No. 25-146

In the United States Court of Appeals for the Ninth Circuit

NETCHOICE,
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
Civil Action No. 5:24-cv-07885-EJD

REPLY BRIEF FOR PLAINTIFF-APPELLANT NETCHOICE

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INTRODUCTION

Defendant does not dispute most of NetChoice's key arguments, which fatally undermines his defense of California Senate Bill 976's parental-consent, default-settings, and age-assurance requirements for online speech. NetChoice thus easily establishes "colorable First Amendment claim[s]." *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019).

Foremost, Defendant does not dispute that the personalized feeds on NetChoice members' websites involve editorial judgments about how to disseminate, present, and order speech. *See* Defendant's Answering Brief ("Resp.") at 32. He even appears to acknowledge that personalized feeds seek to deliver "the best or most relevant content" to users. Resp.39 n.8. Under *Moody*, all covered websites' "personalized" feeds are "distinct[] expressive offerings" fully protected by the First Amendment. *Moody v. NetChoice, LLC*, 603 U.S. 707, 734, 738 (2024).[1] California's effort to "specifically target[]" (Resp.2) how these expressive websites can display and order speech triggers heightened First Amendment scrutiny. *Id.*; *Packingham v. North Carolina*, 582 U.S. 98, 105, 108 (2017). This scrutiny also applies because the Act restricts *minors'* access to protected expression. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 795 n.3 (2011).

Nor does Defendant dispute that his cramped view of the First Amendment would allow States to ban personalized feeds *even for adults*. According

[1] "Covered websites" and other terms are defined in NetChoice's Opening Brief ("Br.").

to him, the First Amendment does not protect NetChoice members' personalized feeds at all, because those feeds are just "features," not expression. *E.g.*, Resp.3, 20, 32. *Moody* already rejected that sweeping view of governmental power to control online speech curation. No matter what label Defendant uses, the Supreme Court has held that "personalized," "customized," "curated," or "individualized" "feeds" are protected expression. *Moody*, 603 U.S. at 728, 734.

Additionally, Defendant does not dispute that parents already have numerous tools available to control minors' online activities. *See* Br.11-12. He even concedes that these tools "might be beneficial in some respects" and are often "*more* restrictive than SB976." Resp.48. That concession shows that SB976's government-imposed restrictions are not the least restrictive alternative, because "features that allow parents to closely monitor their children's online activity" are already available and "*more*" effective than the Act at "alleviating . . . excessive or compulsive internet use." Resp.48.

Defendant also mistakenly argues that "the question at issue in this case" concerns only "'feeds whose algorithms respond *solely* to how users act online.'" Resp.36 (emphasis added; citation omitted). He ignores that this Act covers personalized feeds responding "in whole *or in part*" to user activity. § 27000.5(a) (emphasis added).[2] Regardless, NetChoice members' feeds undisputedly implement content-moderation policies. *E.g.*, 3-ER-328-32

[2] Unless otherwise noted, statutory citations in this brief refer to the California Health & Safety Code.

(Veitch Decl. ¶¶ 29-37). These policies apply human-created editorial judgments when they "promot[e] or demot[e] certain types of content." Resp.33. So they do not respond "solely" to how users act online. *Moody* already held that personalized feeds are fully protected when they implement content-moderation policies *and* respond to users' activity. *See* Br.25-28. Yet Defendant does not respond to this point. Defendant also thinks *Moody* equated "content moderation" to only "restrict[ing] material." Resp.33. He argues that because this Act allows websites to delete content, it "does not restrict content moderation." Resp.33. That is wrong. *Moody* held that content moderation includes not only removing content but also "organiz[ing]" and "prioritiz[ing]" the display of content. 603 U.S. at 718. Personalized feeds do just that, so they are protected expression. *Id.*

Defendant's discrete arguments about each of the Act's three speech restrictions similarly fail. First, for the parental-consent requirements, Defendant never explains why personalized feeds are harmful enough to restrict, yet safe if a parent consents. That is a fatal tailoring flaw. *Brown*, 564 U.S. at 802. And Defendant concedes that existing "parental tools" and industry-created "monitor[ing]" "features" are "*more*" effective than the Act. Resp.48.

Second, the Act's "default setting" requirements are unconstitutional. The "feedback metrics" default stifles expression by restricting metrics that quantify "likes" and other expressive feedback. This feedback is expressive because it communicates information about a particular sentiment—*e.g.*, popularity, interest, or approval—just like bestseller lists, attendance

figures, or the number of signatures on a student-government petition. Similarly, Defendant never contests that the "private mode" default requirement restricts speech. Resp.53. But he also never explains how a default that minors can easily change sufficiently furthers any governmental interest.

Third, Defendant concedes that heightened First Amendment scrutiny applies when governments age-gate access to protected speech. Resp.21; *see Brown*, 564 U.S. at 794. Defendant tries but fails to distinguish *Reno v. ACLU*, 521 U.S. 844 (1997), and *Ashcroft v. ACLU*, 542 U.S. 656 (2004). NetChoice's unrebutted record evidence shows that here, as in those cases, age-assurance technology remains "costly" and unreliable. 3-ER-315 (Cleland Decl. ¶ 29); *see* 3-ER369-70 (Paolucci Decl. ¶ 14) (similar); Ctr. For Democracy and Technology ("CDT") Amicus Br.1-24. And Defendant's prudential ripeness arguments mistakenly dismiss the immediate hardship from present compliance costs that covered websites face under the Act's statutory age-assurance requirement. *E.g.*, 3-ER-315-16 (Cleland Decl. ¶¶ 28-32, 35); 3-ER-372 (Paolucci Decl. ¶ 20).

