No. 23-2969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NETCHOICE, LLC, doing business as NetChoice,

Plaintiff-Appellee,

—v.—

ROB BONTA, Attorney General of the State of California,

Defendant-Appellant.

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 5:22-CV-08861-BLF (THE HONORABLE BETH LABSON FREEMAN, JUDGE)

BRIEF OF *AMICUS CURIAE* COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

These representations are made in order that the judges of this Court may evaluate possible disqualification of recusal.

Computer & Communications Industry Association ("CCIA") is a trade association operating as a 501(c)(6) non-profit, non-stock corporation organized under the laws of Virginia. CCIA has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The *amicus curiae* is a trade association. Its brief *amicus curiae* to the District Court in support of the motion for preliminary injunction was accepted for filing September 18, 2023 (ECF 73).

This brief is submitted pursuant to Fed. R. App. P. 29 in support of NetChoice, LLC d/b/a NetChoice (herein, "NetChoice") to urge the Court to affirm the District Court's decision, which preliminarily enjoined AB2273, the California Age-Appropriate Design Code Act (herein, "AB2273"), codified at Cal. Civ. Code §§ 1798.99.28-1798.99.31, on the ground that, *inter alia*, it likely infringes the First Amendment rights of website and application developers to curate and display speech.

All parties to this appeal have consented to the filing of this brief *amicus curiae*.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.

A list of CCIA members is available at https://www.ccianet.org/members.

STATEMENT OF *AMICUS CURIAE*

This brief was authored entirely by the undersigned counsel and was funded entirely by the *amicus curiae*. No person or party other than *amicus curiae* contributed money to the creation, filing, or service of this brief.

SUMMARY OF ARGUMENT

As the District Court correctly held, California AB2273 likely violates the First Amendment of the U.S. Constitution by attempting to control the information that can be provided to persons under 18 years of age. The First Amendment likely prohibits this statute, just as it barred similar past efforts to censor online speech. *See*, *e.g*., *ACLU v. Reno*, 521 U.S. 844, 870 (1997).

This brief makes two central points in support of the District Court's holding. First, AB2273 would impermissibly restrict online service providers' speech by forbidding amorphous and expansive categories of content that may be "materially detrimental to the physical health, mental health, or well-being of a child" and uses a child's "personal information." §1798.99.31(b)(1). It also bans "any form of automated processing" to "evaluate" a minor's "personal preferences" or "interests," which the statute calls "profiling." §1798.99.30(b)(6). To the extent these provisions are even deciphrerable, they would unlawfully restrict the publication and editorial choices of online services. They would also unlawfully restrict the choices that users make via online services, including search engines, social-media websites, news

publishers, online educational resources, and online libraries. And being all but impossible to understand, much less apply in any consistent or predictable way, AB2273 is hopelessly vague and necessarily overbroad. These flaws render the statute unconstitutional in at least the ten ways that the District Court identified. Op. at 20-34.

Second, AB2273 unlawfully compels speech. It would require nearly all online services to prepare onerous "Data Protection Impact Assessments" ("DPIAs") about controversial topics and to disclose those assessments to state law enforcement officials. §1798.99.31(a). It would require nearly every provider of online services to explain, for every existing and potential feature of their services, how its "algorithms" and "design features" could "expos[e] children to harmful, or potentially harmful, content," "contacts," or "conduct," or could otherwise "harm children." §1798.99.31(a)(1)(B). AB2273 effectively requires publishers to condemn their own services in favor of the State's preferred dogma about contentious social and scientific questions. As such, AB2273 establishes a regime for compelled speech that cannot be squared with the First Amendment. *See*, *e.g.*, *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023) (preliminarily enjoining, as unconstitutional compelled-speech mandate, state law requiring social media websites to publish policies detailing their position on "hateful content").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT AB2273 VIOLATES SERVICE PROVIDERS' FIRST AMENDMENT RIGHTS TO DISPLAY AND RECOMMEND CONTENT.

