No. 21-15869

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWITTER, INC.,

Plaintiff-Appellant,

v.

KEN PAXTON, in his official capacity
as Attorney General of Texas,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of California
Case No. 3:21-cv-01644 (Hon. Maxine M. Chesney)

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE MEDIA LAW RESOURCE CENTER IN SUPPORT OF PLAINTIFF-APPELLE'S PETITION FOR REHEARING EN BANC

[Caption continued on next page]

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CORPORATE DISCLOSURE STATEMENTS

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Media Law Resource Center has no parent corporation and issues no stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee") and the Media Law Resource Center ("MLRC") (collectively, "amici"). As organizations that defend the First Amendment rights of journalists and news organizations, amici respectfully submit this brief in support of Plaintiff-Appellee to highlight the threat posed to foundational press freedoms by the civil investigatory demand that Plaintiffs-Appellees challenge in this case.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellee and Defendant-Appellant have consented to the filing of this brief. *See* Cir. R. 29-2 (a).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The First Amendment "erects a virtually insurmountable barrier" around a publisher's exercise of editorial judgment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). That wall separating state from newsroom is of fundamental importance to a free press. Attorney General Paxton would open a crack in it, to get at the editorial practices of social media firms that he dislikes because of the viewpoints he believes they reflect. *See* Attorney General Ken Paxton (@KenPaxtonTX), Twitter (Jan. 9, 2021, 2:58 P.M.), https://perma.cc/7XTG-2SDX (characterizing Twitter as "the left's Chinese-style thought police," hostile to "conservative" voices). Remarkably, a panel of this Court authorized that effort on the theory that when publishers like Twitter describe their editorial standards, those statements may then permit government scrutiny of how a publisher exercises its editorial judgment under consumer protection laws. Such a rule, if allowed to stand, would force publishers to forfeit their editorial discretion merely by describing the standards that guide it, which in turn would chill their editorial autonomy.

That is not the law. The panel's decision conflicts with the precedents of the Supreme Court and of this Circuit; it raises, too, a First Amendment question of

exceptional importance for members of the news media. Amici respectfully urge this Court to grant the petition for rehearing en banc.

ARGUMENT

I. The panel's decision raises a question of exceptional importance for members of the news media and the freedom of the press.

A. The First Amendment flatly prohibits government interference with the editorial judgments of private publishers.

Private curation of lawful content online—especially content related to public affairs and government officials—is an inextricable feature of modern public discourse. In 1974, the Supreme Court unanimously affirmed that the First Amendment forbids governmental interference in that kind of editorial decisionmaking, holding unconstitutional Florida's "right of reply" statute, which "grant[ed] a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper." *Tornillo*, 418 U.S. at 243. In *Tornillo*, the Court found that any such intrusion "[c]ompelling editors or publishers to publish that which reason tells them should not be published" would violate the First Amendment, regardless of motive. *Id*. at 256 (internal quotation marks omitted). This right to editorial integrity has often been called "absolute." *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1557 (D.C. Cir. 1984); Lucas A. Powe, Jr., The Fourth Estate and the Constitution 277 (1992) ("Because editorial autonomy is indivisible, it must be absolute.").

Notably, the Court decided *Tornillo* at the height of the constitutional fallout from the Watergate scandal. President Richard Nixon was stung at the time by what he felt was unfair news coverage, and he urged the Department of Justice to explore the need for a federal "right to reply" statute to counter it. *See* Anthony Lewis, *Nixon and a Right of Reply*, N.Y. Times, Mar. 24, 1974, at E2, https://perma.cc/PUA9-PF46 ("Overhanging the debate is the reality of Watergate, where a vigorous press broke through repeated official White House denials of wrongdoing."). The Texas Attorney General's use of a consumer protection statute to investigate Twitter's editorial choices arises against a similar backdrop of claims by politicians that social media companies are silencing certain viewpoints, prompting a flood of legislative proposals to counter perceived "bias" in content moderation practices.

But whatever validity those concerns do or do not have, *Tornillo* makes clear that editorial fairness—however desirable—"cannot be legislated." 418 U.S. at 256. Instead, the First Amendment requires that society "take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed" to avoid the graver risk of government censorship. *Id.* at 260 (White, J., concurring). A contrary approach, Chief Justice Burger stated in his opinion for the majority, would "bring[] about a confrontation

with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Id*. at 254. Justice Burger described two key results of government intrusion in editorial matters. First, public discourse "would be blunted or reduced" as editors erred on "the safe course . . . to avoid controversy." *Id*. at 257. Second, government-enforced editorial fairness would directly violate "the unexceptionable, but nonetheless timeless" principle "[w]oven into the fabric of the First Amendment" that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." *Id*. at 261 (quoting 2 Zechariah Chafee, Government and Mass Communications 633 (1947)).

