

No. 21-12355

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NETCHOICE LLC, ET AL.,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida, No. 4:21-CV-220-RH-MAF

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, AMERICAN BOOKSELLERS
ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN
CIVIL LIBERTIES UNION OF FLORIDA, THE AUTHORS GUILD INC.,
THE MEDIA COALITION FOUNDATION, INC., THE MEDIA LAW
RESOURCE CENTER, INC., AND PEN AMERICAN CENTER, INC. IN
SUPPORT OF APPELLEES AND AFFIRMANCE**

SHULLMAN FUGATE PLLC
Deanna K. Shullman
Florida Bar No. 514462
2101 Vista Parkway, Suite 4006
West Palm Beach, Florida 33411
Telephone: (561) 429-3619
Email: dshullman@shullmanfugate.com
Counsel for Amici Curiae

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock. The American Booksellers Association has no parent corporation and no publicly held corporation owns 10% or more of its stock. The American Civil Liberties Union (“ACLU”) and American Civil Liberties Union of Florida are non-profit entities that do not have parent corporations, and in which no publicly held corporation owns 10% or more of any stake or stock. The Authors Guild Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock. The Media Coalition Foundation, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock. The Media Law Resource Center has no parent corporations and issues no stock. PEN American Center, Inc. has no parent or affiliate corporation.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned certifies that, in addition to the persons listed in the certificate of interested persons filed by the parties, the following persons (amici curiae, their parent corporations, publicly held corporations that own 10% or more of the stock, and their counsel) are known to have an interest in the outcome of this case:

1. The Media Coalition Foundation, Inc.

2. Shullman Fugate PLLC.
3. Deanna K. Shullman, Esq.

Dated: November 15, 2021

SHULLMAN FUGATE PLLC
/s/ Deanna K. Shullman
Deanna K. Shullman
Florida Bar No. 514462
2101 Vista Parkway, Suite 4006
West Palm Beach, Florida 33411
Telephone: (561) 429-3619
Email: dshullman@shullmanfugate.com
Counsel for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1
TABLE OF AUTHORITIES	ii
IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE.....	1
RULE 29(a)(4)(e) STATEMENT.....	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The <i>Tornillo</i> rule is a crucial protection for speakers across all media; were S.B. 7072 found to pass constitutional muster, it would erode the vitality of that rule to the profound detriment of free public discourse.	9
II. That newspapers or other traditional news outlets create a “unified speech product” is not a legally relevant to the First Amendment’s prohibition against state regulation of the editorial process.....	18
III. The news media landscape is constantly evolving and crediting the State’s “unified speech product” theory could lead to the direct censorship of “new media” platforms.	22
CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

Brown v. Ent. Merchants Ass’n, 564 U.S. 786 (2011).....13

e-ventures Worldwide, LLC v. Google, Inc., No. 14-cv-646, 2017 WL 2210029
(M.D. Fla. Feb. 8, 2017).....14

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995)
..... 13, 16, 21

Jian Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433 (S.D.N.Y. 2014)..... 13, 14, 15

La’Tiejira v. Facebook, Inc., 272 F. Supp. 3d 981 (S.D. Tex. 2017).....14

Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007).....15

Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241 (1974) passim

Netchoice v. Moody, No. 21-cv-220 -MAF, 2021 WL 2690876 (N.D. Fla. June 30,
2021)..... 14, 16, 18

Preferred Commc’ns, Inc. v. City of Los Angeles, Cal., 754 F.2d 1396 (9th Cir.
1985).....16

Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985)16

Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457, 2003 WL 21464568
(W.D. Okla. May 27, 2003).....14

United States v. Alvarez, 567 U.S. 709 (2012)22

Statutes

S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021)..... 10, 12, 15

Other Authorities

Analisa Novak, *TikTok exec explains social media company’s algorithm and
efforts to keep children safe*, CBS News (Oct. 15, 2021), [https://perma.cc/3L4E-
ZXTE](https://perma.cc/3L4E-ZXTE)19

