NOS. 23-5300/23-5301

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ZILLOW, INC.,
Intervenor Defendant-Appellee
Plaintiff-Cross Appellant

KENTUCKY PRESS ASSOCIATION, ET AL.
Intervenor Plaintiffs-Appellants
Intervenor-Plaintiffs-Cross Appellees
v.

THOMAS W. MILLER, ET AL.
Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 3:19-cv-00049

FIRST BRIEF OF APPELLANTS KENTUCKY PRESS ASSOCIATION AND AMERICAN CITY BUSINESS JOURNALS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case No.: 23-5300/23-5301

Case Name: Zillow, Inc. v. Thomas Miller, et al.

Name of counsel: Michael P. Abate

Pursuant to 6th Cir. R. 26.1, Kentucky Press Association, Inc., and American City Business Journals, Inc., make the following disclosures:

1. Are said parties a subsidiaries or affiliates of a publicly-owned corporation?

   Response: No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   Response: No.

/s/ Michael P. Abate Dated: July 3, 2023
Michael P. Abate
Counsel for Appellants/Cross-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

This case raises novel questions regarding the constitutionality of the Kentucky Open Records Act. Appellants/Cross-Appellees Kentucky Press Association, Inc., and American City Business Journals, Inc. d/b/a Louisville Business First ("Appellants"), believe oral argument would assist the Court in resolving these issues and request the opportunity to present such argument.

JURISDICTIONAL STATEMENT

The district court had federal-question jurisdiction over this case under 28 U.S.C. § 1331. The court entered judgment in favor of Appellee/Cross-Appellant Zillow, Inc., on March 24, 2022, and entered an order denying Zillow's motion to alter or amend the judgment on March 6, 2023. Appellants timely appealed on March 23, 2023, and Zillow cross-appealed. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Two months after the states ratified the First Amendment, Congress passed the Post Office Act of 1792. That law established one set of postage rates for individual letter writers and another, much cheaper set of rates for newspapers. 1792 Post Office Act, 2 Cong. Ch. 7 §§ 9–10, 22, 1 Stat. 232, 235, 238. The reason Congress chose to single out, and subsidize, newspaper speech at public expense lay in the prevailing view at the founding that widespread access to the news was essential "to preserve the liberty, stimulate the industry and meliorate the morals of an enlightened and free people." Letter from George Washington to Matthew Carey (June 25, 1788), *in* 30 The Writings of George Washington 7–8 (John C. Fitzpatrick ed., 1939).

This case is about a similar law, enacted on similar principles. The Kentucky Open Records Act allows residents of the Commonwealth to obtain copies of government records in exchange for certain statutory fees. Requesters seeking records for a commercial purpose pay a higher fee. But noncommercial requesters, including newspapers, pay a lower fee. This policy of subsidizing press (and public) access to government records is consistent with the principle that, under Kentucky law,

"[n]ews outlets occupy a unique position as the eyes and ears of the public, a status authorizing it to demand access" to government proceedings "as the public's representative." *The Cincinnati Enquirer v. Dixon*, 638 S.W.3d 379, 383 (Ky. 2022) (cleaned up).

But the district court believed the Open Records Act's two-tiered fee structure violates the federal Constitution. Specifically, the court thought it ran afoul of the Free Speech and Equal Protection Clauses by requiring government agencies to charge newspapers less than commercial-purpose requesters for the same public records. That, said the court, amounts to a content-based restriction on speech and is facially unconstitutional.

That conclusion is squarely at odds with Supreme Court precedent. In *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, the Court held that a public records statute granting the press access to certain records, but denying access to commercial requesters, couldn't be facially unconstitutional under the First Amendment because the statute, on its face, governed only *access*, not speech. 528 U.S. 32 (1999). Following *United Reporting*, this Court upheld a Kentucky statute that gives the press—but not commercial requesters—access to motor

vehicle accident records. *See Amelkin v. McClure*, 330 F.3d 822, 826 (6th Cir. 2003). There again, the Court distinguished between burdens on access and burdens on speech. The same analysis applies here.

But even if the Act's fee provision could be read as a regulation of speech, it would still be constitutional. The Supreme Court has long held that governments are free to encourage certain forms of speech through the "provision of subsidies" so long as those subsidies are not "aimed at the suppression of dangerous ideas." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983); *Leathers v. Medlock*, 499 U.S. 439, 450 (1991) (subsidy favoring certain forms of speech "does not implicate the First Amendment unless it discriminates on the basis of ideas"). That impermissible aim is absent here.

American law is replete with examples of viewpoint-neutral subsidies that give the press a front-row seat for reporting on government activities. Such laws have existed since the earliest days of the republic and play an indispensable role in keeping the public informed about the conduct of its government. The inevitable effect of the district court's opinion is to call that entire body of law into question, and to undermine the vital public function it serves. The court

did so based on conclusions that are incompatible with the text and history of the First Amendment and are inconsistent with binding precedent.

Finally, even if there were some sort of constitutional infirmity with the statute, the court erred in severing the newspaper exception. On its own, that provision is not the source of the district court's constitutional concerns, and it serves other valid purposes no party has challenged. Essentially, the court substituted its judgment for the legislature's, and in doing so did violence to both the structure and purpose of the Open Records Act.

This Court should reverse.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the district court err when it concluded that the Open Records Act violates the First and Fourteenth Amendments by not requiring members of the press who request records from government agencies to pay the same production fees as commercial-purpose requestors?

2. Even accepting the court's finding of unconstitutionality, did the district court err when it severed the so-called "newspaper

exception" to the statute's definition of "commercial purpose" instead of the heightened fee requirement for commercial-purpose requesters?

STATEMENT OF THE CASE

I. Statutory Framework

The Open Records Act requires that all nonexempt government records "shall be open for inspection by any resident" of Kentucky. KRS § 61.872(1). The statute defines "resident" to include individuals who live, work, or own property in the Commonwealth. *Id.* § 61.870(10). It also includes domestic companies, foreign companies registered with the Secretary of State, and any "news-gathering organization as defined in" a separate statute concerning records of motor vehicle accidents. *Id.*[1]

The Act makes a basic distinction between those who request public records for a commercial purpose and those who request records for a noncommercial purpose. It defines "Commercial Purpose" as the "direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or

[1] The motor-vehicle-accident statute defines "news-gathering agency" to refer, among other things, to newspapers, magazines, TV and radio stations, and online news services. KRS § 189.635(8)(b).

fee." KRS § 61.870. In other words, the general rule is that anyone who plans to use public records to make money is a commercial-purpose requester. Anyone who plans to use the records in some other way is a noncommercial-purpose requester.

That basic distinction plays out in several ways. For starters, public agencies can condition the release of government records to commercial requesters on the filing of "a certified statement" explaining how the requester plans to use the documents once they're produced. *Id.* § 61.874(4)(b). Noncommercial requestors never have to do that. Also, an agency can require a commercial requester "to enter into a contract with the agency" that permits the requester to use the records only "for the stated commercial purpose" and "for a specified fee." *Id.* Noncommercial requesters don't have to do that, either.

But the most important aspect of the commercial/noncommercial distinction for this case has to do with the fees the Act requires each type of requester to pay. The statute permits agencies to "establish a reasonable fee" to charge commercial-purpose requesters for government records. *Id.* § 61.874(4)(a). That fee can be based on "one or both of the following":

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

Id. § 61.874(4)(c). By contrast, fees charged to noncommercial requesters for the same records cannot exceed "the actual cost of reproduction." *Id.* § 61.874(3). That can include "the costs of the media and any mechanical processing cost incurred by the public agency," but not "the cost of staff required" to comply with the Open Records request. *Id.* So while commercial-purpose fees can include copying costs, staff time, and acquisition costs, noncommercial fees include copying costs only—no acquisition costs, and no staff time. *See also id.* § 133.047(4)(c).

