

Nos. 26-5120, 26-5121, 26-5132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

META PLATFORMS, INC.,
Plaintiff-Appellant,

v.

ROB BONTA, in his official capacity
as Attorney General of California,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Jose
Nos. 5:25-cv-09792-EJD, 5:25-cv-09789-EJD, 5:25-cv-09795-EJD

BRIEF OF *AMICUS CURIAE*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), counsel for *amicus curiae* certifies that (1) *amicus* does not have any parent corporations; and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*¹

The Foundation for Individual Rights and Expression (“FIRE”) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide without regard to speakers’ views through public advocacy, strategic litigation, and *amicus curiae* filings in cases implicating expressive rights. *See, e.g., Stanford Daily Publ’g Corp. v. Rubio*, No. 25-CV-06618-NW, 2026 WL 2549090 (N.D. Cal. Aug. 28, 2026) (counsel); *Reges v. Cauce*, 162 F.4th 979 (9th Cir. 2025) (counsel); *NetChoice, LLC v. Bonta*, 170 F.4th 744 (9th Cir. 2026) (“*NetChoice II*”) (counsel).

FIRE’s work includes protecting expressive rights in the digital realm and ensuring courts apply and extend First Amendment protections consistently to emerging technologies. *See, e.g.,* Brief of FIRE *et al. as Amici Curiae* Supporting Petitioners, *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (Nos. 24-656 and 24-657); Brief of FIRE as *Amicus*

¹ No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund this brief’s preparation or submission. All parties consent to the filing of this brief.

Curiae Supporting Respondents in No. 22-277 and Petitioners in No. 22-555, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (Nos. 22-277 and 22-555); Brief of FIRE as *Amicus Curiae* Supporting Respondents, *Murthy v. Missouri*, 603 U.S. 43 (2024) (No. 23-411); Brief of FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant, *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024).

FIRE files this brief to explain how the district court departed from settled law in holding the First Amendment does not protect publishers’ editorial choices designed to serve perceived audience interests because those choices assertedly lack “moral valence.”

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment protects editorial judgment, full stop. That includes not only what a speaker opts to say, but also when to say it, how to present it, and to whom. California’s SB 976 disregards the protection these editorial choices enjoy by barring social media companies from delivering content to anyone using personalized feeds based on each user’s predicted interests, unless “the operator has reasonably determined that the user is not a minor.” Cal. Health & Safety Code § 27001(a)(1)(B).²

This is not the first time this Court has considered SB 976. The trade group NetChoice previously challenged it on First Amendment grounds, *NetChoice, LLC v. Bonta*, 152 F.4th 1002 (9th Cir. 2025) (“*NetChoice IV*”), but this Court has yet to resolve the question presented here: whether regulating editorial choices based on serving users’ predicted interests can withstand First Amendment review. However,

² The core definition for this restriction, with many modifiers and exceptions, captures feeds “in which multiple pieces of media generated or shared by users are ... recommended, selected, or prioritized for display ... based, in whole or in part, on information provided by the user, or otherwise associated with the user or the user’s device.” Cal. Health & Safety Code § 27000.5(a).

this Court affirmed preliminary injunctive relief against another provision of the law that barred operators from displaying “likes” on minors’ social media accounts. *Id.*³

SB 976’s provisions that regulate “personalized feeds” ignore the Supreme Court’s long-standing recognition that “[l]aws enacted to control or suppress speech may operate at different points in the speech process.” *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). As Justice Scalia cautioned, “[c]ontrol any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them.” *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part). Restricting speech at any juncture presents a constitutional

³ The district court had granted partial preliminary relief while holding NetChoice lacked standing on behalf of its members, including appellants here, for as-applied challenges to the personalized feed provisions. *NetChoice v. Bonta*, 761 F. Supp. 3d 1202, 1230–31 (2024) (“*NetChoice III*”). The district court also held more broadly that NetChoice had neither developed a record sufficient for a facial challenge on “how the regulated feeds actually function,” nor showed “SB 976 interferes with social media users’ right to access speech because SB 976 does not remove any speech from social media platforms.” *Id.* at 1218–24.

problem, yet SB 976 places California at the center of how online platforms organize and deliver vast quantities of protected expression to the public in usable form through personalized feeds.

