

No. 26-5120, 26-5121, 26-5132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

META PLATFORMS, INC.,
Plaintiff-Appellant,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF CALIFORNIA
Defendant-Appellee.

TIKTOK, INC., AND TIKTOK USDS JOINT VENTURE LLC,
Plaintiffs-Appellants,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF CALIFORNIA
Defendant-Appellee.

GOOGLE LLC AND YOUTUBE LLC,
Plaintiffs-Appellants,

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
Nos. 5:25-cv-09789-EJD, -09792-EJD, -09795-EJD
The Honorable Edward J. Davila

**BRIEF OF THE ELECTRONIC PRIVACY INFORMATION
CENTER, TECH JUSTICE LAW, AND SIXTEEN LAW AND
TECHNOLOGY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Electronic Privacy Information Center and Tech Justice Law state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus on emerging privacy and civil liberties issues.¹ EPIC regularly participates as amicus in cases involving First Amendment challenges to reasonable platform regulations. *See* EPIC, *The First Amendment* (2025).²

The Tech Justice Law (“TJL”) is a 501(c)(3) nonpartisan, nonprofit organization. TJL works to ensure that legal and policy frameworks are responsive to emergent technologies and their societal effects.

The law and technology scholars who join this brief are some of the foremost experts in technology law, its intersection with constitutional law, and the human impacts of technology:³

¹ All parties consent to the filing of this brief. In accordance with Rule 29, the undersigned states that no party or party’s counsel authored this brief in whole or in part nor contributed money intended to fund the preparation of this brief. No outside person contributed money intended to fund the preparation of this brief.

² <https://epic.org/issues/platform-accountability-governance/the-first-amendment-and-platform-regulation/>.

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SUMMARY OF THE ARGUMENT

SB 976 limits Plaintiffs’ abilities to use behavioral profiling techniques to maximize minors’ use of their platforms. The District Court, this Court, and the Supreme Court have all questioned whether use of these kinds of “algorithms [that] respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards,” is an exercise of protected editorial discretion. *Moody v. NetChoice*, 603 U.S. 707, 736 n.5 (2024). And for good reason.

Behavioral profiling is very different than the content moderation practices the *Moody* Court recognized may be expressive. Content moderation involves companies removing and downranking content that violates their policies about what is fit to publish. These curatorial decisions are analogous to those long recognized as protected editorial judgement. Laws that override content moderation decisions may compel companies to publish messages and viewpoints they deem unfit to publish.

By contrast, behavioral profiling for feed generation does not resemble any recognized form of protected editorial discretion.

Behavioral profiling algorithms are not designed to select and arrange content based on a company's judgment that the message is fit for publication. The curatorial choices do not depend on an evaluation of the content's message, nor do they reflect any human intent to communicate a coherent message, idea, or theme. The algorithms are designed to evaluate *users*, not messages. They are blind to the meaning of the media selected and how that meaning impacts the message sent by the overall compilation. In fact, these algorithms often amplify messages that the companies say are unfit for publication. That is in large part because humans design behavioral profiling algorithms to have a non-expressive goal—maximize usage of the platform—and allow the computer to decide the rules for selecting and ranking content to accomplish that goal. They are not designed to understand—or care—what messages they are selecting and amplifying.

Courts have long recognized in a variety of contexts that conduct can have both expressive and non-expressive components. Feed generation involves both expressive and non-expressive activities, and behavioral profiling more resembles the kinds of functional, non-expressive activities that courts have recognized occur alongside

expression. Because behavioral profiling is not inextricably intertwined with content moderation, the state can regulate it without impacting companies' expression.

Plaintiffs also cannot invoke the First Amendment merely because they are engaged in distributing others' expression. The First Amendment protects distributors when the government uses them as a chokepoint to limit the public's access to information. SB 976 does not do this. And even if SB 976 were said to burden distribution of information, it would be as a constitutional time, place, or manner restriction.

ARGUMENT

I. SB 976 does not burden Plaintiffs' editorial discretion.

A. Content moderation decisions can be expressive.

In *Moody v. NetChoice*, the Supreme Court signaled that a law compelling a social media company to publish what it would rather exclude restricts the company's exercise of editorial discretion. 603 U.S. at 728. The process by which companies exclude or otherwise suppress unwanted content is called content moderation. *Id.* at 719. Content moderation is similar to traditional editorial control because both involve a publisher deciding whether to include or exclude pieces of media based on how each piece would affect the overall message of the compilation. *Id.* at 731–32.