Though it's generally true that any use of a government record for profit counts as a commercial purpose, there are three exceptions to that general rule. One exception is the "[p]ublication or related use of a public record by a newspaper or periodical." *Id.* § 61.870(4)(b)(1). That is, if a newspaper plans to use a government record for newsgathering purposes, the agency producing the record cannot charge for staff time, require a statement disclosing how the record will be used, or compel the newspaper to enter a contract limiting the record's use to a disclosed

purpose. The same is true for any radio or TV station that wants to use a public record in its news reporting. *Id.* § 61.870(4)(b)(2). That's the second exception.[2]

These exceptions recognize that "[t]he fact that a publication carries advertisements or that it is for profit does not render its speech commercial for first amendment purposes." *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1140 (3d Cir. 1982); *see also Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 761 (1976) (speech remains entitled to full constitutional protection "even though it is carried in a form that is 'sold' for profit"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.").

[2] The third for-profit use the statute considers noncommercial is the "[u]se of a public record in preparation for prosecution or defense of litigation" by parties to a lawsuit or their attorneys. *Id.* § 61.870(4)(b)(3).

II. Factual Background

Zillow is a for-profit company best known for its popular website, Zillow.com. Mabe Declaration, R. 61-1, PageID# 3029. The site allows prospective home buyers, renters, and casual looky-loos to browse what it describes as a "living database of more than 110 million U.S. homes." *Id.* Users have access to a wealth of information about each home the site features, including things like square footage, lot size, foundation type, floor plan, school district, property tax history, number of bathrooms, and so on. *Id.* Zillow even offers "Zestimates" for the properties on its site—that is, estimates of what particular homes are worth on the open market based on Zillow's internal data. Zillow Complaint, R. 1, PageID# 7. Not surprisingly, the website is enormously popular, with around 131 million people using it in any given month. Mabe Decl., R. 61-1, PageID# 3030.

Though Zillow allows users to access its site free of charge, it generates revenue in a variety of ways. One way it makes money is by selling ad space to other businesses that offer real estate-related products and services. *Id.* That accounts for a decent share of its revenue—about $898.3 million in 2018. Zillow's Interrogatory

Responses, R. 60-9, PageID# 2991. But most of its income is from non-advertising sources. For example, in 2019 the company earned $923.9 million in lead-generation fees paid by real estate agents who register as "Zillow Premier Agents." *Id.*, PageID# 2992. That same year, Zillow earned $1.4 billion through a line of business called Zillow Offers, the company's proprietary home-buying-and-selling service. *Id.* The company also receives income from its financing service, Zillow Home Loans, which pulled in $100.8 million in 2019 alone. Fundamental to each of these profit streams is the robust suite of information maintained in Zillow's "living database." *See* Joint Stipulations of Fact, R. 60-10, PageID# 2998–99.

To sustain its database, Zillow largely depends on information drawn from county-level property tax records. Zillow Complaint, R. 1, PageID# 7.

To that end, in April 2019, Zillow submitted Open Records requests seeking the entire property tax roll files of over a dozen Kentucky counties. Noto Deposition, R. 54, PageID# 1211. The requests were submitted to each county's Property Valuation Administrator—PVA, for short. PVAs are elected officials responsible for assessing the

tax value of all property in a given county and are under the authority of the state Department of Revenue. KRS § 132.420. The tax roll files Zillow sought from each county are massive and contain detailed information about every property in the county. That includes legal descriptions, use designations, acreage, assessed value, market value, and prior-sales data. Noto Deposition, R. 54, PageID# 1206; Exhibits to PVA Depositions, R. 60-8, PageID# 2970.

In its requests, Zillow explained that it intended to make "some or all of the information" in the tax roll files "available to the users of its website, Zillow.com, free of charge." *Id.*, PageID #2971. Zillow also acknowledged in the requests that it "generates revenue from, among other sources, the sale of advertising space on Zillow.com, where the information contained in these records will appear." *Id.*

All the PVAs determined that Zillow's proposed use was commercial. So while they each agreed to release records responsive to Zillow's request, they conditioned that release on "the payment of the commercial purpose fees." Noto Deposition, R. 54, PageID# 1216. The amount of fees required to produce the tax roll files varied by county in accordance with the size of the file and the amount of staff time

required to produce it. At one end of the spectrum was Franklin County, which quoted Zillow a commercial-purpose fee of $9,924.40. Exhibits to PVA Depositions, R. 60-8, PageID# 2962. At the other end was Shelby County, whose fee was $39,079.95. Zillow Complaint, R. 1, PageID# 15.

III. Procedural Background

Zillow didn't want to pay those fees. So it sued the PVAs of six counties, seeking an order declaring parts of the Open Records Act unconstitutional, both facially and as applied, and an injunction barring the PVAs from charging commercial-purpose fees.

Zillow objected to two aspects of the statute. The first is the basic commercial/noncommercial distinction in the fee statute. The second is the newspaper exception to the definition of "Commercial Purpose." According to Zillow, both provisions suffer from the same legal infirmity: they amount to content- and speaker-based restrictions on speech and so violate the Free Speech Clause and the Equal Protection Clause. Zillow complained that the statute unconstitutionally discriminates against certain kinds of commercial speakers by requiring public agencies to charge more for records based on who the requester is and what kind of speech the requester plans to engage in. The solution,

Zillow argued, is to disregard the purportedly unconstitutional elements of the law and to order the government to charge commercial requesters the same, lower reproduction fees as newspapers and other noncommercial requesters.

After discovery, Zillow and the PVAs filed cross motions for summary judgment. Zillow argued that the statute is unconstitutional and that the court should sever the provision requiring commercial requesters to pay higher fees. The government argued that the Open Records Act is constitutional, but if it's not, then the newspaper exception should be severed, so that newspapers are required to pay the same high fees as other commercial requesters.

The district court ended up siding with Zillow—kind of. The court agreed with Zillow that the newspaper exception was a facially unconstitutional burden on speech. But its solution to that supposed problem was to discard the statutory language exempting newspapers from the commercial-purpose fees, not the language requiring Zillow to pay them. So the end result is that Zillow still has to pay the fees, but now newspapers, whose interests were not represented in the lawsuit, have to pay them too.

Thus, it turned out to be a pyrrhic victory for Zillow. Though Zillow technically won at summary judgment, the only party to benefit from the ruling was the government, which not only gets to keep charging commercial requesters for staff time, but now also gets to charge newspapers as well. Notably, the district court rejected Zillow's argument that the fee statute's basic commercial/noncommercial distinction impermissibly burdens speech. It also explicitly left undisturbed the provisions excluding TV and radio news reporting from the definition of "commercial purpose." Opinion & Order Granting Motion for Summary Judgment (Op.), R. 68, PageID# 3117.

IV. The Newspapers Intervene

Allison Stines is a reporter for Louisville Business First. In February 2022, she sent an Open Records request to the Jefferson County PVA seeking records of all deed transfers, home sales, and new construction in 2021 for homes valued at over $500,000. Intervening Complaint, R. 74, PageID# 3197. LBF requests these records every year to produce annual rankings of the highest residential real estate transactions on new and existing homes in Louisville. These rankings are part of its widely read "book of lists." *Id.* LBF also requests similar

information regularly from PVAs to write a monthly feature on the most expensive real estate transactions in Jefferson County. *Id.* These articles are consistently among the most widely read features on its website. *Id.*

The Jefferson PVA sent an initial response saying it would produce the records as soon as they were compiled. *Id.*, PageID# 3197–98. But after a month went by Allison still hadn't received them. So she sent a follow-up email on March 29, 2022. *Id.*, PageID# 3198. The PVA responded the same day and informed LBF that, for the first time ever, it would be required to pay commercial-purpose fees if it wanted access to public records. *Id.*

That response was based on new guidance issued to all PVAs across the Commonwealth telling them that, going forward, they must charge commercial-user fees to newspapers. *Id.* The new guidance was based on the district court's just-issued order in this case declaring the newspaper exception to be unconstitutional. *Id.*

In view of the increased expense, LBF opted not to purchase the records under the commercial fee schedule. Instead, it was forced to use a manual, more time-intensive process to identify the largest sales in

the Louisville market. *Id.* And because of the nature of the data derived from that alternative process, LBF was unable to create separate lists for existing and new home sales, as it had always done in years past. *Id.*

LBF is far from the only print media outlet to suffer under the new rule. The Kentucky Press Association is the leading trade group for print and online journalists in Kentucky. *Id.*, PageID# 3194. Its members include journalists across the Commonwealth who frequently rely on public records in their reporting. *Id.*, PageID# 3194, 3198. LBF is one of those members. Since its enactment in the 1970s, the Open Records Act has always allowed the KPA's members to access public records without paying commercial-purpose fees. But the district court's decision threatens their ability to do so going forward.

