No. 21-51178

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NetChoice, L.L.C., a 501(c)(6) District of Columbia organization doing business as NetChoice; Computer & Communications Industry Association, a 501(c) (6) non-stock Virginia Corporation doing business as CCIA

Plaintiffs-Appellees,

v.

Ken Paxton, in his official capacity
as Attorney General of Texas

Defendant-Appellant.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
Case No. 1:21-cv-00840 (Hon. Robert Pitman)

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN BOOKSELLERS FOR FREE EXPRESSION, AMERICAN CIVIL LIBERTIES UNION, THE AUTHORS GUILD INC, CENTER FOR DEMOCRACY & TECHNOLOGY, THE MEDIA COALITION FOUNDATION, AND MEDIA LAW RESEOURCE IN SUPPORT OF APPELLEES

[Caption continued on next page]

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiffs-Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification.

Amicus Curiae:

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

American Booksellers for Free Expression. American Booksellers for Free Expression is an initiative of the American Booksellers Association. The American Booksellers Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

American Civil Liberties Union. The American Civil Liberties Union (ACLU) is a non-profit entity that does not have a parent corporation. No publicly held corporation owns 10% or more of any stake or stock in amicus curiae ACLU.

The Authors Guild Inc. The Authors Guild Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Center for Democracy & Technology. The Center for Democracy & Technology has no parent corporation and, because it is a non-stock corporation, no publicly held corporation owns 10% or more of its stock.

Media Coalition Foundation. The Media Coalition Foundation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), American Booksellers for Free Expression, American Civil Liberties Union, the Authors Guild Inc., Center for Democracy & Technology, the Media Coalition Foundation, and Media Law Resource Center (collectively, "amici"). As organizations that defend the First Amendment rights of journalists and news organizations, amici respectfully submit this brief in support of Plaintiffs-Appellees to highlight the threat posed to foundational press freedoms by the Texas statute that Plaintiffs-Appellees challenge in this case.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellees and Defendant-Appellant have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

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

Amici declare that:

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

SUMMARY OF ARGUMENT

The First Amendment "erects a virtually insurmountable barrier" around a publisher's exercise of editorial judgment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). That bulwark is a necessary, fundamental protection for freedom of the press, one that Texas would weaken in order to regulate perceived bias in the editorial practices of large social media firms that state officials believe are "[s]ilencing conservative views." Greg Abbot (@GregAbbott_TX), Twitter (Mar. 5, 2021, 9:35 PM), https://perma.cc/5D3F-BRPG. But the "danger inherent in government editorial oversight, even in the interest of 'balance,' is well established." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 510 (9th Cir. 1988). The rationales the State offers for mandating "balance" here, if accepted, would erode bedrock constitutional guarantees—not just for the new forms of digital media the State targets now, but also for more traditional forms of media that might draw the government's antagonism in the future. The district court rightly enjoined the effort, and this Court should affirm.

The challenged statute, HB 20, is unconstitutional several times over. It prohibits covered platforms from declining to publish content because they object to its viewpoint, substituting the State's own editorial judgment for that of a private publisher in violation of the rule recognized in *Tornillo*. While Appellant

maintains that *Tornillo* does not control this case, the State's proposed distinctions between new and old media do not in fact distinguish covered platforms from newspapers, and this Court must reject any rule that would entitle Texas to police the objectivity of a Dallas daily. That central defect is compounded by transparency provisions that "subject[] the editorial process to private or official examination" without anything approaching an adequate justification, an intrusion that cannot "survive constitutional scrutiny as the First Amendment is presently construed." *Herbert v. Lando*, 441 U.S. 153, 174 (1979). And even if those flaws standing alone did not make clear HB 20's constitutional invalidity, the fact that the statute as a whole targets "only a handful of publishers" requires this Court to conduct a searching First Amendment review even *if* the law could imaginably be characterized as an economic regulation—which it cannot. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983).