Elisa Schearer, *More Than Eight-in-Ten Americans Get News from Digital Services*, Pew Rsch. Ctr., Jan. 12, 2021, <https://perma.cc/YPU9-77SK>.....22

Jacob Bogage, *Reporters are Leaving Newsrooms for Newsletters, Their Own “Mini Media Empire,”* Wash. Post, July 24, 202023

Jean M. Twenge et al., *Trends in U.S. Adolescents’ Media Use, 1976–2016: The Rise of Digital Media, the Decline of TV, and the (Near) Demise of Print*, 8 Psychol. Popular Media Culture 329 (2019).....22

Legal Support for Substack Writers, Substack (July 15, 2020), <https://on.substack.com/p/legal-support-for-substack-writers>23

Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* (1992). ... 12, 15, 17, 25

News Release, Ron DeSantis, Governor, State of Florida, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021) 10, 20

Nic Newman, *The Resurgence and Importance of Email Newsletters*, Reuters Institute Digital News Report (2020)23

Opening Brief of Appellant, *Netchoice v. Moody*, 21-12355 (11th Cir. Sept. 7, 2021)..... 8, 18

Pew Research Center, *Social Media Fact Sheet* (April 7 2021), <https://perma.cc/EG32-ZGRA>.....19

Platformer, platformer.news (last visited Nov. 10, 2021)24

Popular Information, popular.info (last visited Nov. 10, 2021)24

See AOL’s ‘Walled Garden,’ Wall. St. J., Sept. 4, 200021

The Twitter Rules, <https://perma.cc/3F7Q-3RAP> (last visited Nov. 5, 2021)18

**IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND
THE SOURCE OF THEIR AUTHORITY TO FILE**

The Reporters Committee for Freedom of the Press, American Booksellers Association, the American Civil Liberties Union, the American Civil Liberties Union of Florida, the Authors Guild Inc., the Media Coalition Foundation, Inc., the Media Law Resource Center, Inc., and PEN American Center, Inc. (collectively, “amici”), by and through undersigned counsel, respectfully submit this brief as amici curiae in support of Plaintiffs-Appellees. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Amici are organizations dedicated to defending the First Amendment freedoms and newsgathering rights of journalists and news organizations. Amici collectively represent the First Amendment interests of media outlets and communication platforms across all technologies, and the public’s interest in receiving and disseminating information free from government censorship or control. Amici submit this brief because Senate Bill 7072, enacted in 2021 (“S.B. 7072”), would, were it allowed to take effect, violate fundamental First Amendment rights necessary to preserve robust public debate across all media.

The Reporters Committee for Freedom of the Press (the “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 First Amendment Freedoms and the newsgathering rights of journalists.

The American Booksellers Association (“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 1900 member companies operating in 2400 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 American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan, non-profit organization. The organization is dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws and, for over a century, has been at the forefront of efforts nationwide to protect the full array of civil rights and liberties, including freedom of speech and freedom of the press online. The ACLU has frequently appeared before courts throughout the country in First Amendment cases, both as direct counsel and as amici curiae. **The American Civil Liberties Union of Florida** (“ACLU of Florida”) is a state affiliate of the ACLU.

The Authors Guild, Inc. was founded in 1912, and is a national non-profit association of more than 9,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including defending their right of freedom of expression. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

The Media Coalition Foundation, Inc. monitors potential legal threats to the 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 Media Law Resource Center (“MLRC”) is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative, and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals and speaks to the press

and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

PEN American Center, Inc. (“PEN America” or “PEN”) is a nonprofit organization that represents and advocates for the freedom to write and freedom of expression, both in the United States and abroad. PEN America is affiliated with more than 100 centers worldwide that comprise the PEN International network. Its membership includes more than 7,500 journalists, novelists, poets, essayists, and other professionals. PEN America stands at the intersection of journalism, literature, and human rights to protect free expression. PEN champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world. PEN America supports the First Amendment and freedom of expression in the United States.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored any part of this amici curiae brief. No person other than amici or their counsel contributed money intended to fund the preparation or submission of this amici curiae brief.