Both LBF and the KPA filed an unopposed motion to intervene for the purpose of appealing the district court's decision on behalf of the only parties it harms—newspapers. Unopposed Motion to Intervene, R. 72. The court granted the motion. Order, R. 73, PageID# 3190. And after the court considered, then denied, Zillow's motion to alter or amend the judgment, R. 88, LBF and the KPA timely appealed, R. 89. Zillow cross appealed. R. 91.

SUMMARY OF THE ARGUMENT

The district court erred both in its constitutional reasoning and in its severability analysis.

Start with the Constitution. Both this Court and the Supreme Court have held that press-favoring provisions concerning access to public records are facially constitutional under both the First Amendment and the Fourteenth Amendment. That's because such statutes only implicate *access* to government documents, not speech. Those precedents foreclose the district court's ruling to the contrary. But even if the newspaper exception could be read as implicating the First Amendment, the Constitution permits governments to subsidize speech in all kinds of ways, so long as those subsidies are not mere proxies for restricting disfavored speech because of its viewpoint. There is no sign that the Open Records Act is a Trojan horse for viewpoint discrimination.

Even assuming the district court got the constitutional questions right, its severability analysis is wrong. Severability doctrine does not empower courts to erase provisions of law from the Kentucky Revised Statutes, as the district court purported to do. Rather, the point of

severability is to determine the combined legal effect of the Constitution and a statute that partially conflicts with it. The court was particularly wrong to sever the newspaper exception where it has admittedly constitutional uses in the statute that no party challenged here. The court should have "leveled up" by severing the commercial-fee provision, thereby preventing the Commonwealth and its agencies from charging *anyone* the higher commercial-requester fees. That would have preserved a larger share of the statute's text and resulted in protecting more speech overall. By leveling down instead, the trial court solved a purported First Amendment problem by creating another: it required newspapers to pay more to obtain the same records available to TV, radio, and other journalists for far less. That makes no sense, even under the court's own reasoning.

This Court should reverse.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Maben v. Thelen*, 887 F.3d 252, 258 (6th Cir. 2018). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

as a matter of law." Fed. R. Civ. P. 56(a). Here, all parties agree that no facts are in dispute and only legal questions remain. *See Royal Geropsychiatric Servs. v. Tompkins*, 159 F.3d 238, 242 (6th Cir. 1998) ("When a district court's disposition of a case on cross-motions for summary judgment involves purely legal issues, our review is plenary.")

ARGUMENT

I. The Open Records Act Is Facially Constitutional.

Laws granting the press privileged access to government records are not facially unconstitutional. The district court's conclusion to the contrary is wrong for three reasons. *First*, such laws regulate access, not speech. And according to the Supreme Court, that distinction is dispositive. *Second*, even if the Open Records Act's regulation of access could be read as a regulation of speech, it is a constitutionally permissible subsidy. *Third*, because the Act does not burden fundamental free-speech rights, its distinction between newspapers and commercial requesters is valid under the Equal Protection Clause.

A. The Act Does Not Regulate Speech.

Usually, when a party wants to mount a facial challenge to the validity of a law, it has to show "that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican*

Party, 552 U.S. 442, 449 (2008). "But the courts rightly lighten this load in the context of free-speech challenges." *Connection Distributing Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009). In such cases, "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). But even then, the Supreme Court has cautioned that facial invalidation is "strong medicine" that should be employed "with hesitation, and then only as a last resort." *United Reporting*, 528 U.S. at 39 (cleaned up). That's especially true when the ostensibly invalid law regulates "conduct—even if expressive," rather than "pure speech." *Id.* at 40 (quoting *New York v. Ferber*, 458 U.S. 747, 770 (1982)).

Here, the district court concluded that the Open Records Act is facially unconstitutional under the Free Speech Clause because the fees it charges newspapers for copies of public records are different from those it charges commercial requesters. That was a mistake. Both the Supreme Court and this Court have held that such laws are facially constitutional because they merely regulate access, not speech.

1. The District Court's Ruling Is Contrary to Binding Precedent.

In *United Reporting*, the Supreme Court considered whether a California law regulating access to arrest records based on the requester's proposed use violated the Free Speech Clause. To obtain a version of the arrest record that included the arrestee's address, the statute required the requester to make two declarations: first, that the record would be used for a scholarly, journalistic, political, governmental, or investigative purpose; and second, that it would not be used "to sell a product or service." 528 U.S. at 35. In other words, journalists and other noncommercial requesters could access the records, but commercial requesters could not.

The plaintiff in *United Reporting* was a company that wanted to sell arrest records to attorneys, insurance companies, substance abuse counselors, and driving schools. *Id.* at 34. But because the company was a commercial requester, it didn't qualify for access under the statute. *Id.* at 36. So it filed a lawsuit claiming that the statute was facially unconstitutional because it discriminated based on the commercial content of the plaintiff's intended speech. *Id.* The district court agreed

and preliminarily enjoined the government from continuing to deny access. *Id.* at 36–37. The Ninth Circuit affirmed. *Id.*

But the Supreme Court rejected the facial challenge. It reasoned that, "at least for purposes of facial invalidation," the statute could not be read as "an abridgement of anyone's right to engage in speech, be it commercial or otherwise." *Id.* at 40. Rather, it held, "what we have before us is nothing more than a governmental denial of access to information in its possession." *Id.* There was no looming "threat of prosecution"; only the possibility that the plaintiff's records request would be denied. *Id.* at 41. As such, the Court held that the commercial requester "was not, under our cases, entitled to prevail on a 'facial attack'" of the statute." *Id.* at 37.

This Court reached a similar conclusion in *Amelkin v. McClure (Amelkin I)*, 205 F.3d 293 (6th Cir. 2000), which involved a facial challenge to the Kentucky statute governing access to motor vehicle accident reports. Under the statute, the only parties with a right to request accident records are "news-gathering organizations" and those with a personal interest in the accident. KRS § 189.635(5)(c), (8). A group of commercial plaintiffs wanted access to accident records for use

in their business. *Amelkin I*, 205 F.3d at 295. So they challenged the law as violating the First and Fourteenth Amendments. *Id.* Initially, this Court sided with the plaintiffs. *Id.* But after *United Reporting*, the Supreme Court GVR'd the case. *McClure v. Amelkin*, 528 U.S. 1059 (1999). On remand, this Court held that the distinction between the press and other requesters in the accident records statute was "not subject to a facial challenge" because the statute "does not restrict expressive speech, but simply regulates access to the state's accident reports." *Amelkin I*, 205 F.3d at 296.[3]

The same is true of the Open Records Act. Like the arrest-records statute in *United Reporting* and the accident-records statute in *Amelkin I*, the Open Records Act treats requesters of public records differently based on their proposed use, giving preference to the press. "No threat of prosecution" hangs over Zillow's head; only the risk that release of the tax roll files will be denied absent payment of a commercial-purpose fee. Thus, the law "is not an abridgment of

[3] The Court's ruling in *Amelkin I* only dealt with the plaintiffs' facial-overbreadth challenge. In a subsequent appeal, the Court upheld the statute against the plaintiffs' as-applied challenge. *See Amelkin v. McClure (Amelkin II)*, 330 F.3d 822, 825 (6th Cir. 2003).

anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands" of the government. *United Reporting*, 528 U.S. at 40.

