

Case Nos. 23-5300/23-5301

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

ZILLOW, INC.

Intervenor-Defendant – Appellee (23-5300)
Plaintiff - Cross-Appellant (23-5301)

KENTUCKY PRESS ASSOCIATION, INC., et al.

Intervenors-Plaintiffs – Appellants (23-5300)
Intervenors-Plaintiffs – Cross-Appellees (23-5301)

vs.

THOMAS B. MILLER, et al.

Intervenors-Defendants – Appellees (23-5300)
Defendants-Cross - Appellees (23-5301)

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

BRIEF OF APPELLEE/CROSS-APPELLANT ZILLOW, INC.

John C. Greiner (0005551)
Darren W. Ford (0086449)
FARUKI PLL
201 East Fifth Street, Suite 1420
Cincinnati, OH 45202
Telephone: (513) 632-0315
Telecopier: (513) 632-0319
Email: jgreiner@ficlaw.com
dford@ficlaw.com
*Attorneys for Appellee/Cross-
Appellant Zillow, Inc.*

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1(a), Appellee/Cross-Appellant Zillow, Inc. states that 100% of its stock is owned by MFTB Holdco, Inc. Zillow Group, Inc., a publicly traded corporation, owns 100% of MFTB Holdco, Inc.'s stock.

Dated: August 2, 2023

/s/ Darren W. Ford
John C. Greiner (0005551)
Darren W. Ford (0086449)
FARUKI PLL
201 East Fifth Street, Suite 1420
Cincinnati, OH 45202
Telephone: (513) 632-0315
Telecopier: (513) 632-0319
Email: jgreiner@ficlaw.com
dford@ficlaw.com
Attorneys for Appellee/Cross-Appellant Zillow, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 6 Cir. R. 34(a), Appellee/Cross-Appellant Zillow, Inc. respectfully requests that the Court hear oral argument in this case. This appeal involves the constitutionality of a Kentucky statute, requiring an examination of complex issues of federal constitutional law. Zillow believes that oral argument will assist the Court in resolving those issues.

Dated: August 2, 2023

/s/ Darren W. Ford
Darren W. Ford

*Attorneys for Appellee/Cross-
Appellant Zillow, Inc.*

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

The district court had original jurisdiction of this action under 28 U.S.C. § 1331, as it involves claims brought by Appellee/Cross-Appellant Zillow, Inc. ("Zillow") pursuant to 42 U.S.C. § 1983. The district court entered final judgment on March 24, 2022 (Opinion & Order, RE 68), and Zillow timely filed a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) on April 21, 2022 (RE 71). The district court denied Zillow's Rule 59(e) motion on March 6, 2023 (RE 88). Appellants/Cross-Appellees Kentucky Press Association and American City Business Journals, Inc. timely filed a notice of appeal on March 23, 2023 (RE 89), and Zillow filed its notice of cross-appeal on March 29, 2023 (RE 91). Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues to be raised in this cross-appeal are as follows:

1. Whether the district court erred as a matter of law in holding that the commercial/noncommercial purpose distinction drawn by KRS §§ 61.870(4), 61.874(2)-(5), and 133.047(4) ("Commercial Purpose Fee Statutes") did not implicate or violate Zillow's rights under the Free Speech Clause of the First Amendment.
2. Whether the district court erred as a matter of law in holding that the commercial/noncommercial purpose distinction drawn by the Commercial Purpose Fee Statutes did not implicate or violate Zillow's rights under the Equal Protection Clause of the Fourteenth Amendment.
3. Whether the district court erred as a matter of law in severing the newspaper exception of KRS § 61.870(4)(b)(1) from the definition of "commercial purpose" after having found that aspect of the definition unconstitutional, instead of enjoining enforcement of the Commercial Purpose Fee Statutes as a whole.
4. Whether the Court may affirm the district court's decision in this appeal on the ground that the Commercial Purpose Fee Statutes are unconstitutional under the First and Fourteenth Amendments as applied to Zillow.

STATEMENT OF THE CASE

This is an action to challenge the constitutionality of KRS §§ 61.870(4), 61.874(2)-(5), and 133.047(4) (hereinafter "Commercial Purpose Fee Statutes") under the First and Fourteenth Amendments to the United States Constitution.

I. BACKGROUND

A. The Parties

Appellee/Cross-Appellant Zillow, Inc. ("Zillow") is a for-profit corporation, with its principal place of business in Seattle, Washington. (RE 61-1., Declaration of Jonathan James Mabe ("Mabe Dec."), Page ID#: 3029, ¶ 3.) Defendant-Appellee Thomas B. Miller ("Commissioner Miller")¹ is the Commissioner of the Kentucky Department of Revenue ("DOR"). He is charged with directing, instructing, and supervising each Kentucky property valuation administrator ("PVA"). This includes the PVAs' enforcement of the Kentucky Open Records Act ("ORA"), KRS § 61.870, *et seq.*, and specifically, the Commercial Purpose Fee Statutes. (RE 48, Rule 30(b)(6) Dep. of Tom Crawford ("Crawford Dep."), March 11, 2021, Page ID#: 265, 15:5-22, 21:19-22:6.)

¹ Pursuant to Fed. R. Civ. P. 25(d), Commissioner Miller was automatically substituted for the original defendant, Daniel Bork, when Mr. Miller became Commissioner of the Kentucky Department of Revenue in December 2019. *See* <https://revenue.ky.gov/Pages/Executive-Team.aspx> (last visited July 26, 2023).

Defendants-Appellees Brad McDowell, Kellie Lang, Jason Scriber, Blake Robertson, Jill M. Mahoney, and Jada Brady² are the PVAs for Shelby, Franklin, Henry, Owen, Trimble, and Clark Counties (hereinafter "Appellee-PVAs"). (RE 1, Compl., Page ID#: 5-6, ¶¶ 7-12; RE 31, Answer, Page ID#: 200, ¶ 2.)

B. Zillow's Business

Zillow was founded in 2006. Central to Zillow's corporate mission is "empowering consumers with unparalleled data, inspiration and knowledge around homes." (RE 61-1, Mabe Dec., Page ID#: 3029, ¶ 4.) Zillow operates the well-known website www.zillow.com ("Zillow.com"). (*Id.* at ¶¶ 4-5.) Through Zillow.com, anyone with an internet connection can access—free of charge—a living database of more than 110 million U.S. homes ("Database") – including homes for sale, homes for rent and homes not currently on the market.³ (*Id.*) In 2021, Zillow.com had approximately 131,000,000 unique users who used the website and mobile apps each month on average. (*Id.* at Page ID#: 3030, ¶ 7.)

² Pursuant to Fed. R. Civ. P. 25(d), Jada Brady was automatically substituted for the original defendant, Jason Neely, when Ms. Brady became Property Valuation Administrator for Clark County, Kentucky.

