challenges to the hundreds of California statutory provisions and regulations . . . that require individuals or entities to ascertain and disclose factual information”). The Ninth Circuit had, in the same case, upheld the disclosures but rejected *Zauderer* as the basis, in a decision later vacated to certify the state law question to California courts. *Beeman v. Anthem*, 652 F.3d 1085 (9th Cir. 2011). *See also* *Env’t Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003) (citing *Zauderer* as part of an unclear test used to uphold EPA requirement for municipalities to distribute materials explaining the dangers of pollution in stormwater drainage systems); *Full Value Advisors v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011) (upholding confidential disclosures to SEC, largely relying on tradition and describing standard as “rational basis,” but noting that the securities context leads to “different applications of First Amendment principles,” citing but not relying entirely on *Zauderer*, and declining to reach the unripe constitutional questions about disclosing the data to the public).

¹⁶³ *Amestoy*, 92 F.3d at 74.

Supreme Court Justices who are generally concerned about regulatory burdens on businesses seem likely to have concerns about the expansive application of *Zauderer* proposed in *NetChoice*. Justice Kavanaugh, for example, wrote in a D.C. Circuit opinion that it was “plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information,” since “that would be true of any and all disclosure requirements.”¹⁶⁴ He expressed concern about constitutional theories that would support “free-wheeling government power to mandate compelled commercial disclosures.” Justice Thomas, too, has historically been hostile to expansive uses of *Zauderer*. His partial concurrence in the 2010 *Milavetz* ruling, for example, questioned the adequacy of *Zauderer*’s “protection against government-mandated disclosures.”¹⁶⁵ His 2018 opinion for the majority in *National Institute of Family and Life Advocates v. Becerra (NIFLA)* described *Zauderer* as “rejecting broad prophylactic rules.”¹⁶⁶ Writing for the Court in that ruling, he also strongly indicated that the *Zauderer* standard is available only for disclosures in advertising. The statements made by the attorney in *Zauderer*, he wrote, “would have been fully protected if they were made in a context other than advertising.”¹⁶⁷

¹⁶⁴ *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 30–34 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (applying *Central Hudson* but saying *Zauderer* is a version of *Central Hudson*). The Second Circuit stated similar concerns in rejecting the rBST disclosure rule under *Central Hudson*. *Amestoy*, 92 F.3d at 74 (“Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods”); see also *Herbert v. Lando*, 441 U.S. 153, 174 (1979) (“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.”).

¹⁶⁵ *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 256 (2010).

¹⁶⁶ 138 S. Ct. 2361, 2377 (2018) (internal quotation marks omitted).

¹⁶⁷ *Id.* at 2374 (internal quotation marks omitted). Respected colleagues have told me they read *NIFLA* as holding or signaling that *Zauderer* does apply outside the advertising context. I do not see that in the case, and the *NIFLA* language quoted above appears to refute it. *NIFLA* did hold that one mandate at issue in the case could not survive even permissive review under *Zauderer*, but it did so without deciding whether *Zauderer*’s standard actually applied. *NIFLA*, 138 S. Ct. at 2376–78. See also *Milavetz*, 559 U.S. at 255 (Thomas, J., concurring) (concluding that *Zauderer* applies only to “advertisements that, by their nature,” create a risk of consumer deception).

In short, it is far from clear that *Zauderer* can, as a doctrinal matter, be stretched to encompass the platform transparency mandates in *NetChoice*.¹⁶⁸

2. Narrowing Platform Disclosures to Fit Within *Zauderer*

In principle, platform transparency laws would look more like the rule in *Zauderer* and other conventional consumer protection measures if they were narrowly drafted to regulate disclosures about specific, legislatively-recognized risks. This might have the added benefit of reducing burden on platforms and showing more legislative effort to tailor the laws' impact. Requiring transparency only for specific content-moderation-related threats like disinformation or hate speech, however, more starkly highlights the problems with requiring transparency about editorial policies in the first place. And the legislative precision that makes ordinary consumer protection laws *less* problematic under the First Amendment may, in the platform context, make laws *more* problematic.

The platform transparency law recently struck down in New York illustrates the issue.¹⁶⁹ It required platforms to post their policies about “hateful conduct,” as defined in the statute.¹⁷⁰ The state asserted that this policy advanced an interest in reducing racially motivated violence. The district court reasoned that this compelled platforms to “weigh in on the debate about the contours of hate speech when they may otherwise choose not to speak,” effectively leading them to convey a message dictated by the state.¹⁷¹ The court rejected the State’s comparison to laws requiring restaurants to disclose the calorie count in food, and concluded that the speech at issue was not commercial and that the law was not eligible for constitutional review short of strict scrutiny. Another platform transparency law, in California, similarly requires transparency about platforms’ rules and enforcement practices for statutorily-specified kinds of content.¹⁷² A constitutional challenge to

¹⁶⁸ See Krishnan, *supra* note 154, for an argument in favor of using *Zauderer* for platform transparency.

¹⁶⁹ N.Y. GEN. BUS. L. § 394-ccc.

¹⁷⁰ *Id.*

¹⁷¹ *Volokh v. James*, No. 22-CV-10195, 2023 WL 1991435, at *11 (S.D.N.Y. 2023).

¹⁷² California’s listed categories are: hate speech or racism, extremism or radicalization, disinformation or misinformation, harassment, and foreign political interference. New York defines “hateful conduct” to mean “the use of a social media network to vilify, humiliate, or incite violence against a group or a class of persons on the basis of race, color, religion, ethnicity, national origin,

that law brought by platform users (not operators) was dismissed for lack of standing.¹⁷³

Platform transparency mandates like the ones in New York and California create burdens and enforcement risks that, like those in *NetChoice*, may affect the platforms' actual editorial functions. But they do so only for particular kinds of editorial policies. The result, recognized in the New York case and in the Fourth Circuit's *Washington Post v. McManus* ruling, is a content-based burden on editorial processes. As the *McManus* court explained, by requiring disclosures only for political ads, the campaign advertising transparency law under review "single[d] out one particular topic of speech—campaign-related speech—for regulatory attention."¹⁷⁴ As a result, the law made "certain political speech more expensive to host than other speech because compliance costs attach," and imposed a content-based restriction on online speech.¹⁷⁵

disability, sex, sexual orientation, gender identity or gender expression." This would appear to encompass a great deal of First-Amendment-protected speech. See *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (lead opinion) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"); *id.* at 1766–67 (Kennedy, J., concurring in part and concurring in the judgment) (likewise concluding that such speech is constitutionally protected).

¹⁷³ *Minds, Inc. v. Bonta*, No. 2:23-cv-02705, 2023 U.S. Dist. LEXIS 146729 (C.D. Cal. Aug. 18, 2023).

¹⁷⁴ *Wash. Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019). *McManus* contained considerable additional analysis beyond that discussed here. In considering the relevant scrutiny, it reasoned that while exacting scrutiny applies to campaign-related disclosure requirements for speakers, who are motivated to speak, that reasoning did not extend to the platforms carrying their speech. *Id.* It further distinguished platform disclosure laws from laws for broadcast and other older media, citing *Reno* for the proposition that "what goes for broadcasters is too much a product of their technical circumstances to serve as a template for state regulation writ large." *Id.* at 519. *The Washington Post* served as the named plaintiff objecting to transparency measures in *McManus*. Its editorial board later endorsed transparency legislation directed solely at platforms. Editorial Board, *A Small Step Toward Solving Our Social Media Woes*, WASH. POST (Jan. 17, 2022).