SUMMARY OF ARGUMENT

S.B. 7072 poses an acute threat to essential First Amendment protections for the press and public. The law, if allowed to take effect, would compel private communications platforms to carry speech that they otherwise would not, and would allow the State of Florida (the “State”) to directly regulate how these platforms curate, edit, or comment on speech that they host. Giving the State such authority would permit government officials to force platforms to carry speech perceived as favorable to the government or to pressure platforms to remove speech perceived as unfavorable. S.B. 7072 would therefore impermissibly vest the State with the pure power of the censor.

Amici the Reporters Committee, MLRC, and PEN America take no position on technology platforms’ content moderation policies or practices; other amici, including the ACLU, have expressed normative views on the public policy implications of how and when major platforms moderate content by users, including public officials. All amici are, however, united in their position that the curation of lawful content online constitutes an exercise of “editorial control and judgment,” which cannot be regulated by the state “consistent with First Amendment guarantees.” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“*Tornillo*”).

Accordingly, amici respectfully offer the following three points in support of Plaintiffs-Appellees.

First, S.B. 7072’s provisions prohibiting platforms from removing or restricting content posted by “political candidates” and “journalistic enterprises,” banning platforms from adding disclaimers or other commentary to third-party content, and requiring platforms to apply standards and terms of service “consistently” to third-party posts violate the rule against government interference in the editorial process articulated by the Supreme Court in *Tornillo*. 418 U.S. at 258. The *Tornillo* Court held that the First Amendment protects editorial autonomy— protection that applies to editorial choices by private speakers generally, not limited to a particular medium. Indeed, the State’s claimed purpose for enacting S.B. 7072—“balancing the discussion”—is precisely the type of government interference in public discourse held flatly unconstitutional in *Tornillo*. Moreover, as the *Tornillo* Court made clear, the mere fact that a private speaker has significant market power does not reduce the protection the First Amendment affords to its editorial decision-making, contrary to the State’s assertions. As such, were S.B. 7072 found to pass constitutional muster, it could erode *Tornillo*’s protections for speakers across all media.

Second, while many of the online platforms affected by S.B. 7072 primarily serve as virtual meeting places, the acts that would be regulated by S.B. 7072—

deciding what speech to present, how, when, and to whom, as well as the addition of the platform’s own commentary to that speech—are quintessentially editorial choices. Social media platforms are specially curated environments for speech on specific topics or among specific communities. Even those platforms that broadly welcome speech from a wide variety of users and on a wide range of topics still actively curate the channels of speech they provide. These platforms gather information from the public, vet it both before and after publication, and present it to their audiences. Editorial choices are central and essential to this process.

Defendants-Appellants, however, attempt to distinguish between a newspaper and the targeted platforms by arguing that the former is a “unified speech product that conveys a coherent message or offers perspectives on one or more overarching themes,” while the latter is more akin to a cacophony of voices. Opening Brief of Appellant at 24, *Netchoice v. Moody*, No. 21-12355 (11th Cir. Sept. 7, 2021). But that is a distinction without a difference. First, the service each platform provides *is* a distinct experience for a reader, listener, viewer, or other speech consumer—for instance, some are heavily moderated, while others are not. Second, and crucially, *Tornillo* and its progeny say nothing about a “unified speech product” being a legally relevant concept. Rather, those cases reflect the reality that, as soon as the government gets into the business of regulating editorial discretion, it has the ability to influence public discourse to its advantage (a reality

experienced by billions globally who suffer under state-controlled media).

Tornillo is concerned with editorial choices, irrespective of medium. And what S.B. 7072 seeks to control are editorial choices.

Third, Defendants-Appellants present no limiting principle to their proffered constitutional rule. That S.B. 7072 would apply only to large social media platforms (at least those not in the same corporate family as an amusement park) is a matter of legislative drafting, not constitutional law. As such, the rule that Defendants suggest—effectively, that platforms primarily hosting third-party speech are categorically excluded from First Amendment protections when the government seeks to regulate the platforms’ own editorial choices about what to host, when, and how—could significantly impair the emergence of “new media” platforms, such as online services that offer journalists and others tools to serve as their own publishers.

