Nos. 22-277 and 22-555

IN THE
Supreme Court of the United States

ASHLEY MOODY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF FLORIDA, ET AL.
Petitioners,

v.

NETCHOICE, LLC; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
Respondents.

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

(For Continuation of Caption, See Inside Cover)

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN CIVIL LIBERTIES UNION, ET AL. IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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Supreme Court of the United States

NETCHOICE, LLC; AND COMPUTER &
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Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF TEXAS,
Respondent.

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INTEREST OF AMICI CURIAE[1]

Lead amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect the newsgathering and publication rights of journalists around the country.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Texas and the ACLU of Florida are state affiliates of the national ACLU. The ACLU and its affiliates have frequently appeared in First Amendment cases in this Court and courts around the country, both as direct counsel and as amici curiae, including seminal cases regarding free speech online and editorial discretion. *See, e.g.*, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (amicus); *Reno v. ACLU*, 521 U.S. 844 (1997) (counsel); *Miami Herald Publ'g Co v. Tornillo*, 418 U.S. 241 (1974) (amicus).

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amici curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The American Booksellers for Free Expression ("ABFE") is the free speech initiative of the American Booksellers Association ("ABA"). ABA was founded in 1900 and is a national not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA represents 2,100 member companies operating in 2,500 locations. ABA's core members are key participants in their communities' local economy and culture, and to assist them ABA provides education, information dissemination, business products, and services; creates relevant programs; and engages in public policy, industry, and local first advocacy.

The Authors Guild was founded in 1912, and is a national non-profit association of more than 14,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists, and other writers of non-fiction and fiction as members; many are frequent contributors to the most influential and well-respected publications in every field. The Guild works to promote the rights and professional interest of authors in various areas, including copyright and artificial intelligence, as well the authors' right to fair contracts and the ability to earn a livable wage. One of the Authors Guild's primary areas of advocacy is to protect the free expression rights of authors.

Digital Media Association ("DiMA") is the leading trade association advocating for the digital music innovations that have created unparalleled consumer choice and revolutionized the way music

fans and artists connect. Representing the world's leading audio streaming companies for over two decades, DiMA's mission is to promote and protect the ability of music fans to engage with creative content whenever and wherever they want and for artists to more easily reach old fans and make new ones.

The Entertainment Software Association ("ESA") is the U.S. trade association that serves as the voice and advocate for the U.S. video game industry. Its members are the innovators, creators, publishers, and business leaders that are reimagining entertainment and transforming how we interact, learn, connect, and play. ESA works to expand and protect the dynamic marketplace for video games through innovative and engaging initiatives that showcase the positive impact of video games on people, culture, and the economy. ESA also promotes its members' exercise of free-speech rights, including the exercise of editorial judgment in content moderation for the purpose of player safety, and protects their content from mass infringement. ESA also regularly participates in litigation that affects its members' interests, and in 2011, ESA was a respondent in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), where the Supreme Court recognized that video games are entitled to the same First Amendment protections as books, television programs, films, and other expressive works.

The Media Coalition Foundation, Inc., monitors legal threats to First Amendment rights, and engages in strategic litigation and provides amicus support in notable cases to protect the rights of speakers and

those seeking to access speech, as guaranteed by the First Amendment.

The Motion Picture Association, Inc. ("MPA") is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film, television, and streaming industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting the creative ecosystem that brings entertainment and inspiration to audiences worldwide. The MPA's member companies are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc., and Netflix Studios, LLC. These companies and their affiliates are the leading producers and distributors of the vast majority of filmed entertainment in the United States through the theatrical and home entertainment markets. Of particular relevance for this case, the MPA's members all operate internet streaming services (including Netflix, Disney+, Max, Peacock, Paramount+, and Crunchyroll), which carry movies and television programs produced by them (or their affiliates) and by third parties, and which exercise First Amendment-protected choices in determining what content to exhibit to their subscribers.

SUMMARY OF ARGUMENT

The First Amendment guarantees "virtually insurmountable" protection for a private entity's expressive decision to share—or not to share—another speaker's lawful expression with their own audience. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). An enormous spectrum of speakers, publishers, and journalists rely on that bulwark to "combin[e] multifarious voices" for the benefit of their audiences. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). And while the danger of government overreach is most obvious when officials seek to usurp the "choice of material to go into a newspaper," *Tornillo*, 418 U.S. at 258 (majority opinion), the same fundamental freedom underpins a bookseller's judgments about which volumes to display, *see Denver Area Educ. Telecomms. Consortium, Inc, v. F.C.C.*, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part), or a movie theater's choice of films to exhibit, *see Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). In each case, government cannot constitutionally define what news is fit to print or which books are worth stocking, and has no license to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

The alternative approach would be incompatible with a free and independent press, as "[w]e have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the

internal editorial affairs of newspapers." *Tornillo*, 418 U.S. at 259 (White, J., concurring). But in these cases, Texas and Florida would undermine the First Amendment's safeguards for editorial independence to commandeer the audiences of a handful of large online platforms that, in their view, make unfair or unwise—or even worse, biased—judgments about the speech that deserves to be shared with their users. And to enforce their dangerous fantasy of a government-mandated balance of views, the States hope to "subject[] the editorial process" of those social media companies to "official examination," *Herbert v. Lando*, 441 U.S. 153, 174 (1979), through the reporting requirements in these laws. Both efforts challenge core mainstays of this Court's long-held precedents on freedom of speech.