This Court's jurisdiction is secure, and Defendant never disputes NetChoice's associational standing to raise these facial challenges. He incorrectly argues that NetChoice lacks associational standing to raise as-applied challenges, asserting that individual NetChoice members must provide evidence of "exactly" "how" their personalized feeds work. Resp.57-58. NetChoice members need not join this lawsuit as parties, and Defendant misunderstands the core First Amendment issue. Whether personalized

feeds constitute protected expression is "the same" for all NetChoice members. *X Corp. v. Bonta*, 116 F.4th 888, 899 (9th Cir. 2024). The reason is that all NetChoice members use "human beings" and "human judgment" while curating their websites' personalized feeds. Resp.17. Indeed, NetChoice submitted unrebutted evidence that its members' personalized feeds use "human review," 3-ER-354 (Davis Decl. ¶ 41), and that curating those feeds is "human-resource intensive," 3-ER-329 (Veitch Decl. ¶ 32).

NetChoice satisfies the remaining preliminary-injunction factors. Defendant never disputes that even temporary restrictions on expression constitute irreparable harm. *See* Resp.59. And he similarly does not address the evidence showing that the Act threatens a website's "ability to continue operating" because the Act's compliance costs are in "excess of [the] available budget." 3-ER-369, 373-76 (Paolucci Decl. ¶¶ 13, 21, 23-27). California's online speech restrictions should therefore be preliminarily enjoined.

ARGUMENT

I. The Act's speech restrictions trigger First Amendment scrutiny by interfering with websites' editorial discretion and regulating users' access to personalized feeds.

Defendant erroneously argues that the Act's restrictions of personalized feeds do not "interfere[] with" or even "regulate[]" protected speech. Resp.32. But every personalized feed is a "curated compilation" of protected speech and a "distinct expressive offering," *Moody*, 603 U.S. at 728, 738. Even Defendant appears to acknowledge that personalized feeds aim to provide "the best or most relevant content" to users. Resp.39 n.8. The First Amendment protects the editorial discretion websites exercise when they choose how to organize content in personalized feeds. Br.26-28. It also protects users' access to these feeds. Br.28-29. No further evidence about which specific "actors" or "activities" the Act regulates could possibly change this. *Contra* Resp.29, 31-35.

A. Personalized feeds display speech based on websites' editorial discretion, so personalized feeds are protected expression.

Defendant agrees that "selecting and arranging" content is protected "'editorial' decision-making." Resp.32. But he rejects that "the creation of [personalized] feeds necessarily involves exercise of th[is] . . . sort of [editorial] judgment." *Id.* Defendant is wrong.

Defendant cannot evade the First Amendment by mislabeling personalized feeds as a mere "feature" rather than "protected speech." *E.g.*, Resp.30

n.6. His brief repeats the word "feature," or close variations, almost 50 times. That cannot negate Supreme Court precedent holding that covered websites engage in protected expression when they decide on the "selection, ordering, and labeling" of content. *Moody*, 603 U.S. at 727. *Moody* held that "personalized," "customized," "curated," or "individualized" "feeds" are protected expression. *Id.* at 728, 734. No matter how Defendant describes them, these feeds reflect covered websites' "own distinctive compilations of expression." *Id.* at 716.

Defendant wrongly asserts that "evidence about NetChoice members' content-moderation policies" is "irrelevant." Resp.33. First, he is wrong to assume that "content moderation" refers only to "the ability of companies to restrict material." Resp.33. On the contrary, content moderation occurs each time websites "remove, alter, *organize*, *prioritize*, or disclaim" content within a personalized feed. *Moody*, 603 U.S. at 718 (emphasis added). This personalization is "exactly the kind of editorial judgment[] th[e] [Supreme] Court has . . . held to receive First Amendment protection." *Id.* Second, NetChoice members undisputedly curate personalized feeds by "restrict[ing] material." Resp.33. They do that by "limit[ing] publication of speech that [they] consider harmful, objectionable, or simply not conducive to their communities." 3-ER-313 (Cleland Decl. ¶ 23). Each aspect of content moderation is decisionmaking about "the third-party speech that will be included in or excluded from a compilation," which "is expressive activity of its own." *Moody*, 603 U.S. at 731.

Next, Defendant incorrectly posits that "algorithms" strip personalized feeds of their expressive character. Resp.33-35. The district court made the same error. *See* 1-ER-26. Under *Moody*, the First Amendment protects "personalized collection[s]," "individualized list[s] of . . . recommendations," and "prioritization of content[] achieved through the use of *algorithms*." 603 U.S. at 734 (emphasis added). This includes the algorithms implementing "Facebook and YouTube's *content-moderation* practices," as Defendant concedes. Resp.32. The only issue *Moody* declined to reach is whether the First Amendment protects "feeds whose algorithms respond *solely* to how users act online . . . without *any* regard to independent content standards." 603 U.S. at 736 n.5 (emphases added). This limited reservation of judgment in no way applies to all "algorithms that recommend material." Resp.34.[3]

Defendant also blinks reality in suggesting that NetChoice members' personalized feeds "'respond *solely* to how users act online.'" Resp.28 (emphasis added; citation omitted). NetChoice members curate feeds using community guidelines that account for far more than just how users act