ARGUMENT

I. The *Tornillo* rule is a crucial protection for speakers across all media; were S.B. 7072 found to pass constitutional muster, it would erode the vitality of that rule to the profound detriment of free public discourse.

By its plain terms, S.B. 7072 would force private fora for third-party speech to publish content that they otherwise would not, would control how platforms present the speech they host, and would directly gag the platform’s speech by

prohibiting lawful content¹, including “addend[a]” to posts. S.B. 7072 § 4(1)(b), 2021 Leg., Reg. Sess. (Fla. 2021). Worse, the legislature has explicitly stated that its intent in passing S.B. 7072 was to combat perceived political bias by large technology companies—that is, the State has openly admitted that its goal is to use state power to skew online discourse in its favor. *See* News Release, Ron DeSantis, Governor, State of Florida, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), <https://perma.cc/2PGG-ZBYF> (compiling quotes from legislators about the intent behind S.B. 7072). As such, were S.B. 7072’s content moderation restrictions allowed to stand, that precedent would imperil protections for journalists and others, across all media, by limiting the scope of the *Tornillo* rule. To do so would authorize an “intrusion into

¹ Amici emphasize that S.B. 7072 would regulate *lawful* content and, indeed, is aimed, at least in part if not entirely, at core political speech, “an area in which the importance of First Amendment protections is at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (internal quotation marks omitted). This is not a regulation concerning “a classic example[] of commercial speech,” *see Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973), nor does it involve the application of generally applicable laws like antitrust against a private speaker, *see Tornillo*, 418 U.S. at 254 (distinguishing *Associated Press v. United States*, 326 U.S. 1 (1945), and stressing that the district court decree at issue there did not “compel AP or its members to permit publication of anything which their ‘reason’ tells them should not be published” (quoting 326 U.S. at 20 n.18)). Rather, S.B. 7072 directly interferes with the ability of communications platforms to present core political speech as their “reason” dictates. *Id.* at 256.

the function of editors,” *Tornillo*, 418 U.S. at 258, placing the “liberty of the press . . . in peril.” *Id.* at 258 n. 24.

In *Tornillo*, the Court invalidated a Florida law requiring publications to give politicians a “right of reply” in the publication to editorials that attacked their personal character or official record. *Id.* at 244. In doing so, the Court held that government intrusion into the editorial process “dampens the vigor and limits the variety of public debate,” *id.* at 257 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)), and that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” *Id.* at 259 (White, J., concurring) (citation omitted). That insulation of public debate from state control, the Court held, serves “as a powerful antidote to any abuses of power.” *Id.* at 260.

Indeed, such a concern was not abstract for the Court in *Tornillo*. The Court’s ruling came at the height of the fallout from Watergate and shortly after a request by President Richard Nixon that the Justice Department explore the need for a federal “right-of-reply” statute because of press coverage perceived as critical of his administration. Anthony Lewis, *Nixon and a Right of Reply*, *N.Y. Times*, Mar. 24, 1974, at E2, <https://perma.cc/2W2J-AJ65> (“Overhanging the debate is the reality of Watergate, where a vigorous press broke through repeated official White House denials of wrongdoing.”).

The choice of what to say or not say—the heart of the editorial process—is indivisible. In other words, editorial autonomy is an on-off switch—“it is either there or it is not.” Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* 277 (1992). As such, the Court in *Tornillo* applied a bright-line rule with respect to acts of editorial discretion—“any . . . compulsion to publish that which reason tells [the press] should not be published is unconstitutional.” 418 U.S. at 256 (internal quotation marks omitted).