The District Court found that "NetChoice has demonstrated a likelihood of success" on its first claim under the First Amendment, "which asserts that [AB2273] violates the First Amendment because the Act's 'speech restrictions … fail strict scrutiny and also would fail a lesser standard of scrutiny.'" Op. at 37 (quoting Compl. ¶ 82). That finding rests squarely on settled law establishing that the publishing of information is expressive activity and that online publication warrants no less First Amendment protection than its hard-copy forbearers.

A. The First Amendment Protects The Rights Of Online Services To Distribute And Receive Information, Even When The Government's Stated Objective Is Protecting Minors.

The First Amendment protects "the acts of 'disclosing' and 'publishing' information." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Because "publishing" and "distributing" materials is "itself expressive activity," publishers and distributors "have freestanding rights under the First Amendment to communicate with others through such protected activity." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 688 (9th Cir. 2017). "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S.

552, 568 (2011) (internal citation omitted).

As the Supreme Court has explained, therefore, a state's attempt to inhibit "the publication of truthful information seldom can satisfy constitutional standards." *Bartnicki*, 532 U.S. at 527. That analysis includes a state's efforts to target the tools used to distribute speech. In *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61 (1983), for example, the Court held that a law prohibiting advertisements for contraceptives from being sent through the U.S. Mail violated the First Amendment. A decade later, the Court struck down a statute that prohibited the commercial distribution of publications via freestanding news racks on public property as "an impermissible means of responding to the city's admittedly legitimate interests." *Cincinnati v. Discovery Network*, 507 U.S. 410, 424, 431 (1993).

The First Amendment also protects "the exercise of editorial control and judgment"—the choices that publishers make about what material to include and how to present it. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974); *accord Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) ("by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats" and are protected by the First Amendment). As the Court put it in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 570 (1995), "the presentation of an edited

compilation of speech generated by other persons … fall[s] squarely within the core of First Amendment security."

These bedrock protections apply fully to the Internet. As the Supreme Court has explained, "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox," and "[t]hrough the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno*, 521 U.S. at 870. In short, "'the content on the Internet is as diverse as human thought,'" and precedent "provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.*; *accord Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (First Amendment "protects material disseminated over the internet.").

Online services have robust First Amendment rights to make choices "about what content to include, exclude, moderate, filter, label, restrict, or promote." *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1186 (N.D. Cal. 2022) (citing *Tornillo*, 418 U.S. at 257-58). These "acts are expressive," and where a law "directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest, that action is based on conduct in furtherance of free speech rights." 579 F. Supp. 3d at 1186; *accord NetChoice, LLC & Computer & Commc'ns Indus. Ass'n v. Att'y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022)

(online services "are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms").

The First Amendment protects not only the right to share information, but also the right to access or receive it. The "protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). Indeed, this "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 743 (9th Cir. 2021).

All of these protections extend to minors. The "values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. Jacksonville*, 422 U.S. 205, 214 (1975). "[O]nly in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 213. Thus, "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804-05 (2011); *accord Reno*, 521 U.S. at 875 ("the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children … does not foreclose inquiry into its validity.").

Even aside from minors' own rights to share and receive content, the First Amendment bars regulations that, as here, are so broad as to impede adults' access

to content. "[T]he government may not 'reduce the adult population ... to reading only what is fit for children.'" *Bolger*, 463 U.S. at 73. In *Sable Commc'ns of Cal. v. FCC*, for example, the Court held that a statute banning indecent commercial telephone communications violated the First Amendment, notwithstanding the government's contention that it was necessary to protect children—an occasion of "burn[ing] the house to roast the pig." 492 U.S. 115, 127 (1989); *accord Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010) ("the statutes also restrict adults from providing minors with materials that are entirely anodyne for First Amendment purposes").