Content moderation begins with the employees of a social media company establishing content guidelines for the platform. These guidelines “list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics.” *Moody*, 603 U.S. at 719. Content guidelines reflect a company's value judgments about the semantic content of media, prohibiting media judged to be distasteful, low-quality, or irrelevant.

See, e.g., *Community Standards*, Meta (2026).⁴ Engineers design content moderation systems, including algorithms, to implement a company’s content policies by assessing whether individual posts contain violative content and either preventing violative content from being published or removing it from users’ feeds. See Robert Gorwa et al., *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 *Big Data & Soc’y* 1, 3–7 (2020). While a company’s content moderation system may not perfectly remove all violative content, it reflects a company’s conscious efforts to avoid publishing content it deems unfit for publication.

The *Moody* Court signaled in dicta that content moderation can be protected editorial judgement. “When the platforms *use their Standards and Guidelines to decide* which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices.” *Moody*, 603 U.S. at 740 (emphasis added). In the Court’s view, a social media company, through content moderation systems, decides “whether—and, if so, how—to convey posts having a certain content or viewpoint,” and “[t]hose choices rest on a set

⁴ <https://transparency.meta.com/policies/community-standards/>.

of beliefs about which messages are appropriate and which are not.” *Id.* at 738. A company that does not want to spread pro-Nazi beliefs, say, acts expressively when excluding pro-Nazi media. A law that “direct[s] a company to accommodate messages it would prefer to exclude” thus infringes on the company’s protected editorial discretion. *Id.* at 731.

The *Moody* Court saw their decision as a direct application of decades of Supreme Court precedent recognizing the rights of speech compilers to exclude messages and viewpoints they do not wish to carry. *See id.* at 728–33 (discussing the Court’s editorial discretion precedent). The editorial discretion cases are themselves part of the Court’s compelled speech precedent that prohibits the government from “coopt[ing] an individual’s voice for its own purposes.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023). They involve the government overriding a person’s decision not to speak on a given topic or to not express a specific viewpoint or message. To the extent that companies’ content moderation decisions reflect the editorial judgements of their leaders and employees, they fit squarely within this precedent.

B. Plaintiffs' use of surveillance data to generate addictive feeds is not expressive.

SB 976 limits Plaintiffs from using certain categories of minors' personal data to select and rank content in their feeds. Cal. Health & Safety Code § 27000.5(a).⁵ The data that SB 976 restricts Plaintiffs from using is not data that minors deliberately share with Plaintiffs as expressions of their content preferences but instead data Plaintiffs collect through surveilling minors' behavior on their platforms.

Plaintiffs generally do not use minors' behavioral data to make expressive content choices but to fuel revenue-maximizing components of their recommendation systems that extend minors' usage of their products. Unlike content moderation processes, which evaluate the message or viewpoint of third-party content, behavioral profiling algorithms evaluate *users* by measuring how likely it is a user will interact with a given piece of media, regardless of its message or viewpoint. See Neil Richards & Woodrow Hartzog, *Against Engagement*, 104 Boston U. L. Rev. 1151, 1154 (2024). This behavioral profiling lacks

⁵ All statutory citations are to the California Health and Safety Code unless otherwise noted.

every characteristic of protected editorial judgement. It is functional, not expressive.

It matters little that companies combine non-expressive behavioral profiling with expressive content moderation to generate a single algorithmic feed. Courts have long recognized that conduct can have both expressive and non-expressive elements. When the State regulates a non-expressive element, the First Amendment is implicated incidentally, if at all.

i. Behavioral profiling generates content choices based on users' behavior.

Plaintiffs use multiple processes to generate algorithmic feeds. As discussed in Part I.A., Plaintiffs' content moderation systems implement a company's views on the value of certain messages, topics, and viewpoints. Plaintiffs use the personal data SB 976 regulates for a different purpose: to predict what content will lead a given user to engage in behavior that increases the company's ad revenue. *See Ravi Iyer, Feed Algorithms Contain both Expressive and Functional Components*, USC Neely Center for Ethics and Technology (Dec. 10,

2024);⁶ 4-SER-833 (¶¶ 17–18). For some Plaintiffs, the behavior they are trying to maximize is “engagement,” or the probability that the user will interact with a specific piece of content. *See* Arvind Narayanan, *Understanding Social Media Recommendation Algorithms*, The Knight First Amendment Institute at Columbia University 20 (2023) (6-SER-1501–05)⁷; 4-SER-832–34 (¶¶ 16–19); 2-MetaER-70–73 (¶¶ 77–80). Plaintiffs also seek to optimize other metrics of usage, such as session length. 2-SER-490–92 (112:24-114:2),

The primary fuel for Plaintiffs’ behavioral profiling algorithms is user behavioral data collected through surveillance, not explicit user feedback or the topic, meaning, or viewpoint of content. *See* Narayanan, *supra*, at 18. The behavioral data Plaintiffs use include likes, clicks, comments, time spent watching, time spent lingering, and other indications that a piece of content held a user’s attention. *Id.* at 18–19; *e.g.*, 4-TikTokER-612 (¶ 12); 7-GoogleER-1339 (¶ 20); 3-MetaER-450 (¶ 7).