³ Home information available on Zillow.com includes, for example, the type of home (e.g., single family), the year the home was built, the type of heating and air-conditioning, number of parking spots, the lot size, the number of bedrooms, the number of bathrooms, the square footage of the home, available appliances, flooring types, total number of rooms, home style (e.g., colonial), roof type, exterior material, foundation type, price history, property tax history, school district information, and more. (RE 61-1, Mabe Dec., Page ID#: 3029, ¶ 6.)

Zillow.com does not charge users for accessing home listings on its website, but instead derives revenue from selling lead generation and advertising space on its webpages to other businesses, usually those offering real estate-related services and products. (*Id.* at Page ID#: 3030, ¶ 8.) To ensure that its Database stays up to date, Zillow regularly makes public records requests to state officials. (*Id.* at ¶ 10.) Zillow requests the tax roll, tax assessment, and tax appraisal files from PVAs (hereinafter "Tax Roll File") (RE 54, Dep. of Susan Noto ("Noto Dep."), May 5, 2021, Page ID#: 1199 at 24:11-22, Ex. 3), which is also referred to as the tax roll "database." (*See, e.g.*, RE 56, Dep. of Jason Scriber ("Scriber Dep."), March 5, 2021, Page ID#: 1461 at 28:14-24.) The Tax Roll File contains public information regarding residential homes that Zillow uses in its Database. (RE 54, Noto Dep., Page ID#: 1199 at 26:11-27:2, Ex. 3.)

C. The Commercial Purpose Fee Statutes

The ORA, along with KRS § 133.047 (hereinafter "Tax Roll Statute"), create two classes of public records requests: "noncommercial purpose" and "commercial purpose." For copies of public records sought for "noncommercial purposes," a public agency may only charge "the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." KRS § 61.874(3). But the ORA allows a public agency to charge commercial purpose requestors

additional fees for the very same records. KRS § 61.874(4)(a). This fee may be based on either or both of the following: (1) the "[c]ost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records"; and (2) the "[c]ost to the public agency of the creation, purchase, or other acquisition of the public records." KRS § 61.874(4)(c). The term "commercial purpose" is defined to exclude "publication or related use of a public record by a newspaper or periodical" ("Newspaper Exception"). KRS § 61.870(4)(b)(1). The definition of "commercial purpose" also excludes "[u]se of a public record by a radio or television station in its news or other informational programs" and "[u]se of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties[.]" KRS § 61.870(4)(b)(2)-(3).

With respect to public records of a PVA, KRS § 133.047(4)(b) provides that "the Department of Revenue shall develop and provide to each property valuation administrator a reasonable fee schedule to be used in compensating for the cost of personnel time expended in providing information and assistance to persons seeking information to be used for commercial or business purposes." The term "reasonable fee" has the same meaning as used in KRS § 61.874(4)(c), and "personnel time" is defined as "the cost to the agency to create any mechanical processing, data collection, or data creation; the staff

required to process, produce, collect, or create data or information; or the cost to the agency for the creation, purchase, or other acquisition of information." KRS § 133.047(4)(b)(1)-(2). Subsection (c) of KRS § 133.047(4) provides that "[a]ny person seeking information on his own property, or any other person, including the press, seeking information directly related to property tax assessment, appeals, equalization, requests for refunds, or similar matters shall not be subject to fees for personnel time."

In accordance with KRS 133.047(4)(b), the DOR publishes a fee schedule applicable to requests for PVA records ("DOR Fee Schedule") made for a "commercial or business purpose." (RE 1, Compl., Page ID#: 11, ¶ 23, Ex. A; RE 31, Defs'. Answer, Page ID#: 200, ¶ 2.) In addition to the fee schedule, the DOR has created two form documents for use by PVA's in connection with commercial purpose requests. The first is entitled "REQUEST FOR REPRODUCTION OF PVA PUBLIC RECORDS AND CONTRACT FOR COMMERCIAL USERS (KRS 61.870, 61,874 [sic] AND 133.047)" (hereinafter "DOR Request Form and Contract"). (*Id.* at Page ID#: 12, ¶ 24, Ex. B; RE 31, Defs'. Answer, Page ID#: 200, ¶ 2.) The second document is entitled "Contract and Fee Schedule for Commercial Users of PVA Office Records For Use When Non-Geographic Information System (GIS) Records are Requested" (hereinafter "DOR Non-GIS Contract"). (*Id.* at ¶ 25; Defs'. Answer, Page ID#: 200, ¶ 2.)

The statute does not mention any cost Defendant PVAs incur when responding to a "commercial purpose" requestor that they would not incur for providing the same records to a "noncommercial requestor," and the Defendant PVAs confirmed that they would employ the same process regardless of the purpose for which someone made a request. (RE 55, Dep. of Blake Robertson ("Robertson Dep."), March 3, 2021, Page ID#: 1278 at 46:1-8; RE 51, Dep. of Jill Mahoney ("Mahoney Dep."), March 5, 2021, Page ID#: 591 at 58:4-11; RE 56 Scriber Dep., Page ID#: 1461 at 70:24-71:8; RE 53, Dep. of Jason Neely ("Neely Dep."), March 9, 2021, Page ID#: 973 at 54:17-22, 55:11-25; 58:1-24; RE 52, Dep. of Brad McDowell ("McDowell Dep."), March 9, 2021, Page ID#: 791 at 82:1-21; RE 49, Dep. of Rebecca Johnson ("Johnson Dep."), March 3, 2021, Page ID#: 387 at 16:11-17:4; RE 50, Dep. of Kellie Lang ("Lang Dep."), March 3, 2021, Page ID#: 405 at 61:18-66:3.) Thus, the increased fees the ORA allows a PVA to charge commercial purpose requestors are not based on any increased cost to the PVA to respond to "commercial purpose" requests. (RE 48, Crawford Dep., Page ID#: 265 at 43:3-9; RE 50, Lang Dep., Page ID#: 405 at 61:1-5; RE 49, Johnson Dep., Page ID#: 387 at 18:4-7; RE 51, Mahoney Dep., Page ID#: 591 at 47:6-16, 55:10-13, 56:16-17; RE 52, McDowell Dep., Page ID#: 791 at 82:1-21; RE 56, Scriber Dep., Page ID#: 1461 at 70:2-71:8; RE 53, Neely Dep., Page ID#: 973 at 57:16-22; RE 55, Robertson Dep., Page ID#: 1278 at 42:10-16; 44:17-23.)

To enforce the ORA, the act permits a public agency to request a "certified statement" from a requestor regarding whether it is seeking records for a commercial purpose. KRS § 61.874(5)(a). KRS § 61.8745 imposes penalties for violations of the commercial purpose requestor requirements *only*, assessing fees "[t]hree (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated..." as well as costs, attorney's fees, and "[a]ny other penalty established by law."

D. Zillow's ORA Requests

Among the duties of a PVA is the duty to prepare the Tax Roll File for their respective county per KRS § 132.530. The PVAs do not collect any information contained in the Tax Roll File for the exclusive purpose of satisfying public records requests made for a commercial purpose or otherwise. (*See, e.g.*, RE 55, Robertson Dep., Page ID#: 1278 at 54:20-56:5.)

