

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

**Chelsey Nelson Photography LLC,
and Chelsey Nelson,**

Plaintiffs,

v.

**Louisville/Jefferson County Metro
Government; Louisville Metro
Human Relations Commission-
Enforcement; Louisville Metro
Human Relations Commission-
Advocacy; Verná Goatley, in her
official capacity as Executive Director of
the Louisville Metro Human Relations
Commission-Enforcement; and Marie
Dever, Kevin Delahanty, Charles
Lanier, Sr., Leslie Faust, William
Sutter, Ibrahim Syed, and Leonard
Thomas, in their official capacities as
members of the Louisville Metro Human
Relations Commission-Enforcement,**

Defendants.

Case No. 3:19-cv-00851-BJB-CHL

**Plaintiffs' Response to Brief of
Amici Curiae American Civil
Liberties Union of Kentucky and
American Civil Liberties Union
Supporting Defendants**

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Introduction

Louisville’s law violates the First Amendment by preventing Plaintiffs Chelsey Nelson and her studio from photographing, editing, and blogging consistent with her faith and artistic discretion. *Amici* disagree.

But *Amici* largely agree with Chelsey about the way Louisville’s law applies to her studio. They agree Chelsey’s policy and practice of only photographing, blogging about, and participating in opposite-sex weddings violates Louisville’s law. Doc. 108–1, PageID.4759 (this “*is* discrimination”). They agree the law bans Chelsey’s desired statement. *Id.* at 4753–54. They agree Louisville’s “same services” rule requires Chelsey to create photographs and blogs celebrating same-sex weddings because she does so for opposite-sex weddings. *Id.* at 4751. And they agree that Louisville does not force businesses (except Chelsey) to create items they wouldn’t create for anyone under Louisville’s “prior-goods” exception. *Id.* at 4745.¹

Even so, *Amici* see no problem here. They argue that the law somehow regulates Chelsey’s conduct yet is justified because Chelsey’s photographs and blogs are so expressive they are “inherently not fungible.” *Id.* at 4746–48, 4759. They also claim that Louisville’s same-service rule compels Chelsey’s photographs and blogs but not her participation in religious events. *Id.* at 4751, 4755. And they selectively apply Louisville’s prior-goods exception—exempting some speakers (like cake designers and print shops) from printing messages they wouldn’t create for anyone, but not exempting Chelsey. *Id.* at 4745.

In *Amici*’s world, some speech wins, but Chelsey’s speech always loses. That selectivity is “wholly foreign to the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). The First Amendment offers a better approach with a workable standard. All speakers—no matter their views—may decline to create and promote messages

¹ *Amici* do not dispute—and these agreements highlight—the credible threat Louisville’s law poses to Chelsey, her standing, and the ripeness of her claims. Chelsey reserves the right to supplement the factual record.

that violate their conscience. Meanwhile, antidiscrimination laws may prohibit discriminatory conduct that have nothing to do with speech (renting rooms, selling tuxedos, etc.). Doc. 47, PageID.1218n.118, 1226–27nn.165–68 (making this point). This Court should follow the First Amendment’s approach again.

Argument

Louisville’s law violates Chelsey’s First Amendment freedoms because it (I) compels her to speak messages she disagrees with; (II–III) compels and restricts her speech based on content and viewpoint; (IV) is not neutral or generally applicable; (V) forces her to participate in religious events; and (VI) and fails strict scrutiny.

I. The Accommodations Provision compels Chelsey’s speech.

Louisville’s law (A) unconstitutionally compels Chelsey’s speech, (B) even though Chelsey declines to speak based on the message requested, not the status of the requestor, and (C) *Hurley* proves this and controls.

A. The Accommodations Provision compels Chelsey’s speech, despite *Amici*’s attempt to re-label her speech as conduct.

The Accommodations Provision compels Chelsey to speak and infringes on her artistic discretion by forcing her to create photographs and blogs promoting messages that violate her religious beliefs. *E.g.*, Doc. 92–1, PageID.2813–17.

Amici claim the law just regulates “the sale of services to the public”—i.e., Chelsey’s conduct—because it doesn’t dictate how she “frame[s]” or “edit[s]” her photographs, “which moments to capture, or what to include on” her blog. Doc. 108–1, PageID.4747. Courts reject this argument. Doc. 104, PageID.4565 (collecting cases); *infra* n.2. And for good reason. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the law was silent “[o]n its face” about the parade’s content, float colors, and acceptable banners, but the law still applied “in a peculiar way” to the parade organizer’s speech. 515 U.S. 572, 557, 578 (1995).