These principles have repeatedly been applied to invalidate laws aimed at protecting children from potentially harmful communications on the Internet. In *Reno*, the Supreme Court held that "the [Communications Decency Act] lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech," because "[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." 521 U.S. at 874. AB2273 suffers from the same mistake.

B. AB2273 Infringes the First Amendment By Regulating How Lawful Speech Can Be Presented And Disseminated Online.

AB2273 effectively forbids a wide range of protected online communications, and other provisions make those communications fraught with legal peril. In the

name of children's privacy or protection, it applies to virtually every online service, such as search engines, online publications (including newspapers, magazines, and blogs), social media platforms, and the publishers of books, photographs, videos, music, games, recipes, podcasts, and countless other forms of speech. *See* §1798.99.30(b)(5) (exempting only "broadband internet access service[s]," "telecommunications service[s]," and tangible product delivery services). AB2273 subjects all of this content to unprecedented requirements and restrictions, which the District Court correctly found is likely unlawful under the First Amendment.

1. The "material detriment" provision is overly broad, because it prohibits dissemination of a great deal of lawful content to anyone under 18.

AB2273 regulates all content that could be a "material detriment to children." §1798.99.31(a)(1)(B), (a)(2). That term is not defined. Op. at 28. And though it ostensibly is limited to a service "likely to be accessed by children," §1798.99.31(a), that phrase includes services "routinely accessed by a significant number of children," and "substantially similar" services, and services where children are a "significant amount of the audience," or even services with "design elements … of interest to children." §1798.99.30(b)(4)(B), (D)-(F). None of these terms are defined, but it seems clear that virtually any website or online service (save for those offering content like pornography, gambling, or the like) would meet those criteria. The District Court found that California's failure to define these terms likely renders

AB2273 unlawful under both strict scrutiny and the commercial-speech standard. Op. at 28-29 (citing *ACLU v. Mukasey*, 534 F.3d 181, 191 (3d Cir. 2008)).

AB2273 also prohibits service providers from using "the personal information of any child in a way that" might be "materially detrimental to the physical health, mental health, or well-being of a child." §1798.99.31(b)(1). "[P]ersonal information" is defined as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." Cal. Civ. Code §1798.140(v)(1); *see also* § 1798.99.30(a) (incorporating §1798.140). That information includes a person's "IP address," "email address," "account name," "online identifier," and "internet or other electronic network activity information," including "browsing history, search history, and information regarding a consumer's interaction with an internet website application." §1798.140(v)(1). This expansive provision does not simply cover the use of a child's private information for targeted advertising or the sale of that information to data aggregators. It reaches well beyond that scope to regulate such information for almost any purpose. AB2273 thus again "is not narrowly tailored" and would not survive either heightened or intermediate First Amendment scrutiny. Op. at 28-29 (citing *Mukasey*, 534 F.3d at 191).

Displaying content on the Internet necessarily requires the "use" of a person's IP address: any time someone visits a website, their browser uses their IP address to

receive and display the content on the website, be it search results, an online newspaper, or a photographer's online portfolio. Likewise, efforts to tailor information to users based on where they are located—for example, search results for nearby restaurants—typically rely on IP addresses. Similarly, when someone is logged into their account on a particular website—be it a video streaming service, a social media service, or an online store—the website often employs the user's email address, account name, or browsing history to show them personalized content, such as content they have saved, content they have searched for in the past, or content similar to other content they have viewed. In short, virtually any effort to tailor the delivery or presentation of online content to a given user—whether by a search engine, social media service, website, mobile application, news or entertainment service, or streaming video or music provider—is implicated by this "personal information" provision.

Though §1798.99.31(b) applies only where the provider knows "or has reason to know" that the displayed content "is materially detrimental to the physical health, mental health, or well-being of a child," these purported limitations are of little effect. First, the language of the statute suggests that the targeted "detriment" is not to the specific child that is presented with the personalized or targeted content, but rather "a child." In other words, this provision may be triggered if the material or display at issue is potentially detrimental to ***any*** child anywhere. Even setting aside

that different parents, guardians, and others have widely varying views on whether and when online content (itself widely varied) is "detrimental" to children, the statute effectively invites a result whereby ***one*** child might suffer a detriment from particular content and then that content is restricted as to ***all*** children.