⁶ <https://neely.usc.edu/2024/12/10/algorithms-contain-both-expressive-and-functional-components/>.

⁷ https://s3.amazonaws.com/kfai-documents/documents/4a9279c458/Narayanan---Understanding-Social-Media-Recommendation-Algorithms_1-7.pdf.

To create their behavioral profiling algorithms, Plaintiffs use machine learning techniques to direct a computer to determine what combination of behavioral data best predicts the behavior they are trying to maximize—e.g., engagement. 4-TikTokER-613 (¶ 15); 7-GoogleER-1336 (¶ 11); 3-MetaER-450 (¶ 7); *see also* Richards & Hartzog, *supra*, at 1162–63. The algorithm then constructs profiles of users from the surveillance data, uses these profiles to compare each user to other users, and shows each user media that similar users engaged with heavily. *See* Narayanan, *supra*, at 22; 4-TikTokER-612 (¶ 11); 7-GoogleER-1338 (¶ 15); 3-MetaER-450 (¶ 7).

In contrast to content moderation algorithms, usage-maximizing algorithms do not evaluate the viewpoint, topic, or quality of media. Companies use them not to shape a coherent message out of the pool of potential media but to accomplish the functional task of inducing profitable user behavior. *See* Iyer, *supra*; *see generally* Brett Frischmann & Evan Selinger, *Re-Engineering Humanity* (2018). Any message goes—including content that violates the company’s own policies—so long as it maximizes profitable user behavior. *See* Appellee’s Br. at 25–28 (providing examples). Indeed, content

moderation algorithms are necessary precisely because the usage-maximizing algorithms are not designed to select or rank content based on the message expressed.

The behavioral profiling technology that Plaintiffs use to generate usage-maximizing content selections is unlike any curation method used by traditional publishers. Brett Frischmann & Peter Ormerod, *Regulating Manipulative Design Is Not Preempted by CDA 230 or the First Amendment*, 75 Emory L. J. 1101, 1141–44 (2026). Newspapers, magazines, television networks, and film studios generally consider *aggregate* audience data to determine what topics, ideas, and viewpoints their audiences are interested in. SB 976 does not prohibit companies from using aggregate user data to generate algorithmic feeds, and so Plaintiffs are still able respond to audience preferences in the same ways traditional publishers do. What traditional publishers do *not* do is surveil customers’ reading and viewing habits to generate publications for each individual optimized to some revenue-maximizing behavior. Plaintiffs’ conduct is akin to a cable provider using subscribers’ viewing habits to change the channel on subscribers in a pattern most likely to maximize the amount of time they spend

watching television—with no regard for the expressive qualities of the programs selected.

Contrary to Plaintiffs’ and their *amici*’s claims, SB 976 would not prohibit the kind of personalized guidance offered by librarians and booksellers. Librarians and booksellers do not surveil customers. They do not trail children around the library or store, measure how long the children’s eyes dwell on different book covers, group children with other patrons whose eyes dwelled on similar covers, and then hand them a book based on other patrons’ behavior. Patrons ask librarians for a recommendation based on their express preferences, e.g., “a classic science fiction book”, “something by an author influenced by post-modernism”, or “something similar to Crime and Punishment.” The librarian’s response is analogous to a platform’s response to a search query, not behavioral profiling. SB 976 does not prevent Plaintiffs from processing search queries as long as they don’t persistently associate the query with the user, Cal. Health & Safety Code § 27000.5(a)(2), and so does not implicate the kind of behavior librarians and booksellers engage in.

Behavioral profiling is not the only way Plaintiffs could take audience preferences into account. *See generally* Knight Georgetown Institute, *Better Feeds: Algorithms That Put People First* (2025).⁸ It is also not the best way to model users’ actual preferences, as the two often conflict. *See, e.g.,* Compl. ¶ 265–72, *Massachusetts v. TikTok Inc. et al.*, No. 2484-cv-2638-BLS-1 (Mass. Sup. Ct. Feb. 3, 2025) [hereinafter “TikTok Compl.”] (explaining how TikTok introduced a “Refresh” tool for users to reset their engagement data if they were unhappy with their feed, then decided to degrade the tool’s effectiveness when users’ fondness for it caused their engagement numbers to drop); Smitha Milli et al., *Engagement, User Satisfaction, and the Amplification of Divisive Content on Social Media*, 4 Proceedings of the Nat’l Academy of Sci. Nexus 1, 2, 6 (2025) (finding “the engagement-based algorithm is not aligned with users’ stated preference for tweets”).