Given the volume of that material, social media companies necessarily rely on automated systems, including ranking algorithms, to exclude information they do not wish to convey, and to surface content they believe each individual user values. The Supreme Court recently confirmed such editorial choices are expressive and thus receive First Amendment protection. *Moody v. NetChoice, LLC*, 603 U.S. 707, 710–11 (2024) (major platforms exercise protected “editorial control” when they “curate their feeds by combining ‘multifarious voices’ to create a distinctive expressive offering”). As has always been so. *See id.* at 727–31. The “main problem in this case ... is not new,” but rather “sounds a familiar note,” as “the First Amendment offers protection [to] an entity engaging in expressive activity, including compiling and curating others’ speech.” *Id.* at 727–31. And those protected editorial choices have always included consideration of the audience’s interest in the speech.

In an apparent effort to sidestep First Amendment scrutiny, California labels personalized feeds “addictive,” asserts they endanger

minors, and claims social media operators surrender First Amendment rights when they create such feeds using algorithms. The district court accepted this framing and held that insofar as appellants use “predictive algorithms that incorporate users’ past watch history and other data and then suggest content that the algorithms anticipate will be engaging, or ‘interesting’ to users,” that reliance on algorithmic “number-crunching” is “not an expressive judgment” because it lacks “moral valence.” 1-ER-9, 17.⁴

But minors, no less than adults, have the right to receive content social media platforms publish. That content is fully protected and, apart from that which is obscene-to-minors, minors have the same First Amendment rights as adults to access it. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011). No amount of relabeling the mode of content-delivery changes that. “The First Amendment is no word game.” *Chiles v. Salazar*, 607 U.S. 627, 645 (2026).

⁴ Record citations refer to the Excerpts of Record filed by Google, LLC at Dkt. No. 11.

The district court’s conclusion that personalizing feeds involves no expressive activity worthy of First Amendment protection would, if allowed to stand, carry sweeping consequences for online speech. *See* 1-ER-8, 18. It would mean courts could apply rational-basis review and approve far-reaching regulation of personalized feeds up to and including an outright ban, even if the regulation applies only to content published to willing adult audiences. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19, 23, 25 (1989); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058–59, 1068 (9th Cir. 2010). But the First Amendment’s protection of editorial choices does not evaporate simply because a speaker is a website, it uses an algorithm, or its audience includes minors.

The district court’s distinction between editorial judgments that carry a “moral valence” and those that do not finds no support in precedent (including the preliminary injunction decision in the earlier SB 976 case). Because all traditional First Amendment principles apply, SB 976—a content-based regulation of speech—must withstand strict scrutiny. And because California cannot show SB 976 serves a compelling government interest, is narrowly tailored to achieve it, and is the least

restrictive means of doing so, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), it fails constitutional review.

This Court should accordingly reverse the denial of appellants' motions for preliminary injunctions below and remand with instructions for the district court to enter the requested relief.

ARGUMENT

I. Editorial Decisions are Fully Protected as Part of the Speech Process.

SB 976 ignores the First Amendment rights of speakers and their audiences. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). To protect both speech and its intended recipients, the First Amendment must—and does—protect the full editorial process. That includes not only decisions about what to say and to whom, but also when, where, and how to present the message. The district court erred by not honoring these long-settled protections.

A. The First Amendment protects appellants' right to decide what information to distribute, as well as the form in which they provide it.

Supreme Court precedent makes clear the First Amendment protects editorial decision-making. “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and

content of the paper ... constitute the exercise of editorial control and judgment” that the First Amendment protects. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Bursey v. United States*, 466 F.2d 1059, 1087–88 (9th Cir. 1972). And just as First Amendment protections are not limited to information distributed by the press, its protections for editorial decision-making are not limited to newspaper editors.

For example, “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas.” *Brown*, 564 U.S. at 790. So, the editorial decisions game creators make are protected, because “[u]nder our Constitution, ‘esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’” *Id.* (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000)).

The same goes for decisions about collecting and publishing material others create, like those of appellants here. First Amendment protection does not “require a speaker to generate, as an original matter, each item ... in the communication.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995). “Cable operators, for example, are engaged in protected speech activities even when they only

select programming originally produced by others.” *Id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)). Even “the simple selection of a paid noncommercial advertisement” falls within “the core of First Amendment security.” *Hurley*, 515 U.S. at 570. And “republishing and highlighting” decisions “reflect editorial judgment,” as do “decisions about what should be published initially, how much space should be allocated to the subject, or the placement of a story.” *Bursey*, 466 F.2d at 1087. That is equally true of social media, where “expressive activity includes presenting a curated compilation of speech originally created by others.” *Moody*, 603 U.S. at 728.