Amici add further that the “relevant inquiry is not whether *application* of a law” causes speakers “to create products reflecting content to which they object” but whether “the *law itself* draws distinctions based on content.” Doc. 108–1, PageID.4749–50. That misses Chelsey’s facial versus as-applied argument. Doc. 104, PageID.4565. And it misses the law. *See, e.g., 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) (law did not “regulate[] ... conduct” when applied to “force” designer “to create websites”); *Telescope Media Grp. v. Lucero (TMG)*, 936 F.3d 740, 753 (8th Cir. 2019) (similar); *Brush & Nib Studio, LC v. City of Phoenix (B&N)*, 448 P.3d 890, 913–14 (2019) (similar).

Amici cast *TMG* and *B&N* as “sharply divided” and criticize them and this Court for focusing on the “nature of the services sold.” Doc. 108–1, PageID.4750, 4752n.5. But that’s the proper standard. Courts first analyze the regulated activity to evaluate free-speech claims. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 583 (2000) (*Hurley* found law violated discretion “to choose the content of” message “[a]fter noting that parades are expressive endeavors”); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 63–64 (2006) (“expressive nature of a parade was central” to *Hurley*).²

In this crowd, *Elane Photography, LLC v. Willock* stands alone. 309 P.3d 53 (N.M. 2013). *Elane* focused on how the law typically regulated the studio’s “business

² *See also Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021) (focusing on “expressive conduct” of making charitable selections); *303 Creative LLC*, 6 F.4th at 1176 (focusing on “inherently expressive” website); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060–61 (9th Cir. 2010) (focusing on “tattoo *itself*”); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 442 (S.D.N.Y. 2014) (focusing on “expressive character of ... search results”); *Claybrooks v. Am. Broad. Companies, Inc.*, 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012) (focusing on “show’s creative content” as “the end product”); *New York Cnty. Bd. of Ancient Ord. of Hibernians v. Dinkins*, 814 F. Supp. 358, 366 (S.D.N.Y. 1993) (The “first question” should be “whether the Parade and its message constitutes speech.”); Doc. 104, PageID.4565 (citing Sixth Circuit newspaper cases).

operation.” *Id.* at 68. In doing so, *Elane* missed how the “expressive” nature of wedding photography “inevitably express the messages inherent in the event” and then overlooked how the law compelled speech by forcing a photographer to photograph same-sex *and* opposite-sex weddings. *Id.* at 65–66 (cleaned up).

Correctly focusing on the regulated work here—Chelsey’s photographs and blogs—separates this case from those *Amici* cite regulating conduct. *See* Doc. 104, PageID.4567–68 (distinguishing cases cited by *Amici*). *Hishon v. King & Spalding*, 467 U.S. 69 (1984), provides a foil. That antidiscrimination law could apply to a law firm’s employment decision because the decision wasn’t expressive. And the firm never showed that its “expression” rights “would be inhibited.” *Id.* at 78. This Court found Louisville’s law compels Chelsey “to express herself in a manner contrary to her conscience.” Doc. 47, PageID.1219. That’s different. Laws can still regulate expressive businesses’ conduct—tattoo parlors must follow health codes and labor laws—but they cannot regulate the business’s expression.

Amici are wrong to suggest that this principle is not “susceptible to clear or uniform application.” Doc. 108–1, PageID. 4752n.5. Courts already apply it. *Supra* n.2. This Court did when it distinguished restaurants and hotels from photographs and blogs. Doc. 47, PageID.1227. So this principle is workable and applies here.

B. *Amici* confuse Chelsey’s message-based objections.

Chelsey objects to expressing and celebrating certain messages, not to serving certain people. Doc. 92–1, PageID.2816 (making this point); Doc. 92–2, PageID.2881–82, 2890–91 (giving examples). But Chelsey will not create some messages for anyone, no matter who asks. Doc. 92–1, PageID.2816; Doc. 92–2, PageID.2874–78 (giving examples).