On April 25, 2019, Zillow made a request for the Tax Roll File to each of the Appellee-PVAs. (RE 29, Motion to Dismiss Order, Page ID#: 187.) In each of the requests, Zillow disclosed that it was:

. . . an online real estate and rental marketplace that provides free access to online property listings, among other services. Zillow intends to make some or all of the information contained in the real property records sought by this request available to users of its

website, Zillow.com, free of charge. Zillow generates revenue from, among other sources, the sale of advertising space on Zillow.com, where the information contained in these records will appear. More information about Zillow can be found at <https://www.zillow.com/corp/About.htm>.

If your office deems Zillow's intended use for these records to constitute a "commercial purpose" within the meaning of KRS § 61.870(4)(a), please provide the reasons for classifying Zillow's use as such. If your office requires additional information regarding Zillow's intended use of these records, please let me know what additional information you will require to make this assessment. If no additional information is required, please let me know what, if any, requirements Zillow must fulfill to obtain these records in the electronic format requested.

(*Id.*; see also RE 54, Noto Dep., Page ID#: 1154, Exs. 3, 5, 7, 9, 11, 13.)

Each of the Appellee-PVAs classified Zillow's request as one made for a "commercial purpose" within the meaning of the ORA, and assessed fees for "commercial purpose requests" pursuant to KRS § 61.874(3), and in accordance with the fee schedule (the "Fee Schedule") provided by the DOR. (RE 1, Compl., Page ID#: 14-22, ¶¶ 34-71; RE 31, Answer, Page ID#: 200, ¶ 2; RE 29, RE 29, Motion to Dismiss Order, at PAGE ID#: 187-8; RE 57, March 11, 2021 Deposition of Michael Tackett, Ex. 11.) For each county's Tax Roll Files, the PVAs quoted the following: Appellee McDowell requested payment of \$40,746.65; Appellee Lang requested \$9,924.40; Appellee Robertson requested \$18,901.05; Appellee Mahoney requested \$23,494.20; and Appellee Neely requested \$31,055.50. (RE 1, Compl., Page ID#: 14-22, ¶¶ 37, 42, 53, 61, 66; RE 31, Answer, Page ID#: 200,

202, ¶¶ 2, 11.) Appellee Scriber would not provide Zillow with a price quote until it completed the DOR Request Form and Contract⁴ but confirmed that his office considered Zillow's request to be for a "commercial purpose." (RE 1, Compl., Page ID#: 17, ¶ 48; RE 31; Answer, Page ID#: 200, ¶ 2.)

In making the determination that Zillow's request was as a "commercial purpose" request, the Appellee-PVAs relied primarily on two factors: (1) that Zillow is a for-profit company; and (2) that Zillow did not own the parcels about which it requested information. (*See, e.g.*, RE 52, McDowell Dep., Page ID#: 791 at 22:11-19, 27:6-19; RE 48, Crawford Dep., Page ID#: 265 at 35:9-17; RE 49, Johnson Dep., Page ID#: 387 at 14:18-21; RE 50, Lang Dep., Page ID#: 405 at 25:14-21, 40:14-17, 42:3-16; RE 51, Mahoney Dep., Page ID#: 591 at 28:22-29:18; RE 55, Robertson Dep., Page ID#: 1278 at 29:11-23; RE 56, Scriber Dep., Page ID#: 1461 at 23:3-15; RE 53, Neely Dep., Page ID#: 973 at 29:22-30:3.) The Defendant PVAs universally reported prior knowledge of Zillow's business, which shaped their classification of Zillow's request. (*See, e.g.*, RE 52, McDowell Dep., Page ID#: 791 at 25:14-26:4; RE 48, Crawford Dep., Page ID#: 265 at 35:21-25, 36:17-22; RE 50, Lang Dep., Page ID#: 405 at 43:7-22, 100:6-11; RE 51, Mahoney Dep., Page ID#: 591 at 35:15-17, 40:23-41:1; RE 55, Robertson

⁴ The DOR Contract is marked as Exhibit 20 to Appellee Scriber's deposition.

Dep., Page ID#: 1278 at 23:18-24:3; RE 56, RE 56, Scriber Dep., Page ID#: 1461 at 50:9-51:3; RE 53, Neely Dep., Page ID#: 973 at 33:8-17.) None of the Appellee-PVAs reported that they based their commercial purpose determination on Zillow's statement that it would be offering this information to the public for free. (*See e.g.*, RE 53, Neely Dep. Page ID#: 973 at 29:22-30:3, 33:16-17 ("I did not take that into consideration for them to be noncommercial.").)

When asked about the distinctions between Zillow and a newspaper, the PVAs gave answers relating to content, citing a newspaper's broader scope, its public accountability functions, and other rationales comparing Zillow's manner of publishing the information to that of a traditional newspaper. (*See, e.g.*, RE 52, McDowell Dep., Page ID#: 791 at 97:2-10; RE48, Crawford Dep., Page ID#: 265 at 35:9-17; RE 51, Mahoney Dep., Page ID#: 591 at 41:11-42:2; RE 55, Robertson Dep., Page ID#: 1278 at 33:3-15.) For instance, Jason Neely (former PVA for Clark County) testified that Zillow "give[s] no insight behind anything...[,] thus distinguishing it from a traditional newspaper. (RE 53, Neely Dep., Page ID#: 973 at 34:13-14.) Elaborating, he explained:

- A. So you go on their website, and you're looking at a house. You get no other insight behind it. There is no publication. There's no story. There's no –

(*Id.* at 34:17-19.)

Each Appellee PVA testified to the mechanical and time requirements necessary to satisfy Zillow's request. For instance, Appellee Robertson testified that to satisfy Zillow's request, his office would need to download the Tax Roll File onto an Excel spreadsheet, transfer the file to a thumb drive, and mail the thumb drive to Zillow. (*See* RE 55, Robertson Dep., Page ID#: 1278 at 43:5-45:17.) He further testified that satisfying requests similar to Zillow's takes between 10 and 20 minutes to complete. (*Id.* at 45:9-17.) He also testified that the same process of copying and providing information in the Tax Roll File would be employed for both "commercial purpose" and "noncommercial purpose" requests. (*Id.* at 45:21-46:4.) The other Appellee-PVAs described similar processes for supplying the Tax Roll File to public records requestors. (RE 49, Johnson Dep., Page ID#: 387 at 15:8-18:18; RE 50, Lang Dep., Page ID#: 405 at 63:7-64:23; RE 51, Mahoney Dep., Page ID#: 591 at 46:13-49:23; 54:13-58:11; RE 52, McDowell Dep., Page ID#: 791 at 78:18-83:22; RE 53, Neely Dep., Page ID#: 973 at 55:11-59:14; RE 56, Scriber Dep., Page ID#: 1461 at 62:5-68:8.)