B. Use of automated processes to achieve editorial goals on social media does not weaken the First Amendment’s protection.

As the Supreme Court affirmed in *Moody*, “the First Amendment ... does not go on leave when social media are involved.” *Moody*, 603 U.S. at 719. The Court thus held “[t]he Fifth Circuit was wrong in concluding that Texas’s restrictions on the platforms’ selection, ordering, and labeling of third-party posts do not interfere with expression.” *Id.* at 727. That flowed naturally from earlier Supreme Court holdings. For seventy years, the Court made clear basic First Amendment principles do not

vary just because a different technology is involved: “[W]hatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” *Brown*, 564 U.S. at 790 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

If anything, the Court has grown more protective of online speech as the medium has grown more central. It has identified “cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular”—as the most important place for exchanging views today. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

Appellants’ use of algorithmic or other automated tools to implement editorial choices does not remove or diminish the First Amendment protections those decisions enjoy. As the *NetChoice III* court noted: “Algorithms operate personalized feeds, and humans ... build rules into those algorithms that they believe will best serve their purposes.” 761 F. Supp. 3d at 1222. And the district court here admitted, citing the Supreme Court, that it is “well-established that content

moderation can be expressive to the extent that it reflects decisions about what content to be included or excluded consistent with ... standards ‘detail[ing] the messages ... platforms disfavor.’” 1-ER-13 (quoting *Moody*, 603 U.S. at 735).

But then, relying on what it saw as *Moody*’s “expressed skepticism about the expressive nature of personalized feeds,” the court divided that editorial process into content moderation efforts, which it deemed expressive and thus within First Amendment protection, and “personalization efforts”, which it held are not. *Id.* Not only does this take unwarranted and distorting interpretive license with the Supreme Court’s statement,⁵ but separating the editorial process into content moderation and content personalization also lacks doctrinal merit.

⁵ The referenced “skepticism” in *Moody* was its mention, in a footnote observing that “platforms ... unabashedly control the content that will appear,” that the Court was not dealing with “algorithms [that] respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards.” 603 U.S. at 736, n.5. Notably, the paragraph the footnote concludes referenced two plaintiff platforms here, Facebook and YouTube, which offer personalized feeds, and as to which the Court said elsewhere: “The key to the scheme is prioritization of content, achieved through the use of algorithms.” *Id.* at 734. This suggests an unprotected feed would be something that operated differently from platforms with personalized feeds.

Personalization is just as much part of the editorial process as content moderation. Each appellant makes editorial decisions in constructing their algorithms to reflect their selection and ordering preferences. And when the “purpose” of delivering such content is to provide it to recipients, that “is the kind of ‘speech’ the First Amendment protects.” *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). In fact: “If the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does” *Id.* (citation modified).

The district court noted “the degree of human involvement at various points of the [speech] process does not transform a message that is not expressive at the outset into one that is.” 1-ER-10. Whatever the merits of that observation,⁶ decisions about presentation of expressive content like those here are inherently expressive. The more relevant observation would thus be that the degree of algorithmic involvement at various points of the process does not transform a message that is expressive at the outset into something that is not.

⁶ The suggestion that “a message [can be] not expressive” is difficult to square with the underlying truth that messages are, by definition, expressive.

Appellants' selection and ordering preferences, as coded into their algorithms, do not simply "prioritize cat videos in users' feeds," a choice which the district court conceded affects "users' long-term satisfaction with the platform." 1-ER-18. Appellants make editorial decisions that result in presenting "cat videos" to viewers who may enjoy them, while presenting videos about dogs to viewers likely to prefer those. This selection and ordering of social media content, even if algorithmically assisted given the volume of content published, receives the same First Amendment protection as parallel analog processes.

Calling personalized feeds "addictive," as SB 976 does, neither alters the fundamentally expressive nature of appellants' services, or their editorial decision-making over the content published and means of presenting it, nor allows California to avoid the First Amendment protections editorial decision-making receives. Nearly a century ago, the Supreme Court held that "[c]haracterizing [a] publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931). So too here with California's

characterization of personalized feeds as a harm-causing, addictive design feature.⁷

Like the Texas law the Supreme Court considered in *Moody* and the Vermont law it invalidated in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), California’s restrictions on personalized feeds interfere with the expressive elements of personalized feeds by constraining how appellants publish speech, and the types of speech they may publish. In doing so, SB 976 runs headlong into the full panoply of First Amendment safeguards.

