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Federal District Court Upholds New York's Social Media Content Moderation Disclosure Law

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In a blow to tech industry efforts to challenge state social media regulations, X Corp. (formerly Twitter) lost its challenge to a New York state law requiring social media platforms to disclose content moderation policies. Judge John P. Cronan of the U.S. District Court for the Southern District of New York rejected X's claims that the law was barred by the First Amendment, holding that the law's reporting requirements are "purely factual and uncontroversial" and thus subject to a deferential standard of review under *Zauderer v. Office of Disciplinary Counsel*,[1] which found the law survived. In doing so, the decision sets up a potential circuit split with the Ninth Circuit, which reached the opposite conclusion on a nearly identical statute adopted in California in *X Corp. v. Bonta*.[2] This increases the likelihood that the U.S. Supreme Court will eventually be asked to resolve whether *Zauderer* applies to content moderation policy disclosure laws, including whether such disclosures are "controversial" under the law.

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BACKGROUND

In 2024, the New York legislature enacted Article 42 of the General Business Law, which requires social media companies to post their terms of service (TOS) publicly and to file a semi-annual "Terms of Service Report" with the New York Attorney General. In the TOS report, social media companies must disclose whether their TOS define certain categories of content, and if so, the definitions of those categories. Among the specified categories are several that X Corp. would later argue were impermissibly based on the content of the company's speech, including terms addressed to moderating hate speech or racism, extremism or radicalization, disinformation or misinformation, harassment, and/or foreign political interference (the Content Category Report provisions). The law also requires social media companies to detail their content moderation practices addressing those categories and report enforcement statistics of those categories, disaggregated by content type and moderation method. Violators face civil penalties up to $15,000 per violation per day with a 30-day cure period.

X Corp. sued New York's Attorney General Leticia James, arguing that the Content Category Report

provisions were content-based restrictions that are subject to strict or intermediate scrutiny under the First Amendment. X Corp. also argued that the law was preempted by Section 230. New York moved to dismiss the claims, arguing that the law's provisions are commercial speech requiring only factual, uncontroversial disclosures, thus the more permissive *Zauderer* standard applies.

THE DISTRICT COURT OPINION

The district court's opinion accordingly had to address what standard applied to the moderation law, as well as whether it could withstand that scrutiny. Under the First Amendment, laws regulating the content of speech are generally subject to heightened scrutiny. In *Zauderer*, however, the Supreme Court held that laws requiring commercial speakers to disclose "purely factual" and "uncontroversial" information about their goods and services are subject to a more relaxed standard. Under this standard, the disclosure requirements are permitted when the disclosure is (1) reasonably related to a legitimate government interest, and (2) not unduly burdensome.

THE DISCLOSURES ARE COMMERCIAL SPEECH

The court first held as a threshold issue that the disclosures are commercial speech because the disclosure of content moderation policies relate to "the terms of the commercial transaction between the platforms and users." The court contrasted this with a law requiring the disclosure of opinions about content moderation policies or reasons that content moderation policies were adopted, which would not qualify as commercial speech. In making this distinction, the court considered the "Act's plain text," which it found simply asked for disclosure of whether "the current version of the terms of service defines" content categories like hate speech, and if so, what those definitions are. Put simply: the "provision just requires disclosing existing policies, not the reasons for or opinions about those policies."

THE DISCLOSURES PERTAIN ONLY TO PURELY FACTUAL AND UNCONTROVERSIAL INFORMATION

X Corp. argued that its content moderation policies could not be "purely factual" under *Zauderer* because those policies reflect the company's exercise of discretion. In rejecting this argument, the court drew from the reasoning in *New York Restaurant Association v. New York City Board of Health*,[3] a case involving required disclosure of calorie counts on restaurant menus, which held that a restaurant's discretion on what to sell does not make disclosure of calorie contents any less factual. Thus, even if X Corp. exercises discretion when choosing to define categories like hate speech, X Corp.'s confirmation that it has defined those categories and disclosure of what the contents of its definitions is still "factual" in nature.