While the States have chosen to target certain new digital platforms today, they have yet to distinguish the expressive judgments their statutes target from the ones made daily by a litany of other speakers, from the traditional press to Hollywood studios. *Cf. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 144–45 (1973) (Stewart, J., concurring) (highlighting 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). The States' failure to offer a principled distinction between platforms and other speakers means that Texas and Florida's effort to create a bypass around *Tornillo* would actually bulldoze it.

Amici are organizations that defend the Constitution's protections for editorial discretion by

private speakers—news organizations, booksellers, film studios, video game publishers, and more. For the reasons herein, and because upholding Texas and Florida's intrusion on editorial autonomy would undermine the rights of publishers of all kinds, amici respectfully urge this Court to reverse the decision of the Fifth Circuit and affirm the decision of the Eleventh Circuit.

ARGUMENT

I. The First Amendment provides virtually absolute protection for a private entity's exercise of its editorial judgment.

This Court has long recognized that the First Amendment protects not just the solo voice on a soapbox or the lone pamphleteer but also "the function of editors": the liberty accorded to the press and other institutions to collect and organize other speakers' perspectives for their own audiences. *Tornillo*, 418 U.S. at 258. And where that liberty is squarely at stake, the Constitution's protections are virtually absolute, because the government has no legitimate interest in "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48–49.

Put differently, editorial control—which includes decisions about the relative prominence that the elements of an "edited compilation of speech" deserve, *Hurley*, 515 U.S. at 570—cannot be shared with the state. A newspaper forced to give up only one-tenth of the front page to the government loses the same autonomy over its editorial discretion as the

utility company forced to hand over the "extra space" in its billing envelopes to a third-party speaker. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 17–18 (1986) (plurality opinion). The First Amendment forbids such actions because the government does not get to decide what is or isn't fit to print or even what kind of newsletter is inserted with a monthly electric bill. Because the States' efforts to hijack the expressive functions of social media platforms challenge that bedrock principle, they cannot be squared with the Constitution.

a. The First Amendment protects a speaker's freedom to organize other speakers' voices for its audience.

Tornillo arose out of the print newspaper world of the 1970s, when government efforts to control information sparked widespread concern. *See* Richard Harris, *The Presidency and the Press*, New Yorker (Sept. 24, 1973), https://bit.ly/3GuSurw; (cataloging growing state pressure on investigative reporting over previous two decades); Jon Marshall, Watergate's Legacy and the Press 51–72 (2011) (surveying pressure tactics from the Nixon administration to influence news coverage). Its unanimous holding has stood the test of time, and along with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), another unanimous decision of this Court, it is a pillar of our First Amendment jurisprudence. The central insight of *Tornillo*—that a supernumerary role for government in matters of editorial freedom is a reckless gamble with the Constitution—is one this Court has now extended far beyond the news media.

Some speakers, like the editorial board in *Tornillo*, may communicate using their own voice alone; others speak by "combining multifarious voices" for their audiences. *Hurley*, 515 U.S. at 570. The latter includes bookstores, museums, theaters, art galleries, concert halls, and digital platforms like social media websites. And as this Court has recognized again and again since *Tornillo*, the First Amendment shields the second type of speech as surely as it does the first. Such protections are rooted in a deep structural understanding that in a nation in which the "censorial power is in the people over the Government, and not in the Government over the people," *Sullivan*, 376 U.S. at 275 (internal quotation marks and citations omitted), the risk that public officials will thumb the scale of political discourse to their advantage is too great to give them the last word on what a private speaker may say.

This Court's decisions have applied that reasoning to protect the editorial discretion of newspapers deciding which guest columns belong in their pages, *Tornillo*, 418 U.S. at 258; cable companies choosing which stations to offer, *see Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994); parade organizers selecting which groups can march, *see Hurley*, 515 U.S. at 568; and even utility companies deciding what to include in their billing envelopes, *see Pac. Gas & Elec. Co.*, 475 U.S. at 20. In each case, the Constitution has been held to protect private entities not just in authoring speech but also in "transmit[ing]" it to a new audience, *Turner*, 512 U.S. at 636, and to subject government efforts to use the latter type of expression "as a vehicle for spreading a

message with which [the private entity] disagrees" to First Amendment scrutiny, *Pac. Gas & Elec. Co.*, 475 U.S. at 17; *see also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chic. L. Rev. 225, 253 (1992) ("Forced programming is not so much a way of getting a message to the public . . . as it is a way of showing off power by hoisting flags on other people's flagpoles.").