[3] Regardless, Defendant sidesteps NetChoice's arguments that even "'feeds whose algorithms respond *solely* to how users act online'" are fully protected by the First Amendment. Br.31 (citation omitted). Such feeds do not raise "complicated questions." Resp.35 & n.7. The First Amendment protects decisions about "whether—and, if so, *how*—to convey" content. *Moody*, 603 U.S. at 738 (emphasis added). Nor are the questions "fact intensive." Resp.35 n.7. No matter what specific curation strategy a website uses, the Act burdens expression by interfering with covered websites' decisions about whether and how to disseminate speech. *Infra* p.28.

online. 3-ER-313-14 (Cleland Decl. ¶ 23). Those guidelines are readily available online. *Id.* Defendant never addresses them. Similarly, NetChoice members curate content using editorial algorithms created by humans. Br.31-32. Under *Moody*, both the guidelines *and* the algorithms are "editorial judgments" about how to "organize" and "prioritize" content. 603 U.S. at 718. Therefore, it is "a serious misunderstanding of First Amendment precedent and principle" to conclude that restrictions on "Facebook's and YouTube's main feeds" (and other covered members' feeds) do "not interfere with expression." *Id.* at 727. By repeating that error here, Defendant also misunderstands NetChoice's unrebutted evidence showing that these feeds "rel[y] on . . . *human* review," 3-ER-354 (Davis Decl. ¶ 41) (emphasis added), and that curating them is "*human*-resource intensive." 3-ER-329 (Veitch Decl. ¶ 32) (emphasis added). Defendant never claims he submitted contrary evidence.

Finally, Defendant errs in suggesting that the Act's restrictions apply only to personalized feeds that "respond *solely* to how users act online." Resp.36. The Act regulates feeds where content is "recommended, selected, or prioritized . . . based, in whole or *in part*" on users' data. § 27000.5(a) (emphasis added). So this Act covers any personalized feed that *both* implements a website's curatorial content-moderation policies *and* displays speech based on users' preferences. The First Amendment fully protects these feeds under *Moody*, 603 U.S. at 718.

B. Defendant mistakenly dismisses minors' own First Amendment rights to access personalized feeds.

Defendant wrongly downplays users' independent First Amendment rights to access personalized feeds. Br.28-29. These rights equally protect minors, who have the "right to speak *or be spoken to*." *Brown*, 564 U.S. at 795 n.3 (emphasis added). Personalized feeds directly facilitate users' ability to receive speech. *E.g.*, 3-ER-325-26 (Veitch Decl. ¶ 21). By selecting and prioritizing relevant content, these feeds amplify the voices users want to hear. Br.10.

Defendant responds that the Act preserves minors' ability to view the underlying "content" on covered websites. Resp.37. This ignores that personalized feeds are "a distinctive expressive offering." *Moody*, 603 U.S. at 738; *see id.* at 731 (similar). A law prohibiting a bookstore from organizing its shelves by topic would unquestionably implicate the First Amendment. *See* EFF Amicus Br.12-18. Even if the underlying content remains available in *some* form, regulating a website's (or a bookstore's) choices about "how" to organize content in a *particular* curated form burdens users' rights to access protected expression. *Moody*, 603 U.S. at 738.

Defendant dismisses minors' rights in a conclusory footnote, arguing that their rights "do[] not matter" for determining whether the Act implicates the First Amendment. Resp.30 n.6. This view ignores *Brown* and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975). Instead of addressing this binding precedent, Defendant deflects by citing (but not analyzing) *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality op.). But *Pico* did not hold that listeners' rights

exist solely because of speakers' rights, as Defendant suggests. Resp.30 n.6. That is why cases like *Brown* and *Erznoznik* focus so heavily on minors' rights. *See* Br.28-29. Instead, *Pico* held that speakers' and listeners' rights are complementary "corollar[ies]." 457 U.S. at 867 (plurality op.).

Defendant also misunderstands *Packingham*, arguing that this case does not apply to "regulat[ion]" but only to laws that "impose an[] across-the-board ban" on access to social media. Resp.37. That distinction is untenable. *Packingham* would not have come out differently if that law had banned access to personalized feeds rather than social media websites. Both "burdens" and "bans" on access to protected expression implicate the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (citation omitted). The First Amendment therefore protects against state laws prohibiting *or* restricting minors' ability to effectively navigate "the vast realms of human thought and knowledge" on social media websites. *Packingham*, 582 U.S. at 107.

Fundamentally, Defendant's position would allow the State to regulate personalized feeds *even for adults*. *See* Br.35. He argues that this Act does not "interfere[] with protected speech," Resp.32, because it purportedly regulates just certain "*features* of internet platforms," Resp.4. If that is right, personalized feeds are not expressive, and the government could have a free hand to regulate them. Br.35. But *Moody* held the opposite. 603 U.S. at 738. Defendant responds that concerns about adults' access to personalized feeds are overblown, arguing that *this* Act regulates personalized feeds only

"*because* they are harmful to minors." Resp.51 (emphasis added). But Defendant's interpretation of the First Amendment would render personalized feeds wholly unprotected. That could allow the State to regulate them however it sees fit—including for adults. *Moody* already rejected this sweeping assertion of government control over online expression. 603 U.S. at 726-27. This Court should too.

C. Defendant's demand for more evidence about which "actors" and "activities" the Act regulates misreads *Moody*.

Defendant concedes that "whether a platform is covered by SB976 depends *only* on whether the platform uses" personalized "feeds." Resp.40-41 (emphasis added). But he argues that courts cannot analyze the Act's constitutionality, under *Moody*, unless NetChoice submits more evidence granularly identifying all individual "actors" and "activities" the Act covers. *See* Resp.29 (citation omitted). That is not what *Moody* held.

