IN THE
SUPREME COURT OF THE UNITED STATES

No. 21A720

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,
Applicants,

v.

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

CONSENT MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND PROPOSED BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN BOOKSELLERS FOR FREE EXPRESSION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, AUTHORS GUILD, MEDIA COALITION FOUNDATION, AND MEDIA LAW RESOURCE CENTER AS AMICI CURIAE IN SUPPORT OF APPLICANTS' EMERGENCY APPLICATION TO VACATE STAY

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May 17, 2022

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*[1]

TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Proposed amici curiae the Reporters Committee for Freedom of the Press, American Booksellers for Free Expression, American Civil Liberties Union, American Civil Liberties Union of Texas, Author's Guild, Media Coalition Foundation, and Media Law Resource Center respectfully request leave to file the attached brief in support of Applicants' emergency application to vacate the stay entered by the U.S. Court of Appeals for the Fifth Circuit in this proceeding. In light of the expedited posture of this case, amici also request leave to file in 8.5 x 11 non-booklet format. *Cf.* Proposed Revisions to Rules of the Supreme Court of the United States at 6 (Mar. 2022), https://perma.cc/6D33-QC43 (proposing that amicus briefs submitted in this posture be filed in non-booklet format). Counsel for Applicants and counsel for Respondent have consented to the filing of amici's brief and its filing in this format.

The proffered brief will aid the Court by providing the perspective of traditional media organizations—not represented among Applicants' members—on the consequences of the Fifth Circuit's order and the statute under review. As the brief explains, the stay order will have a chilling effect on publishers in all media

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[1] No counsel for any party authored this brief in whole or in part. The amici and their counsel authored this brief in its entirety. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

because of its impact on the constitutional safeguards for editorial autonomy that this Court articulated in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, American Booksellers for Free Expression, American Civil Liberties Union, American Civil Liberties Union of Texas, Author's Guild, Media Coalition Foundation, and Media Law Resource Center (collectively, "amici"). As organizations that defend the First Amendment rights of journalists, news organizations, and other speakers and publishers, amici respectfully submit this brief in support of Applicants to highlight the threat posed to foundational press freedoms by the Texas statute under review.

SUMMARY OF THE ARGUMENT

The stay the United States Court of Appeals for the Fifth Circuit entered in this case opens a dangerous breach in the "virtually insurmountable" constitutional barriers that safeguard a private speaker's editorial autonomy. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). The Texas statute the stay order allowed to take effect, HB 20, prohibits covered social media platforms from declining to publish content because they object to its viewpoint, substituting the State's editorial objectives for those of a private publisher in violation of the *Tornillo* rule. The law's transparency provisions "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 the statute singles out just a "handful of publishers" for its uniquely intimidating burdens—a line drawn on barely cloaked ideological grounds in violation of yet another of this Court's long-standing First Amendment precedents, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983).

HB 20 therefore challenges core pillars of the freedoms of speech and the press. As amici warned below, while Texas has chosen to target new digital platforms today, its defense of HB 20 offers no limiting principle that would prevent it from turning its attention to the most traditional of media tomorrow. The stay order hardly supplies those missing guardrails; indeed, it contains not a line of reasoning. For the reasons given herein, and because the Fifth Circuit's heedless departure from the

First Amendment status quo (and precedent) will have an immediate chilling effect on publishers of all kinds, amici respectfully ask this Court to vacate the stay order.

ARGUMENT

I. The stay order will have a chilling effect on publishers of all kinds who rely on the First Amendment's protections for editorial autonomy.

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

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.[2] In other words, it prohibits covered platforms from exercising their own judgment as to which viewpoints are and are not worth sharing with their audiences.

This Court's decision in *Miami Herald Publishing Co. v. Tornillo* controls judicial review of that statutory 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, as now, debates about editorial fairness were widely understood as proxies for broader political disagreements in American life.[3] But this Court made clear that those disagreements

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[2] 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.