Second, the statute defines "children" as anyone under 18, so if the material might be deemed detrimental to a 5-year-old, the statute would apply even if the content is being displayed based on information associated with a 17-year-old. The generic "child" referenced in this provision could be the most vulnerable minor imaginable or an extremely mature young adult, but, according to the State, the website should know the difference.

Third, the provision is not limited to physical health or even actual diagnosable mental health outcomes. It also relies on the vague and totally undefined concept of "well-being." What material might be considered "detrimental" (also an undefined term) to the "well-being" of a minor is anyone's guess, meaning that under AB2273 "regulated parties [do not] know what is required of them so they may act accordingly." *Butcher v. Knudsen*, 38 F.4th 1163, 1168 (9th Cir. 2022). These "[u]ncertain meanings" will "inevitably lead citizens to 'steer far wider of the unlawful zone,'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citation omitted), leading to self-censorship that will suffocate the "delicate," "vulnerable," and "supremely precious" First Amendment freedoms that "need

breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963). Perhaps the only thing that is clear is AB2273 has no exception for material that is newsworthy, culturally or politically relevant, educational, or of artistic or scientific value. So long as a personalized display of information might be deemed contrary to the "well-being" of someone under 18, it would be forbidden by AB2273.

AB2273's restriction is immense, potentially proscribing the display, to any minor, of all manner of entirely lawful—and indeed socially valuable—speech. *Cf. Grayned*, 408 U.S. at 115 (a statute is unconstitutionally overbroad if it "sweeps within its prohibitions what may not be punished under the First … Amendment[]"). Consider a few examples:

- An online news service displays articles to minors about recent school shootings, leading some minors to feel anxious, depressed, and afraid.
- An Internet search engine provides search results to a minor user's IP address about local skate parks where, as it happens, children frequently get injured.
- A photography-sharing website uses a minor's account name to display images from users that minor has chosen to follow, which include photographs of skinny models that, some believe, amplify unhealthy body images.
- A music streaming service suggests, based on other music a 17-year-old has streamed on the service, a playlist that includes songs with profanity or references to violence.

- Based on the user's prior interactions with the service, a podcasting platform suggests that a 16-year-old listen to a podcast in which survivors of sexual or violent assaults tell their stories, which might be traumatizing for some listeners.

- A popular online video game displays lists of games that 14-year-old users have requested through their accounts after the service becomes aware that playing those games could arguably be detrimental to the health or well-being of a child who should be doing their homework or getting more exercise.

As these examples confirm, AB2273 strikes at the heart of free expression, with none of the "narrow specificity" or "[p]recision of regulation" that is required "in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 433, 438. A statute that prohibited knowingly distributing to minors material that the government deemed "detrimental" to their well-being would plainly be unconstitutional. In *Butler v. Michigan*, 352 U.S. 380, 383 (1957), for example, the Supreme Court struck down a law banning distribution of materials found "to have a potentially deleterious influence upon youth." Likewise, the government could not lawfully bar magazines aimed at teenagers (*e.g.*, Teen Vogue) from putting articles on the cover that they have reason to know could be harmful to minors, nor could the government prohibit bookstores or libraries from recommending "harmful" books to minors. Though cloaked in the language of "personal information" and privacy, AB2273 effectively creates the same kind of unlawful ban. The statute

sweeps in large swaths of lawful speech that could not be directly forbidden by the government, that minors have every right to view, and that publishers equally have a right to make available to them.