Defendant wrongly argues that NetChoice must "inventory[] the universe of platforms" the Act regulates. Resp.30. The district court made the same error. 1-ER-23. Both before and after *Moody*, First Amendment facial challenges have never required a granular census identifying "every" single website that a state law restricting speech covers. *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1116 (9th Cir. 2024). Instead, when a law's "provisions raise the same First Amendment issues for every covered" website, a "facial challenge is permissible." *X Corp.*, 116 F.4th at 899.

Defendant's demand for an "inventory[]," Resp.30, ignores that *Moody* discussed the "*kinds* of websites," 603 U.S. at 718 (emphasis added), and the *categories* of "actors" and "activities" that state laws cover. The Supreme Court called for more evidence in *Moody* because the laws there "appear[ed] to apply *beyond* Facebook's News Feed and its ilk." 603 U.S. at 724 (emphasis added). But here, the parties agree that the Act applies "only" to websites using personalized feeds. Resp.41. These are the exact "kinds" of services, like "Facebook's News Feed and YouTube's homepage," that receive full First Amendment protection under *Moody*. 603 U.S. at 718, 726. Meanwhile, this Act excludes "events management," "email," "online marketplace[s]," "payment service[s]," and "ride-sharing." 603 U.S. at 724-25. Those are the proper levels of generality from which to "determine what [a] law covers." *Id.* (cleaned up). NetChoice explained that in this Court (Br.12-15) and in the district court. *E.g.*, 3-ER-389-91 (Complaint) (describing "covered 'actors' and 'activities'"); 3-ER-285-86 (Motion for Preliminary Injunction) (same).

In other words, the entire point of the *Moody* analysis is to identify "kinds" of websites that "fall on different sides of the constitutional line." 603 U.S. at 718, 726. Defendant concedes that "whether a platform is covered by SB976 depends *only* on whether the platform uses" a personalized "feed." Resp.40-41 (emphasis added). NetChoice's evidence and Defendant's concessions are all any court needs to decide whether personalized feeds are inherently expressive (as NetChoice argues) or "[do not] actually interfere[] with protected speech" (as Defendant argues, Resp.32).

Defendant also incorrectly posits that NetChoice should have submitted evidence about "[h]ow the *feeds* . . . make their recommendations." Resp.33. The First Amendment protects these curated decisions regardless of "how" the feeds operate. *See* Br.26-28; Cato Amicus Br.7. By analogy, a newspaper's editorial choices are protected regardless of how editors select articles—whether by intuition, reader surveys, or tracking past readership. *See M.P. by & through Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 526 (4th Cir. 2025) (noting that newspapers sort content to "prioritize[] engagement"). Personalized feeds likewise reflect protected editorial decisions no matter which specific criteria covered websites use to decide "what third-party speech to display and *how* to display it." *Moody*, 603 U.S. at 716 (emphasis added).

II. The Act's speech restrictions fail heightened First Amendment scrutiny.

A. The Act's speech restrictions trigger and fail strict scrutiny because they depend on content-based and speaker-based coverage definitions.

1. Defendant wrongly asserts that the Act's speech restrictions are not content-based, positing that the Act's "purpose" is to regulate "harmful features—not any particular content." Resp.40. But a litigant's own articulation of a law's purpose cannot shield facially content-based statutory *text* from strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This Act is facially content-based because, among other things, it "defin[es] regulated speech by particular subject matter." *Id.* The Act explicitly defines the

regulated activity based on whether personalized feeds provide user-generated content versus another type of content. § 27000.5(a); *see* Br.50-51.

Besides, the Act's legislative declarations make clear that the Act's purpose is to regulate "social media," not particular "features." *E.g.*, SB976 § 1(d). One of the declarations Defendant submitted helps explain why the Act targets "social media": because of the "content" that such websites' personalized feeds display. 2-ER-238-39 (Radesky Decl. ¶ 61.d-f). Defendant now disavows this aspect of the declaration that he submitted, Resp.40 n.9—even while relying on this declaration for other purposes, Resp.44. This flip-flopping creates "reason to doubt whether the government is actually pursuing" the purportedly content-neutral purposes Defendant invokes. Resp.50.

Defendant also mistakenly argues that the Act is not content-based because it does not "make any content unavailable to any user." Resp.39. But a content-based regulation still violates the First Amendment if it "burdens" but does not "ban[]" disfavored speech. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 812 (2000); *see* EFF Amicus Br.26. Regardless, blocking access to personalized feeds *does* practically make content unavailable, because without these feeds' "recommendations," users would be lost among "the billions of posts or videos" that appear on covered websites. *Moody*, 603 U.S. at 734; *see* Br.10; EFF Amicus Br.13-14. Minors' ability to "search for" specific content does not eliminate this concern. Resp.39 n.8. A search is useful only if a user knows what to look for. By contrast, personalized feeds prioritize

content that users value but may not know to search for—everything from breaking news to personal announcements from friends.

Defendant incorrectly asserts that the Act's exceptions cover only "classes or types of communication," not "viewpoints or topics." Resp.41. The Act's exception for "[c]onsumer reviews" is content-based because it covers speech discussing products or services. § 27000.5(b)(2)(A). And the exception for "commercial transactions" is content-based because it encompasses speech facilitating or related to buying or selling. *Id.* Both categories rely on subject-matter-specific definitions, in stark contrast to speech about other subjects like social or political content. *See, e.g.*, *Comput. & Commc'ns Indus. Ass'n v. Paxton*, 747 F. Supp. 3d 1011, 1032 (W.D. Tex. 2024).