SB 976 leaves companies with ample room to provide the kind of personalization users want. Plaintiffs can still provide minors with feeds containing content from users and channels they subscribe to.

⁸ https://kgi.georgetown.edu/wp-content/uploads/2025/02/Better-Feeds_-_Algorithms-That-Put-People-First.pdf.

Plaintiffs can also provide channels for various interests, like college basketball, crochet, or cats, and allow users to direct content from specific channels to their personalized feeds. And Plaintiffs can rank the content in personalized feeds in any number of ways, including quality, popularity, timeliness, or by any other user-agnostic or aggregate user metric. Such personalization facilitates more user choice, not less, and better respects their privacy and autonomy.

ii. The use of behavioral profiling algorithms is not an exercise of protected editorial discretion.

The *Moody* Court recognized that behavioral profiling is distinct from content moderation in constitutionally salient ways. While laws overriding companies' content moderation decisions fall squarely within the Court's prior precedent on editorial discretion and compelled speech, the same is not true of laws that regulate the use of algorithms that "respond solely to how users act online." *Moody*, 603 U.S. at 736 n.5. As Justice Barrett wrote in her concurrence, "The First Amendment implications . . . might be different" for "a platform's algorithm [that] just presents automatically to each user whatever the algorithm thinks the user will like—e.g., content similar to posts with which the user previously engaged." *Id.* at 746 (Barrett, J., concurring).

This Court agreed that these feed generation decisions are “probably not expressive.” *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1014 (9th Cir. 2025) (*NetChoice II*).

Indeed, the use of behavioral profiling to make revenue-maximizing decisions lacks every characteristic of protected editorial discretion. Behavioral profiling does not involve the company choosing to include or exclude content based on the message, viewpoint, or idea communicated. It also does not reflect any intent to communicate an overall message through the resulting curation. As a result, Plaintiffs do not actually communicate any coherent message, idea, or theme to users through their behavioral profiling process.

1. Plaintiffs’ usage-maximizing algorithms do not select or rank content based on the message expressed.

Protected editorial decisions involve evaluating the communicative content of third-party speech and choosing to include or exclude that speech based on the message expressed. *See* Tim Wu, *Machine Speech*, 161 U. Pa. L. Rev. 1495, 1521, 1528 (2013). The tentpole editorial discretion cases all involve the government attempting to override choices that result from such processes. SB 976

does not do this because Plaintiffs' behavioral profiling algorithms do not assess the communicative content of user posts and thus do not disseminate posts based on their expressive qualities.

Most of the Supreme Court's editorial discretion cases "boil[] down" to "the choice of a speaker not to propound a particular point of view" and the government's inability to override that choice. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995). In *Hurley*, the Court found that the government could not force the organizers of a Boston St. Patrick's Day parade to include a float sponsored by an LGBTQ group because the organizers' decision to exclude the float was grounded in their desire not to send a pro-LGBTQ message. *Id.* at 574. Similarly, in *Miami Herald Pub. Co. v. Tornillo*, the Court recognized a newspaper's right to refuse to publish a response from a political candidate after the paper decided it did not think the candidate's viewpoint merited publishing. 418 U.S. 241, 256 (1974). *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, concerned a power utility's right not to include messages from a citizens rights group in its customer mailings that the company assessed would likely critique or contradict their own views. 475 U.S. 1, 12–13 (1986). And

Moody concerned social media companies’ rights not to “convey posts having a certain content or viewpoint.” *Moody*, 603 U.S. at 738.

While *Turner Broad. Sys., Inc. v. F.C.C.*, did not involve the government forcing cable operators to carry any specific message or viewpoint, it did concern the government’s ability to override the operators’ process of evaluating and choosing among channels based on their communicative content. 512 U.S. 622 (1994). The Court emphasized that the cable operators were engaged in protected editorial discretion because they evaluated the topics, viewpoints, formats, and themes of the available channels and chose to carry specific channels based on whether the channels’ expressive qualities contributed to the variety of expression in the overall cable package. *Id.* at 636. The Court said that the government’s requirement that all cable operators carry broadcast channels burdened the operators’ editorial discretion because it left them with fewer channels they could choose to include based on their expressive qualities. *Id.* at 637.