C. Restrictions on speech motivated by desire to protect children must still adhere to First Amendment limits.

Like all American adults, minors in the United States possess “robust First Amendment protections.” *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 193 (2021). “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Brown*, 564 U.S. at 794 (citation omitted). “In most circumstances, the values protected by the First Amendment are no less

⁷ Nor can California avoid the First Amendment by characterizing constitutionally protected speech as harmful to minors. *See infra* § I.C (discussing, *inter alia*, *Brown*, 564 U.S. at 794, and *Erznoznik*, 422 U.S. at 214).

applicable when government seeks to control the flow of information to minors.” *Erznoznik*, 422 U.S. at 214 (citing *Tinker*, 393 U.S. 503). Thus, the First Amendment bars states from requiring parental consent before minors may access non-obscene speech. *See Brown*, 564 U.S. at 795 n.3.⁸

The internet houses vast amounts of information, *see Packingham*, 582 U.S. at 104, much of which may be useful to minors’ education and development. And “educating the young ... is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source[.]” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Even if California could establish personalized social media feeds negatively impact youth mental health, that would be “relevant to the governmental interest *potentially justifying* a restriction on protected speech, not to whether the speech is constitutionally protected.” *City of Hermosa Beach*, 621 F.3d at 1061 (contrasting the health concerns presented by tattoos not found with pen-

⁸ In *Free Speech Coalition, Inc. v. Paxton*, the Supreme Court upheld under intermediate scrutiny a Texas statute requiring age identification for access to websites that offer “sexual content ... which is obscene from a child’s perspective.” 606 U.S. 461, 474 (2025). That holding does not apply, however, to SB 976, which imposes access restrictions on a much broader range of content. *See id.* at 467.

and-ink drawing as a “distinction [with] no significance in terms of the constitutional protection afforded”). SB 976 must therefore satisfy the same First Amendment standards as any speech regulation, even if the state’s intent is to protect children. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968).

II. The District Court’s “Moral Valence” Distinction Has No Basis in Law.

There is no precedential support for the distinction the district court made between content moderation it deemed expressive and personalization it found non-expressive as assertedly lacking “moral valence.” 1-ER-17–18. The purpose of both types of editorial decision-making is to select the social media content users see. As such, it is all First Amendment-protected activity.

A. First Amendment protection does not turn on the moral weight of editorial decision-making.

Extending First Amendment protection only to moderation policies that implement “moral” choices sanctions unconstitutional viewpoint-based restriction of speech. The district court was correct that the First Amendment “clearly protects ‘moral judgments about art and literature.’” 1-ER-18 (quoting *Brown*, 564 U.S. at 790). Yet it broke from precedent by inventing and inserting a notion of “expressive judgment” to hold the

personalized feeds that SB 976 regulates are unworthy of First Amendment protection because they are “devoid” of that judgment. *Id.*⁹ It thus held in essence that, first, the First Amendment protects editorial choices about what to present to a viewer if the choice has a moral valence, and then, because decisions based on viewer interests assertedly lack such moral valence, they receive no First Amendment protection.

But First Amendment protection is not just for editorial judgment based on motive or morality,¹⁰ and extending it to only moderation that implements “moral” choices unconstitutionally restricts speech based on viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is ... an egregious form of content

⁹ The phrase “expressive judgment” has no antecedent in First Amendment law. The only reported case in which it appears is *Graham v. Florida*, 560 U.S. 48, 74 (2010), where the Supreme Court noted “[a] State’s rejection of rehabilitation ... goes beyond a mere expressive judgment” in holding that although states may express judgments about sentencing through legislation, the Eighth Amendment sets limits when sentencing non-homicidal juvenile offenders.

¹⁰ Speaker motives are sometimes considered in contexts not relevant here, such as when fact-finders must determine if alleged defamers spoke with constitutional malice, see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), or a defendant had a subjective understanding of the threatening nature of his speech. See *Counterman v. Colorado*, 600 U.S. 66, 77-78 (2023).

discrimination.”). That is why the state “must abstain from regulating speech when the specific motivating ideology or the opinion ... of the speaker is the rationale for the restriction.” *Id.*

No precedent supports distinguishing editorial choices driven by the perceived value society places on certain speech—what the district court referred to as decisions with “moral valence”—from those driven by the perceived value to individual recipients, *i.e.* those SB 976 regulates. To the contrary, the Supreme Court rejected as “startling and dangerous” the notion that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Regardless of whether any given expression is perceived as having value, let alone “moral valence,” the decision to express it—or not—belongs to the speaker. In *Hurley*, in holding Massachusetts could not require a private organization to include in its Saint Patrick’s Day parade individuals who wished “to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals,” 515 U.S. at 561, the Court explained that:

The parade’s organizers may not believe [those individuals’ message] about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB’s message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.