While *Tornillo* dealt with a traditional print newspaper, the Supreme Court has since extended full First Amendment protection to the internet as a communications medium. *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997); *cf. Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (noting that "social media users employ these websites to engage in a wide array of protected First Amendment activity"). And courts have recognized that *Tornillo* extends "well beyond the newspaper context," applying its holding to, for instance, a search engine curating results, *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433,

437 (S.D.N.Y. 2014),[1] the organizers of a parade, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995), or a private utility company filling billing envelopes, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986). But the decision's fundamental logic, that the government may not substitute its own editorial viewpoint for a private party's, remains of central importance to news publishers and the freedom of the press. To weaken that principle anywhere will—eventually and inevitably—impair its traditional sweep as well. *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 144–45 (1973) (Stewart, J., concurring) (noting the danger posed by arguments for "greater Government control of press freedom" in new media that "would require no great ingenuity" to extend to newspapers).

B. Under the panel's holding, publishers who speak about their standards would forfeit their editorial judgment to the government.

The panel found that *Tornillo*'s protections are not at stake here because the OAG's investigation seeks to enforce "Twitter['s] [own] statements about balance" rather than "government regulations or statutes which themselves require[]

[1] *See also, e.g.*, *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook's content moderation choices); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (Google's search rankings); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) (same); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568, at *2–4 (W.D. Okla. May 27, 2003) (same).

balance." *Twitter, Inc. v. Paxton*, No. 21-15869, slip op. at 13 (9th Cir. Mar. 2, 2022). That logic would give the government a trivial end-run around the constitutional protections guaranteed under *Tornillo* for publishers of all kinds.

Traditional publishers like *The New York Times* and *The Washington Post* routinely make representations about their editorial standards, outlining everything from ethics to fairness and taste in their publication decisions. *See, e.g.*, *Standards and Ethics*, N.Y. Times, https://perma.cc/8WG9-U5HF (last visited Mar. 28, 2022); *Policies and Standards*, Wash. Post, https://perma.cc/HQR4-KQYX (last visited Mar. 28, 2022). And a publisher's freedom to articulate its views on those questions "lies at the core of publishing control," a reflection of a news organization's "untrammeled authority to set standards of workmanship that determine its intrinsic excellence and its quality and public character." *Newspaper Guild of Greater Phila., Loc. 10 v. NLRB*, 636 F.2d 550, 560–62, 567 (D.C. Cir. 1980) (MacKinnon, J., concurring). Or as Chief Justice Burger put it, a private publisher's power "to advance its own political, social, and economic views" is bound only by "financial success; and . . . the journalistic integrity of its editors and publishers." *Columbia Broad. Sys.*, 412 U.S. at 117 (plurality opinion).

The panel dismissed concerns that anyone would investigate the truth of *The New York Times*' commitment to publishing "all the news that's fit to print,"

reasoning that "[n]o one believes that *The New York Times* literally prints 'all the news that's fit to print.'" *Twitter*, slip op. at 14. But the paper's standards offer much more detail than that one slogan does. For instance, the *Times*' editorial guidelines articulate a commitment to inviting "all shades of opinion" and providing readers with "a robust range of ideas on newsworthy events" in "rich discussion and debate." *See New York Times Opinion Guest Essays*, N.Y. Times, https://perma.cc/JMP6-M6W9 (last visited Mar. 31, 2022). Other newspapers have likewise committed to providing space for a wide variety of voices. *See, e.g.*, *Op-Ed, Explained*, L.A. Times (Oct. 20, 2021), https://perma.cc/4JC2-6XHP (offering "commentary from all kinds of writers with as broad a range of views as possible"). And because the panel did not identify *which* of Twitter's "statements about balance" were potentially misleading, its logic has no limiting principle that would prevent a state attorney general from investigating *The Times*, *The Post*, or any other newspaper, too, under similarly flimsy and pretextual grounds, all backed up by the immense public resources such prosecutors control.