State interference in the content moderation decisions of the social media platforms would carry a similar risk of government control over the content communicated by a private entity. Texas and Florida have imposed their views on the order and fashion in which posts from particular users should be displayed as well as on decisions about whether platforms host certain users or perspectives in the first place. But these choices belong with the platforms because they reflect their editorial judgments about the companies they run and the conversations they facilitate. Content moderation policies and the decisions made under them help to define social media platforms and distinguish them from one another. *See, e.g.*, *Facebook Community Standards*, Meta, https://perma.cc/U6HA-NUYV (last visited Dec. 3, 2023) (explaining that Meta's content decisions aim to communicate, *inter alia*, the belief "that all people are equal in dignity" and a preference for "authentic" expression); *Professional Community Policies*, LinkedIn, https://perma.cc/MUF8-ZUX4 (last visited Dec. 3, 2023) ("LinkedIn's mission is to connect the world's professionals" and "[w]e allow broad conversations about the world of work, but require professional expression."); *Policies Overview*, YouTube, https://perma.cc/2N8Q-CL7X (last visited

Dec. 3, 2023) ("Viewers and Creators around the world use YouTube to express their ideas and opinions freely, and we believe that a broad range of perspectives ultimately makes us a stronger and more informed society, even if we disagree with some of those views."). The endgame of the Texas and Florida laws is that state officials will have deployed the coercive power of the government to lift the "relative voice" of some and suppress the "relative voice" of others, *Buckley*, 424 U.S. at 49, all to gratify their desire for online discourse that meets their ideological whims.

Fighting that conclusion, Texas and Florida have defended their statutes on the theory that prohibiting content moderation does not implicate the First Amendment at all, because social media companies do not—in some hazy overall sense—resemble newspapers. *See, e.g.*, Appellant Br. at 16, *NetChoice v. Paxton*, No. 21-51178 (5th Cir. Mar. 2, 2022) (characterizing *Tornillo* as an "outlier precedent about newspapers"). But that defense misses the point: Newspapers do not resemble parades, parades do not resemble utility companies, and newspapers do not resemble social media companies. *Tornillo*, however, is not the exclusive property of news organizations, though its continued vitality is existential to the watchdog function of the press and the flow of information to the public. Rather, *Tornillo* is a check on government whenever it seeks a role in policing how the news media, or any other expressive industry, makes editorial choices. As this Court has left it well-settled, the rule is "enjoyed by business corporations generally and by ordinary people

engaged in unsophisticated expression as well as by professional publishers." *Hurley*, 515 U.S. at 574.

That Texas and Florida have both crafted their statutes in a manner that could be read to superficially favor the press only highlights the danger. *See* Tex. Bus. & Com. Code, § 120.001(C)(i)–(ii) (exempting from regulation any site that "consists primarily of news"); Fla. Stat. § 501.2041(2)(j) (prohibiting platforms from moderating the content of "journalistic enterprises"). This Court has often emphasized that "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment." *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 588 (1983). So too here, where the States have offered no limiting principle that would prevent them from turning their attention to controlling the editorial judgment of other private speakers, including the news media.

The trajectory of this Court's case law applying the First Amendment to motion pictures illustrates the danger of too narrow an application of the *Tornillo* rule. In *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, 244 (1915), *overruled by Burstyn*, 343 U.S. at 502, this Court infamously concluded that movies were beyond the reach of the First Amendment because the film industry lacked an adequate "practical and legal similitude to a free press." Motion pictures were, in the Court's view, better understood as "a business, pure and simple, originated and conducted for profit, like other

spectacles, not to be regarded . . . as part of the press of the country," 236 U.S. at 244.

That holding underpinned extensive state censorship of the film industry for nearly half a century, including (or even especially) the censorship of newsreels that aimed to inform the public of controversial political developments. *See* Samantha Barbas, *How the Movies Became Speech*, 64 Rutgers L. Rev. 665, 703 (2012) (noting that states relied on *Mutual* to censor, among other things, a popular newsreel of a Senator's speech "opposing President Roosevelt's bill to enlarge the Supreme Court"). In other words, the *Mutual* Court's insistence on limiting the First Amendment's reach to lookalikes for "the press" licensed official interference with the distribution of news and other information about matters of obvious public concern. Forty years later, this Court decisively repudiated that approach in favor of the common-sense recognition that—whatever a particular medium's resemblance or not to print media and "whatever the challenges of applying the Constitution to ever-advancing technology . . . when a new and different medium for communication appears," *Brown v. Entm't Merchants Assn.*, 564 U.S. 786, 790 (2011)—"the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary," *Burstyn*, 343 U.S. at 503. So too here. The *Tornillo* rule applies not to newspapers only, but also to any private entity that engages in expression by collating the voices of other speakers.