Id. at 574–75. These precedents perhaps explain why “moral valence” appears nowhere in the preliminary injunction order in the prior case involving SB 976’s personalized feeds. *See NetChoice III*, 761 F. Supp. 3d 1202.¹¹

To the extent the district court intends here a distinction between the moral value of decisions relating to the selection and presentation of content and the moral value of that content’s messaging, 1-ER-13, this Court should reject it. All editorial decisions about curating third-party content receive First Amendment protection regardless of the moral value of the selected message. The sole purpose of appellants’ decisions to use algorithms to organize content in a feed, as well as about how to structure them, is to control what content users see, and in what order.

¹¹ And this Court simply noted that “*Moody* left open the outer limits of which algorithm-based feeds are expressive for First Amendment purposes” but did not opine further so as to be “careful not to decide more than necessary” on a “thin record.” *NetChoice IV*, F.4th at 1021.

It does not matter whether appellants select content based on their own preferences, the morals of a wider community, or an individual user's tastes. And using data to make the message more relevant or compelling is protected. *See Sorrell*, 564 U.S. at 570. The First Amendment protects the speakers' right to decide for themselves what factors are important when making editorial decisions, including what to present and the order in which to present it.

The district court's adoption of a paradigm that protects editorial decisions based on whether they have "moral valence" does not square with the First Amendment's bar on the facially viewpoint-discriminatory sorting of speech by distinguishing "between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them[.]" *Iancu v. Brunetti*, 588 U.S. 388, 394 (2019). A standard that extends protection only to speech-sorting judgments carrying "moral" significance would leave unprotected countless editorial choices made by newspapers, bookstores, and platforms based on audience interests rather than morality. Such viewpoint-based differential treatment only heightens the level of constitutional scrutiny rather than eliminates the First Amendment's protection. *See Reed*, 576 U.S. at 168.

B. The First Amendment has always protected audience-driven curation.

The district court ignored the fundamental fact that publishers almost always make editorial decisions based on anticipated reception by their chosen audience. Denying First Amendment protection to such choices as “devoid of a moral valence” ignores long-standing First Amendment jurisprudence.

Since the inception of television, for example, broadcasters have relied on audience viewing habits to inform what programming to renew, reschedule, mimic, or cancel—that is what ratings are all about.¹² Book publishers decide which authors to back and what to print based in large part on past sales and/or predictions of popularity. “[W]hen publishers look at a project they ask themselves: What is the market for this? Who would be interested? How many people comprise that segment of the

¹² See *Need to Know: How are TV audiences measured?*, Nielsen: Insights (Nov. 2023), <https://www.nielsen.com/insights/2023/how-to-measure-tv-audiences/> (last visited Sept. 1, 2026).

population?”¹³ When selecting movies to screen, cinemas consider many factors, but most reduce to ‘what does the community want to see?’¹⁴

Regardless of medium, government interference with a speaker’s decision about what to present for public consumption, based on any criteria, implicates the First Amendment—even when the decision is driven by math rather than morality. *See CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973) (broadcast television); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (movies); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (book publishing); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (theater). “That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression ... safeguarded by the First Amendment.” *Burstyn* at 501.

“Traditional publishers and editors ... select and shape other parties’ expression into their own curated speech products[,]” and the

¹³ *What Publishers Want*, Greenleaf Book Group, <https://greenleafbookgroup.com/learning-center/publishing-information/what-publishers-want> (last visited Sept. 1, 2026).

¹⁴ *See* Nate Grey, *How theaters decide what movies to screen*, Vail Daily (Dec. 6, 2018), <https://www.vaildaily.com/entertainment/how-theaters-decide-what-movies-to-screen/> (last visited Sept. 15, 2026).

Supreme Court has “repeatedly held that laws curtailing their editorial choices must meet the First Amendment’s requirements.” *Moody*, 603 U.S. at 717. “The principle does not change because the curated compilation has gone from the physical to the virtual world.” *Id.* “[M]ajor social-media platforms” curate their feeds by “combining ‘multifarious voices’ to create a distinctive expressive offering[,]” and their choices constitute protected “editorial control.” *Id.* at 728, 738 (first quoting *Tornillo*, 418 U.S. at 258; and then quoting *Hurley*, 515 U.S. at 569). It is thus logically and legally inconsistent to treat recommendations based on predictions about what an individual user is likely to find useful, enjoyable, or engaging as so different from traditional editorial judgments—as in *Tornillo*, *Turner*, and *Moody*—that the First Amendment no longer applies.