[3] *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

cannot be legislated away; state control of the "choice of material" to include in a newspaper cannot be "exercised consistent with First Amendment guarantees," *id*. at 258; and when an editorial decision deals with the "treatment of public issues and public officials[,] whether fair or unfair," that principle applies with all the more force. *Id*. This bar on "government tampering" with "news and editorial content" has remained central to the integrity and preservation of a free press for nearly fifty years. *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 (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.'

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 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]

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coverage he believed was unfair to 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").

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 of the censor, to tinker with debate until its own self-fulfilling sense of fairness is satisfied—are far graver still.

Tornillo states a *per se* rule; this Court did not apply strict, intermediate, or any other form of scrutiny to Florida's so-called right-of-reply statute. Rather, *Tornillo* held that "any such compulsion to publish that which reason tells [an editor] should not be published is unconstitutional"—period. 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.").[4] And for good reason: The

[4] 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).

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 ideological objective is "so plainly illegitimate" as to "immediately invalidate" any statute that aims 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," then, a finding that the government has deliberately usurped the editorial role "end[s] the matter." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).

B. The State's defense of HB 20 would allow Texas to impose its editorial judgment not only on the new forms of digital media it targets now, but also on traditional publishers and other speakers it may later disfavor.

In defending HB 20, Texas has relied heavily on the suggestion that *Tornillo* is an "outlier precedent about newspapers." Appellant Brief at 16, *NetChoice v. Paxton*, No. 21-51178 (5th Cir. Mar. 2, 2022). 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 never, in any event, offered distinctions that would successfully distinguish what targeted social media platforms

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Newspapers are as bound as any other entity by, say, the generally applicable law of antitrust. *See Tornillo*, 418 U.S. at 254. Equally, Respondent'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).

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). That the Fifth Circuit sustained HB 20 all the same—without so much as a nod at a limiting principle—will have a predictable chilling effect on all publishers who rely on *Tornillo*'s shield.

Texas's invitation to ask whether covered platforms are 'like newspapers' was always misguided. 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);[5] *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 this country." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger,

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[5] *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) (same with respect to 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); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568, at *2–4 (W.D. Okla. May 27, 2003).

C.J., concurring). In just that vein, while HB 20 exempts for now websites that "consist[] primarily of news, sports, entertainment, or other information or content that is not user generated," Tex. Bus. & Com. Code § 120.001, "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. The Fifth Circuit's order leaves publishers with no hint whether that carve-out is a constitutional necessity or a matter of grace that Texas could withdraw when a news organization draws its ire.

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 this 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 and paper have non-zero costs. For that matter, readers 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 appeared to concede in the Fifth Circuit, 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.

The State's other proffered 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, or 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. Under the First Amendment, the State cannot commandeer it.

On each front, that Texas could not meaningfully distinguish covered platforms from traditional news outlets should have underscored the threat that HB 20 poses to press freedom. To sustain the duties Texas has imposed on social media platforms today risks exposing news organizations—as well as any other speakers Texas may later disfavor—to the same duties whenever the State next turns its attention to them. Until the order is vacated, the Fifth Circuit's stay sustaining those impositions will cast a chilling pall over publishers and speakers in all media.

II. The stay order permits unprecedented inquiries into the editorial process that will likewise chill the free exercise of editorial judgment.

The Fifth Circuit's stay also breaks new First Amendment ground by giving a greenlight to HB 20's transparency provisions. In addition to the direct burdens it imposes on editorial integrity, the statute "subjects 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 platforms "explain" to users whose content they find objectionable "the reason the content was removed," *id.* § 120.103.

Texas maintained below 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.[6] But government mandates *requiring* transparency raise their own distinctive First Amendment concerns—especially when, as here, they complement a viewpoint discriminatory scheme. And even if that illicit goal were not obvious from the face of the statute, Texas never articulated an adequate interest to support its mandates. The Fifth Circuit's decision to enforce them licenses just the sort of "casual inquiry" into editorial deliberation that this Court's precedent forbids. *Herbert*, 441 U.S. at 174.

A. The transparency provisions of HB 20 were designed to complement, and cannot be severed from, the statute's viewpoint-discriminatory core.