S.B. 7072 would limit platforms’ ability to remove or restrict the speech of “political candidates” or “journalistic enterprises,” would require platforms to apply their content moderation policies “consistent[ly]” across all users (with “consistency” to be dictated by the State), and would restrain platforms from adding disclaimers or other commentary to speech they host. S.B. 7072 § 2, § 4(2)(b), § 4(2)(j), 2021 Leg., Reg. Sess. (Fla. 2021). These are self-evidently editorial acts—much like a newspaper deciding which syndicated cartoons to run or op-eds to take, when to run them, and how to present them visually in the funny pages or editorial section. And the danger of state censorship that animated the holding in *Tornillo* is present in equal measure here—either through direct government control of what is said or not said, or through a chilling effect. *See* 418 U.S. at 257 (“Faced with the penalties that would accrue to any newspaper that

published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy.”²

Further, while *Tornillo* involved a print newspaper, the First Amendment protections for editorial autonomy the Court recognized are manifestly agnostic as to medium and apply “well beyond the newspaper context.” *See, e.g., Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014). Parade organizers, for example, have the First Amendment right to curate groups that participate in a parade and exclude those with messages they do not wish to present. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995). Moreover, “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). In other words, *Tornillo*’s rule against government interference with

² While much of the Court’s opinion focused on the potential for chilling public discourse, the Court conspicuously affirmed that its conclusion does not rest on chill. 418 U.S. at 258 (“Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.”). The lack of qualification in the *Tornillo* opinion is a testament to just how foundational the separation of government and editor is to our political system.

editorial judgment is not “restricted to the press,” *Hurley*, 515 U.S. at 574, and it protects “business corporations” and “ordinary people engaged in unsophisticated expression” alike, *id.*

Applying these principles, the district court rightly held that S.B. 7072’s stated purpose of “balancing the discussion” by “reining in the ideology of the large social media providers” through control of their “editorial judgments” is “precisely the kind of state action held unconstitutional” in *Tornillo* and *Hurley*. *Netchoice v. Moody*, No. 21-cv-220-MAF, 2021 WL 2690876, *9 (N.D. Fla. June 30, 2021).

Numerous other courts have likewise determined that the editorial judgments of online platforms receive First Amendment protection. Courts have held that the editorial judgments of a search engine are akin to “the newspaper editor’s judgment of which wire-service stories to run and where to place them in the newspaper,” and are thus protected by the First Amendment. *Jian Zhang*, 10 F. Supp. 3d at 438; *see also e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) (“A search engine is akin to a publisher, whose judgments about what to publish and what not to publish are absolutely protected by the First Amendment.”); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568, at *2–4 (W.D. Okla. May 27, 2003) (concluding that search rankings are protected opinion). And courts have

expressly held that the First Amendment protects an online platform’s decision to remove or exclude content. *See, e.g., La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (holding Facebook could decide whether to take down or leave up a post because of “Facebook’s First Amendment right to decide what to publish and what not to publish on its platform”); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (holding that the First Amendment protects decisions to exclude content from a search platform).

Notably, in S.B. 7072’s findings, the legislature cited “unfair” decisions by social media platforms that “censor” certain voices, S.B. 7072 § 1, 2021 Leg., Reg. Sess. (Fla. 2021), leading to the law’s command that platforms moderate content “consistent[ly] . . . among users,” *id.* at § 4(2)(b). But the First Amendment safeguards free speech and a free press—it says nothing about fairness. *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.”). Indeed, the press at the time of the First Amendment’s adoption was famously *unfair*. *See Powe, supra*, at 278 (noting that the press in the founding era was “partisan and scurrilous”). But the framers, clear-eyed, guaranteed the independence of the press because the alternative would be intolerable to American conceptions of liberty. *See Tornillo*, 418 U.S. at 260 (White, J., concurring).

Accordingly, the First Amendment prohibits the government from limiting editorial autonomy with respect to lawful content *even when* it has a strong justification for doing so. *See Jian Zhang*, 10 F. Supp. 3d at 438 (“Put simply, ‘[d]isapproval of a private speaker’s statement’—no matter how justified disapproval may be—‘does not legitimize use of the [government’s] power to compel the speaker to alter the message by including one more acceptable to others.’”) (quoting *Hurley*, 515 U.S. at 581)).