Some amici take no position on how the social media platforms targeted by HB 20 exercise their editorial discretion; others have expressed a diversity of views, some of them critical. But whatever the vices or virtues of any social media firm's particular choices about the content it hosts on its platform, HB 20 would cut short those conversations in favor of conformity to a single government-imposed view. That intrusion cannot be sustained without undermining core

principles upon which freedom of the press depends. Accordingly, for the reasons given herein, amici respectfully urge the Court to affirm the preliminary injunction.

ARGUMENT

I. The must-carry provisions of HB 20 regulate—and unconstitutionally infringe—the editorial freedom that the First Amendment protects.

A. The First Amendment prohibits the government from imposing its preferred editorial viewpoint, even a notionally neutral one, on private publishers.

The heart of HB 20 is its requirement that covered platforms not "censor a user" on the basis of the "viewpoint" the user expresses. Tex. Civ. Prac. & Rem. Code § 143A.002.[1] In other words, it prohibits covered platforms from exercising their own judgment as to which viewpoints they would like to publish and curate.

The Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo* controls judicial review of that mandate. There, the Court unanimously affirmed that the First Amendment forbids governmental interference in editorial decisionmaking when it held unconstitutional Florida's "right of reply" statute, which "grant[ed] a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper." *Tornillo*, 418 U.S. at 243, 258. Then,

[1] Under the statute, to censor "means 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.

as now, debates about editorial fairness were widely understood as proxies for broader political disagreements in American life.[2] Against that backdrop, the 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 when an editorial decision deals with the "treatment of public issues and public officials—whether fair or unfair"—that core principle applies with all the more force. *Id*.

Tornillo's bar on "government tampering" with "news and editorial content" is central to the integrity and preservation of a free press. *Tornillo*, 418 U.S. at 259 (White, J., concurring). As Chief Justice Burger's opinion emphasized, in addition to the direct threat of censorship raised when the government supervises the "treatment of public issues and public officials," *id.* at 258, a "[g]overnment-enforced right of access inescapably '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

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[2] *Compare* 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 of his administration), *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").

(1964)), flattening diverse editorial viewpoints into one pre-approved voice. So too here, where Texas would replace the diversity of approaches currently taken by social media platforms with a single perspective that the State believes is neutral.

The Court's analysis did not turn on a rosy view of how either the *Miami Herald* in particular, or the press in general, exercises the editorial judgment that the Constitution 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 that the *Herald* had gone on to lose). "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 of the censor, to tinker with debate until its subjective and self-fulfilling sense of fairness is satisfied—are far graver.

Tornillo states a *per se* rule; the Court did not apply strict, intermediate, or any other form of scrutiny to Florida's right-of-reply statute. Rather, the Court held that "any such compulsion to publish that which reason tells [an editor] should not be published is unconstitutional"—period. *Tornillo*, 418 U.S. at 256; *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.").[3] And for good reason: The government's decision to displace an editor's point of view in favor of its own—even a notionally neutral one—is always viewpoint based. That end is "so

[3] Of course, the *Tornillo* rule—though absolute where it applies—does not prohibit all regulation of publishers, including social media platforms. It is only triggered in the first place by state action that directly regulates editorial choices or that has the practical effect of singling out those "exercising the constitutionally protected freedom of the press." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986). Newspapers are as bound as any other entity by, say, the generally applicable law of antitrust. *See Tornillo*, 418 U.S. at 254. Equally, Appellant's suggestion that invalidating HB 20 (which directly regulates editorial judgments) would call into question the validity of generally applicable anti-discrimination statutes (which regulate commercial acts instead) is a red herring. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

plainly illegitimate" as to "immediately invalidate" any statute aimed at it. *City Council of Los Angeles 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."). Like any other case of "viewpoint bias," a finding that the government has usurped the editorial role "end[s] the matter." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).

B. Appellant's arguments in defense of HB 20 would allow the State of Texas to impose its editorial judgment not only on the new forms of digital media it targets now, but also on traditional news publishers.