¹⁷⁵ As discussed above, a more recent case in Washington State reached a different conclusion, upholding that state's political ad transparency requirements over a First Amendment challenge by Facebook, without a written ruling on the First Amendment issues. *State v. Meta Platforms, Inc.*, No. 20-2-07774-7 SEA, 2022 WL 20697994 (Wash. Super. Ct. Oct. 26, 2022).

Texas and Florida arguably evade this problem. Their “disclose it all, let consumers sort it out” approach allows those states to avoid overtly referencing particular kinds of speech or editorial rules, the way the New York and California laws do. The Texas and Florida laws still incentivize platforms to change their speech policies, though, as discussed in Part III. State influence is arguably more pernicious under the Texas and Florida laws, both because it is hidden and because those states’ AGs can become arbiters of the truth of *every* disclosed content policy, and every individual editorial decision. New York and California AGs can assert that power only for speech in statutorily defined categories. In what is perhaps a perverse outcome, a speech mandate saying “tell us everything” may face fewer First Amendment barriers than a speech mandate saying “tell us some things.”

The Texas and Florida laws do also make some interesting distinctions between First Amendment interests—not based on the content of moderated speech, but rather on the preferences of the affected user. Some aspects of the laws seem designed to protect the interests of *speakers*, but go against the interests of those *readers* who may prefer to see a curated newsfeed, interact with friends and family without encountering unwanted pornography or racial epithets, or generally participate in more civil, rule-bound discourse online.¹⁷⁶ Given general social norms and the much higher use of moderated platforms like Facebook compared to largely unmoderated platforms like 4chan or 8chan, it seems reasonable to assume that users very often prefer at least some form of curation.

This prioritization of speakers’ preferences is most evident in the laws’ primary must-carry provisions. But it also carries over, subtly, in the transparency rules. Florida’s unusual View Count transparency rule, for example, is entirely about speakers’ interest in knowing how large an audience they reached. And Texas’s Individual Notice and Appeal rules let affected *speakers* challenge takedown decisions, but offer no similar second bite at the apple to users who ask platforms to remove posts that violate the platform’s rules. This is consumer protection for people who value platforms as megaphones.

Prioritizing speakers over most listeners may arguably be justified as a pure consumer protection measure. Users like politicians, influencers, or musicians—

¹⁷⁶ See generally *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (“no one has a right to press even ‘good’ ideas on an unwilling recipient”); Caroline Corbin, *The First Amendment Right Against Compelled Listening*, 89 B. U. L. REV. 939 (2009).

who use platforms to build a following and reach an audience—may have a greater “reliance” interest in knowing about speech rules that might cause them to lose access to those hard-won audiences. As a hierarchy of First Amendment interests, however, preferencing speakers’ interests over those of listeners is not clearly justified.

B. Regulatory System Goals and Non-Zauderer Case Law

The disclosures at issue in *NetChoice* are, in scale and complexity, less like consumer-facing labels and more like the detailed and technical disclosures historically required from companies in regulated industries. The primary audience for such disclosures is often the government—not individual consumers. Drug manufacturers must report in detail on their operations, for example.¹⁷⁷ So must companies that manufacture or import dangerous chemicals,¹⁷⁸ or are responsible for greenhouse gas emissions.¹⁷⁹ Compliance with regulatory requirements can be quite expensive. Financial transparency mandates under laws like Sarbanes Oxley, for example, may be intertwined with auditing systems costing regulated companies millions of dollars per year.¹⁸⁰ Like the laws in *NetChoice*, these are not one-and-done reporting obligations. They can require ongoing, systemic, and detailed tracking and reporting about companies’ core operations. Regulatory disclosures of this sort rarely if ever require disclosures about editorial practices.

In a sense, regulatory disclosure requirements protect consumers. But they do not primarily do so by helping individuals understand the terms of a proposed transaction. Regulatory protections for public health or the environment turn on a richer idea of the public good, and the role of the state in setting substantive legal requirements. Enforcing agencies are not there just to ensure that companies *disclose* their practices, at which point consumers are free to accept or reject the proffered bargain.

Rather, they are there to ensure that companies follow substantive rules. Disclosures allow regulators to enforce the rules, and also encourage companies to fol-

¹⁷⁷ 21 U.S.C. § 360(j)(3).

¹⁷⁸ 15 U.S.C. § 2601.

¹⁷⁹ 40 C.F.R. pt. 98.

¹⁸⁰ Jagan Krishnan et al., *Costs to Comply with SOX Section 404*, 27 AUDITING: J. OF PRAC. & THEORY 169–86 (May 2008).

low them in the first place. If companies could too easily invoke the First Amendment to avoid these disclosures, the purposes of the regulations themselves would be thwarted. The constitutional justifications for regulatory transparency mandates are critical for the administrative state generally, in ways that go far beyond the narrower tech policy questions at issue in *NetChoice*.

Some experts, including agency lawyers, assert that disclosure mandates of this sort are justified by *Zauderer*.¹⁸¹ The Supreme Court has never rejected that theory, but I am skeptical about the current Court's sympathies for it.¹⁸² In any case, *Zauderer* is clearly not the only possible basis for reconciling ordinary regulatory disclosures with the First Amendment. The Court has also repeatedly stated that compelled speech may be justified as "part of a far broader regulatory system that does not principally concern speech," and identified this reasoning as an alternative to *Zauderer* in avoiding strict scrutiny.¹⁸³ This constitutional reasoning has in recent years appeared more often in dicta than in holdings, leaving its precise parameters far from clear.¹⁸⁴ But whatever the standard is, it provides an independent, non-*Zauderer* foundation for the ordinary disclosures required by agencies enforcing non-speech-related laws.

¹⁸¹ Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33742, 33758 (May 27, 2016) (codified at 21 C.F.R. pt. 101).

¹⁸² Lower court rulings have been inconsistent in analyzing *Zauderer* in regulatory contexts. See *supra* note 162.

¹⁸³ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech."). For an excellent discussion of First Amendment standards in cases about commercial disclosures, see Valerie Brannon, *Assessing Commercial Disclosure Requirements under the First Amendment*, CONG. RSCH. SERV. (Apr. 23, 2019), <https://www.everycrsreport.com/reports/R45700.html>.

¹⁸⁴ See, e.g., *NIFLA*, 138 S. Ct. at 2376 ("[W]e do not question the legality of health and safety warnings long considered permissible[.]"); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. . . courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech."); *Am. Ass'n of Pol. Consultants v. Azar*, 983 F.3d 528, 542 (D.C. Cir. 2020) (distinguishing "impermissible speech restrictions" from "traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech").

This body of law does not support Texas and Florida in *NetChoice*, because their disclosure mandates lack any nexus to legitimate non-speech regulation. It matters for the case, though, in much the way that an iceberg matters for a ship. Depending on how advocates and Justices frame these arguments in *NetChoice*, their case may be on a collision course with this broader body of law, and with highly fraught questions about the First Amendment and the regulatory state.

Below, I will discuss (1) why the non-*Zauderer* cases about ordinary regulatory disclosures do not support the transparency mandates in *NetChoice*, (2) how that body of law, and closely adjacent questions about First Amendment challenges to the regulatory state, may nonetheless affect outcomes in *NetChoice*, and (3) how regulatory models might help in designing and tailoring better transparency legislation for platforms.