Finally, as the district court correctly recognized, the mere size or market power of a private speaker does not void *Tornillo*’s protections. *Netchoice*, 2021 WL 2690876, at *7 (“[T]he concentration of market power among large social-media providers does not change the governing First Amendment principles.”); *see also Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1450 (D.C. Cir. 1985) (“[T]he Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights.” (citing *Tornillo*, 418 U.S. at 247–56)); *Preferred Commc’ns, Inc. v. City of Los Angeles, Cal.*, 754 F.2d 1396, 1404–05 (9th Cir. 1985), *aff’d and remanded sub nom. City of Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488 (1986) (finding barriers to entry do not justify right-of-access).

Indeed, Chief Justice Burger in *Tornillo* discussed the then, as now, acute public concern about diminished competition in mass media in great detail. *See* 418 U.S. at 251 (“The First Amendment interest of the public in being informed is said to be in peril because the ‘marketplace of ideas’ is today a monopoly controlled by the owners of the market.”). The *Tornillo* Court traced the increased concentration of media since the founding, noting that “[t]he result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.” *Id.* at 250. As one commenter noted, “were it not for the Court’s use of phrases like ‘access advocates,’ a person reading [that discussion] and stopping there would assume” that those advocates had won. *Powe, supra*, at 271. But, ultimately, the Court concluded, “[h]owever much validity may be found in these arguments,” a coercive right of access would “at once bring[] about a confrontation with the express provisions of the First Amendment.” *Tornillo*, 418 U.S. at 254.

In sum, *Tornillo* unambiguously forecloses the State’s argument that market concentration alone can justify government interference in the editorial process. Were S.B. 7072 permitted to stand on that ground, it would likewise erode *Tornillo*’s protections for editorial autonomy.

II. That newspapers or other traditional news outlets create a “unified speech product” is not legally relevant to the First Amendment’s prohibition against state regulation of the editorial process.

Defendants-Appellants attempt to distinguish *Tornillo* by asserting that newspapers, among other things, “curate articles to create a unified speech product,” and that, because social media platforms are primarily engaged in facilitating the speech of other private speakers to one another, S.B. 7072’s hosting provisions “do not interfere with any speech by the platforms” Opening Brief of Appellant, *supra*, at 24. Not only does this fundamentally mischaracterize the holding in *Tornillo*, which is concerned with editorial *choices* by any private speaker, the notion of a “unified speech product” (whatever that may mean as a practical matter) as the trigger for whether the First Amendment applies *at all* would significantly endanger press and speech rights in all media.

As an initial matter, social media platforms *do* offer a “unified speech product.” While they offer a service that allows private speakers to meet, share news, express opinions, or connect socially, the platforms are not “passive receptacle[s] or conduit[s] for news, comment, and advertising.” *Tornillo*, 418 U.S. at 258. They often delete content and restrict or block users that violate their standards—which can include prohibitions against fraud, spreading what the platforms deem to be misinformation, hateful content, and glorification of violence, and other policies that limit the discussion of certain topics because the

platforms have determined that those topics are not appropriate for the platform they wish to provide. *See Netchoice*, 2021 WL 2690876, at *9. Platforms further use algorithms to prioritize posts and arrange lawful content in a manner designed to create a distinctive “speech product” that attracts users (and thus advertisers—again, much like a metropolitan daily). *See, e.g.*, *The Twitter Rules*, <https://perma.cc/3F7Q-3RAP> (last visited Nov. 5, 2021). And some social media sites attach disclaimers or other commentary to posts to provide context, address what the platforms deem possible misinformation or other policy violations, or to alert readers or viewers to sensitive content. These decisions help craft distinct user experiences that appeal to different groups, with “[u]sage of the major social media platforms var[ying] by factors such as age, gender and educational attainment.” Pew Rsch. Ctr., *Social Media Fact Sheet* (April 7 2021), <https://perma.cc/EG32-ZGRA> (tracking demographic data and finding, for example, that while 48 percent of Americans between the ages of 18 and 29 use TikTok, only 28 percent of adults between 30 and 49 use the platform; in contrast, 73 percent of adults between 30 and 49 use Facebook); *see also* Analisa Novak, *TikTok Exec Explains Social Media Company’s Algorithm and Efforts to Keep Children Safe*, CBS News (Oct. 15, 2021), <https://perma.cc/3L4E-ZXTE> (“TikTok focuses on age-appropriate experiences and some features are not available to its younger users,” including the ability to send a direct message to other users.).