In defending the suggestion that covered platforms can be prohibited from exercising editorial judgment, Appellant dismisses *Tornillo* as an "outlier precedent about newspapers," Appellant Br. 16, but the State's efforts to distinguish the case away make little sense. The *Tornillo* rule is not the personal property of a closed set of traditional news organizations; it protects a function—editorial judgment—regardless of who exercises it. And the State has not, in any event, offered distinctions that successfully distinguish what targeted social media platforms do from what newspapers do. *Cf. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 144–45 (1973) (Stewart, J., concurring) (noting the danger posed by arguments for "greater Government control of press

freedom" in new media that "would require no great ingenuity" to extend to newspapers). The arguments that the State advances here only underline that HB 20 threatens the First Amendment's core protections for press freedom.

As an initial matter, the question of whether covered platforms are "like newspapers," Appellant Br. 2, is poorly framed. The *Tornillo* rule has been extended "well beyond the newspaper context" because it asks whether the government has seized control of an aspect of the speech process (deciding what to publish) rather than whether the regulation burdens a favored class (the press). *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014);[4] *cf. Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals." (citation and internal quotation marks omitted)). That rule itself protects the press, because a tailored privilege that the government awards to those *it* considers legitimate media can easily become the sort of "abhorred licensing system of Tudor and Stuart England" that "the First Amendment was intended to ban from

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

this country." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring). Texas's effort to limit application of the *Tornillo* rule to an arbitrarily narrow class of speakers presents just that risk of favoritism, *see infra* Part III, and it cannot be squared with the Supreme Court's precedents.

But even if the State's attempt to limit *Tornillo* to publishers who look like newspapers were appropriate, its proposed distinctions would fail on their own terms. For instance, the suggestion that newspapers are distinguished by space constraints that platforms lack can be squared neither with *Tornillo* itself nor with the practical reality of contemporary news publishing. As the Supreme Court made clear, Florida's right-of-reply statute would have violated the First Amendment "[e]ven if a newspaper would face no additional costs to comply . . . and would not be forced to forgo publication of news or opinion by the inclusion of a reply." *Tornillo*, 418 U.S. at 258. The "intrusion into the function of editors" is the keystone harm of such legislation, *id.*, and not just the fact that printing ink has some non-zero costs. For that matter, people today overwhelmingly engage with the news online, *see* Elisa Shearer, *More than Eight-in-Ten Americans Get News from Digital Devices*, Pew Research Center (Jan. 12, 2021), https://perma.cc/UGU5-8PDJ, where traditional publishers have the same capability to "proceed to infinite expansion of [their] column space" as any

covered platform willing to rent the necessary server space, *Tornillo*, 418 U.S. at 257. But as even the State seems to concede, it would violate the First Amendment to require that an online-only magazine run even a single, short contribution that "reason tells [it] should not be published." *Id.* at 256; *see* Appellant's Br. at 20.

The State's other distinctions are no more persuasive. The suggestion that the social media platforms targeted by HB 20 are "passive receptacle[s]" for others' speech, *Tornillo*, 418 U.S. at 258, requires ignoring the wealth of subjective editorial judgments those platforms make daily, many of which mirror the sort of decisions news publishing requires. Both Twitter and Meta, for instance, consider whether content they otherwise find objectionable is "newsworthy" in judging whether it should nevertheless be published—and if so, how best to contextualize it. *Our Approach to Newsworthy Content*, Meta (Jan. 19, 2022), https://perma.cc/7TR5-NEX2; *Our Approach to Policy Development and Enforcement Philosophy*, Twitter, https://perma.cc/KVS2-PAMU (last visited Mar. 18, 2022). Neither is there anything distinctive about the fact that platforms have expressed an interest in surfacing the full diversity of public opinion; so too, since 1896, has *The New York Times*. *See New York Times Opinion Guest Essays*, N.Y. Times, https://perma.cc/7MC2-DB3C (last visited Mar. 21, 2022) (describing a commitment to publishing "all shades of opinion"). Nothing in that ambition—

realized or not—is inconsistent with the exercise of editorial judgment. *Tornillo* stands for the proposition that the government cannot commandeer it.

On each front, that Appellant cannot meaningfully distinguish covered platforms from traditional news outlets underscores the threat that HB 20 poses to press freedom. To sustain the duties Texas hopes to impose on social media platforms today risks exposing news organizations to the same duties whenever the State next turns its attention there. Because the Supreme Court ruled this sort of intrusion out of bounds nearly fifty years ago, the District Court rightly enjoined it.