SB 976 does not override Plaintiffs’ evaluating the communicative content of users’ posts and deciding to carry or not carry based on that evaluation. Behavioral profiling algorithms select and rank content

based on the probability that they will induce a user into staying on the platform, not on the expressive qualities of the content. In a TikTok employee’s own words, the algorithm “doesn’t care about the content—it doesn’t have an agenda. It doesn’t qualitatively understand” the content it selects and ranks for users. TikTok Compl. ¶ 160; *see also* Knight Georgetown Institute, *supra*, at 12–13 (describing non-content signals to which engagement-maximizing algorithms respond). Because the algorithms are blind to the semantic content of the posts they are evaluating, choosing, and ranking, the outputs do not reflect any choice to propound (or not) any message, viewpoint, or quality of expression.

2. Plaintiffs’ usage-maximizing algorithms lack an expressive goal.

The lack of an overarching expressive goal, which would imbue Plaintiffs’ behavioral profiling decisions with an overall message, is also an indication that these decisions are not exercises of editorial discretion. The expressive goal could be an intent to express (or refrain from expressing) *anything*, whether it be a particularized message or viewpoint or something more nebulous like a topic or theme.

For example, the Court in *Hurley* explained that parades were expressive because parade organizers set, and the parade units follow, a

“common theme.” 515 U.S. at 576. In *Hurley*, the parade organizers chose to celebrate Irish-American Heritage and recruited participants that each contributed to this theme with the result that “the parade’s overall message [could be] distilled from the individual presentations along the way.” *Id.* at 577. Without this “common point” that the organizers chose and the assembled people followed, the event would have been “just motion”—not expression. *Id.* at 568.

Plaintiffs’ usage-maximizing algorithms are not exercises of editorial discretion because they are not designed to communicate an overarching message through the choice of the third-party content that they select and rank. Plaintiffs do not seek to express any theme, viewpoint, message, feeling, or anything expressive when they behaviorally profile users. Plaintiffs deploy behavioral profiling with the sole aim of engineering a specific behavioral response in users—with no regard for the message that including or excluding the content sends to the user. *See Frischmann & Selinger, supra.*

As a result, any emergent theme among the outputs of a behavioral profiling algorithm will be purely accidental. More often than not, the resulting compilations are a hodge-podge of messages that

lack a “common theme.” *Hurley*, 515 U.S. at 576. The output is equivalent to a group of people walking together carrying a random assortment of signs with no collective purpose and no coherent message, theme, or viewpoint. Each participant in this walk may be engaged in expression through their individual signs and chants, but the *organizers* failed to engage in expression because they did not set out to craft any message through their decision making and selection process. And just as an assembly of people without a message is “just motion,” *id.* at 569, feed personalization through behavioral profiling is just an endless scroll.

3. Personalization is not inherently expressive.

Personalization is not inherently expressive. The message Plaintiffs say they are sending through behavioral profiling could be the message of any personalized conduct. Examples of personalization found expressive in caselaw communicate a message in a speaker’s own voice, unlike Plaintiffs’ personalization of feeds through behavioral profiling.

Plaintiffs claim that their choice to personalize their algorithmic feeds through behavioral profiling is expressive because it sends a

message along the lines of, “You may find this content interesting.” 7-GoogleER-1384 (¶ 46); (describing YouTube’s message as “You are likely to find interesting the compilation of videos we have selected for you.”); 3-MetaER-535 (¶ 38) (similar); 1-TikTokER-17 (similar). This is not the same as the Plaintiffs *themselves* saying, “We think this content is interesting.” How could they when they have not evaluated the communicative aspects of the content? Plaintiffs’ supposed message is merely a description of the conduct they are engaged in.

Plaintiffs’ argument is, essentially, that personalization is inherently expressive. But if that were so, then all personalization would receive First Amendment protections. There is no precedent for such a sweeping rule. If sending this message were sufficient to transform conduct into expression, it would lead to all personalization “becom[ing] expressive and receiv[ing] speech protections” even though “the Supreme Court has made clear that there is not [a] ‘limitless variety of conduct that can be labeled “speech” [even when] the person engaging in the conduct intends thereby to express an idea.’ ”

NetChoice, LLC v. Bonta, 761 F. Supp. 3d 1202, 1222 (N.D. Cal. 2024) (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)) (*NetChoice*

I). Many products and services use consumers’ personal data to generate personalized outputs. Frischmann & Ormerod, *supra*, at 1129–30. A smart thermostat, for instance, collects and uses its owner’s personal data to predict the temperature that is best for them. *Id.* at 1127. By Plaintiffs’ logic, when the thermostat sets the temperature based on the owner’s personal data, the thermostat company is saying, “This temperature takes into account your preferences,” so any regulation of the company’s collection and use of personal data is subject to First Amendment scrutiny. Similarly, a liquor store clerk who hands a minor a six pack of beer based on the minor’s preference for something fruity could be understood to say, “You will find this beer interesting,” so the sale of the beer should be protected by the First Amendment.