II. PROCEDURAL HISTORY

Zillow filed its Complaint against Appellees on July 9, 2019, alleging that the Commercial Purpose Fee Statutes violated its constitutional rights under the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, both facially, and as applied. (RE 1, Compl.) On

August 26, 2019, Appellees filed a motion to dismiss the Complaint (RE 22, Motion to Dismiss), which the district court denied on May 22, 2020 (RE 29, Mem. Op. & Order). In its order, the district court held that Zillow had standing to bring its claims, and that Zillow had plausibly stated both facial and as-applied claims that the statutes violated its First and Fourteenth Amendment rights.

After development of the record through discovery, the parties filed cross-motions for summary judgment. (RE 60, Defs.' Motion for Summ. J.; RE 61, Pl.'s Motion for Summ. J.) The district court granted in part, and denied in part, Zillow's motion on March 24, 2022. (RE 68, Op. & Order.) The court held that KRS § 61.874(4)(b)(1)—the provision of the Commercial Purpose Fee Statutes excluding "publication or related use of a public record by a newspaper or periodical" from the definition of "commercial purpose" ("Newspaper Exception")—was facially unconstitutional under both the First and Fourteenth Amendments. (RE 68, Op. & Order, Page ID#: 3117-3125.) In doing so, the district court concluded that the Newspaper Exception drew content- and speaker-based distinctions that subjected the statute to strict scrutiny under the First Amendment, which it failed to satisfy. (*Id.* at Page ID#: 3117-3119.) But the district court also held that the commercial/noncommercial distinction drawn by the Commercial Purpose Fee Statutes was content-neutral, and did not implicate First Amendment scrutiny. (*Id.* at Page ID#: 3117.)

For Zillow's Equal Protection claim, the district court reached the same conclusion based on its holding that the Newspaper Exception was a content-based regulation that burdened Zillow's First Amendment rights. (*Id.* at Page ID#: 3124-3125.) The district court did not address Zillow's as-applied challenge having concluded that the Newspaper Exception was facially unconstitutional. (*Id.* at Page ID#: 3112.)

To remedy the constitutional infirmity, the district court severed only the Newspaper Exception from the definition of "commercial purpose." (*Id.* at Page ID#: 3126.) In doing so, the district court found that there was "no suggestion or evidence that the legislature would only desire the commercial purpose fee statutes to exist if newspapers could be exempted." (*Id.*) It thus issued a permanent injunction "to ensure the newspaper exception will not be enforced to Zillow's detriment in the future." (*Id.* at Page ID#: 3129.)

Zillow moved to alter or amend the court's judgment on April 21, 2022, asserting that the district court erred by severing only the Newspaper Exception from the definition of "commercial purpose," and requested that it alter its judgment to sever the Commercial Purpose Fee Statutes from the ORA in their entirety, or find them unconstitutional as applied, and enjoin Appellees from

enforcing them against Zillow. The district court denied Zillow's motion on March 6, 2023. (RE 88, Mem. Op. & Order.)⁵

Zillow timely cross-appealed from the district court's judgment, following the appeal by intervenors the Kentucky Press Association and American City Business Journals, Inc. (hereinafter "Intervenors").

SUMMARY OF THE ARGUMENT

The Kentucky General Assembly elected to make information in a PVA's Tax Roll File available to the public, and to permit the public to obtain copies of that information. For requestors who seek to use the Tax Roll File for a "commercial purpose," the Commercial Purpose Fee Statutes allow PVAs to charge fees well in excess of what they may charge "noncommercial purpose" requestors.

To determine whether a requestor's request for the Tax Roll File is for a "commercial purpose," a PVA must know whether the requestor is, among other types of users, a newspaper or periodical. As the district court correctly determined, this distinction, based on the identity of the speaker, implicates the First Amendment. *See Los Angeles Police Dep't v. United Reporting & Publ'g*

⁵ Zillow also moved for an order awarding it attorney's fees and costs, which the district court deferred ruling on until the conclusion of this appeal. (RE 70 & RE 90.)

Corp. ("*United Reporting*"), 528 U.S. 32 (1999) (Ginsburg, J., concurring); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011). The district court erred, however, in finding the commercial/noncommercial purpose distinction drawn by the statutes did not implicate the First Amendment. It did so by divorcing the Newspaper Exception from the definition of "commercial purpose." Because "commercial purpose" is defined, in part, based on the identity of the requestor and the manner in which they intend to use the information, the commercial/noncommercial classification itself implicates the First and Fourteenth Amendments, and is subject to heightened scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 707 (6th Cir. 2020).

As a consequence of its narrow focus on the Newspaper Exception as separate from the commercial/noncommercial distinction drawn by the Commercial Purpose Fee Statutes, the district court further erred in severing only the Newspaper Exception from the ORA. In doing so, the district court changed the definition of "commercial purpose," thereby improperly rewriting the Commercial Purpose Fee Statutes. *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991). Further, the district court's severance of the Newspaper Exception merely makes it harder for newspapers and periodicals to obtain copies of public information, in contravention of the stated legislative policy that the ORA be

construed to promote the "free and open examination of public records." KRS § 61.871. *See also Eubanks*, 937 F.2d at 1129 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).

Although the district court did not reach this issue, this Court may also affirm the district court's finding of unconstitutionality and grant the relief requested by Zillow on its as-applied challenge to the statutes. The record evidence in this case demonstrates that Zillow publishes information in the Tax Roll File in a truthful, non-misleading way, in the same manner as a traditional newspaper or periodical. In concluding that Zillow was not a newspaper or periodical, and thus a "commercial purpose" requestor, the PVAs relied on the content of Zillow's speech, for instance, the fact that Zillow does not publish "stories" about the information. The record shows that the Appellee-PVAs' application of the Commercial Purpose Fee Statutes to Zillow implicates and burden Zillow's Free Speech rights under the First Amendment, and as such, is subject to at least heightened scrutiny. As the justification for treating Zillow differently than a newspaper or periodical cannot survive even intermediate scrutiny, the Commercial Purpose Fee Statutes are also unconstitutional as applied to Zillow.

ARGUMENT

I. Standard of Review

This Court reviews the district court's grant of summary judgment de novo. *Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 356 (6th Cir. 2023). Summary judgment is appropriate where "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). In reviewing a motion, the Court must view "all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party." *Kutchinski*, 69 F.4th at 356.

II. The district court erred as a matter of law in holding that the commercial/noncommercial purpose distinction drawn by the Commercial Purpose Fee Statutes did not implicate First Amendment scrutiny.

A. The commercial/noncommercial purpose distinction implicates First Amendment scrutiny.

As a threshold matter, the district court correctly held that while governments can choose not to provide information, "once information is publicly accessible, there can be no content-based restrictions on access to it." (RE 69, Op. & Order, Page ID#: 3115 (citing *United Reporting*, 528 U.S. at 43 (1999) (Ginsburg, J., concurring)).) In *United Reporting*, United Reporting Publishing Co. ("URP") brought a facial challenge to a California statute that limited release of arrestees' addresses to requestors who sought the information "for a scholarly,

journalistic, political, or governmental purpose," or "for investigation purposes" where the requestor was a "licensed private investigator." *United Reporting*, 528 U.S. at 35. The California statute also expressly required requestors to attest that they did not intend to use the information "to sell a product or service." *Id.* In determining that the statute was not subject to a "facial challenge," the majority reasoned that, on its face, the statute required requestors to qualify to obtain access, and that the plaintiff, URP, had not attempted to do so.