In any event, even if these platforms are not in the business of selling a “unified speech product,” the *acts* targeted by S.B. 7072 mirror the exercise of “editorial control and judgment” by a newspaper. Like in a newspaper, “the decisions made as to limitations on the size and content” displayed on a social media website, and the platform’s “treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.” *Tornillo*, 418 U.S. at 258. Simply put, as noted above, a newspaper’s choice of which op-eds, letters to the editor, or articles to include is akin to the acts targeted by S.B. 7072. The fact that S.B. 7072 applies to a platform that facilitates public discourse among many other private speakers does not change the constitutional analysis. *See id.* at 256 (“Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.”).

Further, S.B. 7072 does more than restrict routine acts of editorial discretion relating to the prominence of a post on a news feed. It explicitly seeks to curb what the legislation’s drafters have perceived as “bias” by “Big Tech.” *See, e.g.*, News Release, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech, *supra* (“If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable.”).

If taken to its logical extreme, the State’s “unified speech product” theory would categorically exempt entities that primarily facilitate third-party speech from all First Amendment protection. “But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” *Hurley*, 515 U.S. at 569–70 (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”) (internal citation omitted). Further, Defendants-Appellants offer no limiting principle to answer complex questions about, for instance, how this novel theory would apply to a hypothetical hybrid platform that produces its own news but also provides social networking functionality (like the early America Online). See *AOL’s ‘Walled Garden,’* Wall. St. J., Sept. 4, 2000. Or, on the flip side, what would be the implications of the “unified speech product” concept for a traditional newspaper that permits readers to post comments online, as many do. Under Defendants-Appellants’ theory, only speech that is created under the control of a speaker, selected for presentation in a specific way, and that conveys a consistent and discrete theme would be constitutionally protected from S.B. 7072’s hosting provisions under *Tornillo*,

leading to the perverse result that the government could regulate “bias” on a newspaper’s comments page, but not the newspaper.

The examples above serve to illustrate that not only does the “unified speech product” concept fail to capture the reality of social media platforms, it is incoherent, unworkable, and lacks any limiting principle to cabin its scope. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) (stating that our First Amendment tradition stands against “governmental power [that] has no clear limiting principle.”). The command of *Tornillo* is clear: The government can have no role in dictating the editorial process.

III. The news media landscape is constantly evolving and crediting the State’s “unified speech product” theory could lead to the direct censorship of “new media” platforms.

Today, people are much more likely to receive news through a digital platform than traditional print media—a trend that is accelerating. While many Americans still get their news from news websites, social media sites are used by a majority of adults for at least some of their news consumption. Elisa Schearer, *More Than Eight-in-Ten Americans Get News from Digital Services*, Pew Rsch. Ctr., Jan. 12, 2021, <https://perma.cc/YPU9-77SK>. When accounting for generational differences, the pull toward social media is much greater, with young adults listing social media as their most frequent news source. *Id.*; *see also* Jean M. Twenge et al., *Trends in U.S. Adolescents’ Media Use, 1976–2016: The Rise of*

Digital Media, the Decline of TV, and the (Near) Demise of Print, 8 Psychol. Popular Media Culture 329, 338 (2019) (finding that in 2016, while 82% of high school students used social media “almost every day,” 2% of high school students read the newspaper and only 16% read a book or magazine on a daily basis). In short, for many people, and especially younger Americans, social media platforms are a primary source for learning about current events and participating in open dialogue about those events.