As a threshold matter, HB 20's disclosure mandates should have fallen because they cannot be severed from the law's viewpoint-discriminatory core. As this Court recently explained in declining to parse 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*, 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 entirety, 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

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

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).

Texas's only answer to the finding that the law is infected with viewpoint discrimination was 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 should not have been enough to 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 Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 n.10 (7th Cir. 2013) (noting that *O'Brien* does not bar all evidence that "the legislature acted with a viewpoint discriminatory motive" and offering the case 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 aim this Court found illegitimate in *Tornillo* itself: "ensur[ing] that a wide variety of views reach the public," 418 U.S. at 247–48.

Just as in *Tornillo*, as lofty and altruistic 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 their own biases and agenda—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. Texas maintained—and the Fifth Circuit presumably credited—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 this Court's decision in *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 judgment as to which voices they think worth presenting to the public, and the State never carried the heightened burden it therefore bears. The only requirement arguably limited to the disclosure of verifiable facts, the biannual transparency report, cannot survive even *Zauderer* because the State has never advanced 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. '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 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). 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 solely 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.[7] 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 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*, 707 F. App'x 588 (9th Cir. 2017) (finding platform community standards unenforceable in a breach-of-contract action).

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

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[7] *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).

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" in a way that no calorie count or drug label does. *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*,[8] and the State can preserve them only if its "asserted governmental interest is substantial," if its imposition "directly advances the governmental interest 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 never articulated *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."

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[8] *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).

Edenfield v. Fane, 507 U.S. 761, 768 (1993).[9] Neither is there a "history and tradition" of compelling 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 this Court noted in *Herbert*, standalone editorial transparency mandates—as opposed to inquiries into editorial discretion required by the enforcement of generally applicable laws—are unheard of. *Herbert*, 441 U.S. at 174.

The biannual transparency reports, to the extent they can be reviewed under the *Zauderer* standard, suffer from a similar defect: The State 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"). Texas was silent on the question of what users are supposed to do with a tally of how much content of any particular kind a covered platform removes. Nor did 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.

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[9] 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 commentators 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.

On each front, the State's silence should have raised 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 would 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, then, none of them should have survived any degree of constitutional scrutiny. The Fifth Circuit's decision to let them move forward regardless threatens the autonomy of editorial deliberations and provides no obvious stopping point to the State's inquiries.

III. The stay order blesses the State's effort to single out a small set of publishers for unique burdens, a clear alarm bell for illicit retaliation.

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 should have been 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 is squarely at stake in this case, 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 coercive threat to press freedom that the rule of *Minneapolis Star* prohibits.

HB 20's definition of a "social media platform" draws troubling lines twice: It 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 moderation—when, say, a newspaper manages reader comments—covered platforms are disfavored. While that structure benefits the traditional press for now, this 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" that underpins 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, this Court has concluded that differential treatment of members of the same medium, even in the context of ordinary economic regulation, 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. But the only one the State advanced was market concentration—or, more accurately, since Texas made no effort to establish true market power, the fact that the covered platforms are large. But this Court rejected the argument that even actual market power could justify regulation of editorial decisionmaking in *Tornillo*. Just as Texas characterizes the covered platforms as "gatekeepers of a digital 'modern public square,'" with "enormous influence over the

distribution of news," Appellant Br., *supra*, at 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 alone cannot save a statute that cannot otherwise survive 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, this Court concluded that a "special characteristic" within the meaning of *Minneapolis Star* justified differential treatment of a particular medium—cable—and could support 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 residents of Miami were to the *Herald*.

What Texas hopes here is to use the language of concentration to counter what it perceives to be the platforms' editorial viewpoint. But 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 way. *McConnell v. FEC*, 540 U.S. 93, 283–84 (2003) (Thomas, J., dissenting). This Court closed the door to that reasoning in *Tornillo*. The Fifth Circuit erred in reopening it.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to vacate the Fifth Circuit's stay of the preliminary injunction.

Respectfully submitted,

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