In his concurring opinion, the late Justice Scalia explained:

[I]t is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information. That question . . . is not addressed in the Court's opinion.

528 U.S. at 42 (Scalia, J. concurring) (emphasis in original).

Similarly, in his dissent, Justice Stevens agreed with the majority that "California could decide not to give out arrestee information at all without violating the First Amendment," but wrote that "[a] different, and more difficult, question is presented when the State makes information generally available, but denies access to a small disfavored class." *Id.* at 45-46 (Stevens, J. dissenting). Justice Stevens characterized California's denial of access to the information as

"based on the fact that [URP] plan[ned] to publish the information to others who, in turn, intend[ed] to use it for a commercial speech purpose that the State finds objectionable." *Id.* at 46. This, Justice Stevens explained, constituted viewpoint discrimination, which required California to "justify[] its conduct." *Id.* Justices Ginsburg, O'Connor, Souter and Breyer all agreed. *Id.* at 43 (Ginsburg, J. concurring) ("once a State decides to make [government information] available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed").

The district court's holding is further bolstered by the Supreme Court's decision in *Sorrell v. IMS Health, Inc.*, involving a challenge to Vermont's Prescription Confidentiality Law. The *Sorrell* Court observed that eight justices in the *United Reporting* case "recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Sorrell*, 564 U.S. at 569. In recognizing this transfer of information as speech—thereby implicating the First Amendment—the Supreme Court explained:

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.

Id. at 570 (citations omitted).

The Commercial Purpose Fee Statutes impose substantial financial burdens on the ability of a "commercial purpose" requestor to obtain copies of government-held information, in this case, the Tax Roll File held by a Kentucky PVA. A Tax Roll File is indisputably a public record under the ORA, and copies are available for "noncommercial purposes" to requestors who pay the "actual cost of reproduction." *See* KRS § 61.874(3). But for a requestor who intends to use the information contained in a Tax Roll File for a "commercial purpose," the Commercial Purpose Fee Statutes permit PVAs to condition receipt of copies of that information on the requestor's payment of fees well in excess of those a PVA may charge a noncommercial purpose requestor. This despite the fact that a PVA does not incur any additional costs to copy and provide the information in its Tax Roll File based on the "purpose" of the request, or the identity of the requestor.

The district court held that "merely distinguishing use for a commercial versus non-commercial purpose is not a content-based distinction." (RE 68, Op. & Order, Page ID#: 3116.) It further reasoned that "[w]hether the requester expects a profit from their use of government records does not implicate the content or viewpoint of that use." (*Id.*)

The district court's conclusion that the commercial/noncommercial purpose distinction drawn by the Commercial Purpose Fee Statutes is content-

neutral, but that the "Newspaper Exception" is content-based, erroneously divorces the term "commercial purpose" from its statutory definition.

The term "commercial purpose," as defined by KRS § 61.870(4), excludes certain uses by certain speakers, including "[p]ublication or related use of a public record by a newspaper or periodical." In defining "commercial purpose" in this manner, the statute converts uses that constitute "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 fee" into uses for a "noncommercial purpose." Thus, the definitions of "commercial purpose" and "noncommercial purpose" necessarily turn on the identity of the requestor, e.g., whether the requestor publishes information as a newspaper or periodical, or in some other manner.

The district court correctly determined that the Newspaper Exception was a content- and speaker-based distinction, but it erred when it treated that exception as separate from the commercial/noncommercial purpose distinction drawn by the Commercial Purpose Fee Statutes. The Newspaper Exception is part of the statutory definition of "commercial purpose," and necessarily defines "noncommercial purpose." It thus follows that it is the commercial/noncommercial

purpose distinction that implicates First Amendment scrutiny, not merely the Newspaper Exception, which partially defines those terms.

B. Intervenor's arguments in defense of the Commercial Purpose Fee Statutes' constitutionality are meritless.

In their First Brief, Intervenor advance three arguments in support of the constitutionality of the Commercial Purpose Fee Statutes, none of which has merit.

1. The cases relied upon by Intervenor to challenge the district court's holding do not control this case.

First, Intervenor argue that the Commercial Purpose Fee Statutes merely regulate access to government information, and thus, do not implicate the First Amendment. For this argument, Intervenor rely on *United Publishing* and this Court's decisions in *Amelkin v. McClure*. The holdings in these decisions do not, however, govern this case.

United Publishing, discussed above, addressed only the propriety of a facial challenge where the plaintiff had not actually attempted to qualify to obtain the records. *See Sorrell*, 564 U.S. at 568 ("*United Publishing* is thus a case about the availability of facial challenges. The Court did not rule on the merits of any First Amendment claim."). Here, Zillow made a request for records, and was deemed to be a commercial purpose requestor in each instance, which is the basis

for its First Amendment claim. The concurring and dissenting opinions in *United Publishing*, which agree that government discrimination in the provision of public records based on speaker identity implicate the First Amendment, support the district court's holding.

The *Amelkin* holding likewise has no application here. Those cases involved a statute that denied the plaintiffs access to accident reports filed with the Department of State Police. *Amelkin v. McClure*, 330 F.3d 822, 824 (6th Cir. 2003). The plaintiffs argued that the statute "restrict[ed] the uses to which the plaintiffs may put accident reports if and when they obtain the reports." *Id.* at 827. But the statute only prohibited "*news-gathering organizations* that have obtained accident reports from using them for commercial purposes." *Id.* (emphasis in original). And because the plaintiffs were not entitled to obtain the records under the statute in the first place, and the statute did not prohibit them from disseminating accident report information if they somehow obtained the information, the Sixth Circuit held that a facial challenge to the statute was inappropriate. *Id.*

Unlike the situation presented in *Amelkin*, the public, and specifically Zillow, is entitled to obtain a copy of the Tax Roll File, if it pays fees well in excess of those charged to noncommercial purpose requestors. The additional

charges are permitted by the statute despite the fact that PVAs do not incur any greater cost in providing the records to "commercial purpose" requestors than noncommercial purpose requestors. This is therefore not a case where the government has decided to completely restrict access to government records. Instead, it has merely made it harder for one class of speakers—commercial purpose requestors—to obtain the records and disseminate them. Zillow's facial challenge asserts its own rights, in addition to the rights of other requestors classified as "commercial purpose" requestors, who are entitled to obtain copies of the Tax Roll File, but on much more onerous terms than noncommercial purpose requestors.

2. The Commercial Purpose Fee Statutes are not a "subsidy."

Intervenors' second argument is that the Newspaper Exception is merely a government subsidy for a favored class of requestors, i.e., newspapers and periodicals.

