NO. 23-2969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NETCHOICE, LLC,

PLAINTIFF-APPELLEE,

V.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS CALIFORNIA ATTORNEY GENERAL,

DEFENDANT-APPELLANT,

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:22-cv-08861-BLF

The Honorable Judge Beth Labson Freeman

BRIEF OF AMICUS CURIAE FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Floor64, Inc. d/b/a/ The Copia Institute states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held California small business behind Techdirt.com ("Techdirt"). Techdirt is an online publication that has chronicled technology law and policy for more than 25 years. Its founder and owner Michael Masnick[2] was a declarant in the underlying proceedings, articulating how the California Age-Appropriate Design Code Act ("CAADCA") would directly affect his rights to self-expression and that of his business.

Its impact would be profound because his company is an enterprise whose central business purpose is producing expression aimed at broad audiences. Techdirt itself is a media outlet with over a million page views per month that has published more than 70,000 articles regarding subjects such as freedom of expression, as well as other topics relating to law and innovation, including the impact of technology on civil liberties. Techdirt also functions as a platform hosting user discourse in the comment sections appearing on its articles, where it has hosted nearly two million reader comments advancing discussion and discovery about the topics found on its

[1] No party's counsel authored any part of this brief. No one, apart from *amicus* and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

[2] *See* Kashmir Hill, *An Internet Veteran's Guide to Not Being Scared of Technology*, NEW YORK TIMES (Jul. 29, 2023), https://www.nytimes.com/2023/07/29/technology/mike-masnick-techdirt-internet-future.html (profiling Masnick).

pages. It additionally participates in discussions with readers on other platforms run by other companies.

As a think tank the Copia Institute then produces evidence-driven white papers examining the nuance and assumptions underpinning technology policy, as well as games, podcasts, and other media. In addition it produces advocacy instruments including amicus briefs such as this one. All of these efforts are designed to fulfill his and his company's overall expressive goal to educate and influence the public and its policymakers and lead to policy that promotes and sustains innovation and expression.

The Copia Institute therefore submits this brief *amicus curiae* wearing two hats: as a longtime commenter on the issues at the heart of the underlying litigation, and as an example of the many whose own First Amendment rights are threatened by this law and all that would follow if this one were permitted.

INTRODUCTION

The CAADCA may be presented to the world as privacy regulation, but in its function and effect it is really a law seeking to regulate online expression in order to govern who can say what and to whom. The burdens it puts on the Copia Institute's own ability to speak demonstrate how it so violates the First Amendment and its protection of free expression. They are burdens that cannot survive any level of scrutiny, whether the lesser intermediate scrutiny applied by the district court or the more appropriate strict scrutiny that such impacts on free speech require. This Court should therefore recognize these speech impacts, uphold the injunction, and do so in a way that ensures that speech rights remain protected in the face of other regulatory efforts that would similarly shape what expression appears online.

ARGUMENT

I. This law unconstitutionally impinges on the Copia Institute's free expression

At the time the First Amendment was drafted free expression was often enjoyed by printing and distributing pamphlets. Today the modern analog is publishing ideas on a website, but the essence is the same. The exercise of free expression simply involves conveying a message in a communications medium accessible to an audience. The First Amendment, equally as applicable to online media as off, *Reno v. American Civil Liberties Union*, 521 US 844, 870 (1997), prohibits law from making the equation any more complicated than that basic math.

Laws like the one at issue here, however, threaten to make the exercise of free expression significantly more complicated by now imposing a number of obstructing requirements that must be hurdled before one can speak with any reach, if at all. Such burdens are unconstitutional, and how they impact the Copia Institute helps illustrate why. As the declaration by Copia Institute principle and Techdirt editor Michael Masnick explained to the district court, there is hardly a provision that would not impose a barrier to him continuing to engage in his company's expressive activities. Masnick Decl. 7-ER-1210-1217 ("Decl."). The law would require him to curtail his interaction with his readership, abandon portions of his readership, and antagonize what remained of his readership with intrusive, privacy-invading data collection that would also require expensive technology he would have to invest in. *Id.* ¶ 18. It would also require him to expend resources writing compliance reports about any new ways he would like to engage with audiences, rather than new expression itself. *Id.* ¶ 17. All of these measures stand in the way of him simply putting his digital pen to digital paper to tell the world what he thinks, and thus all do so impermissibly.