Moreover, although S.B. 7072 purports to be an effort to target only “Big Tech,” the evolution of online speech platforms is highly dynamic. For instance, platforms like Substack, Medium, and Patreon have developed services that directly facilitate journalism by giving journalists the tools to effectively serve as their own publishers. See Jacob Bogage, *Reporters are Leaving Newsrooms for Newsletters, Their Own “Mini Media Empire,”* Wash. Post, July 24, 2020 (noting a growing preference for direct engagement over curated newsfeeds); Nic Newman, *The Resurgence and Importance of Email Newsletters*, Reuters Institute Digital News Report (2020), <https://perma.cc/DGL5-ZU2U> (finding that email newsletters are gaining in popularity, particularly among news lovers). Many of these platforms offer various backend services, such as editorial support, subscription management, web design, and even legal help. See Legal Support for Substack Writers, Substack (July 15, 2020), <https://perma.cc/86W6-46AC>. But

none of them would appear to qualify as “unified speech products” under Defendants-Appellants’ formulation. In fact, Substack is focused so much on creator branding that Substack-hosted newsletters often have their own custom internet address, and a reader must look at the fine print on the newsletter to see the affiliation with Substack. *See, e.g.*, Popular Information, popular.info (last visited Nov. 10, 2021); Platformer, platformer.news (last visited Nov. 10, 2021).

While many of these platforms may not have the annual gross revenue or monthly participant numbers to qualify as a platform subject to regulation under S.B. 7072 today, the law, if allowed to take effect, would nonetheless have a significant, dire effect on this dynamism in new media. First and foremost, it would establish a precedent that government officials may directly interfere with editorial choices by private speakers to enforce the state’s conception of “fairness” online, and that precedent would not be confined to platforms that meet the definition of a social media platform under S.B. 7072. Rather, as noted above, the underlying logic behind Defendants-Appellants’ legal position is that entities that are primarily engaged in facilitating speech by other speakers to one another suffer no First Amendment harm at all under a scheme like S.B. 7072. In other words, S.B. 7072 would open the door to direct content regulation—in service of policing “bias,” as perceived by the government—on the platforms that millions of Americans now use to get their news. It is difficult to overstate the effect such a

precedent would have on the independence of public discourse from government control.

Second, the mere possibility that the government could expand these regulations to smaller platforms or other online services could chill public discourse, innovation in both social and traditional media online, and newsgathering and reporting. Just as the existence of a “right-of-reply” law in the newspaper context could discourage news outlets from covering anything that would trigger such a right, platforms may also conclude “that the safe course is to avoid controversy.” *Tornillo*, 418 U.S. at 257. Further, that chill would likely fall most heavily on start-ups and smaller platforms, without the resources to navigate S.B. 7072’s “first-of-a-kind” bias-policing regime. *Powe, supra*, at 273–74 (discussing the substantial resources larger publishing entities have in relation to smaller entities). Many will not enter the space at all, while others will host “safer” content, or avoid certain topics, to avoid drawing the government’s ire.

In short, the arguments proffered by the State for why S.B. 7072 does not offend the First Amendment would, if credited, have profound speech-suppressive effects far beyond just the platforms targeted by the law.

CONCLUSION

For the foregoing reasons, amici urge the Court to affirm.

Respectfully submitted,³

SHULLMAN FUGATE PLLC
/s/ Deanna K. Shullman
Deanna K. Shullman
Florida Bar No. 514462
2101 Vista Parkway, Suite 4006
West Palm Beach, Florida 33411
Telephone: (561) 429-3619
Email: dshullman@shullmanfugate.com
Counsel for Amici Curiae

Dated: November 15, 2021

³ Counsel wish to thank law students in the University of Virginia School of Law's First Amendment Clinic, Emily Hockett (class of 2022), Ryan Hazelgren (class of 2023), and Sarah Lazzaro (class of 2023), for their invaluable contributions to this brief. The brief does not express the institutional views of the University of Virginia School of Law.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a) because this brief contains 4,731 words, excluding the parts of the brief exempted under Federal rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Deanna K. Shullman
Deanna K. Shullman

Dated: November 15, 2021