In making this argument, Intervenors ignore the language of the statute, and the record in this case. Specifically, they contend that the ORA "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)." (Doc. 24, First Br. of Appellants, at Page: 42)

To start, the definition of "commercial purpose" carves out more than "one potential for-profit use," as it also excludes use by television and radio stations, and use by lawyers in litigation. Intervenors do not, understandably, address these other exceptions, and indeed, the district court did not either, claiming that Zillow had "waived" any challenge to these exceptions. But these provisions are part of the definition of "commercial purpose," and further reinforce that the statute draws distinctions based on both the identity of a requestor, and the manner in which a requestor intends to publish it.

Second, the only "cost of reproduction" a PVA may pass through to a "commercial purpose" requestor that it may not pass through to a noncommercial purpose requestor is the "cost of staff required." KRS 61.874(3). The Commercial Purpose Fee Statutes allow a PVA to charge a "commercial purpose" requestor well in excess of the "actual cost of reproduction," including the "[c]ost to the public agency of the creation, purchase, or other acquisition of the public records." KRS 61.874(4)(c)(2). By choosing to exempt certain for-profit publishers from the definition of "commercial purpose," the legislature did not provide a mere subsidy, but removed a substantial financial obstacle divorced from the actual cost to the

agency of reproducing the records. As such, this situation falls directly within Justice Ginsburg's concurring opinion in *United Publishing*, in which she wrote that "the provision of address information is a kind of subsidy to people who wish to speak to or about arrestees, and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed." 528 U.S. at 43 (Ginsburg, J., concurring).

But even if the Newspaper Exception could be considered a subsidy for a favored class of requestors, Intervenors offer no explanation for why that subsidy should not also apply to Zillow, which publishes information in the Tax Roll File on Zillow.com for the public to access, free of charge. Indeed, the fact that this government "subsidy" only applies to publishers who may self-describe as traditional "newspapers" or "periodicals" highlights the content-based nature of the definition of "commercial purpose," and why the Commercial Purpose Fee Statutes implicate the First Amendment. Indeed, the only justification for such a subsidy—to promote widespread dissemination of information in government records to the public—would apply with no less force to Zillow, given that Zillow.com is available to the public free of charge. It is therefore only Zillow's identity (non-newspaper, periodical, television station, etc.) that distinguishes it from publishers who receive this "subsidy."

3. The definition of "commercial purpose" is a speaker-based distinction implicating First Amendment scrutiny.

Intervenors also argue that the Commercial Purpose Fee Statutes do not implicate First Amendment scrutiny, despite excepting certain publishers (i.e., speakers) from the definition of "commercial purpose" based on their identity. In making this argument, Intervenors rely on the Supreme Court's recent decision in *City of Austin v. Reagan Nat'l Advertising of Austin, LLC* ("*Reagan National*"), 142 S. Ct. 1464, 1475 (2022).

Reagan National does not support Intervenors argument, as that case did not involve a regulation that drew distinctions based on the identity of the speaker. Instead, that case involved a city ordinance that required regulators to review the content of a billboard to determine whether it was an "on-premises" or "off-premises" sign. *Reagan National*, 142 S. Ct. 1464 at 1469.

Unlike in *Regan National*, the Commercial Purpose Fee Statutes require public agencies, and specifically PVAs, to consider the identity of the requestor, and exempts certain types of publishers from financial requirements that make it much more difficult for for-profit companies to obtain copies of that information. Laws that "target speech based on its communicative content" or the identity of a speaker are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state

interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). If a law "distinguish[es] among different speakers, allowing speech by some but not others," it is content-based. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). *See also Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020). Additionally, a law that distinguishes between commercial and noncommercial speakers is likewise impermissible content-based discrimination. *See Int'l Outdoor*, 974 F.3d at 707, *reh'g denied* (holding that ordinance was content-based because it regulated both commercial and noncommercial speech but treated them differently). *Reagan National* does not change that fundamental principle of First Amendment law.

As in *Reed* and *Int'l Outdoor*, the Commercial Purpose Fee Statutes treat commercial and noncommercial speakers differently, and favor certain speakers (newspapers, periodicals, television stations, etc.) over others. *See Sorrell*, 564 U.S. at 564-66. *See also Amelkin IV*, 330 F.3d at 828 ("The statute would also be constitutionally suspect if it had singled out a small group for unfavorable treatment based either on the content or the viewpoint of the group's speech.").

Intervenors' attempts to paint the speaker-based distinction drawn by the Commercial Purpose Fee Statutes as innocuous is contrary to well-established Supreme Court case law. The Supreme Court's decision in *Reagan National*—

which did not deal with speaker-based distinctions in a regulation—does not compel a different analysis from the one employed by the district court in this case.

III. The district court erred as a matter of law in holding that the commercial/noncommercial purpose distinction drawn by the Commercial Purpose Fee Statutes did not burden a fundamental right for purposes of the Equal Protection Clause.

Because the district court concluded that the commercial/noncommercial purpose distinction did not implicate the First Amendment, it likewise concluded that the Commercial Purpose Fee Statutes did not burden a fundamental right that would subject the statute to strict scrutiny under the Fourteenth Amendment. It did, however, conclude that the Newspaper Exception burdened Zillow's First Amendment rights, and was thus subject to strict scrutiny.

As explained above, the district court erred in divorcing the Newspaper Exception from the terms it defines, i.e., commercial/noncommercial purpose. Had it not done so, it would have concluded that this distinction—not merely the Newspaper Exception portion of the Commercial Purpose Fee Statutes—burdened Zillow's First Amendment rights. And as such, it would have held that this distinction was subject to strict scrutiny under the Fourteenth Amendment.

Intervenors argue that the Commercial Purpose Fee Statutes do not burden Zillow's First Amendment rights, and consequently, that they are not subject to intermediate or strict scrutiny. They further argue that the statute satisfies rational basis review.

For the reasons explained above, Intervenors' argument that the Commercial Purpose Fee Statutes do not burden Zillow's First Amendment rights are without merit, and as such, their argument as to Zillow's Equal Protection Clause claim are likewise meritless.

But even if the Commercial Purpose Fee Statutes were subject only to rational basis review for the requestor-classifications they create, the statutes do not satisfy even that deferential review. This is so because arbitrary tax or assessment statutes fail to promote a legitimate state purpose.

For instance, the Supreme Court struck down an Alabama tax under rational basis review that favored its own resident businesses over out-of-state businesses, holding that "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose." *Metro Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985). Similarly, the Supreme Court struck down a West Virginia tax that discriminated against coal companies on Equal Protection

Clause grounds. *Allegheny Pittsburgh Coal Co. v. Cty. Com.*, 488 U.S. 336, 346 (1989).

If the objective is fundraising, then exempting a large class of requestors (noncommercial) does not further that objective, but rather makes clear that it seeks to burden only one class of speakers' ability to publish government information. Indeed, the undisputed evidence in the record is that PVAs do not incur any greater cost to satisfy "commercial purpose" requests for copies than noncommercial purpose requests. The Commercial Purpose Fee Statutes are therefore unconstitutional under the Fourteenth Amendment as well, regardless of the scrutiny lens through which a court views them.