In particular, the law would effectively require him to abandon younger audiences, no matter how much having to do so violates both his right to speak to these audiences and his younger audiences' right to engage with expression relevant

to them. *Id.* ¶ 14.[3] Techdirt has historically welcomed teenage readers and knows from past experience knows that subjects covered by Techdirt may indeed be relevant to them. *Id.* ¶ 8. For example, Techdirt's reporting on issues like online harassment,[4] teenagers' use of social media,[5] and schools' attempts to restrict social media[6]—or, indeed, lawmakers' attempts, such as this very law[7]—are likely of significant interest to teenage users whose lives are directly affected by such topics. Decl. ¶ 8. Techdirt has even been contacted by high school students about its articles due to their concerns about how these issues bore on their interests and rights. *Id.* In the company's experience young people in the age range this law targets are often

[3] As noted in the declaration the company does not deliberately invite the attention of those under 13, and in its privacy notice forbids those younger 13 from registering for a Techdirt account or submitting any personally identifiable information. Decl. ¶ 7. This law, however, affects adolescent readers who are at least 13.

[4] Mike Masnick, *Rethinking Bullying: Kids Don't See It As Bullying*, TECHDIRT (Dec. 3, 2010), https://www.techdirt.com/2010/12/03/rethinking-bullying-kids-dont-see-it-as-bullying/.

[5] Mike Masnick, *Contrary To Popular Opinion, Most Teens Get Real Value Out Of Social Media*, TECHDIRT (Nov. 28, 2022), https://www.techdirt.com/2022/11/28/contrary-to-popular-opinion-most-teens-get-real-value-out-of-social-media/.

[6] Mike Masnick, *Silicon Valley School District Files Laughable, Vexatious RICO Claims Against Big Social Media… But Not Facebook Or Instagram*, TECHDIRT (Mar. 21, 2023), https://www.techdirt.com/2023/03/21/silicon-valley-school-district-files-laughable-vexatious-rico-claims-against-big-social-media-except-meta/.

[7] Mike Masnick, *Kids Use Discord Chat To Track Predator Teacher's Actions; Under California's Kids Code, They'd Be Blocked*, TECHDIRT (Sep. 13, 2022), https://www.techdirt.com/2022/09/13/kids-use-discord-chat-to-track-predator-teachers-actions-under-californias-kids-code-theyd-be-blocked/.

just as conversant in Techdirt's core areas of coverage as any other demographic and just as interested in looking to Techdirt for breaking technological news and related issue advocacy because they understand how it affects them. *Id.*

But the requirement that Techdirt ensure that "potentially harmful content" not reach younger people would require the company to censor its own expression, both prospectively and also retrospectively, gutting its expansive archives, lest someone deem any of this past or future expression somehow "harmful." *Id.* ¶ 15. This regulatory imposition, whose effect is to cause content to be suppressed, alone betrays the unconstitutionally of the law. Furthermore, there really is no viable alternative, because the only other option to ensure that no teenagers engage with any "potentially harmful" content is to try to sever, or at least cabin, the connection to this audience entirely. But this option itself impinges on the expressive rights of all involved. It is also at best infeasible, if not outright impossible, which represents a Constitutional problem of its own. *Id.* ¶ 16.

Trying to exclude young readers is not at all a simple task for a company like the Copia Institute because currently Techdirt is available to all readers everywhere, including anonymously. *Id.* ¶ 5. And they are not just readers, but at times active contributors to discourse and discussion, *id.* ¶ 3, and not just on Techdirt's own hosted comment sections but on platforms elsewhere on the Internet, such as Discord, where the company interacts with paying subscribers, or various

microblogging platforms like the former Twitter, Bluesky, or Mastodon, where Techdirt publishes links to its articles and its writers engage with readers. There is no way for Techdirt to verify the age of every such reader around the Internet, but even on its own site the challenge is insurmountable.