Further, AB2273 plainly is not limited to material that is "obscene as to youths" or "subject to some other legitimate proscription." *Erznoznik*, 422 U.S. at 213; *accord Brown*, 564 U.S. at 794-95. Instead, California apparently "wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children" (*Brown*, 564 U.S. at 794): speech that someone may deem "detrimental" to the "well-being" of children. That is just as "unprecedented and mistaken" as it was in *Brown*, which reaffirmed that, outside narrow categories, "speech cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id*. at 795 (quoting *Erznoznik*, 422 U.S. at 213); *accord Powell's Books*, 622 F.3d at 1213-15 (statutes restricting minors from accessing material not legally "obscene" or designed to "predominantly appeal[] to minors' prurient interest" violated First Amendment because they "limit minors' access to expressive material that the state may not legitimately proscribe").

The government does not have "a free-floating power to restrict the ideas to which children may be exposed," *Brown*, 564 U.S. at 794, and using the vague language of "detriment" cannot change that. In fact, it makes it worse. By offering no clear or fixed notion of what material might be "detrimental" to minors, the statute

exposes virtually all online content to potential proscription. Such vagueness "raises special First Amendment concerns because of its obvious chilling effect on free speech," *Reno*, 521 U.S. at 871-72 (citing *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1048-51 (1991)), as it "enable[s] … officials to 'act in an arbitrary and discriminatory manner' … and still be completely within the scope of" the law, *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 514 (9th Cir. 1988). The State also overlooks that the basic "point of all speech protection" is to "shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574. The First Amendment does not countenance California's latest effort to suppress legitimate speech in the name of protecting children.

2. AB2273's prohibition on "profiling" is overly broad, effectively prohibiting all content recommendations to persons under 18.

AB2273's intrusion into the right to disseminate lawful speech to minors does not stop there. Section 31(b)(2) prohibits "profil[ing] a child by default." §1798.99.31(b)(2). "Profiling" is defined as "any form of automated processing of personal information that uses personal information to evaluate certain aspects relating to a natural person," including their "personal preferences" and "interests." §1798.99.30(b)(6). Though this provision comes with the veneer of protecting privacy, it goes far beyond that. It prohibits any use of a minor's email address, IP address, account information, browsing or search history to assess their preferences or interests and display content. Further, this "profiling" provision does not care

whether the content is supposedly harmful. Instead, the display is forbidden unless the service provider can affirmatively demonstrate that it "has appropriate safeguards in place to protect children" (another undefined term) and either the "profiling" is "necessary to provide the online service, product, or feature requested" or there is "a compelling reason that profiling is in the best interests of children." §1798.99.31(b)(2).

The "profiling" prohibition would seem to forbid all manner of routine content curation scenarios. For example:

- If a teenager has previously searched for pie recipes on The New York Times's Cooking webpage, it could be unlawful for it to show a list of other baking recipes next time the teenager logs into their account.
- If a streaming service knows that a child has previously watched "Planet Earth" and "The Life of Mammals," it could be unlawful to suggest that the child might also enjoy "Blue Planet."
- If a high-school student has watched videos about physics and math on a video website, it could be unlawful for that website to recommend videos about chemistry experiments.
- If a child listens to the "Short Stories for Kids" podcast, it could be unlawful for the podcast network to recommend other kid-friendly shows in its "You Might Like" section.

- If someone under 18 entered "hospitals near me" in a search engine, it could be unlawful to offer geographically tailored search results based on the user's IP address.

All of these actions flow from the processing of users' "personal information," as the statute defines it, in order to evaluate (and effectuate) the user's preferences and interests. And all of them involve the arrangement and dissemination of perfectly lawful—if not beneficial—speech.

AB2273 makes all of this speech-related activity unlawful in California unless an online service can satisfy exceedingly narrow and vague exceptions that seem to offer little protection. Would it be "necessary" or is there a "compelling reason" for the New York Times to suggest the baking recipes? What amounts to an "appropriate safeguard" to protect children? The statute doesn't say, and though a service provider "might perhaps make some educated guesses as to the meaning of these regulations," it "could never be confident that the [state] would agree." *Bullfrog Films*, 847 F.2d at 513. That uncertainty compounds the "constitutional infirmity." *Id.* at 514. Indeed, California's approach inverts the First Amendment, which requires the government to prove the need for tailored speech restrictions. The First Amendment does not force speakers to convince the State that they have a compelling need to communicate lawful information or to put "appropriate" safeguards in place to protect recipients from all potential consequences of protected

speech.