If anything, the Open Records Act is less restrictive than the statutes in *United Reporting* and the *Amelkin* cases. Those laws prohibited commercial requesters from accessing records *at all*, even as it granted special access to the press for purposes of news reporting. Here, by contrast, the same records are available both to the press and to commercial requesters. The press just pays less for them—a policy Kentucky courts have understood to reflect the press's unique and "invaluable role" as "one of the great interpreters between the government and the people." *Capitol Res. Corp. v. Dep't of State Police*, 2007 WL 2332716, at *6 (Ky. App. Aug. 3, 2007) (Thompson, J.) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)). What's more, in the time since those cases, the Kentucky legislature has amended the Open Records Act to incorporate the very definition of "news-gathering organization" that this Court twice upheld in *Amelkin I* and *Amelkin II*, making plain the similarity between the valid press-

favoring statutes in those cases and the press-favoring aspects of the Open Records law. *See* KRS § 61.870(10)(g).

2. The District Court Misapplied Controlling Case Law.

The district court's opinion, which found the Open Records Act to be facially unconstitutional, gave short shrift to these on-point cases. Take its treatment of the *Amelkin* cases, for instance. The opinion acknowledged that those cases found the commercial vs. news-gathering distinction in the accident-records statute "did not constitute a content-based speech restriction." Op., R. 68, PageID# 3115. Yet still, it asserted without explanation that those cases somehow support its conclusion that the very same distinction in the Open Records Act *is* content-based, and therefore facially invalid. *Id.*, PageID# 3118.

As for *United Reporting*, the district court took note of its central holding—that laws merely regulating access to public records do not implicate free speech and are facially constitutional under the First Amendment. Op., R. 68, PageID# 3113. But then it abruptly concluded—again, without explanation—that the guidance provided in the case's lead opinion was not "definitive." *Id.* The court opted to follow

the concurring opinions instead, which it believed lent support to the conclusion that the Open Records Act is facially invalid. *Id.*

Of course, those concurrences do not trump the Opinion of the Court. Nor, for that matter, do they even support the district court's reasoning. The first concurrence, penned by Justice Scalia, agrees with the Court that a facial challenge to the arrest-records statute was inappropriate because, on its face, the statute was "formally nothing but a restriction upon access to government information." *United Reporting*, 528 U.S. at 41 (Scalia, J., concurring). The only reason for the separate writing was to clarify that an as-applied challenge might come out differently, depending on the facts. *Id.* In the second concurrence, Justice Ginsburg also agreed that the statute "is properly analyzed as a restriction on access to government information, not as a restriction on protected speech." *Id.* at 42 (Ginsburg, J., concurring). She simply added that laws regulating access to government records are different from those that "restrict speakers from conveying information they already possess." *Id.* She also noted that granting the press privileged access is "a kind of subsidy," which is permissible so long as it's not doled out in a viewpoint-discriminatory way. *Id.*

Finally, the district court's attempts to liken this case to *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), are unconvincing. There, the Court reviewed a facial challenge to a Vermont law restricting private entities' use of data that showed individual doctors' prescribing habits. *Id.* at 557. The law prohibited those entities from selling the data, from disclosing it to others for use in marketing, and from using the data themselves to peddle pharmaceuticals to doctors. *Id.* at 557–60. The Court held the law to be facially invalid because it restricted private entities' speech about records already in their possession based on content (no marketing) and viewpoint (no telling doctors that they should prescribe new drugs). *Id.* at 565. *Sorrell* differs from this case in three ways.

First, the Vermont law "prohibit[ed] a speaker from conveying information that the speaker already possesses." *Id.* at 568 (quoting *United Reporting*, 528 U.S. at 40). That's different from the statute in this case, which is "simply a law regulating access to information in the hands of" public agencies. *United Reporting*, 528 U.S. at 40. As *Sorrell* itself noted, "Th[at] difference is significant." 564 U.S. at 568. When a law restrains a person from using or disseminating "information he or

she possesses," the person's "right to speak is implicated." *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). When the law merely regulates "access to government held information," speech is not implicated. *Id.* (citing *United Reporting*, 528 U.S. at 40).

Second, unlike the plaintiffs in *Sorrell*, Zillow faces no "threat of prosecution" over its intended speech. *Id.* at 569 (quoting *United Reporting*, 528 U.S. at 41). The fact that the *Sorrell* plaintiffs could be held civilly liable for speech about information already in private hands is what distinguished that case from *United Reporting* and allowed the plaintiffs to mount a facial challenge. *Id.* Here, by contrast, "no party face[s] a threat of legal punishment," but only a "governmental denial of access to information in [the government's] possession" should it choose not to pay the commercial-purpose fee. *Id.* at 568 (quoting *United Reporting*, 528 U.S. at 40).

Third, unlike the Open Records Act, the statute in *Sorrell* openly targeted, and banned, disfavored speech based on its content and viewpoint. The law included "[f]ormal legislative findings" confirming that "the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs"

because those manufacturers tend to "convey messages that 'are often in conflict with the goals of the state.'" *Id.* at 565 (quoting 2007 Vt. Laws No. 80, § 1(3)). As shown below, the Open Records Act has neither the purpose nor the effect of banning disfavored speech based on its content or viewpoint.

The district court should have followed *United Reporting* and the *Amelkin* cases and held that Zillow cannot bring a facial challenge to the Open Records Act.

B. The Open Records Act Doesn't Burden Speech; It Subsidizes It.

To the extent the newspaper exception impacts speech at all, it acts as a subsidy, not a burden. After all, the Open Records Act doesn't prohibit commercial requesters from engaging in any form of speech. Rather, it simply carves out one potential for-profit use of public records—publication in a newspaper or periodical—from the general definition of "commercial purpose," KRS § 61.870(b), then subsidizes that use by charging lower reproduction fees, *id.* § 61.874(3). And it does so regardless of the viewpoint the publication espouses. That is undoubtedly "a kind of subsidy" to the press. *United Reporting*, 528 U.S. at 43 (Ginsburg, J., concurring) (explaining that granting the press and

others more favorable to public records is a form of speech subsidy); *Davy v. C.I.A.*, 550 F.3d 1155, 1165 (D.C. Cir. 2008) (Tatel, J., concurring) (noting that FOIA's attorney-fee provision was intended to "subsidize" noncommercial requests, including those for journalistic reporting, but not requests by "those who stand to profit . . . and so need no subsidy").

1. Viewpoint-Neutral Speech Subsidies Are Constitutionally Valid.

"Nothing in the Constitution requires the government to subsidize all speech equally." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 646 (7th Cir. 2013). On the contrary, legislatures are "free to subsidize some but not all speech." *Pacific Gas Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 28 (1986).

Take, for instance, the Court's holding in *Regan*. In that case, a nonprofit corporation applied for tax-exempt status under § 501(c)(3) of the Internal Revenue Code. *Regan*, 461 U.S. at 542. The IRS denied the application because the nonprofit was engaged in substantial lobbying activity, requiring it to register under § 501(c)(4) instead. But contributions to § 501(c)(4) corporations are not tax deductible, which makes fundraising tricky. So the nonprofit sued to challenge

§ 501(c)(3)'s prohibition against substantial lobbying activity under the Free Speech and Equal Protection Clauses. The Court rejected the challenge, holding that a legislature's decision to subsidize a fundamental right in some cases, but not others, "does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). In the Court's view, "[c]ongressional selection of particular entities or persons for entitlement to this sort of largesse 'is obviously a matter of policy and discretion. . .'" *Id.* (quoting *United States v. Realty Co.*, 163 U.S. 427, 444 (1896)). And as long as "government provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily . . . broad[].'" *Id.* at 550 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) and *Maher v. Roe*, 432 U.S. 464, 476 (1977)).

Though the government cannot distribute or withhold subsidies based on the would-be speaker's viewpoint, "it is well established that the government can make *content*-based distinctions when it subsidizes speech." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188–89 (2007) (emphasis added). For example, in *Ysursa v. Pocatello Educ.*

Ass'n, the Supreme Court upheld a state law that subsidized general public-sector union activities through payroll deductions, but prohibited contributions to the union's political action committee. 555 U.S. 353 (2009). The Court explained that "the State's decision not to [subsidize the unions' political activities] is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor." *Id.* at 359. That was true even though the statute made an explicit content-based distinction between political speech and non-political speech. Such distinctions are valid, the Court held, as long as they apply equally to all political speech, "regardless of viewpoint or message." *Id.* at 361 n.3; *Davenport*, 551 U.S. at 188–89.