At the moment the company has no way to identify the age of any of its readers, and any manner contemplated by the law that would allow it to verify age would require technology (a) that it does not currently possess, (b) that would be cost-prohibitive to acquire, and (c) that would require collecting far more sensitive and personally identifying data from its users than the Copia Institute currently believes is appropriate and that its readers themselves may deem inappropriate. *Id.* ¶ 12. Having to implement it anyway would divert resources away from its engaging in its own expressive activities to compliance activities, and still risk antagonizing, and thus shrinking, the audience it might still hope to reach thanks to the more invasive data collection practices it would have to employ. *Id.* ¶ 13. And even if the company managed to rearchitect its data collection infrastructure, it may still not be able to reliably verify readers' ages because, as the district court noted, such technology generally doesn't work.[8]

[8] Mike Masnick, *As Congress Rushes To Force Websites To Age Verify Users, Its Own Think Tank Warns There Are Serious Pitfalls*, TECHDIRT (May 5, 2023), https://www.techdirt.com/2023/05/05/as-congress-rushes-to-force-websites-to-age-verify-users-its-own-think-tank-warns-there-are-serious-pitfalls/. *See also* Mike

But even if the company could somehow verify ages, it would fundamentally alter how the Copia Institute connects with its audiences if it had to identify its readers in order to let them engage with its expression. At the moment, the company purposefully chooses to collect only the bare minimum of identifying data from its readers, *id.* ¶ 10, and only insofar as this data enables payments, *id.*, or other interface functionality that readers opt in to employ. *Id.* ¶ 6. It otherwise chooses to welcome anonymous readers, and even anonymous commenters, because it finds that doing so furthers its own expressive agenda in fostering discourse around its own expression. *Id.* ¶ 11. The right to speak anonymously is an important right protected by the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 US 334, 357 (1995). It is also one that the Copia Institute has itself advocated to protect.[9] This law would however override this right by making it impossible for readers to engage with the Copia Institute on this basis and is thus unconstitutional on this ground as well.

Masnick, *As US, UK Embrace 'Age Verify Everyone!' French Data Protection Agency Says Age Verification Is Unreliable And Violates Privacy Rights*, TECHDIRT (Nov. 30, 2022), https://www.techdirt.com/2022/11/30/as-us-uk-embrace-age-verify-everyone-french-data-protection-agency-says-age-verification-is-unreliable-and-violates-privacy-rights/.

[9] *See, e.g.*, Cathy Gellis, *Helping Platforms Protect Speech By Avoiding Bogus Subpoenas*, TECHDIRT (May 26, 2017), https://www.techdirt.com/2017/05/26/helping-platforms-protect-speech-avoiding-bogus-subpoenas/.

Ultimately none of these burdens are incidental or minor. They involve an inherent polluting of the connection between speakers like the Copia Institute and their audiences. For them to continue to speak will require complicated and expensive compliance, all of which impinge on the right and ability to speak at all. For this reason the law must be found unconstitutional.

II. Laws like these inherently impinge upon free expression

The district court reached the correct result—enjoining the law—which this Court should uphold. And its finding that the law was too constitutionally infirm to survive even intermediate scrutiny highlights just how constitutionally infirm it is.

But the analysis that led to it employing the lesser scrutiny standard has raised the risk that the CAADCA may not be the last similarly unconstitutional law we see from legislatures. It might not even be the last we see of this one; the decision effectively left lawmakers a roadmap to use to try to remediate its law. But in reality, no rehabilitation is possible; when a law interferes with the ability to engage in expression by adding extra requirements one must meet before one can speak, then scrutiny must be heightened and the law found unconstitutional.