The Supreme Court approved this same message/status distinction in *Hurley*. Doc. 92–1, PageID.2817 (explaining this). *Hurley* also explained that public

accommodation laws “could ensure equal access” generally for all persons (i.e., status) as long as that access does “not trespass on the organization’s message itself” (i.e., message). 515 U.S. at 580. The Supreme Court has reaffirmed this. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54 (2000); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1736 (2018) (Gorsuch, J., concurring) (cake designer properly objected to “the kind of cake, not the kind of customer”). See also *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) (newspaper could decline religious advertisement because “it was the message itself that [the newspaper] rejected, not its proponents”).

Amici even approve this distinction. Selectively.³ For example, to *Amici*, a baker could decline to create a custom cake with “homophobic text” if she “would not write that text for any customer.” Doc. 108–1, PageID.4745. *Amici* say that a print company need not “produce signs” with text that it wouldn’t make “for any customer.” *Id.* And *Amici* allow a “black baker” to decline “a cake bearing a white-supremacist message” and “an Islamic baker” to refuse a cake for “Westboro Baptist Church” if they “wo[uldn’t] write th[at] message for anyone.” Br. of Resp. at *26 & n.2, *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (No.16-111) (U.S. Oct. 23, 2017), 2017 WL 4838415 (ACLU representing respondents).

That describes Chelsey. She will not create photographs or blogs promoting same-sex marriage *for anyone*, but she will create photographs for LGBT photographers, business owners, wedding-planners, and parents if the photographs themselves do not convey messages against her beliefs. Doc. 92–1, PageID.2816. Chelsey is not offering a limited “menu.” *Contra* Doc. 108–1, PageID.4744. Rather,

³ *Amici* take polar opposite positions for speech they favor—*Hurley* “protects business corporations,” the First Amendment is “manifestly agnostic as to medium,” and “market concentration alone” cannot “justify government interference in” speech. No. 21-12355 PageID.19–20, 23 (excerpted in Exhibit A).

like the hypothetical LGBT, African American, or Muslim cake artists or print shop, Chelsey offers and declines the same messages to everyone.

This explains why Chelsey need not “know *who* the service is for.” *Contra id.* at 4745. Chelsey would accept a photography request from a groom’s gay parent for a wedding between one man and one woman. Doc. 92–2, PageID.2881. So she need not know who makes the request; she just needs to know “the *message* conveyed by the requested services.” *Id.* at 2882 (emphasis added).

Chelsey’s practice contrasts with *Amici*’s hypotheticals of photographers refusing interracial marriages, “women, Muslims, [or] Black people,” or corporate headshots for women. Doc. 108–1, PageID.4742, 4745, 4750–51. These involve per-se refusals to serve entire groups. Chelsey does no such thing. She would photograph or blog about opposite-sex weddings if her clients or the photographed spouses identified as gay, lesbian, or bisexual and she would photograph “staged” opposite-sex weddings whether the models identified as LGBT or not. Doc. 92–2, PageID.2880–81. There’s no difference between Chelsey’s message-based objections and those *Amici* approves. *Amici* just prefers some messages over Chelsey’s. But all speakers have the freedom to choose what they say. That includes Chelsey.

C. *Hurley* controls here, not cases about conduct that *Amici* cites.

As *Hurley* held, governments may not use public-accommodation laws to compel someone to speak messages with which they disagree. 515 U.S. at 572–73. This principle controls here.

Amici say that *Hurley* only applies to “a private expressive association” not “businesses.” Doc. 108–1, PageID.4751. The *Hurley* parade, however, was not “private”—it was “open to ... the patronage of the general public.” *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293, 1297–98 (Mass. 1994). The *Hurley* parade was business-like—parade participants could “pay to

enter the parade” or “make a contribution to the council.” *Id.* at 1296, 1298 n.13. And *Hurley* rejected *Amici*’s non-commercial limitation by extending protections to “business corporations generally,” like “professional publishers.” 515 U.S. at 574.

That’s why so many courts apply *Hurley* to protect business from compelled speech. *See, e.g., Coral Ridge*, 6 F.4th at 1255 (Amazon); *TMG*, 936 F.3d at 752, 758 (film studio); *Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) (newspaper); *B&N*, 448 P.3d at 913–14 (art studio); *Claybrooks*, 898 F. Supp. 2d at 1000 (television studio); *Baidu.com*, 10 F. Supp. 3d at 441–42 (internet company).