When personalization does communicate something, it isn’t the sort of vague, generic message that Plaintiffs claim they are sending, but a message in the speaker’s own voice. In cases where the Supreme Court has found the personalization of a product expressive, such as a personalized wedding website, *303 Creative*, 600 U.S. at 587, and a personalized wedding cake, *Masterpiece Cakeshop v. Colorado Civil*

Rights Commission, 584 U.S. 617, 626 (2018), the message the Court found expressive was not “this is the best website for you” or “you’ll find this cake interesting” but a message in the speaker’s own voice: “This is a marriage I want to celebrate.” Similarly, in *Sorrell*, the pharmaceutical companies challenging a regulation of physician prescribing data used that data to decide what words and ideas would best persuade individual physicians to prescribe their drugs. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). The companies’ marketers thus used the data not to say, “You may find this advertisement interesting,” but to personalize a message in their own voice along the lines of, “Our brand-name drug is superior to the generic drug you often prescribe.” *Id.* at 558.

Plaintiffs, meanwhile, do not tailor any message in their own voice using minors’ behavioral data. They induce users to engage in profitable behavior not through persuasion but through psychological manipulation. Plaintiffs’ behavioral profiling algorithms are more like personalized slot machines than the tailored speech in precedent and should be treated similarly under the First Amendment. Matthew B. Lawrence, *Public Health Law’s Digital Frontier: Addictive Design*,

Section 230, and the Freedom of Speech, 4 J. Free Speech 299, 348 (2024).

Personalization might be expressive in certain contexts, such as gift-giving, where it communicates something about the relationship between two people. But this does not describe behavioral profiling for addictive feeds. Humans have limited time and attention, and devoting some of it to choosing a gift for a person reflects the gift-giver's feelings toward the person. A person who picks out a gift for a friend that reflects the friend's interests does not say, through their gift-giving, "This is something I think you will find interesting," but, instead, "I care about you." Usage-maximizing algorithms, deployed at scale, do not express a similar message through their personalization, because the personalization is *impersonal*: it is performed by a computer, in a matter of moments, with little marginal cost to the company, to benefit the company, not the user.

iii. The use of machine learning to behaviorally profile users further undermines the expressiveness of the content decisions.

Another reason to doubt the expressiveness of Plaintiffs' recommender systems is the fact that they delegate decisionmaking to

black-box machine-learning algorithms to make content ranking decisions, which attenuates alleged expressiveness. When companies use behavioral profiling to generate personalized feeds, they rely on machine-learning algorithms whose operations are a black box that can only be explained at high levels of abstraction. *See* Part I.B.i. As a result, the human creators of the algorithm cede their ability to control, explain, understand, or predict the algorithm’s output. *See Moody*, 603 U.S. at 795 (Alito, J., concurring in the judgement) (contrasting newspaper editors’ expressive curation with algorithms that “prioritize content based on factors that the platforms have not revealed and may not even know.”); Mackenzie Austin & Max Levy, *Speech Certainty: Algorithmic Speech and the Limits of the First Amendment*, 77 Stan. L. Rev. 1, 63–64 (2025). No court has ever ruled that a speaker engages in editorial expression when they compile speech using metrics that they can neither understand nor explain, *see* Austin & Levy, *supra* at 30–33, and whose output they cannot control and must frequently disavow, *see, e.g.,* Jason Kohler, *Instagram ‘Error’ Turned Reels Into Neverending Scroll of Murder, Gore, and Violence*, 404Media (Feb. 27, 2025)

(summarizing Meta’s apology for accidentally filling users’ feeds with videos of violent human and animal deaths).⁹

This is why many of the Justices in *Moody* questioned whether even content moderation could be considered expressive when it is delegated to machine-learning algorithms. As Justice Barrett wrote in her concurrence, “technology may attenuate the connection between content-moderation actions (e.g., removing posts) and human beings’ constitutionally protected right” of expression. *Moody*, 603 U.S. at 746 (Barrett, J., concurring). She further noted, “If the AI relies on large language models to determine what is ‘hateful’ and should be removed, has a human being with First Amendment rights made an inherently expressive ‘choice . . . not to propound a particular point of view?’” *Id*; *see also Moody*, 603 U.S. at 795 (“[W]hen AI algorithms make a decision, even the researchers and programmers creating them don’t really understand why the models they have built make the decisions they make. Are such decisions equally expressive as the decisions made

⁹ <https://www.techpolicy.press/an-advocates-guide-to-automated-content-moderation/>.

by humans?”) (Alito, J., concurring in the judgement) (quotation marks and citations omitted).