The relevant question, then, is not whether the *entities* regulated by a statute resemble newspapers but whether the *choices* regulated by the statute

reflect "the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258. And the decisions at issue in these cases plainly do. Texas has regulated what it calls "Censor[ship]," defined to mean "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression," Tex. Civ. Prac. & Rem. Code § 143A.001(1); in other words, decisions about what to express and what not to express. To the same effect, Florida has regulated "Censor[ing]," "Deplatform[ing]," and "Shadow ban[ning]," Fla. Stat. § 501.2041(1), activities which encompass decisions about whether, when, and how to communicate user-generated expression to the platforms' audiences. But those choices are the same means by which social media platforms express their *own* point of view as to what expression "serve[s]—and does not serve—the public conversation," *The X Rules*, X, https://perma.cc/VG7D-ULZ9 (last visited Dec. 3, 2023), bringing the First Amendment's protections into play.

Of course, exactly because the social media platforms regulated here take the view that civil discourse is best served when "everyone's voice is valued," *Facebook Community Standards*, *supra*, they are "rather lenient in admitting participants"—but the First Amendment does not require a speaker "to edit their themes to isolate an exact message," *Hurley*, 515 U.S. at 569. It may be difficult for readers to distill a concise theory of newsworthiness from their daily papers except by pointing to the sum of the stories that happened to be published that day, or for a visitor to articulate a gallery's assessment of artistic merit except by nodding towards the collection of

paintings it displays. But in either case, a clear central message is conveyed: that each element in the whole "was worthy of presentation" in the eyes of the speaker that included it. *Id.* at 575. And as the controversy that frequently attends the platforms' moderation decisions makes clear, the public routinely infers the same "overall message" of worth from those expressive choices. *Id.* at 577; *see, e.g.*, Monica Anderson, *After Musk's Takeover, Big Shifts in How Republican and Democratic Twitter Users View the Platform*, Pew Rsch. Ctr. (May 1, 2023), https://perma.cc/5LG6-7RLZ (describing changes in public opinion on X's impact on civic discourse after recent modifications to its moderation standards).

But even setting aside the wholesale impression that the platforms' editorial choices create, *see Hurley*, 515 U.S. at 569 (emphasizing that "a narrow, succinctly articulable message is not a condition of constitutional protection"), the decisions that Texas and Florida would regulate reflect "the exercise of editorial control and judgment" at the retail level too. *Tornillo*, 418 U.S. at 258. Sometimes, for instance, Meta and X may think like a newspaper by asking whether user expression is "newsworthy" when judging how broadly it should be disseminated. *Our Approach to Newsworthy Content*, Meta (Aug. 29, 2023), https://perma.cc/EUK8-APVG; *Our Approach to Policy Development and Enforcement Philosophy*, X, https://perma.cc/YY9P-KUL5 (last visited Nov. 8, 2023). And they consider, too, the reliability and authenticity of third-party expression in deciding how large an audience it deserves to reach. *Compare, e.g.*, *Distribution of Hacked Materials Policy*, X, https://perma.cc/PFW9-2J47 (last visited Dec. 3,

2023), *with* Joe Pompeo, *"Connect the Dots": Marty Baron Warns* Washington Post *Staff About Covering Hacked Materials*, Vanity Fair (Sept. 23, 2020), https://bit.ly/3T5FCjh. The fact that those choices may be controversial or subject to criticism only underlines that they involve expressive judgment, not the mechanical operation of "a passive receptacle or conduit." *Tornillo*, 418 U.S. at 258.

Just as editorial autonomy is not a "benefit restricted to the press," *Hurley*, 515 U.S. at 574, the platforms also make choices that resemble those of other institutions that speak by moderating the speech of others. For example, video game publishers conduct content moderation in video games to keep players safe online and in doing so, exercise editorial discretion and judgment. At times, the platforms might organize creators' content for display—as a museum or gallery might—based on what they think would appeal to their audiences. *See, e.g.*, *What is Pinterest?*, Pinterest, https://perma.cc/74DZ-85L7 (last visited Dec. 3, 2023) ("Your home feed is where you'll find Pins, people and business we think you'll love, based on your recent activity."); *cf. Kerson v. Vt. L. School, Inc.*, 79 F.4th 257, 270 n.10 (2d Cir. 2023) (noting without resolving the "potential First Amendment concern that might flow from interpreting [the Visual Artists Rights Act] as requiring a private party to continue displaying expressive content against its will"). In other postures, the platforms may aim for comprehensiveness—like "a newsstand [that] carries all newspapers," *see U.S. Telecom. Ass'n v. FCC*, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)—while

nevertheless displaying most prominently the speech they expect their audiences to find most appealing.