II. The transparency provisions of HB 20 likewise target—and unconstitutionally burden—the free exercise of editorial discretion.

In addition to the direct burdens it imposes on the editorial process, HB 20 also seeks to "subject[] the editorial process to private or official examination" in search of concealed bias. *Herbert*, 441 U.S. at 174. It does so by requiring that covered platforms "publicly disclose" how they "curate[] and target[] content to users," Tex. Bus. & Com. Code § 120.051; that they "publish an acceptable use policy" explaining how they "ensure content complies" with those standards, *id.* § 120.052; that they "publish a biannual transparency report" with aggregate data on content taken down, *id.* § 120.053; and that they "explain" to users whose content they find objectionable "the reason the content was removed," *id.* § 120.103.

Texas maintains that these intrusions are less objectionable than the government's direct exercise of editorial control, as if forcing the *Miami Herald* to disclose *why* it rejected Pat Tornillo's submissions would have been a defensible compromise. Not so. Technology company transparency can benefit the public, and some amici have supported voluntary transparency measures.[5] But government mandates requiring transparency raise First Amendment concerns—especially when, as here, they complement a viewpoint discriminatory scheme. Even if that concern were not present, under the First Amendment, Texas must articulate at least a substantial interest in HB 20's disclosure requirements. Because it has failed to do so, the District Court appropriately enjoined them.

A. The transparency provisions of HB 20 cannot be severed from the statute's viewpoint-discriminatory must-carry mandate.

As a threshold matter, HB 20's disclosure provisions must fall because those portions of the law cannot be severed from its viewpoint-discriminatory core. As the Supreme Court recently reiterated in declining to distinguish valid and invalid segments of a viewpoint-discriminatory statute, when a law "'aim[s] at the suppression of' views, why would it matter that [the legislature] could have captured some of the same speech through a viewpoint-neutral statute?" *Brunetti*,

[5] *See, e.g.*, *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, https://santaclaraprinciples.org/ (last visited Apr. 5, 2022).

139 S. Ct. at 2302 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment)). That the law pursues a forbidden purpose dooms the whole statute, not just the portions that make its illegal goal most clear. *See* William Baude, *Severability First Principles*, 109 Va. L. Rev. (forthcoming 2023) (manuscript at 29–30 & n.140), https://bit.ly/3xa0lrd (noting that "constitutionally forbidden intent" may imply a statute's invalidity in all cases it covers). Were it otherwise, the government could leave to courts the task of crafting comprehensive media regulation from the ruins of intentional censorship schemes. *See Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997); *cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318–19 (2016) (declining to enforce the severability clause of a Texas law that lacked a legitimate purpose).

Appellant's only answer to the finding that the law is infected with viewpoint discrimination is a brief citation to *United States v. O'Brien*, 391 U.S. 367 (1968), for the proposition that "what fewer than a handful of Congressmen said" will not invalidate a facially constitutional statute, *id.* at 384. Perhaps not, but that proposition cannot save HB 20. For one, as discussed above, the law is viewpoint-discriminatory on its face; its keystone provision requires that platforms edit in keeping with the government's preferred theory of "neutrality," the end to which all of its provisions are geared. But even if this Court were to ignore the

statute's "inevitable effect," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (quoting *O'Brien*, 391 U.S. at 384), HB 20's "stated purposes may also be considered," *id.*; *see also, e.g.*, *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 n.10 (7th Cir. 2013) (noting that *O'Brien* does not prohibit all consideration of evidence that "the legislature acted with a viewpoint discriminatory motive" and offering the example of a formal preamble). Here, Texas's stated intent to "protect[] the free exchange of ideas and information in this state," HB 20, § 1(2), is identical to the purpose the Supreme Court found illegitimate in *Tornillo*: "ensur[ing] that a wide variety of views reach the public," 418 U.S. at 247–48.