A. The commercial nature of impacted speech does not lessen the Constitutional infirmity

That the speech interests a law burdens may be commercial in nature does not ameliorate nor obscure the constitutional injury such burdens represent, or prompt them to be assessed by a lesser standard of scrutiny. If it did then it would leave

disadvantaged any expression done where there is a commercial aspect. Obviously the First Amendment does not work that way or else no media business could ever depend on having First Amendment's protection, and it is clear from ample precedent that such businesses obviously do. *See*, *e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 US 241 (1974) (upholding the First Amendment rights of a major newspaper). It is therefore important not to conflate the commerciality of speech intended to drive a market choice with the commerciality of speech where money affects the ability to participate in the marketplace of ideas generally. To the extent that the district court's decision seemed to invite legislation that could target speakers involved with the latter, whose expressive activities involve revenue, this Court should foreclose such outcomes.

The speech interests of the Copia Institute help illustrate why the level of scrutiny used to analyze an impact on free expression should not pivot on the commerciality factor. In the case of the company that homes both the Copia Institute and Techdirt, it exists as the corporate personality that enables its founder, CEO, editor, and owner Michael Masnick's personal expressive activities. It allows him to raise the money needed to fund his expressive work and employ others to join him in communicating to the world ideas that he feels important to express. *See* Decl. ¶ 9. But if having any sort of profit motive could disqualify the company's expressive

activities from the First Amendment protection heightened scrutiny helps ensure, then neither the company nor the person could engage in them.

This case also demonstrates how absurd it would be if having the money needed to subsidize compliance with this law could make an expressive business more likely to be subject to it. After all, if any companies are to be expected to underwrite the infrastructure investments needed to do things like age verification, then they must also be expected to have some form of revenue. But to treat having the resources needed to comply as a reason the Constitutional allows such compliance to be mandated it would put any speaker whose expression is somehow subsidized by monetization at a disadvantage to any speaker who somehow manages to be able to speak for free. One reason Masnick runs a company is to vindicate his personal expressive interests because by having a company capable of generating revenue it allows him to engage in more expression. *Id.* ¶ 14. Penalizing the company for having a profit interest enabling it to sustain those expressive activities means penalizing Masnick himself and ultimately limiting his personal expressive ability to only what he can afford to do without any hope of remuneration. If such were the constitutional rule then not only would it compromise the First Amendment right of corporatized speakers, but it would ultimately also compromise that of individual speakers like him too. It thus cannot be the rule.

B. That laws may seem to target acts that are not obviously expressive does not absolve them of the constitutional injury they cause speech.

This California law is not the only law states have recently promulgated targeting platforms.[10] It is not even the only one in California.[11] Sometimes, like in this case, the laws are wrapped up in policy packaging that make it seem like they are intended to deliver on another policy priority, like, in the case of this one, privacy. Other times they are more directly touted as laws designed to affect what expression young audiences can engage with online. *See NetChoice v. Yost,* No: 2:24-cv-00047 (E.D. Ohio filed Feb. 12, 2024) (enjoining Ohio's law requiring age verification).[12] But in essentially all cases they end up affecting what everyone can say online. Whether as an unintended consequence, or the result of legislative desire, the harm to free expression is the same.

Which is why the Constitutional analysis should be rooted in measuring that resulting injury to expression. By focusing on the burdens to speech, and employing the heightened standard burdens to speech generally require, further unconstitutional

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[10] *See* Free Speech Coalition, *Age Verification Bill Tracker*, FSC ACTION CENTER https://action.freespeechcoalition.com/age-verification-bills/ (last accessed Feb. 14, 2024).

[11] Alan Riquelmy, *California lawmakers eye changes for social media use by kids*, COURTHOUSE NEWS SERVICE (Jan. 29, 2024), https://www.courthousenews.com/california-lawmakers-eye-changes-for-social-media-use-by-kids/.

[12] The pretext for this law was to govern minors' ability to enter into contracts, including terms of service. *Yost*, slip op. at 12.

legislative efforts may be forestalled. Otherwise it will be all too easy for a legislature to route around the constitutional bar to their meddling with expression by packaging up those efforts with a policy excuse that could survive the lesser scrutiny employed when speech interests are not involved.[13] Because they most definitely are involved, the scrutiny should be elevated accordingly.