1. The state interest in regulatory systems

The state interest in regulatory disclosures is not, or not primarily, about ensuring that consumers know the terms of a transaction. Instead, it is about enforcing legitimate underlying rules. U.S. law often requires companies to make broad and detailed disclosures in areas such as food safety, environmental protection, or securities regulation. The First Amendment basis for such “underlying and oft unnoticed forms of disclosure the Government requires for its essential operations” is unclear and contested.¹⁸⁵ It is clear, however, that lawmakers’ authority to compel disclosures in this context does not rest solely on *Zauderer*. In its 2018 *NIFLA* ruling, the Supreme Court described *Zauderer* as one of two avenues for lawmakers to compel speech from commercial actors without triggering strict scrutiny.¹⁸⁶ The other basis comes from Supreme Court cases holding that “[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.”¹⁸⁷

¹⁸⁵ *Full Value Advisors v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011).

¹⁸⁶ *NIFLA*, 138 S. Ct. at 2373. Lower courts have struggled with the relationship between *Zauderer* and these regulatory justifications, see, e.g., *Full Value Advisors*, 633 F.3d 1101, and other cases discussed *supra* note 162.

¹⁸⁷ *NIFLA*, 138 S. Ct. at 2372. The Court in this passage refers to “professional” speech in order to address the reasoning of the decision under review. *Id.* But elsewhere in the ruling, it questions the idea that “professional” speech is a constitutionally distinct category. *Id.*

The Court cited *Casey*, which upheld a law requiring doctors to convey state-mandated messages to patients seeking abortions, as an example.¹⁸⁸ That law, the *NIFLA* Court said, “regulated speech only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”¹⁸⁹

Other Supreme Court cases have applied similar logic in upholding other forms of compelled commercial speech. *Glickman v. Wileman Brothers*, for example, upheld a law requiring regulated agricultural producers to contribute funding for commercials, over the producers’ First Amendment objections.¹⁹⁰ The Court has described these laws as “traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech.”¹⁹¹

The underlying state interest in these cases is whatever led the state to adopt the “regulatory system” in the first place. In *Casey* it was, per the Court, the state’s interest in regulating the practice of medicine. The IRS might similarly justify tax filing requirements based on a state interest in taxation; or the Department of Labor might justify requiring employers to display workplace posters based on a state interest in protecting workers.¹⁹²

¹⁸⁸ *Id.* at 2373 (citing *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992)).

¹⁸⁹ *Id.*

¹⁹⁰ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997). *Glickman*, like many cases in this area, involved compelled financial support for third party speech rather than disclosures of information specific to a particular business. *See, e.g.*, *United States v. United Foods*, 533 U.S. 405, 415–16 (2011) (upholding First Amendment challenge to law requiring mushroom farmers to support joint ad campaign); *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (upholding First Amendment challenge to law requiring union contributions). *NIFLA* and *Casey* are closer to the labeling context: both involve posted or verbal disclosures to patients about abortion-related medical services.

¹⁹¹ *Barr v. Am. Assn. of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2359 (2020) (striking down law exempting certain government debt-related calls from general restriction on robocalls).

¹⁹² U.S. DEP’T OF LABOR, WORKPLACE POSTERS, <https://www.dol.gov/general/topics/posters>. Not all such laws will survive First Amendment review, of course. The D.C. Circuit struck down a workplace poster law requirement, for example, in *Nat’l Ass’n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 964 (D.C. Cir. 2013).

The standard of review in Supreme Court cases about compelled speech in regulatory contexts is, to put it mildly, unclear. The disclosures may simply not be protected speech, and thus receive no First Amendment review at all.¹⁹³ Or courts might apply rational basis review,¹⁹⁴ intermediate scrutiny,¹⁹⁵ exacting scrutiny,¹⁹⁶ or even strict scrutiny.¹⁹⁷ It is unsurprising, given this precedential mess, that litigants and courts themselves may look to *Zauderer* as an alternate or primary justification. In *Azar*, for example, the D.C. Circuit relied on *Zauderer*, but also invoked the non-*Zauderer* regulatory case law, saying that “[r]equiring hospitals to disclose prices before rendering services undoubtedly qualifies as ‘traditional or ordinary economic regulation of commercial activity.’”¹⁹⁸

¹⁹³ In *First Amendment Coverage*, Amanda Shanor describes “large swaths of the administrative state, including antitrust, securities, and pharmaceutical regulation” as falling outside the scope of First Amendment protection, and argues that a single, stable legal standard defining “uncovered” speech may not be “feasible or normatively desirable.” 93 N.Y.U. L. REV. 318, 321 (2018).

¹⁹⁴ *Barr*, 140 S. Ct. at 2359 (Breyer, J., concurring in part and dissenting in part) (characterizing *Glickman* as a “rational basis” standard).

¹⁹⁵ The cases supporting intermediate scrutiny in the context of regulatory systems generally involve speech restrictions rather than compulsions. *Id.* at 2356 (Sotomayor, J. concurring) (reviewing under intermediate scrutiny and concluding that provision exempting government robocalls from a law generally barring such calls failed because it was not “narrowly tailored to serve a significant governmental interest”) (internal citations omitted); *id.* at 2360 (Breyer, J., concurring in part and dissenting in part) (stating that the applicable standard was intermediate scrutiny and that the law survived); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (holding that law restricting disclosure of patient data for pharmaceutical marketing purposes fails both intermediate and strict scrutiny, without resolving which applies); *City of Austin v. Reagan Nat’l Advert.*, 142 S. Ct. 1464, 1479–81 (2022) (Alito, J., concurring in the judgment in part and dissenting in part) (stating that *Sorrell*’s standard would apply to sign ordinances in cases where signs were commercial speech).

¹⁹⁶ *Janus*, 138 S. Ct. at 2483 (characterizing *United Foods* as an exacting scrutiny standard and saying union contribution mandate at issue in *Janus* failed both that standard and strict scrutiny); *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988) (upholding First Amendment challenge to compelled disclosures for charitable solicitors under standard that the majority calls “exacting” and the dissent calls “strict”).

¹⁹⁷ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (noting that strict scrutiny might apply to one disclosure mandate, but holding that the mandate fails even intermediate scrutiny).

¹⁹⁸ *Azar*, 983 F.3d 528, 542 (quoting *Barr*, 140 S. Ct. at 2335). No opinion in *Barr* cites *Zauderer*, though this is perhaps unsurprising since *Barr* involves a speech restriction rather than a compulsion.

Whatever the standard of review for regulatory disclosure requirements is, it should not affect the outcome of *NetChoice*. The regulatory systems cases permit speech compulsions when they are necessitated by some *other*, valid, non-speech-related law. The Texas and Florida transparency laws have no such foundation. They were enacted in large part to aid enforcement of legal regimes concerned solely with speech: The carriage mandates enacted in Texas and Florida.

Nothing in the regulatory systems cases indicates that states may simply bootstrap a speech compulsion onto another law that is *itself* a speech compulsion. If the states' must-carry rules were struck down, the transparency mandates would be left as free-standing obligations untethered to any separate, constitutionally viable regulation at all. In either scenario, the transparency rules would lack any nexus with "traditional or ordinary economic regulation of commercial activity" of the sort that might justify merely "incidental burdens on speech."¹⁹⁹

2. *NetChoice* and the future of the regulatory state

The Supreme Court does not have to address the relationship between the First Amendment and the administrative state in *NetChoice*. But it could. Its ruling could limit—or, more likely, unleash—more litigation seeking to "weaponize[e]" the First Amendment against "economic and social laws that legislatures long would have thought themselves free to enact."²⁰⁰ This context may drive unpredictable

¹⁹⁹ *Barr*, 140 S. Ct. at 2359. Of course, the Court could change this. It could uphold the *NetChoice* must-carry mandates on reasoning similar to that applied for cable or broadcast and repudiate this aspect of *Reno v. ACLU*. In that case, the Texas and Florida must-carry requirements might themselves in theory be deemed adequate underlying regulation to require "incidental" disclosure requirements.