C. The choices behind a recommender system are editorial choices the First Amendment protects.

The district court’s description of appellants’ individual feed models as “recommendation systems” that “include both content moderation and personalization processes[,]” 1-ER-11, confirms they involve the First Amendment-protected editorial acts of reviewing content for suitability and selecting it for presentation to users. *See* Sec. I-A, *supra*. Each

appellant screens uploaded content against written community standards before any item becomes eligible for recommendation.¹⁵ Those standards, the district court correctly held, reflect “value-laden judgments” the First Amendment protects. *Id.* at 18.

What survives screening is then sorted and ranked “in accordance with each appellant’s ‘editorial judgments and goals.’” *Id.* at 12 (quoting Hr’g Tr. 23:6–7).¹⁶ Review, selection, and arrangement are all present, and the court found each of them in the record. Whatever else that is, it is not “serv[ing] as ‘passive receptacle[s]’ of third-party speech or as ‘dumb pipes’ that merely emit what they are fed[,]” as the district court held, echoing Justice Alito’s concurrence in *Moody*. 1-ER-11 (quoting 603 U.S. at 782 (Alito, J., concurring in judgment)).

¹⁵ Meta filters “problematic items” at the first stage of its process, YouTube recommends only videos not removed under its Community Guidelines, and content violating TikTok’s Community Guidelines never enters the candidate pool for the “For You” feed. 1-ER-12 (first quoting Mobasher Decl.; and then citing Goodrow Decl.; and then quoting Zhou Decl.).

¹⁶ “YouTube’s recommender system’s goal is to ‘predict which content will be relevant, enjoyable, and valuable to a particular user,’ and is ‘optimized for long-term user satisfaction.’” 1-ER-12 (quoting Goodrow Decl.). “TikTok and Meta’s recommendation systems work to achieve similar goals, relying on ranking processes.” *Id.* (citing Zhou Decl.).

Appellants' systems, in fact, look nothing like the examples Justice Alito was describing. Those included a newspaper that “run[s] nearly all the classified advertisements it receives, regardless of their content and without adding any expression,” *Moody*, 603 U.S. at 783 (Alito, J., concurring in judgment), and an entity that, “like some ‘sort of community billboard, regularly carr[ies] the messages of third parties’ instead of selecting only those that contribute to a common theme[.]” *Id.* at 782 n.17 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 23 (1986) (Marshall, J., concurring in judgment)). Those hardly resemble the systems appellants operate as described by the district court.

But even more fundamentally, the framework the district court applied is not the law of *Moody* but rather rests on propositions Justice Alito advanced (joined by Justices Thomas and Gorsuch) that the Court’s majority did not adopt, as the concurrence explicitly notes. Principally, it relies on the proposition that “compilations that organize the speech of others in a non-expressive way (*e.g.*, chronologically) fall ‘beyond the realm of expressi[on],” which is expressly noted as “contra” to the majority opinion. *See id.* at 783–84 (quoting *Hurley*, 515 U.S. at 569).

In any event, as the parts of the record discussed above establish, appellants build systems that exclude, select, and order what users see, to specifications appellants choose. Those specifications are editorial judgments, and the First Amendment protects them.

III. SB 976 Violates the First Amendment as a Content-Based Restriction Not Narrowly Tailored to Satisfy a Compelling State Interest.

A. SB 976 is subject to strict scrutiny.

SB 976 is a content-based speech regulation that “is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.” *Brown*, 564 U.S. at 799. Examination of the text reveals SB 976 as content-based without regard to California’s motives for enacting it, as it regulates websites that publish content “generated or shared by users” but not those publishing their own content or content licensed from nonusers. Cal. Health & Safety Code §27000.5(a). That differential treatment alone suffices to establish it as a content-based law. *See Reed*, 576 U.S. at 165 (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive

[or] content-neutral justification”). Other courts have held similarly for laws singling out user-generated content for differential treatment.¹⁷