Describing these restrictions on speech, as California has done, as a ban on "profiling" makes no difference. Sinister labels do not let the government circumvent the First Amendment's protections. California cannot use privacy as a stalking horse to prohibit core acts of speech: disseminating and presenting lawful information to the public, including minors, who want it or may find it useful.

II. AB2273 COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

In addition to provisions that operate as unconstitutional restrictions on protected speech, AB2273 also compels speech in violation of the First Amendment. The District Court declined to engage in a compelled-speech analysis of AB2273,[1] but the Court may consider this additional ground to affirm the preliminary injunction. *E,g,. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc*., 180 F.3d 1072, 1077 n.3 (9th Cir. 1999) ("We can, of course, affirm on any grounds supported by the record[.]").

A. The DPIA Requirement Forces Service Providers To Speak In Ways They Would Not Otherwise Speak.

AB2273 imposes a new compelled speech regime: the statute mandates that

[1] Judge Freeman stated that "[a] law compelling speech is no less subject to First Amendment scrutiny than a law prohibiting speech," Op. at 7 (citing *Frudden v. Pilling*, 742 F.3d 1199, 1203 (9th Cir. 2014)), but focused on AB2273's restrictions of speech as sufficient reason to find NetChoice likely to prevail on its First Amendment claim.

online service providers "complete a Data Protection Impact Assessment [(DPIA)] for any online service, product, or feature likely to be accessed by children." §1798.99.31(a)(1). A DPIA is "a systematic survey to assess and mitigate risks that arise from the data management practices of the business to children." §1798.99.30(b)(2). Service providers must complete a DPIA for both any existing service, product, or feature, §1798.99.33(a), and any new service, product, or feature, prior to launching it to the public, §1798.99.31(a)(1)(A). DPIAs must address numerous topics, including whether the design of the service, product, or feature "could harm children, including by exposing children to harmful, or potentially harmful, content," "contacts," or "conduct"; whether the service, product, or feature uses "algorithms" that could harm children; and "[w]hether and how" the service, product, or feature "uses system design features to increase, sustain, or extend" children's "use of" the service, product, or feature. §1798.99.31(a)(1)(B). Service providers must make DPIAs available to the Attorney General within five days upon request, §1798.99.31(a)(4)(A).

The DPIA requirement plainly compels service providers to speak in ways that they otherwise would not. That requirement triggers constitutional scrutiny: the First Amendment covers "the decision of both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796-97 (1988). "By compelling individuals to speak a particular message," the state necessarily

"alter[s] the content of their speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 585 U.S. ___ (2018) (*NIFLA*) (internal citation omitted). Compelled speech requirements are therefore "content-based regulation[s] of speech" that are "subject to exacting First Amendment scrutiny." *Riley*, 487 U.S. at 795, 798. Whether they involve "compelled statements of opinion" or "compelled statements of 'fact,'" such regulations are "presumptively unconstitutional," *NIFLA*, 138 S. Ct. at 2371, because both "form[s] of compulsion burden[] protected speech," *Riley*, 487 U.S. at 797-98. Either way, the First Amendment directs that the "government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id*. at 800.