Just as in *Tornillo*, as lofty as that goal may sound in the abstract, in context it states an intent to override a private editorial point of view in favor of one that government officials, with all of their own biases and agendas, consider freer and worthier. And as that aim's inclusion in the statute's preamble makes clear, that illicit purpose pervades all of the legislation's operative provisions. HB 20's transparency provisions cannot be disentangled from it, regardless of whether they could validly have been enacted for other reasons in another context not presented.

B. Even if they stood alone, the transparency provisions of HB 20 would unconstitutionally infringe the protected exercise of editorial discretion.

Even if HB 20's disclosure mandates were not fatally infected with the statute's viewpoint discriminatory purpose, they cannot survive the scrutiny the Constitution requires. Appellant maintains that HB 20's transparency provisions are subject to only minimal First Amendment review because they compel only "factual and uncontroversial" commercial disclosures within the meaning of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). But most of the law's transparency provisions—its requirements to disclose how content is curated, to publish the standards that govern that exercise, and to explain why any piece of content removed was deemed objectionable—are not governed by *Zauderer* because they do not concern commercial speech and they are not "factual." *Id.* Instead, they require that covered platforms explain their irreducibly subjective editorial judgment as to which voices they think worth presenting to the public, and the State has not carried the heightened burden it therefor bears. The only requirement arguably limited to the disclosure of verifiable facts, the biannual report, cannot survive even *Zauderer* because the State has yet to advance an adequate justification for it.

With respect to the requirements other than the biannual report, it is doubtful that publishers' representations about how they exercise "editorial control and judgment" can be shoehorned under the heading of commercial speech in the first

place. *Tornillo*, 418 U.S. at 258. That family of doctrines is limited to "expression related solely to the economic interests of the speaker and its audience," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980), and no one thinks newspapers voluntarily publish their standards just to explain the terms on which papers are sold, *see, e.g.*, *Standards and Ethics*, N.Y. Times, https://perma.cc/Q6GY-9JNX (last visited Mar. 18, 2022); *cf. Sullivan*, 376 U.S. at 266 (decision to accept editorial advertisement for pay is not commercial speech). To the contrary, such disclosures serve a range of public ends—expressing the publisher's point of view as to what good journalism is, say, or helping readers form their own views on the reliability of any given news item. *See Newspaper Guild of Greater Phila., Loc. 10 v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1980) (noting the First Amendment interests at stake in a newspaper's ability to communicate its journalistic integrity to the public). In much the same way, platforms' policies are written to express their views on what a healthy public conversation looks like, not just to sign up one more user. *Cf. Prager Univ. v. Google LLC*, 951 F.3d 991, 999–1000 (9th Cir. 2020) (rejecting, for purposes of a Lanham Act claim, the suggestion that "YouTube's statements concerning its content moderation policies" amount to advertising designed to win market share).

Representations about editorial standards are, for that matter, too laden with subjectivity to "propose a commercial transaction." *Pittsburgh Press Co.*, 413 U.S. at 385. 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/7CBB-LN8M (last visited Mar. 18, 2022), and transforming every disagreement over the meaning of "fairness" 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.[6] No surprise, then, that courts have likewise found platform moderation policies too vague, hortatory, or subjective to fit under rubrics such as false advertising. *See, e.g.*, *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 41 (Cal. Ct. App. 2021); *Prager Univ.*, 951 F.3d at 999–1000. Policies of this kind are shot through with expressive judgment; they cannot reasonably be likened 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*, 707 F. App'x

[6] *See, e.g.*, *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 121–23 (1st Cir. 2000); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1354–55 (7th Cir. 1995).

588 (9th Cir. 2017) (finding platform community standards unenforceable in breach-of-contract action because they restrict only users, not the platforms).

But even if representations about editorial judgment could be deemed commercial speech, the lenient *Zauderer* standard would be inapplicable to these disclosures because they are not "factual and uncontroversial." 471 U.S. at 651. To require a platform to explain which speech it finds objectionable in general, *see* Tex. Bus. & Com. Code §§ 120.051–052, or why it finds a given post objectionable in particular, *see id.* § 120.103, compels expression of an editorial viewpoint. There is no fact of the matter about which news is and isn't fit to print; deciding that speech is "offensive or inappropriate" calls for "subjective judgment." *Robinson v. Hunt County*, 921 F.3d 440, 447 (5th Cir. 2019).