Project Veritas v. Schmidt is not to the contrary. *See* 125 F.4th 929 (9th Cir. 2025). That case held that Oregon's statute prohibiting unannounced recordings of conversations was content-neutral. *Id.* at 937. But no part of that holding would allow Oregon to escape strict scrutiny if it were to pass a new law exempting recordings of conversations about "product reviews" or "commercial transactions." *See id.* Because this Act's exemptions for "reviews" and "transactions," § 27000.5(b)(2)(A), depend on *content*, they are "easy to categorize as content based," *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 557 (S.D. Ohio 2024). *See NetChoice, LLC v. Bonta*, 2025 WL 807961, at *9 (N.D. Cal. Mar. 13, 2025) ("*Bonta II*") (similar).

Defendant wrongly claims that speaker-based distinctions matter only if they favor speakers who align with the government's viewpoint. Resp.42.

This narrow conception ignores that selectively regulating speakers *because of* the content of their speech still triggers strict scrutiny. Br.51-52. Defendant never explains why the State can avoid strict scrutiny when it exempts websites that choose to create curations of *their own* content (like Spotify or Hulu) while targeting websites that curate *users'* content. *See* Br.51. And because this distinction is facially speaker-based, no content-neutral purpose can save it from heightened scrutiny. *Contra* Resp.42.

NetChoice argued that the Act's speech restrictions "fail all forms of First Amendment scrutiny." Br.42 (discussing "feedback metrics"); *see* Br.35, 43, 52 (similar for *all* the Act's speech restrictions). So NetChoice has not forfeited arguments about intermediate scrutiny. *Contra* Resp.47. All the Act's speech restrictions fail any level of First Amendment scrutiny because they are not narrowly tailored to furthering a sufficient governmental interest.

2. Defendant's brief also shows why these content-based and speaker-based coverage definitions are not narrowly tailored and thus fail any form of heightened First Amendment scrutiny. For example, Defendant never explains why YouTube's personalized feeds demand regulation while Spotify's similar personalized feeds do not. *See* Br.52. Defendant also never explains why the Act's coverage definitions exempt personalized feeds on websites focused on commercial transactions or consumer reviews, many of which equally rely on user information and algorithmic recommendations. Br.38; *see* § 27000.5(b)(2)(A). Either way, if "any website that uses" a

personalized "feed" is harmful enough to regulate, Resp.49, the Act is underinclusive by targeting only some such websites.

Defendant responds that the Act's coverage definitions are permissibly underinclusive because underinclusiveness is a constitutional defect only if there are "reason[s] to doubt whether the government is actually pursuing the interest it invokes." Resp.50. That is wrong. *Brown*, for instance, held that "the legislation [wa]s seriously underinclusive . . . because it permit[ted] a parental or avuncular veto." 564 U.S. at 805. That was a facial tailoring flaw. *Id.* at 802.

Regardless, reasons for doubt are overwhelming here. The Act's legislative declarations cite "social media" almost a dozen times before shifting to personalized feeds. SB976 § 1(a)-(g). Defendant likewise oscillates, citing both "compulsive . . . internet use," Resp.1, and "the time users spend on social media," Resp.8, before transitioning to personalized feeds. These unexplained jumps from broad concerns about internet use to a narrow focus on personalized feeds "raise[] serious doubts about" whether the State is genuinely pursuing the interests Defendant invokes. *Brown*, 564 U.S. at 802.

Defendant also fails to justify the Act's substantial overinclusiveness. He argues that the Act does not need tailoring because it broadly restricts all personalized feeds. Resp.49. Yet Defendant offers no explanation for why personalized feeds need regulating even on websites that minors are unlikely to access. *See* Br.52.

Finally, Defendant wrongly dismisses both the parental tools that already exist and the State's own ability "to encourage the use of [these tools] by parents." *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *21 (W.D. Ark. Aug. 31, 2023) (cleaned up). Parental controls are a "le[ss] restrictive means," *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) (citation omitted), because they are a *private* available alternative rather than a *governmental* mandate, *Playboy*, 529 U.S. at 826. Defendant concedes that these tools "complement," "might be beneficial in some respects," and are often "*more* restrictive than SB976." Resp.48. Defendant thus fails to explain why these tools are inadequate to address the harms he cites.

B. The parental-consent requirements violate the First Amendment.

Defendant ignores *Brown*'s holding that "the state has" no "power to prevent children from hearing or saying anything *without their parents' prior consent*." 564 U.S. at 795 n.3. That holding bars all the Act's parental-consent requirements. *See* Br.29 (discussing §§ 27001, 27002(b)(2)). Defendant never addresses this point. He also ignores *Erznoznik*, 422 U.S. at 214 which recognized minors' First Amendment "right to speak or be spoken to," *Brown*, 564 U.S. at 795 n.3. These cases establish that parental-consent requirements for protected speech must satisfy heightened scrutiny. *See* Br.28-29. Defendant's arguments do not show how the Act's parental-consent requirements meet that bar.

Defendant identifies no legitimate governmental interest in requiring minors to obtain parental consent before accessing personalized feeds. *See* Resp.45-47. Defendant starts by deflecting from NetChoice's central argument: None of Defendant's evidence addresses personalized feeds specifically. Br.36. Instead of meeting that argument head-on, he cites evidence addressing: "content," which he elsewhere disavows (Resp.40 n.9); "[a]utoplay," which the Act does not address; and "[n]otifications," which are not at issue here. Resp.45 (citing 2-ER-237-41 (Radesky Decl. ¶¶ 61, 64, 67)). Defendant also cites "experimental studies" about "social media." Resp.45 (citing 2-ER-181-87, 2-ER-194 (Feder Decl. ¶¶ 38-48, 59)). But he also argues that the Act "is in no way targeted toward" social media (Resp.40), even though the Act's legislative findings focus exclusively on "social media." SB976 § 1. Thus, Defendant's evidence does not support the governmental interests he invokes.