In each context, the key point is the same: Whether a platform opts to be selective or non-selective, very selective or only minimally selective, those choices are themselves expressive, and the platforms' "own message" is necessarily affected by any expression the government seeks to "force[]" them "to accommodate." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 63 (2006). Of course, a business's decision about whether to transact with a third-party cannot always be couched in such terms. Nothing legible is communicated by a shopping mall's customers, *see Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87–88 (1980), the collection of private calls transmitted over a telephone line, or a law school's roster of recruiters, *see FAIR*, 547 U.S. at 63, nor are those individual interactions "inherently expressive," *id.* at 64. But the product a social media platform offers *is* the "editorial control and judgment" it promises to exercise, without which the expressive environment they offer would be either unrecognizable or unusable. *Tornillo*, 418 U.S. at 258. The First Amendment protects those decisions.

b. Texas and Florida have no legitimate interest in picking which speakers deserve to reach an audience.

Under this Court's precedent, to demonstrate that the government has deliberately "intru[ded] into the function of editors" nearly always suffices to establish that the First Amendment has been violated. *Tornillo*, 418 U.S. at 258. As *Tornillo* and

its progeny make clear, that "virtually insurmountable" bar on "government tampering" with editorial discretion, *id.* at 259 (White, J., concurring), flows from the reality that the government has no legitimate interest in displacing a publisher's sense of the "relative voice" that other speakers deserve within the publisher's own expression, *Buckley*, 424 U.S. at 49.

In *Tornillo* this Court invalidated 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, 258. Then, as now, debates about editorial fairness were widely understood as proxies for broader political disagreements in American life.[2] But this Court made clear that those disagreements cannot be legislated away; that state control of the "choice of material" to include in a newspaper cannot be "exercised consistent with First Amendment guarantees," *id.* at 258; and that whether a given editorial judgment is "fair or unfair" has no bearing on the analysis, *id.* As Chief Justice Burger's opinion for the Court emphasized, in addition to the direct threat of censorship raised when the government supervises

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[2] *Compare, e.g.*, Anthony Lewis, *Nixon and a Right of Reply*, N.Y. Times, Mar. 24, 1974, at E2, https://perma.cc/2W2J-AJ65 (noting that President Nixon urged the Justice Department to explore a federal right-of-reply statute because of press coverage he believed was unfair), *with* Press Release, Ken Paxton, Att'y Gen. of Texas, *AG Paxton Issues Civil Investigative Demands to Five Leading Tech Companies Regarding Discriminatory and Biased Policies and Practices* (Jan. 13, 2021), https://perma.cc/JYW3-S9S6 (resolving to investigate the "removing and blocking [of] President Donald Trump from online media platforms").

the "treatment of public issues and public officials," *id.*, a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,'" *id.* at 257 (quoting *Sullivan*, 376 U.S. at 279), flattening diverse editorial points of view into a single voice.

It bears underlining that this Court's decision in *Tornillo* did not turn on a rosy view of how either the *Miami Herald* in particular or the press in general exercises the editorial judgment the Constitution fully protects. To the contrary, in the first half of the Court's opinion, Chief Justice Burger summarized with sympathy concerns that powerful media corporations "too often hammer[] away on one ideological or political line using [their] monopoly position not to educate people, not to promote debate, but to inculcate in [their] readers one philosophy, one attitude—and to make money." *Tornillo*, 418 U.S. at 253 (quoting William O. Douglas, *The Bill of Rights Is Not Enough*, *in* The Great Rights 124–25 (Edmond Cahn ed., 1963)); *see also* Lucas A. Powe Jr., The Fourth Estate and the Constitution 271 (1992) (noting that a reader "stopping there" would assume the *Herald* had lost). "But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed," *Tornillo*, 418 U.S. at 260 (White, J., concurring), because the dangers posed by the alternative path—assigning the government the power to tinker with public debate until its own self-fulfilling sense of fairness is satisfied—are far graver.

Tellingly, having canvassed the potential First Amendment harms, this Court made no reference to strict, intermediate, or any other form of means-end scrutiny in invalidating Florida's right of reply statute. Instead, *Tornillo* concludes that "any such compulsion to publish that which reason tells [an editor] should not be published is unconstitutional." 418 U.S. at 256 (internal quotation marks omitted); *see also Passaic Daily News v. NLRB*, 736 F.2d 1543, 1557 (D.C. Cir. 1984) ("The Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers."); Powe, *supra*, at 277 ("Because editorial autonomy is indivisible, it must be absolute."). And for good reason. As this Court emphasized in *Hurley*—likewise without applying the tiers of scrutiny—there is no need for further analysis when the government fails to "identify[] an interest going beyond abridgment of speech itself." 515 U.S. at 577. But just as in *Tornillo* and *Hurley*, Texas and Florida have offered nothing but variations on the same argument that their statutes serve an interest in altering the balance of views the platforms communicate—and with it the platforms' own overall message. That goal is fatal to the statutes' validity under any standard of review. *See Hurley*, 515 U.S. at 577.