IV. The district court erred as a matter of law in severing the newspaper exception of KRS § 61.870(4)(b)(1) from the definition of "commercial purpose" after having found that aspect of the definition unconstitutional, instead of enjoining enforcement of the Commercial Purpose Fee Statutes as a whole.

As an initial matter, Zillow agrees with and adopts by reference the arguments made by Intervenors regarding the district court's severability analysis, and that the district court's judgment should be reversed on that ground.

Where a district court determines a definition within a statute is unconstitutional, it must determine whether the definition section may be severed, leaving a constitutional definition. In doing so, the district court should not

introduce new terms or add a narrowing interpretation to a statute in order to save a portion of it. *See Eubanks*, 937 F.2d at 1122 (holding that while federal courts will construe ambiguities in statutes to avoid constitutional difficulty when "fairly possible," "the general federal rule is that courts do not rewrite statutes to create constitutionality.").

Likewise, deletion of language could compound a problem of unconstitutionality where the deletion is within the definition of a term. *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1041 (W.D. Ky. 1998) ("Where the overbreadth of [the statutory] definition causes a constitutional problem, a court would only compound the problem by deleting the specific definition."). Circuit courts have thus expressed doubt over resulting definitions where portions of a definition, and exceptions to the definition, are struck. *Nat'l Advert. Co. v. Town of Niagara*, 942 F.2d 145, 149 (2d Cir. 1991) (noting the district court's severance of an exception to a definition and questioning "if it does not mean that, what is its meaning?").

As the district court acknowledged in its order denying Zillow's Motion to Alter or Amend the Judgment, the district court's judgment severing the Newspaper Exception from the definition of "commercial purpose" leaves Zillow in no better or worse a position than it was when it filed this action. (RE 88, Mem. & Op. at Page ID#: 3253.) To obtain the Tax Roll File, Zillow will need to pay

over one-hundred thousand dollars to the six Appellee-PVAs. This is so because Zillow remains a "commercial purpose" requestor under the revised definition of "commercial purpose." In other words, it is as difficult for Zillow to obtain the Tax Roll File now as it was in 2019, and the burden on its ability to obtain and publish information in these public records remains firmly in place.

What the Court's judgment does do, however, is make newspapers and periodicals commercial purpose requestors. By altering the definition of "commercial purpose," the court imposed a new burden on the speech of other publishers (not intended by the General Assembly) and made the examination of public records in Kentucky less "free and open"; a result at odds with the stated policy of the Kentucky General Assembly in enacting the ORA. *See* KRS § 61.871.

Central to the Court's decision that it could sever only the Newspaper Exception from the definition of "commercial purpose" was its conclusion that there was "no suggestion or evidence that the legislature would only desire the commercial purpose fee statutes to exist if newspapers could be exempted." (RE 68, Page ID#: 3126.)

In reaching this conclusion, the Court did not address KRS § 61.871, which provides:

The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that *free* and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

(Emphasis added.) In its order denying Zillow's Motion to Alter or Amend, the district court did not find any conflict between its judgment and this statement of legislative policy because it did not "intend that all examination of public records be literally 'free'." (RE 88, Mem. Op. & Order, at Page ID#: 3254.)

The district court's reasoning ignores the fact that the legislative purpose reflected in KRS § 61.871 is to make it easier to access public records, not harder. The district court's judgment makes it harder, in contravention of this clear policy. Thus, the ORA no longer functions in a manner consistent with General Assembly's stated intention in enacting that law. *See Eubanks*, 937 F.2d at 1129 (observing that the Supreme Court had suggested that the relevant inquiry in a severance analysis is "whether the statute will function in a manner consistent with the intent of Congress" (quoting *Alaska Airlines*, 480 U.S. at 685)).

To remedy this, this Court should sever the Commercial Purpose Fee Statutes from the ORA in their entirety, and enjoin enforcement of them. Doing so would not deprive PVAs of their ability to recover the costs of reproduction, and

would promote the free and open examination of public records in the Commonwealth, consistent with the General Assembly's intent.

V. The Court may also grant Zillow relief on its as-applied challenge to the Commercial Purpose Fee Statutes, which the district court did not address.

The court did not address Zillow's as-applied challenge, finding it unnecessary in light of its determination that the Newspaper Exception was facially unconstitutional. But as the record supports Zillow's as-applied challenge, and it is an alternative ground for finding unconstitutionality, Zillow requests that the Court consider those claims in this appeal, or remand to the district court for consideration in the first instance.

"In an as-applied challenge, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) (internal quotations and citations omitted). It may also be unconstitutional if, in its application, "it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred[.]" *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383

(1984)) (quotation marks omitted). Thus, this Court considers the statute in the context of Zillow's requests.

The district court found it "apparent that in making the commercial purpose determination, the PVAs necessarily considered the purpose of Zillow's eventual use of the information—a use which undeniably amounts to commercial speech." *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (citations omitted) ("Commercial speech [is] expression related solely to the economic interests of the speaker and its audience.")). The issue in this context is that the PVAs failed to accept Zillow's explanation of its intended use, instead drawing assumptions based upon prior experience with Zillow.

Zillow does not deny it makes a profit from Zillow.com and other lines of business, but Zillow requested the Tax Roll File with the intention of publishing that public information on its free website, Zillow.com. In this way, the request for the Tax Roll File is no different than any request made by a periodical or newspaper under the Commercial Purpose Fee Statute where the intention is to publish the information for the public.

However, the PVAs offered distinguishing characteristics between Zillow and a "periodical or newspaper" under the Commercial Purpose Fee

Statutes that highlight the content-based analysis the Commercial Purpose Fee

Statutes require as to Zillow. For instance, former PVA Jason Neely testified:

Q. What about Zillow, in your view, made them not a newspaper?
We'll take one at a time.

A. They print no news.

Q. So there's lack of a physical actual newspaper?

A. Oh, not even that. They give no insight behind anything, if that makes sense.

Q. When you say, "insight behind anything," what do you mean by that?

A. So you go on their website, and you're looking at a house. You get no other insight behind it. There is no publication. There's no story. There's no --

(RE 53, Neely Dep., Page ID#: 973 at 34:8-19.) And Appellee Robertson's reasoning was similar:

Q. Okay. And was there a reason that you didn't consider them to be a newspaper or periodical?

A. I mean, none specifically that pops into my head. I -- I just never considered them to be a newspaper. When I think of a newspaper, I think of weather, sports, a publication, like lots of -- lots of different things. News. A lot of stuff comes to mind. Zillow doesn't come to mind when I think of a newspaper.

Q. Okay. So in terms of your analyzing whether something is or not a newspaper or periodical, you look at the types of information that they publish, correct?

A. Yeah. To a certain extent, yeah.

(RE 55, Robertson Dep., Page ID#: 1278 at 33:3-15.) The DOR, through its Rule 30(b)(6) representative, offered yet another content-based rationale, testifying:

- A. Well, my understanding is Zillow is a for-profit company using this information to, you know, provide accurate information for users for free -- like me -- but you are also getting various treaties from advertisers and other agencies to sponsor those websites, and that's your revenue stream, but you're also not promoting the public goods. You're not holding me accountable as state official, making sure I'm doing my job.