"[S]peaker-based distinctions" are also "permissible when the state subsidizes speech." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 646. As the Supreme Court held in *Leathers*, a government subsidy that "discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas." 499 U.S. at 450; *see also Regan*, 461 U.S. at 550 (upholding subsidy scheme that excluded

lobbying content because the scheme was not "aimed at the suppression of dangerous ideas").[4]

2. The Newspaper Exception Is a Viewpoint-Neutral Subsidy.

The district court determined that the newspaper exception is unconstitutional because, it believed, the provision discriminates against certain viewpoints, content, and speakers. In reality, the law doesn't discriminate on any of those bases. But even if it did, the only one that would matter is the first. *United Reporting*, 528 U.S. at 43 (Ginsburg, J., concurring) (governments are "free to support some speech without supporting other speech" as long as they don't discriminate on the basis of "viewpoint"). Consider each in turn.

Viewpoint. A law discriminates based on viewpoint when it targets "the specific motivating ideology or the opinion or perspective of the speaker." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 168 (2015)

[4] A similar rule, allowing content and speaker restrictions, but not viewpoint restrictions, applies in the area of forum analysis. *See, e.g.*, *Cornelius v. NAACP Legal Defense Ed. Fund*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

(quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). According to the district court, by charging different rates for records to be used in "news reporting versus other purposes," the Open Records Act unconstitutionally discriminates "based on the viewpoint of the requester's speech." Op., R. 68, PageID# 3118. But neither the generic term "news reporting" nor the even more generic term "commercial purpose" is a "specific motivating ideology" or "opinion." *Reed*, 576 U.S. at 168. They're just highly generalized categories of use that sometimes include expression and sometimes do not. *Amelkin II*, 330 F.3d at 837. And to the extent some of those uses are expressive, that expression may include any number of viewpoints, none of which are "singled out" by the Act "for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1799 (2017) (Kennedy, J., concurring).

Content. A regulation of speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed,* 576 U.S. at 163. Rather than singling out particular viewpoints for worse treatment, a content-based restriction tends to

prohibit "public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980).

The district court regarded the newspaper exception as a content-based regulation of speech because it treats newspapers' use of the records for publication more favorably than other for-profit uses. As Zillow argued in its motion for summary judgment, the PVAs decided to charge Zillow commercial-purpose fees based on the nature of "Zillow's content in comparison to each PVA[']s understanding of a traditional newspaper or periodical." Zillow's Motion for Summary Judgment, R. 61, PageID# 3024. In Zillow's view, because the Act requires agencies to examine the nature of the requester's proposed use before deciding which fee applies, its rules governing access to public records are inherently content restrictive.

That argument appears to be based on a maximalist reading of *Reed* that the Supreme Court recently rejected. In *Reed*, the Court determined that a city ordinance about the placement of signs was content based because it imposed more strictures on temporary signs displaying directions to religious meetings than on signs displaying political and other messages. The Court explained that there are two

kinds of impermissible content-based distinctions: "facial distinctions based on a message" that overtly "defin[e] regulated speech by particular subject matter," and "more subtle," distinctions that "defin[e] regulated speech by its function or purpose." *Reed*, 576 U.S. at 163. Some courts, including this one, took that to mean that if a regulator needs to read the content in question to know if a regulation applies, then the regulation is automatically content based, triggering strict scrutiny. *See, e.g.*, *L.D. Mgmt. Co. v. Gray*, 988 F.3d 836 (6th Cir. 2021) (holding off-premises-sign statute to be unconstitutional under *Reed*); *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) (same).

But in an opinion published after the district court's summary-judgment ruling in this case, the Supreme Court explicitly rejected what it called the "read-the-sign rule." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022). In *City of Austin*, the Court upheld an ordinance that distinguished between on-premises and off-premises billboards, imposing different requirements on each, even though regulators had to read the content of a sign to know whether it violated the law. That's because unlike the sign ordinance in *Reed*, the law in *City of Austin* made "no content-discriminatory

classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations." *Id.* at 1472. Because "[t]he message on the sign matters only to the extent that it informs the sign's relative location," the on/off-premises distinction was content neutral. *Id.* at 1473.

The newspaper exception to the Open Records Act's definition of "commercial purpose" is content neutral for the same reason. The statute doesn't impose differing fees based on whether the requester intends to use the records to communicate a religious, political, or ideological message. *Id.* at 1473. Rather, as the district court rightly observed, "Both Zillow and a newspaper could publish the tax roll files in the same manner and expect the same profit, but only Zillow would have to pay the commercial[-]purpose fee." Op., R. 68, PageID# 3118. But that only proves that the Act is content-neutral, because "[t]he statute does not specifically disfavor discrete groups on content-related grounds." *Amelkin II*, 330 F.3d at 829.

When determining if a law restricts speech based on content, "[t]he government's purpose is the controlling consideration." *Ward v.*

Rock Against Racism, 491 U.S. 781, 791 (1989). If the regulation "serves purposes unrelated to the content of expression," then it's "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* The purpose of the Open Records Act's newspaper subsidy is not to stifle some category of speech, but simply to remove one obstacle to the press's ability to fulfill its constitutional mandate of ensuring that "public servants are indeed serving the public." *Kentucky Bd. of Exam. v. Courier-Journal*, 826 S.W.2d 324, 328 (Ky. 1992). And, as noted above, even if the newspaper exception were content-based, governments are allowed to make such distinctions when subsidizing speech. *Davenport*, 551 U.S. at 188–89.

Speaker. The Supreme Court has recognized that some speaker-based distinctions can be constitutionally suspect. For instance, restrictions that prevent whole categories of speakers, like corporations, from engaging in political speech violate the First Amendment. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). So do laws that single out particular speakers for worse treatment because of their disfavored viewpoint. *See Sorrell*, 564 U.S. at 564–65. But speaker-based distinctions are not "automatically" unconstitutional.

Schickel v. Dilger, 925 F.3d 858, 876 (6th Cir. 2019) (upholding speaker-based bans in Kentucky election law against First Amendment challenge). Such classifications only become problematic if they serve as a proxy for some content- or viewpoint-discriminatory purpose. *Citizens United*, 558 U.S. at 340 (speaker-based distinctions "are all too often simply a means to control content").

And yet, the district court believed that any regulation that "contemplates the identity of the speaker" is, by definition, "textbook viewpoint discrimination." Op., R. 68, PageID#3119. That view conflicts with a host of free-speech cases approving differential treatment of speakers based on their identities. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (permitting regulation of government employees' speech made in their employed capacity); *Regan*, 461 U.S. at 548 (rejecting free-speech challenge to differential treatment of veterans' groups and other charitable organizations in the federal tax code); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (upholding statute that allowed denial of visas to noncitizens based on their pro-communist speech); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)

(permitting schools to regulate student speech if it substantially interferes with schoolwork and discipline).

These cases directly undermine the "broad assertion that all speaker-partial laws are presumed invalid." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). On the contrary, "speaker-based" distinctions require strict scrutiny only "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* (citing *Regan*, 461 U.S. at 548).

There are three reasons the newspaper exception is not an invalid speaker-based speech regulation.

First, it's not a speaker-based distinction at all. The law does not lay out one set of fees that applies to all newspapers, regardless of use, and another that applies to all commercial requesters regardless of use. A newspaper is considered a noncommercial requester *only* if it intends to use government records for "publication" of the news. KRS § 61.871(4)(b)(1). But if LBF or another KPA member were to request government records in order to sell them on the open market, or to use them to generate non-news-related profit, the statute would require

payment of commercial-purpose fees. *Id.* § 61.874(5)(a). Similarly, if Zillow wished to start a periodical committed to discursive reporting on real estate news, any tax roll files it requested in connection with that reporting would fall under the lower, noncommercial fee. In other words, either speaker could be charged either fee depending on how they intended to use the records. That's a use-based distinction, not a speaker-based one.

Second, as mentioned earlier, speaker-based distinctions are permissible in the context of subsidized speech. *Wisconsin Educ. Ass'n Council*, 705 F.3d at 646. So even if the subsidies the Open Records Act gives newspapers are speaker based, those subsidies remain valid as long as they aren't a fig leaf for viewpoint discrimination.