This Court's case law on viewpoint discrimination leads to the same result by a complementary route. Using a private institution's expression as a vehicle for a state-sanctioned viewpoint is "so plainly illegitimate" as to "immediately invalidate" any statute or government action that aims to do it. *City Council of L.A. v.*

Taxpayers for Vincent, 466 U.S. 789, 804 (1984); *accord Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, . . . such interest *cannot* outweigh an individual's First Amendment right to avoid becoming the courier for such message." (emphasis added)).

Moreover, because an editorial viewpoint is nothing more or less than the entirety of an editor's choices, even a superficially 'content-neutral' intrusion on that function—like a mandate that a newspaper's front page list events in chronological order—necessarily enforces a single point of view as to how the day's news is best arranged, to the exclusion of every perspective the state disfavors. And as this Court has underlined, to say "that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–32 (1995). So too when the government silences every alternative to an official editorial perspective, even a notionally 'neutral' one; the position that *all* lawful expression is "worthy of presentation" to the platforms' audiences is just as much a viewpoint as the perspective that much, some, or little of it is. *Hurley*, 515 U.S. at 575. The Constitution prohibits the States from enforcing any one of those viewpoints to the exclusion of the others.[3]

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[3] Of course, the principles underpinning *Tornillo* do not prohibit all regulation of institutions that exercise editorial discretion, and the same is true of social media platforms. Those safeguards are only triggered in the first place by state action that directly regulates editorial choices. Newspapers, parades, and platforms are all just as bound as any other entity by, say, the generally applicable law of antitrust. *See Tornillo*, 418 U.S.

Through either lens, the States' efforts to mandate their view of editorial fairness online violate the First Amendment. Texas and Florida have couched their goals in terms of "protecting the free exchange of ideas and information," H.B. 20 § 1(2), 87th Leg. (Tex. 2021), and "protecting [their] residents from inconsistent and unfair" content moderation, S.B. 7072 § 1(10) (Fla. 2021). But those aims are identical to the ones this Court found unconstitutional in *Tornillo*: "to insure fairness and accuracy" in editorial decisionmaking, 418 U.S. at 251, while "ensur[ing] that a wide variety of views reach the public," *id.* at 247–48. And just as in *Tornillo*, as lofty as those goals may sound in the abstract, in context they express an intent to replace the platforms' point of view as to the speech "worthy of presentation" to their audiences, *Hurley*, 515 U.S. at 575, with an editorial perspective that state officials—with their own biases and agendas, often electoral, sometimes punitive and retaliatory—consider worthier.

Turner v. Broadcasting Systems, Inc. v. F.C.C., 512 U.S. 622 (1994), which the States pervasively cite, does nothing to undermine that conclusion. In *Turner*, this Court identified an effectively *sui generis* consideration supporting the imposition of must-carry obligations in the cable television context: the fact that "the *physical* connection between the television set and the cable network gives the cable operator

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at 254. But Texas and Florida have regulated—only and directly—the editorial choices of private institutions in the "business of expression." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 761 (1988).

bottleneck, or gatekeeper, control over" the programming a subscriber can access. *Id.* at 656 (emphasis added). But *Turner* reiterated—as *Tornillo* had already recognized—that mere market power (to say nothing of the sort of inchoate authority over the marketplace of ideas the States rely on here) cannot justify the same intrusions. *See id.* On the contrary, to invoke a speaker's "size and success" in reaching an audience as reason for fettering their expression would turn the First Amendment on its head. *Hurley*, 515 U.S. at 577. Because the question of who has too much, not enough, or just the right amount of power to persuade is not one that back-of-the-envelope economics can answer, this Court has made clear that "the mere assertion of dysfunction or failure in a speech market, without more," cannot displace First Amendment protections. *Turner*, 512 U.S. at 640. The same is true here. And, it bears noting, the larger the platform the state seeks to control, the greater will be the state's influence on public and political discourse.

At base, Texas and Florida have invoked the language of market concentration as loose camouflage for their objection to what they perceive as the platforms' editorial viewpoint and for their sense that the targeted platforms' speech enjoys too much influence in public life. The "chilling endpoint" of that reasoning "is not difficult to foresee," because nothing in it would "stop a future [legislature] from determining that the press is 'too influential'" in the same fashion. *McConnell v. FEC*, 540 U.S. 93, 283–84 (2003) (Thomas, J., dissenting). This Court closed the door to that hollow line of reasoning in *Tornillo*, and it should remain shut.