On top of the risk that elected officials will wield government power to retaliate against news coverage or communications platforms they perceive as unfavorable, the panel's rule will predictably discourage publishers from articulating their standards. As is, because editorial guidelines communicate

important constitutional values, many publishers—including internet platforms—voluntarily make them public. *See, e.g.*, *Our Approach to Policy Development and Enforcement Philosophy*, Twitter, https://perma.cc/KVS2-PAMU (last visited Mar. 18, 2022); *Our Approach to Newsworthy Content*, Meta (Jan. 19, 2022), https://perma.cc/7TR5-NEX2. This voluntary editorial transparency builds credibility and promotes trust among readers and society at large, enabling the free press that ultimately supports "the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). Indeed, Texas itself recognizes the value of those disclosures inasmuch as it has attempted to coerce them.[2] *See* H.B. 20, § 120.051(b) (Tex. 2021); Order, *NetChoice, LLC v. Paxton*, No. 1:21-cv-840-RP (W.D. Tex. Dec. 1, 2021). But under the panel's approach, editors face a stiff penalty for this kind of speech: the loss of protection for their editorial choices. That rule would force editors to either forgo articulating their editorial standards openly or face a crushing litigation burden every time a reader disagrees with their application of them—a risk that "[o]nly the stout-hearted will

[2] Of course, that editorial transparency is valuable does not necessarily mean the government can mandate it. *See Herbert v. Lando*, 441 U.S. 153, 174 (1979); Br. of Amici Curiae Reporters Comm. for Freedom of the Press, Am. Booksellers for Free Expression, Am. C.L. Union, Authors Guild Inc., Ctr. for Democracy & Tech., Media Coalition Found., and Media Law Res. Ctr. in Supp. of Appellees, *NetChoice, LLC v. Paxton*, No. 21-51178 (5th Cir. Apr. 8, 2022).

brave." *Van Nuys Publ'g Co. v. City of Thousand Oaks*, 489 P.2d 809, 816 (Cal. 1971).

II. The panel's decision directly conflicts with established precedent and is wrong as a matter of law.

A. A publisher's editorial standards are not commercial speech, and the Constitution bars the government from attempting to enforce them.

In addition to its disastrous consequences, the panel's rule is incompatible with Supreme Court and Ninth Circuit precedent. In particular, the panel erred in concluding that Twitter's editorial standards are commercial speech—and potentially "misleading commercial speech" actionable under Texas's Deceptive Trade Practices Act (DTPA). *Twitter*, slip op. at 10–11. Of course, the regulation of deceptive commercial practices serves a legitimate government interest; neither new media firms nor traditional newspapers have a First Amendment right to engage in them. *Cf.* Sarah Scire, *The End of "Click to Subscribe, Call to Cancel"? One of the News Industry's Favorite Retention Tactics Is Illegal, FTC Says*, Nieman Lab (Nov. 15, 2021), https://perma.cc/5KED-4C8B. But Texas cannot repackage editorial fairness as consumer fairness to circumvent *Tornillo*, because the policies and statements the OAG is investigating cannot be categorized as commercial speech.

Commercial speech is confined to "expression related *solely* to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (emphasis added). But the fact that a publisher has *mixed* motives for speaking, some of them commercial and some of them not, is not enough to diminish their First Amendment rights. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."). Otherwise, *Tornillo* itself would have been a commercial speech case because the *Miami Herald*—all else equal—would rather sell more rather than fewer newspapers.

Amici are aware of no published decision concluding that a publisher's editorial standards relate "solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561. On the contrary, as discussed above, the publication of editorial standards serves a range of First Amendment values, including building journalistic credibility, supporting the political system, and providing open public discussion. *See Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 375 (D.D.C. 2020) (collecting Supreme Court's case law on the values served by editorial integrity). Editorial standards are, for that matter, too laden with subjectivity to "propose a commercial

transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). News organizations often aspire to provide coverage that is objective, for instance, but "arguments about objectivity are endless," *Policies and Standards*, Wash. Post, https://perma.cc/HQR4-KQYX (last visited Mar. 28, 2022). Turning every disagreement over the meaning of fairness into a consumer-fraud suit would impose a crushing burden on the press.

For just that reason, federal courts have routinely concluded that representations about how reporting will be conducted cannot be enforced through the law of fraud or contract without posing grave First Amendment risks. *See, e.g.*, *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 121–23 (1st Cir. 2000); *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1354–55 (7th Cir. 1995). And no surprise, then, that courts have likewise found platform moderation policies too vague, hortatory, or subjective to fit under rubrics like false advertising. *See, e.g.*, *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 41 (Cal. Ct. App. 2021); *Prager Univ. v. Google LLC*, 951 F.3d 991, 999–1000 (9th Cir. 2020) (concluding, for purposes of a Lanham Act claim, that statements related to YouTube's content moderation policies are not commercial advertising).