²⁰⁰ *NIFLA*, 138 S. Ct. at 2383 (Breyer, J., dissenting). The *NIFLA* majority responded that "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Id.* at 2380–81. Similarly in the 2020 *Barr* decision, the conservative plurality stated that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," and that "courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech." *Barr*, 140 S. Ct. at 2341, 2347. Recent First Amendment scholarship examining First Amendment challenges to traditional regulation includes views as divergent as Enrique Armijo, *The Content-Discrimination Two-Step Post-Reed and Austin*, 2021–2022 CATO SUP. CT. REV. 141, and Amanda Shanor & Sarah E. Light, *Greenwashing & the First Amendment*, 122 COLUM. L. REV. 2033 (2022).

alignments on the Court, and equally unpredictable outcomes. Parties and *amici* in *NetChoice* should be attentive to this dynamic in formulating their arguments.

The Supreme Court's decision to review the Individual Notice and Appeal provisions in *NetChoice* will likely bring far more attention to both those mandates and the laws' other transparency provisions, including from conventional business interests. Companies like ExxonMobil in Texas or Royal Caribbean in Florida, for example, may not be happy to learn that their states' AGs have been arguing that *Zauderer* provides, effectively, a blank check for expansive, state-mandated disclosures in the name of "consumer protection." They may rightly worry that if companies like Twitter or Reddit cannot object to such laws on First Amendment grounds, then brick and mortar businesses will have even less chance of doing so. Advocates concerned about the regulation of non-speech businesses may adopt the stance that West Virginia's AG recently did in an SEC matter: insisting, as the platforms do in *NetChoice*, that disclosure mandates should be subject to strict scrutiny.²⁰¹ Or they may prefer to seek out arguments that justify disclosure mandates for platforms without supporting them for more traditional companies. One way to do that could be to emphasize the democratic-self-governance interests relevant to major speech platforms, rather than the more generic consumer protection or regulatory interests that might apply equally to other industries.

²⁰¹ Patrick Morrissey, *Letter to Allison Herren Lee*, OFFICE ATT'Y GEN. STATE OF W. VA. (Mar. 25, 2021), <https://www.sec.gov/comments/climate-disclosure/cll12-8563794-230748.pdf>. Arguments about the SEC's authority to require disclosures relating to climate risks offer a preview of theories that may also appear in *NetChoice* *amicus* briefs. The rules are set to take effect in Fall 2023. Karen Rives, *SEC Climate Disclosure Rule Delayed Until Fall, Former Commissioner Says*, S&P GLOB. MKT. INTEL. (Apr. 28, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sec-climate-disclosure-rule-delayed-until-fall-former-commissioner-says-75479173>; Jacqueline M. Vallette & Kathryn M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2022), <https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/>; Andrew Ramonas, *SEC Climate Rules Risk Legal Battle with Environmental Groups*, BLOOMBERG L. (Apr. 18 2023), <https://news.bloomberglaw.com/esg/sec-climate-rules-risk-legal-battle-with-environmental-groups>. Some comments from notable First Amendment experts include Rebecca Tushnet et al, *Letter to Vanessa A. Countryman* (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132173-302670.pdf>, and Ramya Krishnan et al., *Letter to Gary Gensler*, KNIGHT FIRST AM. INST. (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131800-302235.pdf>.

The intersections between *NetChoice* and First Amendment “Lochnerization” issues could play out in a number of ways. The Court’s decision to review only the Individual Notice and Appeals mandates, and not the more systemic disclosure obligations, might increase the odds of a ruling that focuses—as the Solicitor General’s brief did—on how those mandates burden individual editorial decisions. In that scenario, the Court could choose not to discuss *Zauderer* at all.

But even given the limits of the questions presented, the Court could still address *Zauderer*. Perhaps most consequentially, the Court could expressly limit *Zauderer* to cases involving advertising and consumer deception. That would eliminate it as a basis for broader regulatory disclosure mandates, and shift vast edifices of regulatory law into relying solely on the non-*Zauderer* justifications discussed in Part IV.B.1. Given the unclear standard of review in those cases, it is hard to say what disclosure mandates they permit. But both Justice Kavanaugh and Justice Thomas have invoked history and tradition as what the former called “reliable guides” in answering this question, and in discerning when lawmakers may “justify the infringement on the speaker’s First Amendment autonomy that results from a compelled commercial disclosure.”²⁰² That focus could potentially lead to rather restrictive interpretations of lawmakers’ power to compel disclosures to regulators like the FDA, EPA, SEC, or EEOC.

Implications for the regulatory state might be equally fraught if the Court in *NetChoice* embraced the idea, implied by some arguments below, that *Zauderer* is in fact the sole, slim reed upholding all regulatory disclosure mandates. Such a decision would potentially eliminate alternate “regulatory system” constitutional justifications for compelling disclosures incidental to the enforcement of other non-speech laws. The interpretation of *Zauderer* in *NetChoice* would then be critically important for larger issues of the administrative state. As discussed above, the Court could in principle apply *Zauderer* while avoiding any swipes at the foundations of the regulatory state. Such an opinion might focus on *Zauderer*’s “burden on speech” prong, and reason that the impact on editorial practices in *NetChoice* is

²⁰² *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring). Justice Thomas, writing for the majority in *NIFLA*, said that the “Court’s precedents do not permit governments to impose content-based restrictions on speech without ‘persuasive evidence . . . of a long (if heretofore unrecognized) tradition’ to that effect.” *NIFLA*, 138 S. Ct. at 2372 (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011)).

unique to platforms, and distinguishable from disclosures from non-speech industries. I do not think that conservative or business-friendly justices will read the case that expansively, though—at least, not unless they can find a way to read it expansively for platforms, while simultaneously reading it restrictively for other companies.

NetChoice does not have to veer so close to the constitutional third rail of First Amendment “Lochnerization.” The compelled speech issues it raises are distinct from those raised in other commercial contexts for at least three major reasons. First, *NetChoice* involves unique concerns about state influence on platforms’ underlying editorial practices, as discussed in Parts III.A and B. It could be resolved on those grounds, without addressing the more typical compelled speech issues that arise with disclosure laws for other industries.

Second, *NetChoice* raises unique concerns about the speech rights of platform users. That First Amendment issue has no analog in cases about disclosure mandates in non-speech industries.²⁰³

Third, as I will discuss in the next subpart, states’ interest in platform transparency laws involve democratic-self-governance goals. That is quite different from the interests animating most consumer protection or regulatory disclosure laws and could lead to different outcomes in First Amendment analysis.

In principle, the Court could cite any of these differences as a basis for ruling on the transparency issues in *NetChoice* without saying a word about compelled speech in other industries. The Court could, for example, accept platforms’ argument that *Lando* provides the best analogy, and apply strict scrutiny. It might treat some disclosure mandates as commercial speech, reviewed under intermediate scrutiny under *Central Hudson*.²⁰⁴ It could, perhaps, find its way to using the “extracting” scrutiny applicable in the electoral context. If the Court upheld Texas’s and Florida’s carriage mandates, it could even justify transparency measures as merely incidental to the must-carry regulation, and permissible under cases like *Casey*.

²⁰³ See generally Alan Z. Rozenshtein, *Silicon Valley’s Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337 (2021) (arguing that platform speech claims aid Lochnerization, but user speech claims do not).