To be sure, *Amici* say *Coral Ridge* did not “extend[] *Hurley*’s holding to commercial businesses open to the public.” Doc. 108–1, PageID.4751n.4. But that court assumed Amazon and its charitable foundation were public accommodations under Title II (which “serve[d] the public” by definition, 42 U.S.C. § 2000a(b)). 6 F.4th at 1256 n.12. With that assumption, the court compared “Amazon’s choice of what charities are eligible to receive donations” to the *Hurley* parade organizer’s “choice of parade units.” *Id.* at 1255. So, *Hurley* protected Amazon, a for-profit public accommodation. *Amici* also distinguishes *Claybrooks* because the television studio wasn’t acting as a public accommodation. Doc. 108–1, PageID.4751n.4. But that distinction is irrelevant. *Claybrooks* still applied *Hurley* to protect a for-profit business from an anti-discrimination law that compelled speech.⁴

Courts are also up to the task of “deciding which businesses are sufficiently” expressive to warrant First Amendment protection. *Contra* Doc. 108–1, PageID.4751 (citations omitted). Courts often do that—by, for example, comparing video games to “protected books, plays, and movies.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 790 (2011). The “basic principles” of the First Amendment “do not

⁴ *Amici* also claims that *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995) dealt with “a public speech” “more akin to the expressive parade at issue in *Hurley*” than Chelsey’s photographs and blogs. *Id.* But Chelsey’s photographs and blogs are speech as this Court held. Doc. 47, PageID.1215–17.

vary when a new and different medium for communication appears.” *Id.* (cleaned up). Chelsey’s proposal is not “unworkable.” *Contra* Doc. 108–1, PageID.4751–52. That’s especially true here where the First Amendment “unquestionably” protects “photography.” Doc. 47, PageID.1216–17. Meanwhile, *Amici*’s proposal allowing the government to regulate “work product [that] involves creativity” regardless of the “nature of a business’s product”—would ruin free speech. Doc. 108–1, PageID.4748.

Unable to distinguish *Hurley*, *Amici* claim that *FAIR* controls because Louisville’s law “regulates conduct” and only incidentally compels speech. *Id.* at 4753. But the law *directly* regulates Chelsey’s *speech*—her photographs and blogs—by forcing her to create speech celebrating messages she disagrees with. *Supra* § I.A. *FAIR*’s “equal access” policy applied to schools hosting recruiters—an activity that was “not inherently expressive” because schools were “not speaking when they host[ed].” 547 U.S. at 64–65. For that reason, the policy could require schools to send logistical emails incidental to hosting—i.e., emails incidental to non-expressive conduct. *Id.* at 62. *FAIR* distinguished its policy from unconstitutional laws that change or “interfere[] with a speaker’s desired message.” *Id.* at 63–64. In that way, *FAIR* supports Chelsey. Because Chelsey’s “own message [is] affected” by Louisville’s law, the law is unconstitutional as applied to her. *Id.* at 63.

II. *Amici* confirm that the Accommodations Provision compels Chelsey to speak based on content and viewpoint.

The Accommodations Provision compels Chelsey to speak based on content and viewpoint, Doc. 92–1, PageID.2818–19, a fact *Amici* readily confirm. As *Amici* explain, public accommodations can turn down requests containing political content because “political belief” is not a protected class. Doc. 108–1, PageID.4745. And a baker may decline “to include homophobic text on a cake.” *Id.* Put differently, the law lets bakers refuse to create cakes containing any political content or criticisms of same-sex marriage, but punishes Chelsey for declining to create photographs and

blogs celebrating same-sex marriage. “That is about as content-based as it gets.”
Barr v. Am. Ass’n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020).

Amici further underscore this with their attempt to distinguish Chelsey’s “pet photography” example. Doc. 108–1, PageID.4749. They are correct that pet photographers must offer the same pet photography to any customer. So “dogtographers” must capture the canines of “a Black customer” and “a white customer” alike.⁵ *Id.* Chelsey does just that—she offers the same wedding services with the same content (opposite-sex wedding photographs and blogs) to anyone. *Supra* § I.B. But Louisville’s law does not compel a dogtographer to photograph felines because she depicts dogs. But it does force Chelsey to create photographs and blogs celebrating same-sex weddings because she creates photographs and blogs celebrating opposite-sex weddings. That distinction turns on content.