If SB 976’s text did not trigger strict scrutiny, examination of California’s motives would. Even when a statute “contains no explicit content-based limitation,” it is content-based and subject to strict scrutiny if the “Government’s asserted *interest* is ‘related to the suppression of free expression.’” *United States v. Eichman*, 496 U.S. 310, 315 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 410 (1989)). And by implication and in practice, SB 976 targets speech curated to interest, entertain, and engage users. There is, in fact, no way to identify California’s desire to regulate personalized feeds, nor to justify the statute, *without* reference to their “communicative content.” *See Reed*, 576 U.S. at 163–66. The law presumes people are more interested in content curated to their own interests than that presented

¹⁷ *E.g.*, *NetChoice v. Jones*, 822 F. Supp. 3d 656, 673 (E.D. Va. 2026) (a law that “regulate[s] user-generated content, but not provider-selected content” is “content-based”), *appeal docketed*, No. 26-1252 (4th Cir. Mar. 6, 2026); *NetChoice v. Carr*, 789 F. Supp. 3d 1200, 1222 (N.D. Ga. 2025) (same); *NetChoice, LLC v. Yost*, 778 F. Supp. 3d 923, 953–54 (S.D. Ohio 2025) (same), *rev’d on other grounds*, 180 F.4th 268 (6th Cir. 2026); *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1121–23 (D. Utah 2024).

chronologically or based on popularity with others, and that is a content-based distinction subject to strict scrutiny.

That test “is unforgiving because it is the standard for reviewing the direct targeting of fully protected speech.” *Paxton*, 606 U.S. at 484. It is “as a practical matter ... fatal in fact absent truly extraordinary circumstances.” *Id.* at 485. And SB 976 is not the rare exception to that rule.

B. Protecting minors from ideas the state considers unsuitable for them is not a compelling state interest.

California’s interest in protecting minors supplies no compelling justification for restricting social media platforms’ editorial decisions to present content as they deem most effective, including crafting feeds to each user’s tastes. SB 976’s bar against social media using personalized feeds to present content to minors while allowing personalization when presenting material to adults ignores that both adults and minors have the constitutional right to engage with content curated based on their perceived interests. The state cannot suppress otherwise protected ideas, including editorial choices, by calling delivery methods “addictive” and restricting access to minors only—while burdening adults no less, by

requiring them to verify their age—merely because officials deem the methods unsuitable for young people. *See Brown*, 564 U.S. at 794–95.

“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” *Id.* at 794 (citations omitted). Families may make such decisions, but the government cannot—and that is especially true of laws that require parental consent, which do not “enforce *parental* authority over children’s speech” but rather “impose *governmental* authority, subject only to a parental veto.” *Id.* at 795 n.3. Social media’s popularity with the young does not change that.

The Supreme Court thus rejected precisely the approach California takes with SB 976. *Id.* at 802. “[P]unishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech” is a proxy for parental authority of dubious legitimacy. *Id.* “Accepting that position would largely vitiate the rule that ‘only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to’ [minors].” *Id.* (quoting *Erznoznik*, 422 U.S. at 212–13).

“That the State finds expression too persuasive,” or “catchy,” *Sorrell*, 564 U.S. at 578, or too engaging for young people, *Brown*, 564 U.S. at 798, “does not permit it to ... burden its messengers.” *Sorrell*, 564 U.S. at 578. Nor may the State abridge minors’ access to protected speech based on belief it may distress some audiences. *See Mahanoy*, 594 U.S. at 185, 190–91 (criticism protected despite upsetting classmates). The state’s “general conception of [a] child’s best interest does not create a force field against the valid operation of ... constitutional rights,” or justify *per se* any policy enacted “to promote children’s ... wellbeing.” *Bates v. Pakseresht*, 146 F.4th 772, 783, 785 (9th Cir. 2025). California may have been well-intentioned in enacting SB 976, but good intentions do not provide the compelling interest the First Amendment requires.

C. SB 976 violates the First Amendment because it is not sufficiently tailored.

SB 976 is not narrowly tailored because in addition to restricting minors’ access to protected speech, it imposes unconstitutional burdens on adult access, and less restrictive means can satisfy California’s stated interest. A law that “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another ... is unacceptable if less restrictive alternatives would be at least as

effective in achieving the legitimate purposes that the statute was enacted to serve.” *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (quoting *Reno*, 521 U.S. at 874).¹⁸ “[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Playboy*, 529 U.S. at 815.