If the expressiveness of *content moderation* decisions can be attenuated by the use of machine learning algorithms, then the case for the expressiveness of *behavioral profiling* using machine learning is even weaker because such conduct lacks any characteristic of editorial discretion. *See* Part II.B. When platforms lack curatorial control, they can hardly claim to be exercising editorial judgement.

iv. Behavioral profiling is a functional, not expressive, aspect of feed creation.

Courts have long recognized that some communications “combin[e] nonspeech and speech elements, *i.e.*, functional and expressive elements.” *United City Studios, Inc. v. Corley*, 273 F.3d 429, 451 (2d Cir. 2001). This “de facto functionality doctrine” allows the “state to regulate the functional aspects of the communication process, while protecting its expressive aspects.” Wu, *supra*, at 1496–97. Behavioral profiling is a functional aspect of feed creation. This functional aspect is not inextricably intertwined with the expressive aspects of feed creation. The State can regulate the use of behavioral-profiling algorithms

without impacting a company's ability to select and rank content based on a company's views about the messages expressed.

First Amendment doctrine has long recognized that conduct can contain both speech and nonspeech elements. *See O'Brien*, 391 U.S. at 376; *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (enforcement of a no-camping-in-the-park law targeted the “facilitative” aspect of a protest). “When speech has both protected and unprotected features . . . ‘the unprotected features of the [speech] are, despite their [communicative] character, essentially a ‘nonspeech’ element’ for purposes of the First Amendment.” *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 492 (2025) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992)). In a First Amendment challenge, then, courts do not just look at whether the conduct being regulated has *some* expressive element, but whether the specific practice that is regulated is expressive or non-expressive.

When considering limits on the distribution and use of computer code, courts have long focused on whether the law at issue regulates the expressive or the functional aspect of the code. *See Kyle Langvardt, Crypto's First Amendment Hustle*, 16 Yale J.L. & Tech. 130, 146 (2023).

The distribution of code is expressive when the code is “meant to be read and understood by humans” and when it communicates the “scientific ideas” of the programmer to others. *Bernstein v. Dep’t of Justice*, 176 F.3d 1132, 1142, 1145 (9th Cir. 1999), *reh’g granted, op. withdrawn*, 192 F.3d 1308 (9th Cir. 1999). A use of code is functional when the code is instead used to accomplish the task that the software was programmed to achieve. *Corley*, 273 F.3d at 451. For example, when a researcher distributes code to communicate to other researchers how to design an encryption algorithm, such a use of code is expressive. *Bernstein*, 176 F.3d at 1141. But when a person distributes encryption software to an end user to decrypt an encrypted file, that use is functional. *Corley*, 273 F.3d at 451, 454. If a law regulates a functional aspect of code, courts determine whether the regulation would have an incidental impact on an expressive aspect of the code, and if so, subject the regulation to intermediate scrutiny. *See id.* at 454.

Similarly, courts have recognized that architecture combines both expressive and functional activities. *See, e.g., Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, 311 F. Supp. 2d 972, 1005 (D. Nev. 2004) (noting that while a building project

“may involve an intent to convey an artistic, political, or self-expressive message, the great majority [of building choices] are functional in nature and are not commonly associated with expression”). Whether a regulation of building practices triggers First Amendment scrutiny depends not on whether any aspect of building design is expressive (some of it surely is, such as the choice of Beaux-Arts or Brutalism) but on what aspect of the building process is being regulated and whether that aspect has the characteristics of expressive conduct. *See Burns v. Town of Palm Beach*, 999 F.3d 1317, 1335–43 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

When social media companies use surveillance data to optimize use, they are not trying to—nor do they actually—send their own ideas or messages to the user. *See* Part I.B.ii. Their behavioral profiling algorithms, instead, serve the functional purpose of organizing the media on a platform in a way that maximizes the amount of time users spend on the platform, which maximizes corporate profits. *See* Richards & Hartzog, *supra*, at 1162–63.