For that reason, Louisville’s law is content and viewpoint based because it treats Chelsey’s “choice to talk about one topic—opposite-sex marriages—as a trigger” to compel her to celebrate same-sex weddings. *TMG*, 936 F.3d at 753; *303 Creative LLC*, 6 F.4th at 1178 (same). *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (content-based law when “appeal for funds” triggered message on “contributions”); *Planet Aid v. City of St. Johns*, 782 F.3d 318, 328 (6th Cir. 2015) (similar). *Amici* are wrong to deny that the law is not content-based because it requires photographers to photograph both same-sex and opposite-sex weddings. Doc. 108–1, PageID.4749, 4752. That’s the point—photographers may celebrate both same-sex and opposite-sex weddings, but Chelsey cannot only celebrate opposite-sex weddings because that speech triggers a requirement to speak a message to which she objects.

⁵ *See, e.g., Meet Kaylee, Dog Breath Photography*, <https://bit.ly/343QPte> (Kaylee Greer “has dedicated her life to telling the stories of the dogs who have been forgotten and left behind.”) (last visited January 23, 2022).

This squares up the right-of-reply statute in *Miami Herald Publishing Company v. Tornillo*. 418 U.S. 241, 244, 256–58 (1974). Newspapers triggered that statute by printing one candidate’s particular viewpoint, *id.*, just like Chelsey triggers Louisville’s law by celebrating a particular view of marriage. Likewise, Louisville’s law awards access to Chelsey’s speech only to those who have contrary views about marriage, as *Pacific Gas & Electric Company v. Public Utilities Commission of California (PG&E)*, 475 U.S. 1, 12–16 (1986), prohibits.

To avoid this result, *Amici* cite cases about laws governing a private club and buffer zones. Doc. 108–1, PageID.4749 (citing *Roberts* and *Madsen*). But those laws were “content neutral in application” because they did not infringe on the expression of the club or the protestors while the laws in *Tornillo*, *PG&E*, and here unconstitutionally usurp “the editorial independence of the” speakers. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 653–55 (1994).

III. *Amici* do not dispute that the Publication Provision restricts Chelsey’s speech based on content and viewpoint.

The Publication Provision also restricts Chelsey’s speech based on content and viewpoint. Doc. 92–1, PageID.2819–20. Rather than disputing this, *Amici* claim that Louisville can restrict Chelsey’s speech because her “policy” is illegal. Doc. 108–1, PageID.4753. Not so. The First Amendment protects Chelsey’s activities; so she can explain them. *See* Doc. 104, PageID.4560–61 (discussing intertwinement). This doesn’t jeopardize laws banning speech about *illegal* activities as *Amici* suggest. Doc. 108–1, PageID.4753. Those laws still stand. But laws cannot prohibit speech proposing activities involving the exercise of constitutionally protected rights. *Cf. TMG*, 936 F.3d at 757 n.5; *B&N*, 448 P.3d at 926; Doc. 47, PageID.1222.

IV. The exemptions to the Accommodations and Publication Provisions treat Chelsey worse than comparable secular businesses.

Louisville’s law is not neutral or generally applicable because it treats Chelsey worse than comparable secular activities through unwritten and written exemptions. Doc. 92–1, PageID.2820–23; Doc. 104, PageID.4570–73.

Start with the unwritten exemptions. Louisville has a “formal mechanism” for granting exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021), but doesn’t offer one to Chelsey. Doc. 111, PageID.4799 (Louisville claims its “interest in denying an exception to Chelsey”). For example, Louisville uses a “prior-goods exception.” Doc. 92–1, PageID.2821–22 (explaining this). *Amici* admits that under this exception, businesses “may decline service” they wouldn’t provide “for any customer.” Doc. 108–1, PageID.4754. So, to *Amici*, a baker may refuse to create a custom cake with “homophobic text” if she wouldn’t create that cake for anyone. *Id.* at 4745. Meanwhile, Louisville does not extend its prior-goods exception to Chelsey even though she wouldn’t create photographs or blogs celebrating same-sex marriage for anyone. Louisville cannot “refuse to extend that exemption system” to Chelsey without passing strict scrutiny. *Fulton*, 141 S. Ct. 1878 (cleaned up).