²⁰⁴ The platforms also argued in opposition to Florida’s transparency mandates that “at the very least, intermediate scrutiny is required when a law singles out just some participants in a marketplace for disseminating speech.” Conditional Cross-Petition for Writ of Certiorari, *NetChoice, LLC v. Moody*, No. 22-393, at 32 (U.S. Oct. 24, 2022).

There is no one right path to resolving the platforms' First Amendment challenges to transparency mandates in *NetChoice*. But whatever path the Court chooses is likely to have consequences far beyond this case, and may well shape lawmakers' options for regulating companies far outside the Internet context.

3. Tailoring disclosure rules in regulatory systems

Existing regulatory disclosure regimes are relevant for one final reason. They are our primary legal models for tracking and documenting the operation of systems that rival major platforms' content moderation in scale and technical complexity. If the Court in *NetChoice* did adopt a standard of review that required meaningful tailoring for platform transparency laws, then regulatory precedent might tell us something about how to do that tailoring. Specifically, agency rule-making itself could provide better tailoring than static requirements set by legislators.

Relying on agencies as front-line protectors of First Amendment rights is hardly typical in U.S. law, of course. The point here is not that agencies should decide what speech is permissible. Rather, they might be uniquely capable of designing and iterating on systems for transparency about content moderation that maximize utility in advancing state interests, while minimizing unnecessary burdens. These systemic questions lie at the heart of platforms' industrial-scale content moderation operations, and undergird regulatory approaches to platforms outside the U.S.²⁰⁵

Rulemaking processes under laws like the federal Administrative Procedures Act (APA) enable agencies to gather information, hear from interested parties, and fine-tune legal requirements in light of new information or evolving technologies and business practices. Expert agencies can also help align disclosure rules with substantive regulatory goals. An environmental agency, for example, might require disclosures about specific dangerous chemicals in municipal water supplies, but not about substances that the agency knows to be benign. Or an agency might specify

²⁰⁵ See generally LORNA WOODS & WILLIAM PERRIN, ONLINE HARM REDUCTION—A STATUTORY DUTY OF CARE AND REGULATOR, CARNEGIE UK TRUST 5 (2019) (proposing regulatory approach that is centered on “the design of the service” and that “is systemic rather than content-based, preventative rather than palliative”); evelyn douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022) (describing a “second wave of regulatory thinking about content moderation” using a “systems thinking approach”); Digital Services Act Regulation (EU) 2022/2065 arts. 34 & 35 (systemic risk assessment and mitigation requirements).

the frequency with which water testing is required, or the granularity of disclosures—like disclosing contaminant parts per *million* but not parts per *billion* or *trillion*. Comparable clarity is sorely lacking in the Texas and Florida laws.

Regulators may also do a better job of tailoring consumer-facing disclosures, ranging from Individual Notices to Published Speech Rules. The familiar, FDA-mandated, black and white panels listing ingredients and key nutrients in packaged food are an example. Requirements for these labels are periodically updated using APA rulemaking processes.²⁰⁶ For the 2016 update, the FDA received numerous comments and issued a 259 page report justifying its conclusions.

The hospital pricing disclosures in *Azar*, which the D.C. Circuit upheld under *Zauderer*, fit this model, too. The requirements were the product of an extensive fact-finding process in Congress and again at the Department of Health and Human Services, in a detailed, APA-compliant rulemaking process. Legislators in Texas and Florida undertook no such review before enacting disclosure rules far more sweeping, detailed, and technical than the ones in *Azar*. And, unlike the law at issue in *Azar*, the Texas and Florida laws can be fine-tuned and interpreted only by courts.

Clarifying highly technical rules through case-by-case litigation can be difficult in the best of circumstances. Relying on two-party litigation is particularly problematic for issues affecting multiple interest groups. In the platform context, three groups are often affected by the outcome of litigation: people who want to speak and access information online, people harmed by online speech, and platforms themselves.²⁰⁷ But only two parties are represented, and courts may have little or no reason to even consider other interests. The litigation rules for Texas's and Florida's laws make it even less likely that courts will clarify transparency rules efficiently, fairly, or reasonably. In Texas, private claimants can continue to sue and seek new outcomes of previously resolved issues, even if another court has enjoined enforcement of the statutory provision at issue.²⁰⁸ In Florida, plaintiffs are incentivized to

²⁰⁶ 21 CFR § 101.9.

²⁰⁷ See generally Keller, *Three-Body*, *supra* note 60.

²⁰⁸ § 143.007 provides in part (d) that a “user may bring an action under this section regardless of whether another court has enjoined the attorney general from enforcing this chapter or declared any provision of this chapter unconstitutional unless that court decision is binding on the court in which the action is brought,” and in part (e) that “Nonmutual issue preclusion and nonmutual claim

sue early and often, because they can win up to \$100,000 per claim.²⁰⁹ That statutory damages provision in turn may decrease the chances that disputes will reach courts at all. Consequential disputes affecting online speech may instead be settled quietly between just two parties—private plaintiffs or state AGs on one side, and platforms on the other.

The point here is not that we should *want* an overall regulatory system for platform content moderation. Such a system would have tremendous First Amendment problems of its own.²¹⁰ The point is that, for complex technical systems like platforms' content moderation operations, disclosure rules refined through regulatory processes have a better chance of being carefully tailored, compared to rules thrown together hastily by legislators and adjudicated by courts.

C. Democratic Self-Governance Goals

For many platform transparency advocates, the goal is not merely to protect individuals' rights as consumers, but to empower them as participants in public discourse and democratic self-governance.²¹¹ This is the transparency argument that I personally find most compelling. We should expect and demand better transparency from platforms like YouTube and Facebook, not just because we are consumers of their products, but also because of the major role platforms play in shaping our information ecosystem and political outcomes. Without better information about the role platforms play, we are individually and collectively impaired in the project of democratic self-governance.

The transparency laws in *NetChoice* seem, in reality, to have been prompted at least in part by democratic goals—as suggested both by lawmakers' express intentions to prevent platform “censorship” and by Florida's special carriage require-

preclusion are not defenses.” Even without such problems, the Supreme Court has in the past rejected arguments that unclear compelled disclosure requirements are acceptable because they will be “judicially defined over the years,” noting that speakers cannot be compelled to wait for years before “speak with a measure of security.” *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988).

²⁰⁹ FLA. STAT. § 501.2041(6)(a).

²¹⁰ Keller, *Lawful*, *supra* note 48.

²¹¹ Ramya Krishnan, *How the Supreme Court Could Encourage Platform Transparency*, SLATE (Jan. 09, 2023), <https://slate.com/technology/2023/01/supreme-court-florida-texas-social-media-laws.html>.

ments for political speech. Those laws' transparency measures, which facilitate enforcement of these "anti-censorship" mandates, might be expected to share that legislative purpose. The laws' application only to relatively large platforms is also in keeping with concerns about influence on discourse and democratic process, and harder to justify purely as a consumer protection measure.

In briefs addressing the transparency measures, however, the states assert only an interest in consumer protection. That is understandable, given the litigation advantage of invoking the *Zauderer* line of cases. But comparing disclosures about speech and public participation to disclosures about the price of goods or services is also sadly reductive. Much like the platforms' "we are newspapers" line of argument, it makes key rights and interests of Internet users harder to see.²¹²

Squeezing democratic self-governance interests into the doctrinal box of consumer protection has worked out well so far for Texas and Florida. But I think transparency advocates should be uneasy about relying on the transactional logic of consumer protection to support democratic self-governance, or to advance Internet users' own First Amendment interests. There are real downsides to situating the beneficiaries of transparency laws as passive consumers of commercial products, rather than active participants in society. Among other things, the consumer-protection logic makes it harder to justify transparency mandates that serve interests held by society broadly, as opposed to the interests of individual platform customers.