Without any such evidence, Defendant retreats to arguing that mere "correlation" between personalized feeds and "harm[]" provides a sufficient governmental interest to restrict protected speech. Resp.45. *Brown* holds otherwise. Br.36. The Supreme Court there specifically rejected the State's asserted governmental interest, because the State failed to establish that the targeted expression could "*cause* minors" harm. 564 U.S. at 800. Defendant seizes on other flawed aspects of the research from *Brown* to argue that evidence is sufficient unless it shares those exact flaws. Resp.46. But *Brown* rejected that research specifically because it was "'based on correlation, not

evidence of causation.'" 564 U.S. at 800 (citation omitted). The other flaws helped support that conclusion, but they were not dispositive. *See id.* Here, "evidence of causation" is likewise necessary. *Id.* [4]

In any event, Defendant fails to show that the parental-consent requirements are properly tailored. He never explains why personalized feeds are simultaneously harmful enough to require government intervention yet benign enough to allow free access for minors who obtain parental consent. *See* Br.37-38. *Brown* expressly faulted California for treating expression as "dangerous" enough to regulate yet safe enough to access "so long as one parent . . . says it's OK." 564 U.S. at 802. Defendant makes the same error here. Meanwhile, the parental-consent requirement is overinclusive because it ignores the parental tools Defendant concedes are already available and "*more* restrictive than SB976." Resp.48; *see supra* p.19.

C. The default-settings requirements violate the First Amendment.

Defendant concedes that the Act's "default-settings provisions" are a "means of tailoring SB976 to" regulate personalized "feeds." Resp.51. Regulation of personalized feeds implicates the First Amendment. *Supra* p.6. That means the default-settings requirements implicate the First Amendment too. *See* § 27002(b)(2)-(5). And they trigger strict scrutiny, because the Act's

[4] Unlike the "concept of judicial integrity," a claim that particular expression is "harmful to minors" (Resp.49) would "lend itself to proof by documentary record." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015).

central coverage definitions are content-based and speaker-based. *Sorrell*, 564 U.S. at 563-64. Defendant fails to establish that these requirements survive any form of heightened First Amendment scrutiny.

1. *"Feedback metrics" default*. Defendant halfheartedly suggests (Resp.51) that the "feedback metrics" default regulates "economic activity" or "nonexpressive conduct." *Sorrell*, 564 U.S. at 567. But feedback metrics are expression—both because they convey information, and because they are speech about speech. Br.40. Defendant never explains his contrary views, and both are implausible. "[N]umbers that signify an amount of feedback" (Resp.52) are neither commercial speech nor akin to non-expressive activity like "'outdoor fires.'" *Sorrell*, 564 U.S. at 567 (citation omitted).

Defendant's resort to "intermediate scrutiny" is futile. Resp.52. "Metrics that quantify feedback" is a content-based category because "feedback" is a specific type of content (as distinct from views, shares, etc., Br.40). *See Reed*, 576 U.S. at 163. Defendant responds that "likes" are just a "class[]" or "type[]" of speech. Resp.52. But unlike "speech that constitutes" the act of "solicitation," or speech that "draws neutral, location-based distinctions," *Project Veritas*, 125 F.4th at 950, "likes" and other forms of feedback directly convey a specific type of expressive sentiment. Regulating them—or speech that quantifies them—is therefore content-based.

The lone governmental interest Defendant cites does not support the "feedback metrics" requirement. Even if feedback metrics play a role in "self-esteem and mental health," Resp.52, "governmental restriction of free

expression" is not the appropriate way to address this—particularly when parents have existing tools that Defendant concedes are more effective. *Brown*, 564 U.S. at 801 n.8. No matter whether the State thinks feedback metrics are "too persuasive," *Sorrell*, 564 U.S. at 578, or too "offensive," it "is not . . . the role of the State" to proscribe them. *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 638 (2018); *see* Br.29.

This requirement also is not "narrowly tailored." Resp.52. Defendant is wrong that "there is little expressive value in . . . . numbers that signify an amount of feedback." Resp.52. Bestseller lists, ticket sales, signatures on student petitions, and counts of protest participants all have expressive value. Br.40-41. California could not prohibit newspapers from publishing such information. It also cannot prohibit covered websites from displaying similar metrics.

Defendant repeats the district court's error by arguing that the "feedback metrics" default is narrowly tailored because it "allows minors to access the content of any feedback they receive." Resp.52; *see* 1-ER-34. That logic is mistaken. A minor can count the number of "likes" or other feedback herself even if she leaves the default on. Such counting *increases* her "screen time" (Resp.9) as compared to quickly viewing a feedback metric. Alternatively, the minor can disable the default. Either way, this restriction leaves wide-open substitute paths for minors to determine the amount of feedback.

2. *"Private mode" default*. Defendant never disputes that the "private mode" default "'restrict[s]'" speech and thus implicates the First

Amendment. Resp.53 (quoting 1-ER-34). That restriction triggers heightened scrutiny under *Brown*, because it limits minors' "right to speak or be spoken to." 564 U.S. at 795 n.3. Defendant ignores this, arguing instead that the Act is not "speaker-based." Resp.53. But Defendant does not explain how separating speakers who *are* connected to a minor from speakers who *are not* connected to a minor is anything but speaker-based. Either way, the "private mode" default burdens speech, so "the Government bears the burden of proving [its] constitutionality." *FEC v. Cruz*, 596 U.S. 289, 305 (2022) (citation omitted).