This sort of speech-focused analysis is also important even when considering whether the applicable protection is statutory, rather than Constitutional. Although the district court did not need to reach the issue, an alternative basis for enjoining the statute is that it violates "Section 230," 47 U.S.C. § 230, and specifically its preemption provision, 47 U.S.C. § 230(e)(3), which prohibits states from interfering with platforms' ability to choose what user expression to facilitate on their systems. This law would most definitely have such an effect on platforms. In the example of the Copia Institute it would cause it cease engaging with younger readers, including in the Techdirt comment section, which is a platform function otherwise covered by Section 230. 47 U.S.C. § 230(f)(2) (defining an "interactive computer service," or, for colloquial purposes here, a platform like Techdirt when it hosts user expression

[13] These laws are unconstitutional because their effects are unconstitutional, regardless of whether the legislatures behind them intended them to have this effect. But unless those effects are kept at the fore of the analysis and subject to heightened scrutiny, it would be very easy for a legislature seeking to regulate online expression to pass laws wrapped up in pretextual veneers that give the impression they had some other policy goal in mind, when it reality the impingement on expression was the goal all along.

in its comments and the like). In fact, the Copia Institute was able to defend its expression thanks to Section 230 protecting how it ran its comment section, again illustrating how critical these Constitutional and statutory protections are to ensuring that expressive entities can continue to be expressive entities. *See Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343, 368 (D. Mass. 2017).[14]

The concern however is that in a few previous cases this Court has found Section 230 inapplicable because the analysis there has largely been focused on activities not obviously expressive. In *Lemmon v. Snap*, 995 F. 3d 1085 (9th Cir. 2021), the Court focused primarily on a software feature offered by the platform as a discrete, almost physical product, rather than as a mechanism that helped enable others' speech, which would ordinarily mean that Section 230 would insulate the platform from liability if the resulting user speech were somehow harmful. And in *Homeaway v. City of Santa Monica*, 918 F. 3d 676 (9th Cir. 2019), the Court upheld local regulation on a platform that enabled users to announce they had housing to rent, even though the platform ordinarily would be protected by Section 230 if the user expression—in this case, the post announcing the rental—were somehow wrongful, as may be the case when the rental itself violates local ordinances. In

[14] *See also* Mike Masnick, *Case Dismissed: Judge Throws Out Shiva Ayyadurai's Defamation Lawsuit Against Techdirt*, TECHDIRT (Sep. 6, 2017), https://www.techdirt.com/2017/09/06/case-dismissed-judge-throws-out-shiva-ayyadurais-defamation-lawsuit-against-techdirt/.

Homeaway, too, this Court's analysis focused more on the offline effects of a platform's facilitation of user expression than on the fact that both the *Homeaway* and *Snap* situations ultimately involved imposing liability on platforms arising from how someone else used it to speak and would necessarily deter them from enabling user expression, even though that enablement was a something Section 230 was in large part designed to encourage.

Focusing the statutory and constitutional analysis on the speech interest affected by laws is important because those like the one at issue here have such significant effects on them. In particular, they zero in on the relationship that targeted entities have with their audiences, be they audiences they speak to directly or whose expression they facilitate, or, as in the case of the Copia Institute, both. And they are inherently designed to disrupt that connection. But whether this intended disruption can survive First Amendment scrutiny will depend on courts recognizing that it is this expressive connection that these laws are disrupting, and regardless of whether they are passed with the pretext of preserving privacy, minors' ability to contract, or some other alleged purpose. Certainly there can be real world impacts to the loss of privacy, harms resulting from ensaring young people in dubious contracts, or potentially myriad other offline effects a legislature may want to abate. But when their legislation take aim at the exercise of expression in order

to do it, then these efforts need to be judged in accordance with how they affect these expressive interests and their constitutional and statutory protection.

CONCLUSION

The injunction against CAADCA should be upheld.

Dated: February 14, 2024

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**CERTIFICATE OF COMPLIANCE
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PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Floor64, Inc. d/b/a The Copia Institute In Support Of Defendant-Appellee complies with the word limit of Fed. R. App. P. 29(c)(2) because this brief contains 3628 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 14, 2024

By: /s/ Catherine R. Gellis
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 14, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 14, 2024

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