In *Volokh*, the S.D.N.Y. applied these principles to preliminarily enjoin the New York Hateful Conduct Law, which "compel[led] social media networks to speak about the contours of hate speech," specifically by "requir[ing] that social media networks devise and implement a written policy—*i.e.*, speech" that "detail[ed] how the network w[ould] respond to a complaint of hateful content." 656 F. Supp. 3d at 440. In writing these required policies, the online services were "force[d] … to weigh in on the debate about the contours of hate speech when they may otherwise choose not to speak." *Id*. at 442. The court held,

> Even though the Hateful Conduct Law ostensibly does not dictate what a social media website's response to a complaint must be and does not even require that the networks respond to any complaints or take down

> offensive material, the dissemination of a policy about "hateful conduct' forces Plaintiffs to publish a message with which they disagree.

Id. That speech mandate triggered strict scrutiny, which the law failed. *Id*. at 444.

The DPIA requirement suffers from similar First Amendment problems. Any entity offering an online service, product, or feature must now prepare an onerous written account of how it "could harm children including by exposing children to harmful, or potentially harmful, content." §1798.99.31(a)(1)(B)(i). The law thus requires that online service providers "devise and implement a written policy—*i.e.*, speech." *Volokh*, 656 F. Supp. 3d at 440. And they must do so even if the provider believes that its service benefits children or protects them from harm, and even if it disagrees with the idea that exposing children to a wide variety of lawful speech is harmful. Like the Hateful Conduct Law in *Volokh*, therefore, AB2273 requires services "to endorse the state's message" about "harmful content"; a service that "devises its own definition of ['harmful content'] would risk being in violation of the law and thus subject to its enforcement provision." *Id*. at 441. "Clearly, the law, at a minimum, compels Plaintiffs to speak" about harmful content, and thereby "forces them to weigh in on the debate about the contours of [harmful] speech when they may otherwise choose not to speak. *Id*. at 442 (internal quotation marks omitted).

AB2273 is actually worse than the statute in *Volokh*. Service providers are

effectively forced by the State to confess their purported harmful impact, and in turn to endorse the State's underlying assumption that lurking everywhere is "harmful, or potentially harmful, content" and "conduct" that children might be allowed to "witness, participate in, or be subject to." §1798.99.31(a)(1)(B)(i), (iii). This mandate is no less an impermissible compelled-speech provision than a requirement that newspapers or television news networks prepare regular, written statements describing which information they disseminate might be harmful or potentially harmful to minors and what efforts they are making to mitigate those harms. *Cf. Tornillo*, 418 U.S. at 256 (any "compulsion" on newspapers "to publish that which reason tells them should not be published is unconstitutional").

Add to this injury AB2273's compulsion to reveal, via DPIAs, confidential coding information; the Supreme Court has made clear that such "requirements can chill association 'even if there is no disclosure to the general public.'" *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388, 594 U.S. ___ (2021) (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). To be sure, providers required to create DPIAs are not obligated to post them to the world at large. But that does not save the statute, because AB2273 requires covered entities to "make the [DPIA] available, within five business days, to the Attorney General pursuant to a written request." §1798.99.31(a)(4). The law thus compels entities to speak and then to disseminate that speech to the state's chief law enforcement officer.

For these reasons, the DPIA provisions are content-based regulations that trigger, and cannot survive, strict scrutiny. *Volokh*, 656 F. Supp. 3d at 444.

B. *Amici* Who Argue that AB2273 Is Permissible Under *Zauderer* Are Incorrect.

Though Appellant has not raised it as a ground for reversing the preliminary injunction, a few *amici* rely on *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985), to argue that AB2273 is a permissible regulation of speech. Br. of Inst. for Law, Innovation & Tech. at 22-23 (Dec. 20, 2023) (Dkt.12); Br. of Nevada, *et al.* at 19-20, 22 (Dec. 20, 2023) (Dkt.15). But AB2273 targets expressive speech, not commercial speech, and, unlike the regulation in *Zauderer*, has nothing to do with ensuring truth in advertising.

Zauderer permits compelling private actors to publish speech in the commercial setting that "is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome." *American Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 756 (9th Cir. 2019) (*en banc*). The DPIA requirements in AB2273 fail this test.

1. <u>The DPIA Requirements Do Not Regulate Commercial Speech</u>.