II. The First Amendment forbids disclosure mandates that target the exercise of editorial judgment.

In addition to the direct restrictions they impose on editorial decisionmaking, the Texas and Florida laws under review also "subject[] the editorial process" to "official examination" in order to enforce the States' preferred vision of neutrality by other means. *Herbert*, 441 U.S. at 174. Texas for its part requires platforms to "explain the reason" content was removed to the user affected, Tex. Bus. & Com. Code § 120.103(a), while Florida mandates that users impacted by content moderation be given a "thorough rationale explaining the reason" for the platform's choice, as well as a "precise and thorough explanation of how the social media platform became aware" of the user's expression, Fla. Stat. § 501.2041(3). But just as it would not have been a defensible compromise to force the *Miami Herald* to disclose *why* it rejected Pat Tornillo's submissions (as opposed to forcing it to publish those submissions), the States cannot police the editorial process indirectly by exacting the tax of an explanation. To hold otherwise would create a blueprint for states to circumvent *Tornillo* by repackaging editorial fairness as consumer fairness—at great cost to the editorial autonomy of not only the platforms but other private institutions as well, including the press.

a. Compelling speakers to explain the basis for their editorial judgment is not, as the States argue, merely a commercial disclosure subject to less First Amendment scrutiny.

As this Court has explained, the "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). And while Texas and Florida argue that the explanation mandates deserve less First Amendment protection on the theory that—like a drug label or a calorie count—they compel only "factual and uncontroversial" commercial disclosures, *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985), in reality their regulations burden fully protected expression twice over: first, by discouraging editorial decisions that would require explanation, and second, by interfering with the platforms' freedom to articulate their editorial practices on their own terms.

On each front, the statutes "trench upon an area in which the importance of First Amendment protections is at its zenith." *Wash. Post v. McManus*, 944 F.3d 506, 513–14 (4th Cir. 2019) (citation omitted). Consider first the chilling effect on editorial decisionmaking. The explanation requirements would have the inevitable effect of discouraging platforms from removing content in the first place, making removal "more expensive" than the States' preferred *laissez-faire* approach "because compliance costs attach to the former and not to the latter." *Id.*

at 516. Given the extraordinary volume of moderation decisions the platforms make each day, the work of providing the required explanations—standing alone—would be so costly as to be unworkable. But Florida's statute ratchets up the risk even further, providing for statutory, actual, and punitive damages for each notice that a court finds insufficiently thorough. *See* Fla. Stat. § 501.2041(6)(a). In each case, the explanation requirements threaten to chill dramatically decisions to curate user-generated expression that are, as already discussed above, fully protected by the First Amendment. Just as forcing a book publisher to explain the grounds for its many decisions to reject manuscripts from the slush pile would punish editors for exercising appropriate selectivity, so the States cannot compel the platforms to explain their editorial choices.

Equally importantly, the explanation mandates interfere with the platforms' latitude to articulate their own editorial standards—a freedom that "lies at the core of publishing control" for both new media and old. *Newspaper Guild of Greater Phila., Loc. 10 v. N.L.R.B.*, 636 F.2d 550, 560 (D.C. Cir. 1980). Despite the States' best efforts, that kind of expression cannot be shoehorned into the more permissive doctrinal category of commercial speech. "Commercial speech" describes only "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), and no one thinks that newspapers voluntarily publish their standards just to explain the terms on which papers are sold, *see Standards and Ethics*, N.Y. Times, https://perma.cc/793S-67V9 (last visited Sept.

26, 2023). On the contrary, such disclosures serve a range of important public and corporate ends—expressing the publisher's point of view as to what amounts to good journalism, or helping readers form their own views on the reliability of any given story. *See Newspaper Guild of Greater Phila.*, 636 F.2d at 560. In similar fashion, social media platforms' policies are written to express their views about what a healthy public conversation looks like, not just to sign up the marginal user.

Representations about editorial judgment are, for that matter, too subjective to "propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 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/Y76W-5YNP (last visited Sept. 26, 2023), and transforming every disagreement over its meaning into a consumer-fraud suit would impose a crushing litigation burden on the press. For much the same 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 running grave First Amendment risks.[4] And it is no surprise, then, that lower courts have likewise found platform moderation policies too aspirational or

[4] *See, e.g.*, *Hay v. N.Y. Media LLC*, No. 20-cv-6135, 2021 WL 2741653, at *3 (S.D.N.Y. July 1, 2021), *aff'd*, No. 21-1727, 2022 WL 710902 (2d Cir. Mar. 10, 2022); *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).

subjective to fit under rubrics like false advertising. *See, e.g.*, *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 41 (2021); *Prager Univ. v. Google LLC*, 951 F.3d 991, 999–1000 (9th Cir. 2020).

Expressions and choices of this kind are inescapably shot through with subjective editorial judgment; they cannot reasonably be compared to a term-sheet or invitation to deal. *Cf. Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1064 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017) (finding platform community standards unenforceable in a breach-of-contract action). Were it otherwise, any reasonable disagreement about the best interpretation of a speaker's editorial standards would be the seed of costly, chilling litigation—a result that would undermine *Tornillo*'s safeguards for editorial freedom well beyond this particular context.

b. Editorial judgments are neither "factual" nor "uncontroversial."