To satisfy that burden, Defendant cites a governmental interest in "protect[ing] minors from being exploited by strangers online." Resp.53. But that reasoning would allow Defendant to require the same default for adults (who strangers can also exploit). *See supra* p.11. Regardless, California law already prohibits various forms of exploitation of minors. *E.g.*, Cal. Penal Code § 272. So the "private mode" restriction is "prophylaxis-upon-prophylaxis" that the First Amendment prohibits. *Cruz*, 596 U.S. at 306. Separately, Defendant ignores that minors are free to disable the default. *See* Br.43. If the government is truly targeting "exploitat[ion]" (Resp.53), that makes no sense. *See Brown*, 564 U.S. at 805. Defendant also ignores that the Act leaves alternative channels like "gaming sites or video chat applications" unregulated. *Griffin*, 2023 WL 5660155, at *19 (cleaned up). Such "[u]nderinclusiveness" is "alone enough to defeat" this restriction. *Brown*, 564 U.S. at 802.

D. The age-assurance requirements violate the First Amendment and are ripe for review.

Defendant never disputes that heightened First Amendment scrutiny applies when governments age-gate access to protected speech. Br.45; *see Brown*, 564 U.S. at 794. Here, the statutory age-assurance requirements fail any level of heightened scrutiny. This is true regardless of whatever regulations Defendant may later promulgate, so NetChoice's challenge is ripe.

1. Defendant never asserts any standalone governmental interest supporting the age-assurance requirements. *See, e.g.*, Resp.51 (linking age-assurance to personalized feeds). Therefore, if the "personalized feeds" restrictions are unconstitutional, the age-assurance restrictions are too. Br.45.

Regardless, Defendant has also failed to show that the age-assurance restrictions are sufficiently tailored. He argues that age-verification is not "necessarily subject to strict scrutiny" (Resp.21), citing *Reno*, 521 U.S. 844, and *Ashcroft*, 542 U.S. 656. He correctly acknowledges that those cases concerned "obscene or indecent" material *unprotected for minors*. Resp.20. But that distinction makes this law worse. This Act burdens access to a countless amount of fully protected, non-obscene speech for both minors and adults. Defendant does not contest that social media websites using personalized feeds have millions, if not billions, of posts discussing fully protected speech on almost any topic imaginable. *See* Resp.21. That alone supports an injunction against the age-assurance provisions. *See Bonta II*, 2025 WL 807961, at *21 ("[a]pplying strict scrutiny" to reject a statutory "age estimation" requirement "in all applications").

Defendant also attempts to limit *Reno* and *Ashcroft* to their facts. But the facts he highlights are also present here, because age-verification technology remains "unreliable" and "prohibitively expensive." Resp.21; *see* CDT Amicus Br.1-24. And those facts were relevant in *Reno* and *Ashcroft* only because the government was regulating speech that was *unprotected* for minors. *See Ashcroft*, 542 U.S. at 668; *Reno*, 521 U.S. at 865. The speech here is *protected* for minors, so the First Amendment analysis does not turn on technological feasibility.

Defendant also downplays concerns about anonymity. Resp.22-23. But risks to anonymity—and the corresponding chilling effects—remain a huge problem. *See* Chamber of Progress Amicus Br.17-21. No matter what actual degree of anonymity may be "available on the internet," Resp.21, age-assurance chills speech because users perceive it as threatening their anonymity. 3-ER-370-71 (Paolucci Decl. ¶ 17). This fear is not "nebulous." Resp.22. Dreamwidth's users "frequently cite [Dreamwidth's] . . . refusal to even gather any data . . . as the reason" they use that website. 3-ER-370 (Paolucci Decl. ¶ 17). Finally, "[t]here is no age verification system that is not also a deanonymization . . . system." *Id.*; *see* CDT Amicus Br.10. That is why multiple courts have rejected similar requirements. *E.g.*, *Bonta II*, 2025 WL 807961, at *21; *see* Br.46.

2. Defendant's arguments about prudential ripeness are likewise unavailing. The first "prudential" ripeness prong asks whether a court can "'deal with the legal issue[] presented.'" Resp.19 (citation omitted). That

legal issue here is whether the Act's *statutory* age-assurance requirements violate the First Amendment. Defendant argues that this issue is unfit for review because NetChoice "fall[s] far short of establishing a per se rule about the constitutionality of age-assurance requirements." Resp.20. That is a merits argument, not a ripeness argument. The *statutory* "age-assurance requirement" creates an age-gate for protected speech, so it is fit for review now.

Defendant also disputes the second prudential ripeness prong, arguing hardship is absent because the statutory requirement "*may* be further defined" in future regulations. Resp.24 (emphasis added). Whatever those regulations provide, compliance will be costly and time-consuming—a fact Defendant never disputes. Resp.24. So covered websites must either spend money *now* or gamble on regulations that "may" further define the Act's technical requirements. Resp.20, 24. Either way, covered websites face present hardship. Br.48-49.

III. The Act's central coverage definitions are unconstitutionally vague.

Defendant never disputes that the vagueness standard is "more stringent" in First Amendment cases. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982). Instead, Defendant again mistakenly argues that this case does not even "'implicate[] free speech rights.'" Resp.55 (citation omitted). Defendant's other arguments fare no better.