Significantly, the court also held that while the existence of X Corp.'s content moderation policies may generate controversy, "the fact that they are what they are is not" controversial, for the purposes of *Zauderer*. According to the court, the disclosure law's purpose is not, as X Corp. frames it, to generate public controversy, but rather to give consumers information about social media platforms' policies so that they may choose platforms that align with their values. The court wrote that adopting X Corp.'s framing would turn "the *Zauderer* framework on its head" — as any compelled disclosure has the potential to generate controversy. The controversy that X Corp. is concerned with, the court concluded, "is a feature" of *Zauderer* and the First Amendment, "not a bug."

DISCLOSURE IS REASONABLY RELATED TO NEW YORK'S INTEREST IN PREVENTING DECEPTION OF CONSUMERS AND NOT UNDULY BURDENSOME

The court also found that *Zauderer* scrutiny was satisfied, concluding that New York's legislature had "rationally determined" that current content moderation policies are hard to find and hinder consumers' comparison of different platform policies. Furthermore, the *Zauderer* framework allows states to "mandate disclosures in the hopes that better informed consumers will make different decisions," as "long as those decisions are left up to the marketplace" of ideas. The court also wrote that X Corp.'s argument that the law is unduly burdensome because it chills the protected speech of social media platform users fails, as the argument was entirely speculative.

SECTION 230 DOES NOT PREEMPT THE CONTENT CATEGORY REPORT PROVISIONS

Lastly, the court rejected X Corp.'s claims that Section 230 immunizes social media companies because it found that the "Content Category Report Provisions are consistent with Section 230, and are thus not preempted by that provision."

CONCLUSION

The decision gives platforms operating in New York a concrete answer to disclosure obligations under the law. However, because the complaint was dismissed without leave to amend, an appeal to the Second Circuit is likely, so companies should not treat this decision as the final word. The decision also signals a potential split with the Ninth Circuit. In 2024, the Ninth Circuit, in *X Corp. v. Bonta*, struck down a nearly identical law after applying strict scrutiny. In doing so, the Ninth Circuit held that the "Content Category Report Provisions likely compel non-commercial speech" because the speech at issue does not concern the usual definitions of commercial speech and requires companies to "express a view about those terms by conveying whether a company believes certain categories should be defined and proscribed." As non-commercial speech, the Ninth Circuit declined to apply *Zauderer*. Practically, platforms operating nationally should expect to have varying compliance obligations depending on the circuit until this split is resolved.

While X Corp. was at the center of the discussion, the reporting requirements apply beyond large, name-brand social media companies like X, Meta, and TikTok. Any company operating a "public or semipublic internet-based service or application" with New York users that functions to "allow users to interact socially with each other within the service or application" and "construct a profile to use the service" to "create or post content viewable or audible by other users" is subject to the reporting requirements.

Aside from the implications for social media companies, the court's treatment of *Zauderer*'s "uncontroversial" prong is worth noting. In recent years, the "uncontroversial" prong of *Zauderer* has been used to strike down laws requiring notices about emergency contraceptives and abortion referrals at pregnancy service centers and to uphold laws requiring restaurants to disclose calorie counts. However, there is little consensus on whether "controversial" refers to the disclosure's subject matter, its reception by consumers, or the specific statement compelled. This opinion offers a clearer formulation: a policy can be controversial while the fact of its existence is not. This reasoning may be especially useful in areas such as consumer product warnings, nutritional and health-related disclosures, and climate-related disclosures where lawmakers and industry members continue to debate the lines between uncontroversial, factual disclosure and impermissible compelled speech.

Notes

1. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).
2. X Corp. v. Bonta, 116 F.4th 888 (9th Cir. 2024).
3. New York Restaurant Association v. New York City Board of Health, 556 F.3d 114 (2d Cir. 2009).

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