²¹² The states could also argue that the transparency laws serve a more basic state goal: promoting Internet users' speech rights, by letting them better anticipate what platforms will allow them to say, and defending speech from content moderation errors. That state interest would be similar to the one recognized in the *Turner* cases, in promoting the "widest possible dissemination of information from diverse and antagonistic sources." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). Such an argument for transparency laws would be similar to states' argument in support of must-carry mandates. State lawyers may have calculated that, if the speech-interest-based argument works for must-carry, then states are likely to win on the transparency mandates as well—but that in case the argument fails for must-carry, states are better off keeping the transparency arguments separate, and relying on consumer protection interests. Tactical choices by parties that are simultaneously litigating multiple issues pervade current platform litigation. They unavoidably distort the arguments presented to courts, and compound the already substantial problems with treating either states or platforms as proxies for users' interests.

In this final Part, I will start in Subpart 1 by discussing potential platform transparency laws that more clearly advance democratic self-governance goals, including laws relating to elections or enabling better independent research into platforms' influence on public discourse. Those laws may be harder to defend on consumer protection grounds than the *NetChoice* laws. For advocates of those laws, therefore, it may prove important to flesh out alternate First Amendment arguments, including arguments expressly grounded in democracy interests. Subparts 2 and 3 will examine some of the sparse relevant precedent for demanding disclosures from private entities in order to protect publicly held interests in democracy. Subpart 4 will list potentially relevant inquiries about government transparency that may help in improved design or tailoring of platform transparency laws.

Up to this point, this Paper has been concerned with the things that *don't* work about platform transparency laws. Part III described practical ways in which laws might limit platforms' ability to apply their own editorial policies, and reshape Internet users' ability to seek and impart information online. Part IV.A and IV.B explained the inadequacy of cases about consumer protection or regulation as precedent for addressing these speech concerns.

This Part is more positive, but also more speculative. It sketches out areas of development for transparency laws outside of *NetChoice's* marriage of convenience with consumer protection and *Zauderer*. It is very much a sketch—many of the questions raised here would benefit from additional thinking, and from the expertise of practitioners versed in fields including election law, government transparency law, and media law.

1. Alternate transparency mandates with clearer links to democratic interests

Many common platform transparency proposals—ones Florida and Texas chose not to enact—have clearer connections to democracy interests, and weaker connections to consumer protection. That is most obvious with laws like the federal draft Honest Ads Act, which would have required platform disclosures about political campaign ads.²¹³ Such election-related disclosures clearly relate to democratic interests, rather than consumer protection in the commercial sense.

²¹³ Honest Ads Act, S. 1356, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1356>.

The link to democratic self-governance is also evident in disclosure mandates that are intended to inform the legislative process. As Nate Persily put it in proposing that platforms be compelled to disclose data to vetted researchers, “for policy-makers to effectively regulate Facebook—as well as Google, Twitter, TikTok and other Internet companies—they need to understand what is actually happening on the platforms.”²¹⁴

Individual participants in democracy have an interest in understanding how public discourse is shaped by platforms and their users, too. Knowing about things like Russian disinformation campaigns on social media, patterns of over-removal by platforms seeking to avoid liability, or racial or political bias in platforms’ own content moderation may also help us as consumers. But it is particularly and acutely relevant to our individual autonomy and ability to participate in the democratic process.

Compelled platform disclosures of the sort mandated in Texas and Florida are poorly suited for revealing systemic problems like platform bias in moderation, or undetected disinformation campaigns. That’s in part because platforms themselves are often unaware of the problems. They couldn’t properly disclose them, even if they wanted to. Even the most “raw” aggregate data required in Texas and Florida—the Statistical Transparency Reports—can at best tell us only what the *platform* thinks happened. The more granular data in those states’ Individual Notices may be informative about individual cases, but will provide little information about larger patterns.²¹⁵

Reliable information on topics like disinformation campaigns or platform errors has, to date, often come from independent research done by academics, journalists, and civil society organizations. Some studies are the product of special ac-

²¹⁴ Nathaniel Persily, *Facebook Hides Data Showing It Harms Users. Outside Scholars Need Access.*, WASH. POST (Oct. 5, 2021).

²¹⁵ The EU’s ambitious but, so far, poorly designed solution to this problem is to assemble a public database tracking every Individual Notice platforms send users about content moderation. Daphne Keller, *Rushing To Launch the EU’s Platform Database Experiment*, CTR. INTERNET & SOC. (July 16, 2023), <https://cyberlaw.stanford.edu/blog/2023/07/rushing-launch-eus-platform-database-experiment>.

cess granted by platforms to trusted experts. But some of the most important findings build on public or widely available data.²¹⁶ Public data sources have multiple advantages. For one thing, they allow work to be done by researchers with diverse interests, skillsets, or backgrounds. That enhances the odds of identifying—and fixing—previously unnoticed problems.

As the open-source software mantra goes, “with enough eyeballs, all bugs are shallow.” Availability of source data also means that researchers’ conclusions can be checked by third parties. And, importantly for the First Amendment concerns discussed here, when platform data is made public, state actors are largely eliminated as gatekeepers or as sources of influence on platforms’ rules for user speech.

Many proposed or enacted laws, like PATA in the U.S. or some provisions of the DSA in Europe, are designed to unleash more independent research. Mechanisms for doing so include reforming laws that currently deter researchers from “scraping” content displayed by platforms; requiring platforms to simplify access to already-public data by offering research APIs; and creating new legal mechanisms for researchers to review internal platform data.

Research-oriented laws are comparatively difficult to justify on consumer protection grounds. They may indirectly help consumers, but they are not much like the point-of-sale labels, warnings, or price lists that courts have approved under *Zauderer*. And, unlike the Texas and Florida laws, proposals like PATA are not particularly focused on telling people what to expect from their *individual* experience as consumers using a platform. They are often more about understanding the big picture of platforms’ societal impact.

2. First Amendment considerations for democracy-based mandates

These more democracy-oriented transparency proposals have upsides and downsides for First Amendment purposes. The upsides are mostly practical; the downsides are mostly doctrinal. U.S. courts have had few opportunities to consider disclosure rules for privately-held information that is of public importance to the functioning of democracy. Like so many other questions about private Internet

²¹⁶ Academic publications using data from the Lumen Database at Harvard, for example, likely number far into the hundreds. See Brief of Amici Curiae Chilling Effects Clearinghouse Leaders in Support of Appellee, *Perfect 10, Inc., v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2010), <https://perma.cc/Z744-TTYJ> (citing studies as of 2010).

platforms' relationships with—or functional substitution for—real-world governments, the issues are novel and legal precedent is sparse. But, like those other areas of law, the rules around platform transparency are likely to evolve quickly. Bringing considerations based on democracy interests to bear on transparency discussions would be very timely, even without the forcing function of *NetChoice*.