The Act's key terms "significant" and "primary" are impermissibly vague. Br.54. Defendant never responds to the cases holding that similar

terms in similar laws were unconstitutionally vague. Br.54 (citing *Griffin*, 2023 WL 5660155 at *13, and *NetChoice, LLC v. Fitch*, 738 F. Supp. 3d 753, 778 (S.D. Miss. 2024)). Instead, he says these terms are akin to "reasonabl[e]." Resp.56. But reasonableness is a well-known "legal standard" pervading American law. Bryan A. Garner, *Garner's Dictionary of Legal Usage* 754 (3d ed. 2011). By contrast, subjective terms like "significant" and "primary" do not provide enough notice for a person of "'ordinary intelligence . . . to know what'" this Act covers. Resp.57 (citation omitted).

Likewise, Dreamwidth's understandable confusion stems from how one of the Act's exemptions interacts with one of the Act's top-level coverage definitions—not from how two exemptions interact with each other. Br.53-54; *contra* Resp.55. As Dreamwidth explained, a feed based on a user's "friends lists" is apparently covered under § 27000.5(a) yet exempted under § 27000.5(a)(4). That makes the Act vague. Nor is this just a "single instance" of confusion. Resp.55. Other websites with "friends lists" face the same disjointed combination of coverage definitions and exemptions.

IV. NetChoice has standing to raise as-applied First Amendment claims on behalf of its members.

Defendant never disputes NetChoice's standing to raise *facial* challenges. NetChoice members are covered by the Act. *E.g.*, 3-ER-360 (Davis Decl. ¶ 56); 3-ER-309, 314 (Cleland Decl. ¶¶ 8, 26). Defendant never argues otherwise. And the Act imposes First Amendment injuries and compliance costs. *Infra* p.30. So this Court's Article III jurisdiction is secure.

Instead, Defendant contests only the third prong of associational standing, arguing that NetChoice cannot raise *as-applied* claims. That prong asks whether NetChoice's as-applied challenge "require[s] the participation of each individual member." Resp.57-58. It does not. Br.56.

Defendant argues that NetChoice members must participate as named parties to submit evidence analyzing "exactly" how particular personalized feeds "operate" and "how" each covered website "makes unique decisions" about content curation. Resp.58. No court needs that evidence to resolve NetChoice's First Amendment claims. *Supra* p.12. *Moody* held that all personalized feeds curating speech compilations are fully protected—including when they use "algorithms" to both "implement . . . standards" and "prioritize[e] . . . content." 603 U.S. at 734-35. It does not matter precisely *how* personalized feeds operate or websites curate content. *Contra* Resp.58-59. That is why *Moody* expressly recognized that NetChoice could have litigated the challenges there using "as-applied claims." 603 U.S. at 724. So too here.

NetChoice offered undisputed evidence that its members' personalized feeds make expressive editorial judgments by implementing publicly available community guidelines. *E.g.*, 3-ER-309-10 (Cleland Decl. ¶¶ 6-9). This evidence shows that NetChoice members' personalized feeds do not rely on algorithms responding *solely* to user behavior. *Supra* p.8. It also shows that NetChoice members can provide facts to the court without joining the case as parties. So, at minimum, the district court should have granted as-applied relief to NetChoice's members. Br.30-31.

Defendant responds that *Moody* "never addressed SB976." Resp.35. That is just trying to limit *Moody* to the precise state laws challenged there. But *Moody* made broadly applicable holdings reaffirming the First Amendment's protections for online speech. 603 U.S. at 727. The personalized feeds this Act regulates share the same kind of "customiz[ation]" and "individualiz[ation]" as the "feed[s]" protected under *Moody*. *Id.* at 734-35. Indeed, some of the personalized feeds at issue here are the *same* feeds *Moody* analyzed. *Id.* at 736 n.5.

Ultimately, the distinction between as-applied and facial claims here is one of *relief*: whether an injunction will protect NetChoice members only versus all covered websites. Br.56. Either way, NetChoice members are entitled to a preliminary injunction.

V. The other preliminary-injunction factors favor NetChoice.

Defendant never addresses the irreparable harm these constitutional violations create. *See* Resp.51-52. Even a momentary loss of websites' rights to curate and display personalized feeds—*or* users' rights to access them—"'unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (citation omitted). Defendant ignores these injuries based on his erroneous view that this Act does not regulate protected speech. *Supra* p.6.

Defendant also wrongly dismisses the compliance costs that irreparably harm NetChoice members. This Act mandates expensive, complex systems, Br.58, not just "ordinary" costs, Resp.59. Defendant ignores the unrebutted

evidence that the Act, for example, threatens Dreamwidth's "ability to continue operating" because the costs are "in excess of [the] available budget." 3-ER-369, 372-73, 374-76 (Paolucci Decl. ¶¶ 13, 20-21, 23-27). That evidence is neither "conclusory" nor "speculative." Resp.59. Defendant does not dispute that sovereign immunity blocks NetChoice members from recovering these costs from the State. *See* Br.58. So the costs are irreparable, even if "some" or "many" NetChoice members could shoulder them. Resp.60.

Finally, the public interest and the balance of the equities favor a preliminary injunction. An injunction would not displace the existing private "beneficial" parental tools that Defendant begrudgingly acknowledges. Resp.48. And Defendant remains able to "encourage[]" the use of those tools. Resp.48. So an injunction would not threaten the State's ability to "pursu[e] its compelling public interest in protecting children's health." Resp.60. Rather, an injunction would uphold the First Amendment by prohibiting government control of online speech.

CONCLUSION

This Court should reverse those parts of the district court's order denying a preliminary injunction.

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I hereby certify that I caused this document to be electronically filed on this 20th day of March, 2025, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. All registered case participants will be served via the Appellate Electronic Filing system.

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