To comply with SB 976, commencing January 1, 2027, platforms must “reasonably determine[] ... [each] user is not a minor” or “obtain[] verifiable parental consent” to provide a personalized feed if the user is a minor. Cal. Health & Safety Code § 27001; see *NetChoice III*, 761 F. Supp. 3d at 1210–11. Requiring all users to produce proof of age in the name of protecting minors “is to burn the house to roast the pig.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957). That is why, outside the unique and narrow category of speech obscene-to-minors, courts have repeatedly invalidated age-verification for online content given the burden imposed on all users by requiring “that website visitors forgo the anonymity

¹⁸ The Supreme Court, even in upholding age-verification for online obscene-to-minors content, see *supra* note 8, reaffirmed minors’ First Amendment rights generally, and left intact *Ashcroft’s* and *Reno’s* treatment of content other than that which is obscene-to-minors—which necessarily includes virtually all social media. See *Paxton*, 606 U.S. at 474, 481–82 & n.7, 485–86 (citing *Brown*, 564 U.S. at 799–800).

otherwise available on the internet[.]” *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003), and by raising vital “privacy and security concerns[.]” *ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008).¹⁹

The statute’s instruction that age information “be deleted immediately after it is used,” § 27001(b), does not cure the defect. A promise of prompt deletion cannot restore anonymity a user surrenders, nor protect their information during the interval the operator holds it,²⁰ and does nothing to reassure the adult who declines to hand over proof of identity in the first place. The deterrent lies at the moment of demand.

Moreover, less restrictive alternatives are available. Parents who wish to limit or supervise their children’s use of social media that utilize

¹⁹ See also *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007), *aff’d sub nom. Mukasey*, 534 F.3d 181; *PSINet Inc. v. Chapman*, 167 F. Supp. 2d 878, 889 (W.D. Va. 2001) (“Fear that cyber-criminals may access [identifying information] ... may chill the willingness of some adults to participate in the ‘marketplace of ideas.’”), *aff’d*, 362 F.3d 227 (4th Cir. 2004).

²⁰ Data breaches create real risks of identity theft and other harms and are not uncommon, as illustrated by the most recent breach, involving theft of 150 million driver’s licenses from IDScan. See Zack Whittaker, *ID verification giant IDScan confirms data breach with more than 150 million driver’s licenses stolen*, TechCrunch (Sept. 10, 2026), <https://techcrunch.com/2026/09/10/id-verification-giant-idscan-confirms-data-breach-with-more-than-150-million-drivers-licenses-stolen/> (last visited Sept. 15, 2026).

personalized feeds can already do so through carrier controls, router settings, operating-system and device restrictions, application-level tools, and supervision features covered operators supply directly. Filters of that kind “impose selective restrictions on speech at the receiving end, not universal restrictions at the source[.]” and operate so that “adults ... may gain access to speech they have a right to see without having to identify themselves[.]” *Ashcroft*, 542 U.S. at 667.

California can also give “parents the information needed to engage in active supervision[.]” *Playboy*, 529 U.S. at 826, or “encourage websites ‘to offer voluntary [tools]’” and “educate children and parents” about them. This Court noted as much when it enjoined the state’s last effort to legislate in this area, *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1121 (9th Cir. 2024) (“*NetChoice I*”), and again when it found SB 976’s requirement to turn off like-count features by default to be insufficiently tailored. *NetChoice IV*, 152 F4th at 1016–17. The State has never explained why those measures would fail here. SB 976’s “entire effect is only in support of what the State thinks parents *ought* to want[.]” which “is not the narrow tailoring to ‘assisting parents’ that restriction of First Amendment rights requires.” *Brown*, 564 U.S. at 804.

Lack of tailoring is also evident insofar as § 27001(a)(2) of SB 976 permits a minor to receive every feed the State calls addictive “so long as one parent ... says it’s OK.” *Id.* at 802. Such harms do not dissolve on a guardian’s say-so. “That is not how one addresses a serious social problem.” *Id.* As underinclusiveness of this degree is fatal even under intermediate scrutiny, see *Nat’l Inst. of Family & Life Advoc. v. Becerra*, 585 U.S. 755, 773–74 (2018), it dooms SB 976 under strict scrutiny here.

CONCLUSION

Because SB 976 is unconstitutional as applied to Appellants, this Court should reverse the district court’s order denying a preliminary injunction and remand with instructions to enter the requested relief.

Dated: September 15, 2026

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I hereby certify that on September 15, 2026, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the Court's Appellate Case Management System. I further certify that to the best of my knowledge, counsel for all participants are registered ACMS users, and service will be accomplished via the ACMS system.

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