Louisville’s written exemptions are just as bad. *Amici* claim that those exemptions are irrelevant because Chelsey “is not a boarding house and does not seek to discriminate on those bases.” Doc. 108–1, PageID.4755. That misstates the law. Courts measure comparability “against the asserted government interest that justifies the regulation at issue.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Louisville’s asserted interest here is in “rooting out *all forms* of discrimination.” Doc. 92–7, PageID.3295 (emphasis added). So its failure to cover age, familial-status, or most sex discrimination is decisive.⁶ Doc. 104, PageID.4570–71.

⁶ *Amici* wrongly claim that sex discrimination in public accommodations is covered by “a separate provision.” That provision only applies to “restaurant[s], hotel[s], motel[s],” and government-funded facilities. Metro Ord. § 92.05(C).

Monclova Christian Academy v. Toledo-Lucas County Health Department applies the comparability analysis correctly—free-exercise claims don’t depend on identifying “similar forms of” religious and secular activity because they evaluate “different statutes or decrees” undermining the government’s interests. 984 F.3d 477, 480–81 (6th Cir. 2020). See *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (law not generally applicable if it “exempts or does not reach a substantial category of conduct” undermining the law’s purpose). *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* applied the same analysis to find that various exemptions harmed and undermined the city’s public health and other interests. 508 U.S. 520, 543–44 (1993). So did *Tandon* when moviegoing and eating out undermined the state’s interest in stopping COVID transmission. 141 S. Ct. at 1297. The cases *Amici* cite either were distinguished by *Monclova*, conflict with *Lukumi* and *Tandon*, were vacated, or all of the above. Doc. 108–1, PageID.4755n.7.

V. The Accommodations Provision’s same-service rule compels Chelsey to participate in and celebrate religious ceremonies she objects to.

Louisville’s same-service rule forces Chelsey to participate in religious ceremonies she objects to. Doc. 92–1, PageID.2823–24; Doc. 104, PageID.4573–74. *Amici* agree that this rule normally forces Chelsey to “offer ... the same services” for same-sex and opposite-sex weddings. Doc. 108–1, PageID.4751. But *Amici* say the rule doesn’t force her to participate in sex-same wedding ceremonies to the same extent she participates in opposite-sex wedding ceremonies. *Id.* at 4756. *Amici* never explains the rule’s asymmetrical application. And it conflicts with the law’s text which prohibits “[a]ny direct or indirect ... differentiation.” Metro Ord. § 92.02 (defining discrimination).

For this reason, Louisville’s law also involves “coercion and mandatory participation in religious acts.” *Contra* Doc. 108–1, PageID.4756n.9. If Chelsey were

forced to photograph same-sex weddings (as Louisville’s law demands), she would “feel coerced” to participate in the ceremony. Doc. 92–2, PageID.2879–80.

And the constitutional rule against compelled participation in religious ceremonies isn’t limited to the clergy, as *Amici* suggest. Doc. 108–1, PageID.4756. *Cf.* Doc. 104, PageID.4574 (citing case involving on-duty police officer). Applying these protections to Chelsey also would not require extending them to “a long list of persons.” Doc. 108–1, PageID.4756. Few businesses participate in the wedding ceremony and even fewer are like Chelsey who “cannot practically leave the ceremony during any part of the ceremony.” Doc. 92–2, PageID.2880.

VI. The Accommodations and Publication Provisions fail strict scrutiny.

Because Louisville’s law violates Chelsey’s First Amendment rights, strict scrutiny applies. *E.g.*, Doc. 92–1, PageID.2825. Louisville’s law fails strict scrutiny because it does not further a compelling interest in a narrowly tailored way.

To avoid this, *Amici* first assert that an actual problem exists because several artists from other states have objected to creating custom artwork celebrating same-sex marriage. Doc. 108–1, PageID.4759. If anything, these few examples show how limited Chelsey’s request is. And they disprove *Amici*’s fear that exempting Chelsey will lead “a wide range of businesses [to] claim a First Amendment exemption.” *Id.* at 4742. What’s more, *Amici* cite no Louisville examples (besides Chelsey) and there’s no access-to-photography-problem for same-sex wedding photography in Louisville. Doc. 92–1, PageID.2826 (citing Louisville’s admissions and examples). *Cf. McManus*, 944 F.3d at 521 (no compelling interest where state could not “identify so much as a single” example of asserted harm occurring).