In that light, the most generous standard of review from which these provisions could benefit is the intermediate scrutiny set out in *Central Hudson*,[7] and the State can preserve them only if its "asserted governmental interest is substantial," if its imposition "directly advances the governmental interest

[7] *Compare Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny to a commercial disclosure ineligible for *Zauderer* because of its controversial content), *with R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012), *overruled on other grounds*, *Am. Meat Institute v. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (applying intermediate scrutiny to a disclosure under the same circumstances).

asserted," and if the intrusion "is not more extensive than is necessary to serve that interest," 447 U.S. at 566. They cannot satisfy that standard because the interests that Texas advanced are either insubstantial or illicit. For instance, the statute ties the content-curation disclosures to an interest in "enabl[ing] users to make an informed choice," Tex. Bus. & Com. Code § 120.051, but 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 drain the *Central Hudson* test of any meaning," *Am. Meat Institute v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring). Texas has declined to articulate *how* users are currently impaired in making the decision whether to use covered platforms, and it cannot expect this Court to "supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).[8] Neither is there a "history and tradition" of compelling

[8] Amici express no view on whether certain transparency measures could be defended on different grounds or a different record. "A regulation that fails *Central Hudson* because of a lack of sufficient evidence may be enacted validly in the future on a record containing more or different evidence." *Pub. Citizen v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 221 (5th Cir. 2011). Some amici have identified important public benefits that inure from technology company transparency. *See, e.g.*, Caitlin Vogus & Emma Llansó, Ctr. for Democracy & Tech., Making Transparency Meaningful: A Framework for Policymakers 44 (Dec. 2021), https://perma.cc/99AE-K787. But *Texas* has not offered a substantial interest to justify HB 20's disclosure provisions, and their constitutionality cannot be supported by the possible existence of others that the State has not advanced.

disclosure of editorial standards that would make the connection intuitive. *Am. Meat Institute*, 760 F.3d at 31–32 (Kavanaugh, J., concurring). On the contrary, as the Court noted in *Herbert*, standalone editorial transparency mandates—as opposed to inquiries into editorial discretion required by the enforcement of generally applicable laws—are essentially unheard of. *Herbert*, 441 U.S. at 174.

The biannual transparency reports, even if governed by the *Zauderer* standard, suffer from a similar defect: The State has entirely failed to explain what this information is for. *See Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (noting that, even under *Zauderer*, the state's justification must be "nonhypothetical"). Appellant is silent on the question of what users are supposed to do with a tally of how much content a covered platform removes. Nor does it explain what ties those aggregate statistics to "the free exchange of ideas and information," HB 20, § 1(2), just as the health of a media market would not be revealed by counting the op-eds the local paper rejects.

On each front, the State's silence raises the inference that it is unwilling to articulate its true interest, which is 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 puts 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 v. Valeo*, 424 U.S. 1, 48–49 (1976); *see also Am. Meat Institute*, 760 F.3d at 32 (Kavanaugh, J., concurring) (noting that compelled disclosure of "the political affiliation of a business's owners" would clearly be invalid). With no valid justification to back HB 20's disclosure mandates, none of them can survive any level of scrutiny.

III. The flaws in HB 20's provisions are exacerbated by the fact that the law singles out a small set of publishers for special burdens.

If the invalidities in HB 20's individual provisions weren't enough, the statute as a whole—through its definition of covered platforms—violates the First Amendment's prohibition on "singl[ing] out" a small class of speakers without adequate justification. *Minneapolis Star*, 460 U.S. at 582. In that light, much of the State's effort to frame HB 20 as a regulation of conduct rather than speech or editorial judgment is beside the point. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640–41

(1994) (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)). That principle squarely applies here, where Texas has drafted a statute that applies to just three companies—all of them in the "business of expression," *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 761 (1988)—and models the very kind of threat to press freedom that the rule of *Minneapolis Star* prohibits.