As a practical matter, many of the democracy-related transparency proposals described in this Part can be crafted to avoid the threats to free expression discussed in Part III. The opportunities for abuse by state enforcers would be minimized under rules that do not turn on interpretation of speech rules, but are instead about the mechanics of access to already-public data.²¹⁷

A state AG investigating platforms' compliance with research API requirements, for example, might ask whether a data set is complete or correctly formatted. But they would have little or no reason to second-guess platforms' editorial decisions. Reforming scraping laws would pose even less risk of state abuse, because the state would have no role in enforcement (except for courts' role in rejecting platform claims against researchers). Some research-oriented proposals would also be less burdensome for platforms, meaning that the threats to competition and diversity of online speech rules discussed in Part III.B would also be reduced. Scraping law reform, in particular, would place little or no First-Amendment-relevant burden on platforms.²¹⁸

Of course, lawmakers who expressly asserted democracy-related goals for platform transparency laws might find it much harder to do what Texas and Florida have done in First Amendment litigation: bypass strict scrutiny by invoking *Zauderer*. Without the fig leaf of consumer protection goals, states might have to defend their laws under a more stringent standard of review, be it the special “exacting

²¹⁷ Relatedly, the Eleventh Circuit held that Florida's “user-data-access requirement,” which allows users to access and export content they themselves stored on platforms, triggered no First Amendment scrutiny. *Moody*, 34 F.4th at 1223.

²¹⁸ All of these proposals are complicated, and not immune from First Amendment critique. Scraping law reform could burden platforms, for example, if it effectively led them to tolerate scraping that slowed down their servers or endangered their users. But that doesn't seem like a burden that would potentially incentivize changes in editorial policy the way the *NetChoice* laws would. Other more ambitious proposals, like the real-time content dashboards proposed in PATA, would be very burdensome and raise more of the problems discussed in Part III.B. Proposals that would effectively put government agencies in a position to approve some research projects but not others could raise questions about improper state influence, akin to those discussed in Part III.A.

scrutiny” standard applied in election-related cases, or more conventional intermediate or strict scrutiny.

One important issue for democracy-based interests in platform transparency involves the same “are platforms newspapers” question that animates *NetChoice* and many other platform regulation debates. If states have an interest in compelling platform transparency based on the companies’ role in shaping public discourse and political outcomes, might they also assert that same interest in compelling transparency from the *Washington Post* or Fox News? I think the answer is probably no, because of the distinctions between platforms and newspapers discussed in Part III.C.1. In particular, platforms’ role as communications infrastructure for ordinary people in daily life is a key differentiator. But this question deserves more exploration.

The only major federal ruling about an overtly democracy-related platform transparency law to date is *Washington Post v. McManus*, which involved election ad disclosures by sites hosting online ads. In it, the Fourth Circuit upheld a First Amendment challenge to Maryland’s online campaign ads transparency law.²¹⁹ It reasoned that more lenient standards of review might apply to traditionally regulated media like broadcast, or to laws that regulate political speakers directly—but not to laws that regulate the Internet, and incentivize platforms to simply avoid hosting certain ads based on their political content. The more recent case from Washington State discussed above reached a different conclusion, and is currently on appeal.²²⁰

In principle, the same considerations that shape judicial review of election-related transparency mandates might apply to platforms, and justify exacting scrutiny. In its seminal *Citizens United* ruling, the Supreme Court upheld campaign ad disclosure requirements based on the state’s interest in ensuring “that the voters are fully informed about the person or group who is speaking . . . so that the people will be able to evaluate the arguments to which they are being subjected.”²²¹ Users’

²¹⁹ *Wash. Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019) (declining to decide between strict and exacting scrutiny and holding that law fails both standards).

²²⁰ *State v. Meta Platforms, Inc.*, No. 20-2-07774-7 SEA, 2022 WL 20697994 (Wash. Sup. Ct., Oct. 2022).

²²¹ *Citizens United v. FEC*, 558 U.S. 310, 317 (2010) (internal quotation marks omitted). The Court noted that disclosure mandates might nonetheless be unconstitutional if objectors presented sufficient evidence of resulting “threats, harassment, or reprisals” against members of named

general interest in asking “why am I seeing this?” with respect to politically important information online is arguably similar.

In the Ninth Circuit’s formulation, the more relaxed exacting scrutiny standard for election-related disclosures is justified in part because voters have an “interest in knowing who was trying to sway their views” including through “subtle and indirect communications” before an election.²²² The same reasoning might apply to laws requiring transparency about *platforms*’ role in swaying views or allowing researchers to evaluate foreign influence or disinformation campaigns.

Arguing for exacting scrutiny on this basis would require stretching Supreme Court precedent far beyond its original context, of course. But that’s what Texas and Florida are already doing in relying on *Zauderer*. It’s what almost everyone has to do, in arguing almost every constitutional question about platform regulation, because the issues involved are genuinely novel. The law is in flux. For issues like those in *NetChoice*, it is likely at an inflection point. If we ever want platform regulation to advance democracy-related goals, now would be a good time to start identifying such laws’ constitutional underpinnings.

3. Other democracy-related transparency cases

Another way to think about democracy interests in transparency is to view platforms not as entities that *influence* real world governance, but as entities that *carry out* their own, private governance. If platforms are the “new governors,” perhaps their disclosure obligations should build on the transparency rules we now apply to state agencies, legislatures, executives, and courts.²²³

groups. This risk has become more relevant in the platform context with threats against Twitter content moderators identified in the “Twitter Files.” See Donie O’Sullivan, *Former Top Twitter Official Forced to Leave Home Due to Threats Amid ‘Twitter Files’ Release*, CNN (Dec. 12, 2022), <https://www.cnn.com/2022/12/12/tech/twitter-files-yoel-roth/index.html>.

²²² Nat’l Ass’n for Gun Rights v. Mangan, 933 F.3d 1102, 1114 (9th Cir. 2019) (discussing transparency mandates about funding for electioneering).

²²³ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018). In the electoral context, Justice Scalia noted a similar blurring of state and private roles, suggesting that voters who sign their support of referendum petitions had reduced First Amendment protection against compelled disclosures, because they were functionally acting as legislators rather than individual speakers. *Doe v. Reed*, 561 U.S. 186 (2010) (Scalia, J., concurring).

I think this framing can be fruitful for the design and tailoring of platform transparency laws, as I'll explain below. But it doesn't otherwise tell us much about First Amendment standards. The First Amendment interests in government disclosures are generally on the *public's* side. The government does not get to assert First Amendment rights, or object on compelled speech grounds to laws like the Freedom of Information Act. And questions about compelling private actors to speak in order to provide information about the government just don't come up much.

A smattering of cases, however, broadly support the idea of *some* democracy-based interest in compelling speech, even outside of the election context. In 2001, for example, the Fifth Circuit upheld a ruling against private individuals who argued that laws compelling them to answer census questions violated the First Amendment.²²⁴ The lower court in that case rejected the claim in strong language, saying “[t]here is no right to refrain from speaking when essential operations of government require it for the preservation of an orderly society.”²²⁵ Of course, democratic interests in compelling disclosures for the census are unusually clear, given its constitutionally prescribed role in shaping electoral representation.

More often, conflicts between private entities and the public interest in understanding government reach courts in the form of intellectual property claims. Companies object to Freedom of Information Act (FOIA) disclosures that allegedly include their trade secrets, for example.²²⁶ Disputes of this sort can also arise when private vendors provide important services to governments or carry out traditional state roles. Commercial providers of algorithms used by courts in sentencing, for example, have argued on trade secret grounds that their algorithms cannot be disclosed—even to lawyers representing affected criminal defendants.²²⁷

Courts have in some cases upheld the public's rights to access privately held or owned information, using intellectual property doctrines that are themselves

²²⁴ *Morales v. Daley*, 116 F. Supp. 2d 801, 815 (S.D. Tex. 2000), *aff'd without opinion sub. nom.* *Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001).