Third, for the reasons explained above, there is nothing viewpoint-discriminatory about subsidizing press access to government records. News reporting is not a viewpoint. Neither is engagement in non-journalistic commercial activity.

The newspaper exception is a use-based regulation on access to government records. It is agnostic as to the user's viewpoint, content, and identity. The question it asks of requesters is this: Will the records

be used to report on government conduct and expose it to public scrutiny, or will they be used for the private enrichment of the requester? *Davy*, 550 F.3d at 1165 (Tatel, J., concurring) (analyzing FOIA provisions legitimately subsidizing journalistic reporting but not private, for-profit actors who "need no subsidy"). That is a constitutionally permissible distinction for the government to draw.

3. Subsidies Favoring Press Speech Have Been Widespread Since the Founding.

The district court acknowledged that its decision to invalidate press-friendly aspects of the Open Records Act rests on a "novel theory" in the history of free-speech jurisprudence. Op., R. 68, PageID# 3113. That's an understatement. Laws privileging the press have existed all levels of government since the earliest days of the Founding.

The Framers understood that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both." Letter from James Madison to W. T. Barry (August 4, 1822), *in* 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910); *see also* Washington, *supra*, at 7–8 ("I entertain an high idea of the utility of periodical Publications: insomuch that I could heartily desire, copies of . . . Magazines, as well as common

Gazettes, might spread through every city, town and village in America").

So they took steps to ensure that such information would be readily available in every community scattered across the young Republic. The first thing they did was amend the Constitution to protect not only the freedom of individuals to speak without fear of government interference, but also the particularized freedom of the press to report the news without hindrance. U.S. Const., amend I. Then, just two months after the amendment's ratification, Congress enacted its first large-scale subsidy of the press.

The Post Office Act of 1792, which established postage rates for the whole country, included massive subsidies for newspapers. Postage for a single letter mailed domestically ranged from six cents to 25 cents, depending on the distance it had to travel. 1 Stat. 232, 235. But postage for newspapers was limited to "one cent, for any distance not more than one hundred miles, and one cent and a half for any greater distance." *Id.* at 239. In other words, the government charged a much higher rate

for public dissemination of individual and commercial speech,[5] while newspapers paid next to nothing.

The newspaper subsidy was a much-debated topic in Congress at the time. But what's striking about those debates is that everyone assumed a subsidy for the press was both desirable and constitutionally permitted. Desai, *supra*, at 692–93. The only argument was over the amount and structure of the subsidized rates. Jeffersonian partisans preferred a low, flat rate that would increase access to the news in rural areas, where their support was greatest. *Id.* at 693 (citing Richard B. Kielbowicz, News in the Mail: The Press, the Post Office, and Public Information, 1700-1860s, 33 (1989)). The Federalists preferred a "graduated rate," though one still much lower than postage for a standard letter. *Id.* The parties compromised and agreed to the two-tiered subsidized rate structure described above.

Soon after the law was enacted, a consensus emerged that newspaper postage rates were still too high. *See* George Washington,

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[5] *See* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 Hastings L.J. 671, 694 n.104 (2007) (noting that the majority of letter writers at the time "were merchants sending market information").

President, Fourth Annual Address to the United States Senate and House of Representatives (Nov. 6, 1792) (noting concerns that postage rates charged for newspapers have operated "in experiment, against the transmission of news papers to distant parts of the country" and calling upon Congress to act, given "the importance of facilitating the circulation of political intelligence and information").[6] So in 1794, Congress slashed the postage rates for newspapers even further and expanded the subsidy to apply to magazines as well. *See* 3 Cong. Ch. 23, 1 Stat. 354, 362.

Preferred rates for newspapers and magazines far below the government's actual cost of delivery persisted in various forms throughout the 19th and 20th centuries. *See, e.g.*, Postal Act of 1845, 28 Cong. Ch. 43, 5 Stat. 732 et seq. (newspapers to be delivered by the postal service free of charge); 1951 Act to Readjust Postal Rates, 82 Cong. Ch. 631, 65 Stat. 672 et seq. (setting rates for an "individually addressed copy" of a periodical at "one-eighth of 1 cent"). "These subsidies were by no means trivial in actual impact. In 1794, only 3% of

[6] Available at https://www.presidency.ucsb.edu/documents/fourth-annual-address-congress-0/.

postal revenue came from newspapers, while 70% of the weight was newspapers. By 1832, postal revenue from newspapers had increased to 15%, but the weight had increased to 75%." Desai, *supra*, at 694–95 n.105. It wasn't until 2006 that Congress passed a law requiring the postal service to set rates on all classes of mail, including periodicals, high enough to cover the cost of delivery. *See* 39 U.S.C. § 3622(c)(2).

The point is that Congress started instituting subsidies favoring press *speech*, not just press access to records, within weeks of the First Amendment's ratification. And those subsidies didn't end until around a decade ago. "[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). That strongly suggests subsidies favoring the press are constitutionally valid.

The tradition of laws subsidizing the press's ability to disseminate information is not just deep; it's wide. The federal government, as well as virtually every state, subsidizes press access to government records

and proceedings in recognition of its unique role as the "eyes and ears of the public." *Dixon*, 638 S.W.3d at 383. *See, e.g.*, 5 U.S.C. § 552(a)(4)(ii) (requiring federal agencies to charge "representative[s] of the news media" lower fees for FOIA requests than "commercial use" requesters); Supreme Court of the United States, Requirements for Issuing Supreme Court Press Credentials (2023) (conferring on members of the press "privileges that journalists find helpful," including reserved access to the scarce number of "seats in the Courtroom during Court sessions" and leave to enter "the Court building after normal business hours")[7]; Ala. Code § 32-10-7 (granting press access to accident reports "for the purpose of publishing or broadcasting the news"); *McCall v. Oroville Mercury Co.*, 142 Cal. App. 3d 805 (Cal. Ct. App. 1983) (recognizing press exemption from California statute prohibiting publication of criminal history); 11 Del. C. § 8513 (limiting access to criminal history reports to potential employers and "[m]embers of the news media"); Fla. Stat. Ann. § 119.105 (exempting "news media" from prohibition against commercial use of police reports); Ga. Code Ann. § 50-18-72 (limiting

[7] Available at https://www.supremecourt.gov/publicinfo/press/media_requirements_and_procedures_revised_070717.pdf

release of accident reports to those with a personal interest in the accident and "representative[s] of a news media organization"); 5 ILCS 140/6(c) (exempting the "news media" from "commercial purpose" fees imposed by the Illinois's FOIA statute); IC § 5-14-3-3 (e) (exempting "publication of news" from conditions imposed on "commercial" use of public records); M.G.L. ch. 6 § 10(d)(ix) (exempting the press from "commercial purpose" fees under Massachusetts' public records law); MSA § 197.225 (granting news media, but not commercial requesters, access to records related to Minnesota residents who died in military service); MCA § 61-11-508 (giving "representatives of the news media," but not commercial requesters, access to certain motor vehicle records); N.C.G.S. § 132-10 (excluding publication of government records by the press from definition of "commercial purpose"); ORC § 149.43 ("reporting or gathering news" exempted from "commercial purpose" restrictions under Ohio public records law); 51 O.S. § 24A.5(4) (excluding "publication in a newspaper" from commercial-purpose fees under Oklahoma Open Records Act); ORS § 802.179(14) (requiring government to disclose personal information in Oregon motor vehicle records when requested by "representatives of the news media"); S.C.

Code Ann. § 2-1-130(g) (requiring state legislature to give free copies of legislative manuals to "[r]epresentatives of the news media"); Tex. Gov't Code Ann. § 552.275(j) (exempting press from limits on agency time spent responding to records requests); Utah Code § 63G-2-203(c) (excluding "media representative[s]" from staff-time fees for production of public records); RCW § 42.56.250(1)(h) (granting "news media" special access to public agencies' personnel files); W.S.A. § 938.396(1)(b)(1) ("news media" exception to prohibition against release of law enforcement records concerning juveniles).