(RE 48, Crawford Dep., Page ID#: 265 at 35:9-17.)

The prevailing distinctions were based on the scope of a newspaper's content versus Zillow's, the purpose behind that content—i.e., offering "insight," policing public officials, and the variety of the content. In other words, in order to determine that Zillow does not fall within the Newspaper Exception, the PVAs would have analyzed Zillow as the speaker, and Zillow's content in comparison to each PVAs understanding of a traditional newspaper or periodical. This sort of content-/speaker-based analysis implicates the First Amendment.

In addition, most PVAs concluded that the requestor's identity (Zillow), and what they knew about Zillow's business model, were key factors in their determinations that it was not eligible to be treated as a newspaper or periodical. (RE 49, Johnson Dep, Page ID#: 387 at 14:6-11; RE 50, Lang Dep, Page ID#: 405 at 42:3-16; RE 51, Mahoney Dep., Page ID#: 591 at 28:22-29: 9; RE 52, McDowell Dep., Page ID#: 791 at 27:6-19; RE 55, Robertson Dep., Page ID#: 1278 at 29:6-23; RE 56, Scriber Dep., Page ID#: 1461 at 22:25-23:15.) Said another way, the Commercial Purpose Fee Statutes necessarily require the PVAs to

identify the speaker (i.e., Zillow) and analyze the speaker's content (i.e., Zillow.com) in determining whether or not their intention to publish the information for public consumption made them eligible to be treated as a noncommercial purpose requestor in the same manner as other publishers with very similar for-profit business models, and specifically, newspapers or periodicals.

The Commercial Purpose Fee Statutes, as applied to Zillow, burden Zillow's ability to obtain and publish (i.e., speak) government information in the same manner as favored for-profit publishers, who are exempted from the definition of "commercial purpose" based on their identity, despite the fact that they may also generate profit from the publication of government information. This classification, which burdens Zillow's fundamental right to free speech under the First Amendment, is thus subject to strict scrutiny under the First Amendment and Fourteenth Amendment. And because there is no rational, much less compelling justification for treating Zillow differently than other publishers of government information, the Commercial Purpose Fee Statutes are unconstitutional as applied.

CONCLUSION

For the reasons set forth, Zillow respectfully requests that the Court reverse the district court's judgment, sever the Commercial Purpose Fee Statutes

from the ORA in their entirety, and enjoin their enforcement. In the alternative, Zillow requests that the Court find the Commercial Purpose Fee Statutes unconstitutional as applied to it, and enjoin enforcement of those statutes as to Zillow.

Respectfully submitted,

/s/ Darren W. Ford
John C. Greiner (0005551)
Darren W. Ford (0086449)
FARUKI PLL
201 East Fifth Street, Suite 1420
Cincinnati, OH 45202
Telephone: (513) 632-0315
Telecopier: (513) 632-0319
Email: jgreiner@ficlaw.com
dford@ficlaw.com

*Attorneys for Appellee/Cross-
Appellant Zillow, Inc.*

CERTIFICATE OF COMPLIANCE

1. This document complies with the Type-Volume limitation of Fed. R. App. P. 32(a)(7)(B), and this Court's briefing letter, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9193 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally space typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Darren W. Ford
Darren W. Ford (0086449)

CERTIFICATE OF SERVICE

I certify that on the 2nd day of August, 2023, I electronically filed the foregoing Brief of Appellee/Cross-Appellant Zillow, Inc. using the CM/ECF system, which will send notification of such filing to CM/ECF participants.

/s/ Darren W. Ford
Darren W. Ford (0086449)

ADDENDUM**DESIGNATION OF DISTRICT COURT DOCUMENTS**

RECORD ENTRY NUMBER	DESCRIPTION OF ENTRY	DATE DOCUMENT ENTERED	Page ID#
RE 1	Complaint for Declaratory Judgment & Injunctive Relief	07/09/2019	Page ID#: 1
RE 22	Motion to Dismiss	08/26/2019	Page ID#: 124
RE 29	Memorandum Opinion and Order: Motion to Dismiss	05/22/2020	Page ID#: 186
RE 31	Answer to Complaint	06/26/2020	Page ID#: 199
RE 48	March 11, 2021 Deposition of Tom Crawford	07/13/2021	Page ID#: 265
RE 49	March 3, 2021 Deposition of Rebecca Johnson	07/13/2021	Page ID#: 387
RE 50	March 3, 2021 Deposition of Kellie Lang	07/13/2021	Page ID#: 405
RE 51	March 5, 2021 Deposition of Jill Mahoney	07/13/2021	Page ID#: 591
RE 52	March 9, 2021 Deposition of William Brad McDowell	07/13/2021	Page ID#: 791
RE 53	March 9, 2021 Deposition of	07/13/2021	Page ID#: 973

	Jason Neely		
RE 54	May 5, 2021 Deposition of Susan Noto	07/13/2021	Page ID#: 1199
RE 55	March 3, 2021 Deposition of Blake Robertson	07/13/2021	Page ID#: 1278
RE 56	March 5, 2021 Deposition of Jason Scriber	07/13/2021	Page ID#: 1461
RE 57	March 11, 2021 Deposition of Michael Tackett	07/13/2021	Page ID#: 1667
RE 60	Defendants' Motion for Summary Judgment	07/14/2021	Page ID#: 1792
RE 61	Plaintiff's Motion for Summary Judgment	07/14/2021	Page ID#: 3002
RE 61-1	Declaration of Jonathan James Mabe	07/14/2021	Page ID#: 3029
RE 63	Response to Plaintiff's Motion for Summary Judgment [RE 61]	08/13/2021	Page ID#: 3036
RE 64	Response to Defendants' Motion for Summary Judgment [RE 60]	08/13/2021	Page ID#: 3057
RE 65	Reply Brief [to RE 63] in Support of Plaintiff's Motion for Summary	08/27/2021	Page ID#: 3078

	Judgment [RE 61]		
RE 66	Reply Brief [to RE 64] in Support of Motion for Summary Judgment [RE 60]	08/27/2021	Page ID#: 3097
RE 68	Opinion and Order: Motions for Summary Judgment	03/24/2022	Page ID#: 3109
RE 69	Judgment	03/24/2022	Page ID#: 3131
RE 70	Plaintiff's Motion for Attorney Fees	04/21/2022	Page ID#: 3133
RE 71	Plaintiff's Motion to Alter or Amend Judgment	04/21/2022	Page ID#: 3143
RE 88	Memorandum Opinion & Order	03/06/2023	Page ID#: 3251
RE 89	Notice of Appeal by American City Business Journals, Inc. & Kentucky Press Association, Inc.	03/23/2023	Page ID#: 3258
RE 90	Order: Zillow's Motion for Attorney Fees	03/28/2023	Page ID#: 3260
RE 91	Notice of Appeal of Plaintiff Zillow, Inc.	3/29/23	Page ID#: 3262