²²⁵ *Id.* at 816 (quoting *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995)).

²²⁶ *FOIA Guide, 2004 Edition: Exemption 4*, DEP'T OF JUSTICE (2004), <https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-4>.

²²⁷ Vera Eidelman, *The First Amendment Case for Public Access to Secret Algorithms Used in Criminal Trials*, 34 GA. ST. U. L. REV. 915, 933 (2018).

grounded in democratic or First Amendment considerations. The Supreme Court, for example, rejected a claim that authoritative annotations to Georgia legislation were copyrighted and could not be freely distributed.²²⁸ Government works cannot be copyrighted, the Court explained, because of the “animating principle” that “no one can own the law.”²²⁹ Because “[e]very citizen is presumed to know the law,” Chief Justice Roberts wrote, “all should have free access to its contents.”²³⁰

A lower court similarly rejected efforts by the voting machine company Diebold to prevent disclosures about problems with machines used in elections.²³¹ The court held that sharing the company’s copyrighted materials was fair use, and noted that doctrine’s role in ameliorating conflicts between copyright law and the First Amendment.²³² It would, the court observed, be “hard to imagine a subject the discussion of which could be more in the public interest.”

These cases demonstrate appropriate judicial reluctance to let private companies withhold important information about key democratic infrastructure, like legal codes and the mechanics of electoral administration. Similar reasoning might be relevant for laws requiring disclosures about platforms’ rules, or about problems with AI and other automated tools used to enforce them.

4. Legislative design and tailoring considerations

Experience with disclosures from actual governments could also be useful in designing functional transparency laws for platforms. Looking to existing transparency measures from legislatures, courts, police, and other state bodies can help us identify effective mechanisms and avoid obvious pitfalls in platform transparency

²²⁸ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020); *see also* *Am. Soc. for Testing & Materials, et al v. Public.Resource.Org, Inc.*, ___ F.4th ___, 2023 WL 5918491 (D.C. Cir. Sept. 12, 2023) (upholding fair use defense for copyright defendant that freely distributed technical specifications incorporated into laws such as building codes).

²²⁹ *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507.

²³⁰ *Id.*

²³¹ *Online Pol. Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

²³² *Id.* at 1204. The case arose when Diebold sent ISPs notices under the DMCA, demanding removal of links to leaked internal emails about their machines’ technical problems. The Internet users who had posted the emails sued Diebold, saying that it had misrepresented its rights, in violation of 17 U.S.C. § 512(f). The court upheld their claim, in one of the very few cases vindicating users’ rights in this situation.

measures.²³³ This matters for legislative drafting, and should also matter for courts assessing how well transparency laws achieve their goals, and whether they are adequately tailored to avoid harms to speech rights.

If platforms are like governments, their speech rules are like legislation. A platform user's interest in knowing Twitter's rules might be analogized to her interest in "know[ing] the law" of her state, as in the *Georgia* copyright case. But legislators—including in Texas and Florida—are not expected to expose every step of the lawmaking process to public scrutiny.²³⁴ Experience with real-world legislative transparency might also help in reaching nuanced answers to questions like these:

- Should platform Trust and Safety teams have to disclose every meeting, conversation, and interim draft created while establishing Published Speech Rules?
- Should the required detail and clarity of Published Speech Rules match the detail and clarity of, say, state civil codes? Of summaries like the Restatement of Torts?
- Should we expect *more* detailed written rules from platforms than we do from legislatures, given that platforms are less able to supplement their rules through a "common law" of reported cases?

Experience with real-world courts could also be useful for designing Individual Notices and other transparency requirements about specific moderation decisions. The judicial analogy, like the legislative one, is of course imperfect. Platforms can at best dispense very rough justice, with nothing like the procedural rights that would exist in court. Generating truly court-like paperwork would be grindingly inefficient. Users would likely not welcome the resulting barrage of notifications. Still, drafters of platform transparency laws can learn from experience with real government actors in considering questions like these:

- Do civil procedure rules or local court rules have something to teach us about the mechanics of platforms' Individual Notices or communications

²³³ Case law about election-related disclosures might provide other examples of "tailoring." The disclosures at issue in *NAGR*, for example, were limited in terms of what activities or financial expenditures triggered the disclosure obligation, the degree of detail required in the disclosures, and the pre- and post-election temporal window in which additional disclosure obligations applied. *Nat'l Ass'n for Gun Rights v. Mangan*, 933 F.3d 1102, 1116–18 (9th Cir. 2019).

²³⁴ For a discussion of valid reasons not to disclose such detail, see David Pozen, *Transparency's Ideological Drift*, 128 *YALE L.J.* 100 (2018).

about Appeals? Judicial precedent might help in assessing what events should trigger new notices, for example, or how notices should be delivered and what information they must convey.

- Should platform users, like defendants in court, be told who has accused, sued, or borne witness against them?²³⁵
- Should platforms have to disclose moderators' internal deliberations or draft opinions?
- When should platforms exclude information from public disclosures—much as courts might anonymize names of children or abuse victims, or redact trade secrets?

There is no indication that the Texas or Florida legislators considered any such questions. They seem not to have even thought much about the concerns of *actual* state actors. Tax collectors in Florida, for example, may be surprised to learn that platforms seemingly must leave up posts explaining how to engage in tax fraud—so long as the posts also mention political candidates. Police may be similarly displeased at platforms' apparent duty to notify users when content is removed or hidden from potential readers, even when doing so would compromise ongoing law enforcement investigations. Platforms' increasing ubiquity makes them the site of human misbehavior of all sorts, including behavior that real-world authorities legitimately seek to govern. Legislators' choice to enact sweeping carriage and transparency mandates without reconciling even these basic competing state interests is a strong symptom of the overall lack of care with which the Texas and Florida laws were drafted.

V. CONCLUSION

The threat to First Amendment rights from badly drafted platform transparency laws is all too real. Internet users and the general public will gain little if laws like the ones in *NetChoice* provide better information about platforms' speech rules, only to put new power over those rules in the hands of state actors whose

²³⁵ Civil society groups around the world have called for platforms to at least inform users when their speech has been removed at the request of governments. Daphne Keller, *When Platforms Do the State's Bidding, Who Is Accountable? Not the Government, Says Israel's Supreme Court*, LAWFARE (Feb. 7, 2022), <https://perma.cc/4N5D-ZBLN>. That information may not be required under the state laws in *NetChoice*, though the Florida law does require platforms to provide a "thorough rationale" in Individual Notices to affected users, including "how the social media platform became aware of the censored content."

actions are hidden from the public. But the public interest in better information about major platforms' editorial practices is real as well. Better platform disclosures can not only protect Internet users as consumers, but empower them as active participants in democratic self-governance. As with so many issues in platform regulation, this one has speech and informational interests on all sides.

Well-designed transparency laws for major platforms should be able to survive First Amendment review. But Texas's and Florida's laws are not well-drafted, and have potential to do great harm. In its review, the Supreme Court should hold the Notice and Appeals mandates to far more searching review than has been applied in the *NetChoice* cases so far under *Zauderer*. The scrutiny the Court applies—and which future courts should apply to other transparency mandates, including the remaining Texas and Florida requirements—should require clear connections between state interests and the required disclosures, and careful tailoring.

Concrete examples of better tailoring have been described throughout this paper, but my suggestions are just the beginning. Platform law practitioners, researchers, and Trust and Safety professionals are sure to have other ideas. Important improvements won't happen, though, unless courts take seriously the First Amendment issues with platform transparency mandates.