The district court's concededly "novel" reading of the First Amendment would effectively upend that entire body of law in one go. The historical pedigree of press-favoring statutory subsidies, and the widespread nature of their current practice, counsels against adoption of such a sweeping new rule. After all, "[a] governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality." *Doe v. Reed*, 561 U.S. 186, 221 (2010) (Scalia, J., concurring). "The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation."

Walz v. Tax Commission of New York, 397 U.S. 664, 681 (1970). Here, the practice in question boasts an unbroken tradition dating back to the Founding and stretching to countless statutes and court rulings the nation over. If that isn't enough to establish its constitutionality under the Free Speech Clause, it's hard to imagine what could.

C. The Act Does Not Violate the Equal Protection Clause.

The district court also concluded that the newspaper exception is invalid under the Equal Protection Clause. According to the court, the exception makes unlawful distinctions between two similarly situated groups—commercial requesters and newspapers.

Rational-basis review applies to Zillow's equal protection challenge. Neither "commercial requester" nor "newspaper" is a suspect or quasi-suspect classification. And because the Open Records Act's subsidy on press access to public records is not a free-speech restriction, no fundamental right is at issue. *See United States v. Madero*, 142 S. Ct. 1539, 1559 (2022).

The newspaper exception easily satisfies the rational-basis test.

Ensuring government's accountability to its citizens is a legitimate state interest. *See Chastain v. Sundquist*, 833 F.2d 311, 324

(D.C. Cir. 1987) ("[P]ublic accountability constitutes an essential feature of good government"); *Continental Ill. Nat. Bank, v. St. of Wash*, 696 F.2d 692, 701 (9th Cir. 1983) ("Achievement of public accountability is certainly a legitimate public purpose").

And the Open Records Act is rationally related to that interest. Kentucky's General Assembly enacted the Open Records Act based on its finding "that free and open examination of public records is in the public interest." KRS § 61.871. Newspapers throughout the Commonwealth have regularly proven the truth of that finding by using the Open Records law to examine critical issues affecting the state and, in many instances, to spur reform efforts.

Perhaps the best example of this was the long-running effort by the Louisville *Courier Journal* to obtain records related to fatality and near-fatality cases of children in contact with the state's child welfare system. *See, e.g.*, *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375 (Ky. App. 2016). As a result of the newspaper's dogged investigation efforts—which included obtaining and reviewing more than 100 lengthy child fatality and near-fatality files—the state enacted crucial legislative reforms, including the creation of a

Child Fatality Review Panel intended to tackle the state's historically high rates of child abuse. *See, e.g.*, KRS § 620.055.

Likewise, student journalists across Kentucky have used the Act to examine how state universities respond to allegations of serious sexual misconduct by faculty and staff at those institutions. *See, e.g.*, *University of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 49 (Ky. 2021). Journalists from Western Kentucky University sent a series of Open Records requests to universities all over the state. And they used the records they received to paint a devastating—and national award-winning—picture of Kentucky educational institutions seeking to cover up these transgressions, while quietly allowing perpetrators to relocate to other institutions, where they often repeated their misconduct. *See* N. Ares, *In the Dark: Records Shed Light on Sexual Misconduct at Kentucky Universities*, WKU College Heights Herald (May 2, 2017).

Journalists also used the Open Records Act to shed light on the many donors to purportedly private foundations attached to public universities in Kentucky, including donations that could be perceived as attempts to influence powerful politicians aligned with those

institutions. *See, e.g.*, *Cape Publications v. Univ. of Louisville*, 260 S.W.3d 818, 820 (Ky. 2008).

The point of the newspaper exception is to make that kind of reporting possible. But under the district court's ruling here, such reporting would become cost-prohibitive; the staff time needed to review and redact large numbers of public records would put them out of reach of virtually every media requester. This would turn the Act's stated purpose on its head by using a legislative attempt to favor the media's right of access—as the eyes and ears of the public—as the grounds for making the public's records off-limits to its watchdogs.

II. The District Court Should Not Have Severed the Newspaper Exception.

Even assuming the Open Records Act *is* unconstitutional, the district court got the severability analysis wrong. The court believed that the Act's newspaper exception was the source of the supposed constitutional infirmity. So, it reasoned, the "appropriate remedy for an unconstitutional provision is to strike the provision." Order, R. 88, PageID# 3256. Accordingly, the court purported to "strik[e] the Newspaper Exception" from the statute books. *Id.*

There are two things wrong with that approach. The first is that it misunderstands the role of severability in constitutional law. And the second is that it locates the Act's supposed free-speech-offending elements in the wrong part of the statute. The result of those missteps is that the district court chose to disregard statutory language that, even by its own lights, doesn't actually violate the Constitution.

A. The District Court Misunderstood the Purpose of Severability.

Contrary to what the district court believed, "severance is not a remedy." *Lindenbaum v. Realgy, LLC*, 13 F.4th 524, 529 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1362 (2022). Courts do not "strike down statutes." *Id.* at 526. They "only 'say what the law is.'" *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

The role of severability analysis, then, is to determine "what the law is" when a statute and the Constitution come into conflict. Said another way, severability is concerned with the "combined legal effect of the Constitution and one or more statutory provisions when there is a conflict between them." William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5 (2023). The Constitution says what the law *is not*, by "automatically displac[ing] any conflicting statutory provision."

Collins v. Yellen, 141 S. Ct. 1761, 1788 (2021); *Marbury*, 5 U.S. at 177 ("[A] legislative act contrary to the constitution is not law"). But it displaces contrary statutes *only* to the extent of the conflict, "leaving the remainder intact." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010)); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 766 (2010). That remainder is the law, and it must be enforced. KRS § 446.090 ("[I]f any part of the statute be held unconstitutional the remaining parts shall remain in force").

Because the district court treated severance like a "remedy" rather than a straightforward question of law, R. 88, PageID# 3256, it ended up disregarding more of the statute than the Constitution, even as the district court reads it, would require.

B. The District Court Mislocated the Act's Supposed Constitutional Problems.

According to the court, the part of the Open Records Act that impermissibly regulates speech is the newspaper exception because that's the part that exempts newspapers from having to pay commercial-purpose fees. But the reality is more nuanced.

On its own, the newspaper exception doesn't regulate anything. It is a definition provision, stating that "[p]ublication or related use of a public record by a newspaper or periodical" is not a "[c]ommercial purpose" as the Act uses that term. KRS § 61.874(4)(b). That exception serves a variety of nonspeech purposes elsewhere in the statute. For instance, it exempts newspapers from having to disclose how they intend to use requested records and from being required to enter contracts with public agencies. *Id.* § 61.874(4)(b). Neither Zillow nor the district court take issue with those applications of the newspaper exception.

Nor did the court find any problem with the separate provision charging lower fees to noncommercial requesters than commercial ones. *See* Op., R. 68, PageID# 3116–17 ("The commercial/noncommercial-purpose distinction is content-neutral"). So on its own, the fee provision, like the bare distinction between newspapers and commercial requesters, does not implicate free-speech concerns.

It's only when those two individually valid provisions come together that the supposed problem arises. What the district court found constitutionally objectionable is that the Act "allows [newspapers]

to access the tax roll files at a lower cost" than commercial requesters. *Id.*, PageID# 3117. But neither the newspaper exception nor the fee provision achieves that result on its own. It takes both provisions, working together.

C. Principles of Severability Require the Court to Disregard the Commercial-Fee Provision, not the Newspaper Exception.

The question, then, is which provision should the Court disregard? If severance is a "remedy," as the district court believed, then courts might be thought to have "remedial discretion" to slice off whatever portions of the law they deem appropriate in order to fix the statute. Brian C. Lea, *Situational Severability*, 103 Va. L. Rev. 735, 756 (2017). But "severance is not a remedy," and treating it as one exchanges the judicial function—determining what the law is—for the "quasi-legislative" function of amending statutes by judicial decree. *Lindenbaum*, 13 F.4th at 529 (citation omitted)).