HB 20's definition of a "social media platform" draws troubling lines twice: The statute excludes any site that "consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider," and then goes on to target only firms with more than 50 million active users in a calendar year. Tex. Bus. & Com. Code § 120.001(1)(C)(i)–(ii). The first carveout ensures that even when conventional news publishers and covered platforms engage in identical content moderation—when, say, a newspaper manages reader-generated comments—covered platforms are disfavored. While that structure benefits the traditional press for now, the Supreme Court has long recognized 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*, 460 U.S. at 588. And as discussed above, there is no "special

characteristic of the press" behind the distinction, which "suggests that the goal of the regulation is not unrelated to suppression of expression." *Id.* at 585.

That the law applies to such a small set of speakers exacerbates the threat. In a long line of cases, for instance, the Supreme Court has concluded that differential taxation of members of the same medium may violate the First Amendment because of the danger of distinctions drawn on cloaked ideological grounds. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 244–51 (1936) (tax on newspapers with over 20,000 weekly circulation); *Minneapolis Star*, 460 U.S. at 591–92 (tax on paper and ink applicable in practice only to large publications); *Ark. Writers' Project*, 481 U.S. at 232 (tax exemption designed to "encourag[e] fledgling publications" and "foster communication"). Laws—even otherwise unobjectionable economic regulations—whose burdens focus so narrowly on just a few publishers "begin[] to resemble more a penalty" for speakers that the state dislikes than a good-faith regulatory effort. *Minneapolis Star*, 460 U.S. at 592.

There should be no question, then, that Texas must put forward "a counterbalancing interest of compelling importance that it cannot achieve without differential" treatment. *Id.* at 585. The only one Appellant advances here is market concentration—or, since Texas has made no effort to establish true market power, the fact that the covered platforms are large. But the Supreme Court

rejected the argument that even actual market power could justify regulation of editorial decisionmaking in *Tornillo*. Just as Appellant characterizes the covered platforms as "gatekeepers of a digital 'modern public square,'" with "enormous influence over the distribution of news," Appellant Br. 5 (first quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); then quoting *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting in part)), it was urged in *Tornillo* that a concentrated press had "become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion," 418 U.S. at 249. But the Court, without gainsaying the accuracy of that showing, assigned it no weight because the proposed remedy—a coercive intrusion on editorial discretion—brought about "a confrontation with the express provisions of the First Amendment." *Id.* at 254. In other words, as large as the regulated platforms may be, that fact cannot save a statute that cannot otherwise survive heightened First Amendment scrutiny.

Texas's preferred authority for the opposite proposition, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), is inapposite. There, the Supreme Court concluded that a "special characteristic" within the meaning of *Minneapolis Star* justified differential treatment of a particular medium—cable—and could support the imposition of must-carry obligations. *Id.* at 660–61. In

particular, "[w]hen an individual subscribes to cable, the *physical* connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over" the programming a subscriber can access. *Id.* at 656 (emphasis added). But the *Turner* Court reiterated that a newspaper's merely economic dominance cannot justify similar intrusions. *See id.*; *cf. id.* at 640 ("[T]he special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence."). *Turner* therefore did not disturb the principle that "purely economic constraints on the number of voices available in a given community [cannot] justify otherwise unwarranted intrusions into First Amendment rights," *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985). And Texans are no more captive to the platforms today than Miami was to the *Herald* in 1974.

What Texas hopes here is to use the language of concentration as camouflage for its objection to what it perceives as the platforms' editorial viewpoint—its sense that their 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 Congress from determining that the press is 'too influential'" in the same way. *McConnell v. FEC*, 540 U.S. 93, 283–84 (2003)

(Thomas, J., dissenting). The Supreme Court closed the door to that line of regulation in *Tornillo*. This Court should not be tempted to reopen it here.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to affirm the District Court's preliminary injunction.

Dated: April 8, 2022

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Fed. R. App. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 6,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 2

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Dated: April 8, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, I caused the foregoing Brief of the Reporters Committee for Freedom of the Press et al. as Amici Curiae in support of Plaintiffs-Appellees to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send notice of such filing to all counsel of record.

Dated: April 8, 2022

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