DPIAs do not regulate purely "commercial speech," which the Supreme Court has defined as "speech that does no more than propose a commercial transaction." *Harris v. Quinn*, 573 U.S. 616, 648 (2014). The DPIAs do not propose commercial transactions—they are not even designed to be seen by the purchasing public.

Moreover, the DPIA requirements apply to services and features that are provided for free or with no financial motivation, such as by non-profits like Wikipedia.

Although, in some instances, "speech that does not propose a commercial transaction on its face can still be commercial speech," *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021), that conclusion applies only where the speech is "related solely to the economic interests of the speaker and its audience," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). AB2273 has nothing to do with "economic interests." AB2273 is solely concerned with whether an online service, product, or feature may expose "children to harmful, or potentially harmful, content." This assessment involves subjective moral, cultural, social, psychological, political, and religious considerations.

Here too, *Volokh* is illustrative. The court there held that compelling online service providers to prepare a written hate-speech policy was not commercial speech, because it compelled them "to speak about the range of protected speech it will allow its users to engage (or not engage) in." *Volokh*, 656 F. Supp. 3d at 443. Similarly here, service providers that must prepare a DPIA are compelled to speak about what speech (including all manner of protected, lawful speech) their services allow users to access, how those services control or regulate access to such speech, and how that speech might affect users. "This is different in character and kind from commercial speech and amounts to more than mere disclosure of factual

information[.]" *Id*.

2. DPIAs Do Not Regard "Purely Factual and Uncontroversial" Information.

The speech that AB2273 compels is far from "factual and uncontroversial." The Supreme Court in *NIFLA* held that a law requiring licensed clinics to state that California "has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women" was not merely factual and thus did not deserve *Zauderer* review. 138 S. Ct. at 2369, 2372 (observing that abortion is "anything but an uncontroversial topic"). This Court interprets *NIFLA* to "stand[] for the proposition that the *Zauderer* standard applies only if the compelled disclosure involves 'purely factual and uncontroversial' information." *CTIA - The Wireless Ass'n v. Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019).

A DPIA requires a business to evaluate and disclose a highly subjective, controversial, and contentious set of issues, including whether particular product features, designs, or algorithms may be "harmful, or potentially harmful" to children or whether they might expose them to harmful or potentially harmful content. §1798.99.31(a)(1)(B). Even beginning to make such assessments requires complex and nuanced judgments about matters of psychology, medical science, and cultural norms. Reasonable people can disagree about whether all manner of content is

harmful to children.

But AB2273 would force online service providers to wade into those controversies and to repeatedly voice their view on these highly fraught issues. The DPIA requirements compel online service providers to take sides in a "heated political controversy." *See CTIA*, 928 F.3d at 848. Not only that, providers must state that their own "products are ethically tainted," even when they strongly dispute that characterization. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530, 553 (D.C. Cir. 2015) ("*NAM*") (striking down SEC regulation requiring companies to state that their products are "not 'DRC conflict free'"). Such state laws are worlds apart from *Zauderer*. Indeed, what the D.C. Circuit said in *NAM* applies equally here: "requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so." *Id*. at 530. In short, by "compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment." *Id*.

CONCLUSION

The Court should affirm the District Court's order.

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Dated: February 13, 2024

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In compliance with Fed. R. App. P. 29(a)(4), I certify that, according to the word-count function of Microsoft Word, the foregoing brief *Amicus Curiae* contains 6,275 words, which is less than one-half the number of words that Fed. R. App. P. 32(a)(7) generally affords to a party for its principal brief.

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I certify that on February 13, 2024, the foregoing brief *Amicus Curiae* was filed with the Clerk of the U.S. Court of Appeals for the Ninth Circuit via CM/ECF. I further certify that the foregoing brief *Amicus Curiae* was served electronically via CM/ECF on all parties' counsel who have appeared and are registered in the CM/ECF system.

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