Speaking of access, *Amici* claim that an “equal access” interest justifies regulating Chelsey’s photographs and blogs because they’re “unique” and “inherently not fungible.” Doc. 108–1, PageID.4758–59. The Supreme Court has

never agreed that one-of-a-kind speech gets *less* First Amendment protection, especially when alternatives exist. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 534 n.1 (1980) (“regulated monopoly” status did not “preclude ... First Amendment rights”); *Hurley*, 515 U.S. at 577–78 (law did not allow access to parade’s “enviable vehicle for the dissemination of GLIB’s views” when “GLIB ... had a fair shot” at its own parade); *Turner*, 512 U.S. at 656 (newspaper’s “local monopoly” did not “obstruct readers’ access to other competing publications”). *Amici* don’t even agree. Ex. A at 13 (claiming “market power” doesn’t void protection).

Amici’s “uniqueness” argument also imperils the First Amendment. If adopted, Louisville could force any custom artist, publisher, or writer to open their medium to views they disfavor. After all, custom creators are inherently unique.

Amici next argue that seeking other photographers injures “personal dignity.” Doc. 108–1, PageID.4757. That claimed interest does not justify interfering with Chelsey’s protected speech. *303 Creative LLC*, 6 F.4th at 1179 (rejecting “dignitary harms”). And this interest cannot apply to Chelsey’s boutique editing services—she never interacts “with the married couple.” Doc. 92–2, PageID.2853.

In any event, the dignity and equal-access interests cannot be compelling because Louisville’s law is underinclusive—it allows many forms of status-based discrimination. Doc. 92–1, PageID.2826–27 (explaining underinclusivity and citing examples). The law is underinclusive even under *Amici*’s “uniqueness” argument. Louisville’s prior-goods exception allows custom cake artists and print shops to deny access to their unique speech. Doc. 108–1, PageID.4745. Louisville admits that Chelsey can deny access to couples marrying in “non religious” ceremonies. Doc. 92–7, PageID.3334. And Chelsey could deny access to anyone if she offered her custom works “exclusively to members of her church congregation.” Doc. 111, PageID.4795.

It is also irrelevant if exemptions occur in “*other provisions.*” Doc. 108–1, PageID.4759. *Lukumi*’s public health and animal mercy laws were underinclusive

when restaurants were “outside” their “scope” and *other* laws allowed euthanizing, poisoning, and testing animals. 508 U.S. at 544–45; *id.* at 547 (strict scrutiny).

As to narrow tailoring, that’s meant to be “a difficult hill to climb.” *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). *Amici* say Louisville can do it because its law “is tailored to *Louisville*’s interest.” Doc. 108–1, PageID.4760. But Louisville admitted that its law isn’t tailored at all—Louisville has no “information” about “what alternative measures ... legislators may have considered.” Doc. 104–4, PageID.4647. That alone defeats strict scrutiny. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015) (buffer zone not narrowly tailored when “legislature did not engage in factfinding and analysis” to justify size of the zone).

Plus, Louisville could tailor its law better. Doc. 92–1, PageID.2827–29 (giving examples). *Amici* argue that Louisville need not follow what “other jurisdictions have done.” Doc. 108–1, PageID.4760. But Louisville must consider those options. *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (department “failed to show” it could not follow inmate beard policy of other jurisdictions); *McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (state did not “consider[] different methods that other jurisdictions have found effective”). When a “plausible, less restrictive alternative” is “offered” governments must “prove”—“beyond anecdote and supposition”—that it “will be ineffective.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816, 822 (2000).

Courts don’t “defer” to city decrees that “nothing less than a total ban would be effective.” *Reno v. ACLU*, 521 U.S. 844, 875 (1997). If they did, Louisville would have no “incentive to draft a narrowly tailored law in the first place” and could redeem any law after-the-fact. *Osborne v. Ohio*, 495 U.S. 103, 121 (1990). Strict scrutiny demands evidence. Louisville has none. So its law fails strict scrutiny.

Conclusion

Amici cannot save Louisville’s law. This Court should grant Chelsey’s motion.

Respectfully submitted this 24th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2022 I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

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EXHIBIT A

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**

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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.

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*,

CONCLUSION

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

Respectfully submitted,³

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