Even if representations about editorial judgment could be squeezed into the category of commercial speech, the States' mandates would be ineligible for the lenient standard that governs run-of-the-mill product packaging because the speech they require is anything but "factual and uncontroversial." 471 U.S. at 651. On the contrary, to compel platforms to explain why they rejected a user's contribution compels expression of an editorial point of view. Just as there is no fact of the matter about which news is and isn't fit to print, deciding whether third-party speech is "worthy of presentation" calls for subjective

judgment in a way that no nutrition label does. *Hurley*, 515 U.S. at 575.

In insisting otherwise, Texas and Florida maintain that their explanation requirements—like other consumer-disclosure measures—"enable users to make an informed choice" about what the platforms' editorial perspective already is. Tex. Bus. & Com. Code § 120.051(b). But that defense itself raises grave constitutional difficulties. For one, it would eviscerate *Zauderer*'s requirement that compelled disclosures be limited to "purely factual" material rather than "matters of opinion." 471 U.S. at 651. Consumers might well be curious about for whom a platform's owner—or a newspaper's—voted in the last presidential election; that the answer to that question can be objectively determined does not make it the kind of 'fact' the government can compel a speaker to disclose. *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring). The same is true of a newspaper's editorial standards, or a publishing house's selection guidelines: That their contents can be verified does nothing to mitigate the reality that compelling their disclosure would "force citizens to confess" their opinion on what those journalistic standards or publishing guidelines should be. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

More fundamentally, though, the government has no legitimate interest in exposing that a private institution holds a particular editorial perspective. Speakers are free to disclose and detail their editorial judgments—or not. That choice is itself protected by the First Amendment. Just as statutes that directly

regulate editorial decisionmaking cannot survive First Amendment review without "identifying an interest going beyond abridgment of speech itself," *Hurley*, 515 U.S. at 577, this Court emphasized in *Herbert v. Lando* that statutes "that subject[] the editorial process" to "official examination merely to satisfy curiosity or to serve some general end such as the public interest . . . would not survive constitutional scrutiny as the First Amendment is presently construed," 441 U.S. at 174. So too here: Unlike a calorie count or drug label, the only interests served by the States' explanation mandates are either insubstantial or unconstitutional.[5]

Reciting "informed choice" does nothing to cure that defect. It is "plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information," because that "circular formulation" would imply the validity of any and all disclosure mandates. *Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh J., concurring). But at no point have the States articulated *how*, in their view, users are currently impaired in their ability to make an informed choice about whether to use the platforms, and they cannot expect this Court to "supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 507 U.S. at 768; *see also Nat'l Inst. of Fam. & Life Advocs. v.*

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[5] Amici express no view on whether certain disclosure mandates in the context of content moderation could be defended on different grounds or a different record. But Texas and Florida have not offered a permissible interest to justify the mandates actually at issue, and their constitutionality cannot be supported by the possible existence of other interests that the States have not advanced. *See Edenfield v. Fane*, 507 U.S 761, 768 (1993).

Becerra, 138 S. Ct. 2361, 2377 (2018) (noting, even under *Zauderer*, that the government's justification must be "nonhypothetical"). Neither is there a "history and tradition" of compelling disclosure of editorial standards that would make the connection intuitive. *Am. Meat Inst.*, 760 F.3d at 31–32 (Kavanaugh, J., concurring). On the contrary, as this Court noted in *Herbert*, standalone editorial disclosure mandates are unheard of. 441 U.S. at 174.

The States' silence is unsurprising because the purpose of the mandates is plain: to search for perceived ideological bias and prove the existence of "a dangerous movement by social media companies to silence conservative viewpoints and ideas." Press Release, Off. of the Tex. Governor, *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship* (Sept. 9, 2021), https://perma.cc/2EL2-8H9Q. But a mandate geared towards that goal will fail constitutional scrutiny no matter how much evidence of bias Texas and Florida put forward, because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48–49; *see also Am. Meat Inst.*, 760 F.3d at 32 (Kavanaugh, J., concurring) (noting that compelled disclosure of "the political affiliation of a business's owners" would be invalid, notwithstanding consumer interest in that information). At base, the statutes' explanation mandates—like their content moderation restrictions—aim to steer "the exercise of editorial control and judgment" toward the viewpoints that Texas and Florida prefer. *Tornillo*, 418 U.S. at 258. The Constitution prohibits that objective.

* * *

Fifty years ago, weighing the grave risks of government interference with the exercise of editorial discretion, this Court concluded that it had "yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees." *Tornillo*, 418 U.S. at 258. Florida and Texas have failed to make that demonstration here. Amici urge the Court to reject their challenge to *Tornillo*'s foundational rule and reaffirm its continuing vitality for the news media and others who rely on the Constitution's protections for editorial freedoms.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the decision of the Fifth Circuit and affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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