So too here. Twitter's editorial standards are opinion-based policies that cannot be objectively verified by the government to promote "impartiality" as

Texas defines it. The "bias" in content curation that the OAG is alleging will necessarily be in the eye of the beholder. Then-Chair of the Federal Trade Commission, Joe Simons, recognized as much in testimony before the Senate Commerce Committee in August 2020, when he addressed former President Trump's executive order directing the Federal Trade Commission to consider whether "bias" online constituted unfair or deceptive trade practices under Section 45 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020). "Our authority focuses on commercial speech, not political content curation," Simons explained. "If we see complaints that are not within our jurisdiction, then we don't do anything." *See* Leah Nylen et al., *Trump Pressures Head of Consumer Agency to Bend on Social Media Crackdown*, Politico (Aug. 21, 2020), https://perma.cc/4HP7-Q2RG.

At base, while Texas may disagree with how online platforms curate lawful content, there is no role for the state in enforcing its preferred conception of editorial fairness, whether repackaged as consumer protection or not. *See Tornillo*, 418 U.S. at 256 ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."). The DTPA serves laudable goals, but it may not be used to mandate a government standard of fair-dealing in the realm of political discourse.

B. A threat to retaliate against a publisher's exercise of editorial judgment is actionable as soon as the threat has been issued.

The panel decision's ripeness holding is also wrong. On its face, the investigation is predicated on Twitter's editorial judgment, and any threat to retaliate against such choices is a "harm that can be realized even without an actual prosecution." *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). The chilling impact not only on Twitter, but also on "free expression—of transcendent value to all society, and not merely to those exercising their rights," counsels allowing Twitter's claim to proceed without delay. *Van Nuys Publ'g Co.*, 489 P.2d at 816 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Even setting aside the distinctive First Amendment interests at stake, Twitter's claim is ripe under a traditional application of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The question whether the government can meddle in a publisher's exercise of editorial discretion is "purely legal," *id.* at 149, and the answer is well-settled: It cannot. In that inquiry, there is no further factual development necessary to conclude that Attorney General Paxton's investigation is predicated on protected editorial choices, because he said so. *See* Press Release, Ken Paxton, Att'y Gen. of Tex., AG Paxton Issues Civil Investigative Demands to Five Leading Tech Companies Regarding Discriminatory and Biased Policies and Practices (Jan. 13, 2021), https://perma.cc/BZ7A-GEHA (explaining that the

investigative demands were motivated in part by the "removing and blocking [of] President Donald Trump from online media platforms"). Indeed, the CID itself explains that it is "relevant to the subject matter of an investigation of possible violations of the DTPA in Twitter's representations and practices regarding what can be posted on its platform"—i.e., Twitter's editorial choices. Office of Att'y Gen., Consumer Prot. Div., Civil Investigative Demand (Jan. 13, 2021), https://perma.cc/V64M-3GN2.

Similarly, there is no further factual development needed to conclude that Twitter's statements about its editorial standards are not subject to objective government enforcement as a matter of law. *See Prager Univ.*, 951 F.3d at 999–1000. And because Twitter's standards are not commercial speech, the further factual development the panel contemplated—to determine whether Twitter's representations about editorial fairness are false—would be constitutionally irrelevant no matter what the Attorney General's investigation ultimately uncovered. *See United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) (noting that misleading *non*commercial speech, unlike false commercial speech, enjoys First Amendment protection); *cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (holding that a pre-enforcement challenge to a statute proscribing false election speech was "purely legal, and [would] not be

clarified by further factual development" (citation omitted)). At base, however the investigation may proceed, its interest in exposing secret bias in a publisher's editorial practices is not a legitimate one, and no amount of discovery can rescue it. *Cf. Am. Meat Institute v. U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (noting that compelled disclosure of "the political affiliation of a business's owners" would violate the First Amendment).

Meanwhile, the hardships of the CID are felt immediately and irrevocably. Under the panel's holding, a news organization would have to wait until the end of a blatantly retaliatory investigation to obtain any relief. But "each passing day" that speech is burdened is a new infringement on a publisher's rights, intolerable under the First Amendment. *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975). The Supreme Court has made clear the practical strains that flow from compliance with speech-burdening investigations, including the "diver[sion of] significant time and resources to hire legal counsel and respond to discovery requests." *Driehaus*, 573 U.S. at 165. More worrisome still, even where a publisher's conduct is unimpeachable, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone," chilling editorial decisions that might prove politically controversial. *Speiser v. Randall*, 357 U.S. 513, 526 (1958). There is

no sound justification for requiring that Twitter shoulder those burdens when the CID expressly targets lawful expression. Each day the demand hangs in the air, "legitimate utterance[s] [are] penalized." *Id.* That result is unreasonable, and the panel's decision endorsing it should be vacated.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to grant the petition for panel rehearing and rehearing en banc.

Dated: April 11, 2022

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