There are several factors courts consider when deciding between two statutory provisions that violate the Constitution in combination but don't violate it on their own. These include special-purpose canons of construction, general-purpose canons, and legislative intent. All three

weigh in favor of invalidating the commercial-fee provision, not the newspaper exception.

Special-purpose canons. The Supreme Court has applied certain tiebreaker rules in severability cases when it's not clear which provision of a statute should yield. Two such canons apply in this case.

First, "court[s] should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). That's because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Thus, if a court can prevent a statute's unconstitutional effects by disregarding either of two provisions, it should pick the one that preserves as much of the statute as possible. *Ass'n of Am. Railroads v. United States Dep't of Transp.*, 896 F.3d 539, 544 (D.C. Cir. 2018) ("[C]ourts must preserve as much of a statute as is constitutionally possible, because the cardinal principle of statutory construction is to save and not to destroy." (cleaned up)).

Here, that's the commercial-fee provision, not the newspaper exception. The commercial-fee provision appears in KRS § 61.874(4)(c). That subsection is referenced nowhere else in the statute, and no other

provision is dependent upon it. The newspaper exception, by contrast, occurs in the "Definitions" portion of the statute and is implicated every time the terms "commercial purpose" and "noncommercial purpose" appear. *Id.* § 61.870(4)(b)(1). One necessary consequence of severing the newspaper exception is that it also effectively severs provisions sparing the press from having to enter contracts with public agencies or to disclose its reasons for requesting public records. *Id.* § 61.874(4)(b). But neither Zillow nor the district court has argued that those provisions are unconstitutional. And in any case, requiring reporters to disclose their intended use of government records as a precondition of access raises the specter of unconstitutional prior restraints on the freedom of the press. The bottom line is this: severing the newspaper exception effectively jettisons other parts of the statute that are plainly constitutional; severing the commercial-fee provision doesn't. So if either provision needs to be severed, it should be the latter.

The second special-purpose canon that applies is one that says, in cases involving free-speech rights, courts should do severability in a way that results in more speech, not less. For instance, in *Citizens United*, the Court examined an unconstitutional election law that

outright banned corporate political speech but exempted media corporations from the ban. 558 U.S. at 351–52. Rather than sever the media companies' exemption, the Court chose to treat all corporations like media companies. *Id.* at 329 (declining to resolve First Amendment challenge in a manner that itself would result in "chilling political speech, speech that is central to the meaning and purpose of the First Amendment"). That accords with the Court's general practice of "leveling up" in free-speech cases. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (severing portion of tax statute requiring general-interest magazines to pay a tax rather than the exemptions shielding newspapers from the tax); *Carey v. Brown*, 447 U.S. 455 (1980) (affirming opinion striking down entire statutory scheme that unconstitutionally prohibited only some picketing outside residences, thereby allowing all picketing activity, instead of striking down the narrow exception for certain preferred messages); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (same, concerning ordinance targeting picketing outside schools).

Here, the district court did the opposite. Instead of severing the supposed obstacle to commercial requesters' speech—the fee provision—it subjected newspapers to the same obstacle.

What's worse, the court's decision uniquely disfavors newspapers compared to other members of the press. The court expressly declined to sever the TV and radio exceptions to the definition of "commercial purpose." *See* Op., R. 68, PageID# 3117. So now, as a direct result of the district court's ruling, TV reporters can obtain PVA records without paying commercial-purpose fees, but newspaper and magazine reporters can't. Thus, in the name of stopping speaker-based distinctions, the court injected a new speaker-based distinction into the statute that it didn't previously contain.

General-purpose canons. General-purpose canons also provide guidance in the severability context, particularly the constitutional-avoidance canon. Under that doctrine, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). In cases like this one, where two

otherwise valid statutory provisions "produce [an] unconstitutional combination," courts should consider whether one of the two provisions "can be 'interpreted' into constitutional compliance." Baude, *supra*, at 49. If one of the two severance candidates can be so interpreted, and the other cannot, then courts should sever the noncompliant provision. *Id.*

Reading the newspaper exception out of the statute doesn't avoid constitutional problems; it creates them. Because the district court only severed the newspaper exception, not the TV and radio exceptions, government agencies can now charge print journalists at the commercial rate while charging TV and radio journalists at the noncommercial rate. If charging LBF lower rates than Zillow violates the Constitution, then it also violates the Constitution to charge NPR lower rates than LBF.

Severing the newspaper exception also gives agencies the greenlight to require journalists to provide a "certified statement" disclosing how they intend to use the records. KRS § 61.874(4)(b). That is nothing less than a prior restraint on the press's unique rights under the First Amendment. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("Both the history and

language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.").

Severing the fee provision, instead, avoids those problems. Rather than requiring different requesters to pay different sets of fees on the supposed basis of content or speaker identity, all requesters would pay the same rate. Not only that, with the newspaper exception still intact, *all* members of the press, not just TV and radio reporters, would still be free to report on government conduct without having to tip their hand to government agents as a condition of access. If the Court is to sever any part of the statute, it should sever the fee provision.

Legislative Intent. Divining legislative intent can be a sticky business. That is why this Court "usually" prefers to "interpret a statute according to its plain meaning, without inquiry into its purpose." *United States ex rel. Felten v. William Beaumont Hosp.*, 993 F.3d 428, 431 (6th Cir. 2021). But severability of a state statute is "a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). And in Kentucky, courts construe statutes in accordance with the intent of the legislature. *Hardin Cnty. Sch. v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001) (interpreting

the Open Records Act "according to its plain meaning and its legislative intent"); *Lindenbaum*, 13 F.4th at 528 ("[W]hen assessing the severability of state statutes, the court looks to the intent of the state legislature."). In the severability context, courts consider "which statutory provision [the legislature] would have preferred to keep if it knew it could only have one." Baude, *supra*, at 45; KRS § 446.090 (requiring inquiry into "the intent of the General Assembly").

Here, it is apparent that the legislature would prefer to keep the newspaper exception, not the commercial-fee provision. The express policy of the Open Records Act is that "free and open examination of public records is in the public interest." KRS § 61.871. According to the Act's preamble, "access to information concerning the conduct of the peoples' business is a fundamental and necessary right of every citizen in the Commonwealth of Kentucky." *Util. Mgmt. Grp., LLC v. Pike Cnty. Fiscal Ct.*, 531 S.W.3d 3, 7–8 (Ky. 2017) (quoting 1976 Ky. Acts Chapter 273). That policy of openness and transparency is not served by erecting a high paywall between the press, who are the public's eyes and ears, and the government, which the Act calls "the servant of the

people." 1976 Ky. Acts Chapter 273. But that is precisely what the district court did when it severed the newspaper exception.

A recent amendment to the Open Records Act likewise conveys an overarching intent to preserve press access to public records, even as the legislature curtailed access by non-press requesters. Two years ago, the General Assembly narrowed the class of persons who qualify for access under the statute. Before the amendment, any "person" could submit an Open Records Request. 2021 Kentucky Laws Ch. 160 (HB 312). After the amendment, only a "resident of the Commonwealth" can request records. KRS § 61.872. As noted above, the statute defines "resident of the Commonwealth" to include any individual who lives, works, or owns property in Kentucky; domestic businesses and foreign businesses registered with the Secretary of State; and any "news-gathering organization" regardless of its location. *Id.* § 61.870(10). In other words, even as the legislature drastically reduced the pool of potential requesters who qualify under the Act, it kept the pool of potential press requesters the same. And it's a big pool, including all the news-gathering organizations in the world.

Put simply, the Kentucky legislature has exhibited a strong policy favoring both press access and the "free and open examination of public records." KRS § 61.871. Severing the newspaper exception undermines both, while severing the commercial-fee provision undermines neither.

CONCLUSION

"The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean*, 297 U.S. at 250.

The Court should hold that the Open Records Act does not violate the Constitution. But if it does, the commercial-fee provision should be severed, not the newspaper exception.

Respectfully submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with Fed. R. App. P. 32(a)(5) and 32(a)(7)(B) because it was prepared using Century Schoolbook 14-point type and contains 12,692 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2023, I filed a copy of the foregoing brief and served it on all parties by filing it through the Court's CM/ECF System. Counsel for all parties are registered ECF users.

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