While companies may combine expressive content moderation with non-expressive behavioral profiling to create a single feed,

regulation of the latter does not impact the former. A company could re-engineer a feed to not use the surveillance data without changing their content moderation practices. *See* Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, Facebook (May 5, 2021) (discussing content moderation and engagement maximization as independent processes).¹⁰ The feed would be just as expressive after that change because the company’s user-agnostic content preferences, and not their behavioral profiling, are responsible for the curation’s expressiveness.

II. SB 976 does not limit the circulation of information.

Meta and some of its *amici* argue that the First Amendment is implicated in this case regardless of whether Plaintiffs are themselves engaged in expression because SB 976 burdens the distribution of information. *E.g.*, Meta Appellant Br. 32–33; ACLU & ACLU of Northern California Amici Curiae Br. 6–11. The underlying interest in the cases they cite—maintaining public access to protected expression—is absent in this case. SB 976 does not prevent Plaintiffs from distributing any user posts. Nor does it limit who can receive these

¹⁰ <https://www.facebook.com/notes/751449002072082>.

posts. And even if SB 976 were said to burden the distribution of speech, it is a constitutional restriction on the manner of distribution.

The central cases *Meta* and its *amici* cite concern prohibitions on distributing specific categories of speech. *Smith v. California*, 361 U.S. 147, 150 (1959) (concerning obscene books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (concerning “sacrilegious” movies); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 568 (9th Cir. 1984) (concerning “hard rock” concerts). These cases are all concerned with protecting the public’s access to protected speech that is either directly proscribed, *id.*; *Burstyn*, 343 U.S. at 497, or likely to be suppressed incidental to a distributor attempting to avoid strict liability for distributing unprotected speech, *Smith*, 361 U.S. at 153. SB 976 does not prohibit Plaintiffs from distributing any user posts of any kind, and so there is no danger that the law will result in the public losing access to any protected speech on Plaintiffs’ platforms.

Other cases *Meta* and its *amici* cite are aimed at preventing the government from limiting the audience for disfavored ideas and viewpoints. *Grosjean v. Am. Press Co.* involved a tax on newspapers that was “not an ordinary form of tax, but one single in kind, with a

long history of hostile misuse against the freedom of the press,” namely, to limit circulation of disfavored ideas. 297 U.S. 233, 250 (1936); *see also* Elizabeth Kolbert, *The Big Sleezy*, The New Yorker (June 5, 2006) (explaining that the law in *Grosjean* targeted newspapers critical of Senator Huey Long, who referred to the tax as “a tax on lying.”).¹¹ Similarly, *Lakewood v. Plain Dealer Publ’g Co.* involved a licensing scheme for newsracks on city streets that gave the government “unbridled discretion” to control the circulation of information and thus prevent readers from receiving disfavored publications. 486 U.S. 750, 757 (1988) . The ordinance in *Martin v. City of Struthers* prohibited door knocking methods traditionally used to spread religious and political messages, including the “poorly financed causes of little people.” 319 U.S. 141, 146 (1943). The Court thought the law could serve no purpose but “the naked restriction of the dissemination of ideas.” *Id.* at 147. SB 976 does not pose the same threat because Plaintiffs do not use behavioral profiling to espouse any specific viewpoints or ideas.

Cases involving social media access restrictions for minors also implicate completely different interests than the present case because

¹¹ <https://www.newyorker.com/magazine/2006/06/12/the-big-sleazy>.

they prevent minors from speaking and accessing posts on the regulated platforms. *See, e.g., NetChoice, LLC v. Carr*, 789 F. Supp. 3d 1200, 1223 (N.D. Ga. 2025). SB 976 does not do this and thus does not limit the speakers or audience on Plaintiffs' platforms.

What's more, the government action in *Grosjean*, *Lakewood*, and *Martin* did not implicate the parties' roles as distributors but publishers and speakers engaging in their own expression. Indeed, many of the cases Meta and its *amici* say support their argument that Plaintiffs can invoke the First Amendment without showing that SB 976 burdens their expression actually cut the opposite way: these cases all concern a plaintiff's own speech and not just their distribution of third-party speech. *Sorrell*, 564 U.S. at 570 (discussing cases involving commercial speakers and the media); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (concerning a restriction on corporations speaking on ballot measures). Several of their cases concern a party's exercise of editorial discretion, which SB 976 does not burden. *Children's Health Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 759 (9th Cir. 2024) (concerning Meta's exercise of editorial discretion over vaccine-related content); *Preferred Commc'ns, Inc. v. City of Los Angeles, Cal.*, 754 F.2d

1396, 1410 n. 10 (9th Cir. 1985), *aff'd and remanded sub nom. City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488 (1986) (concerning cable operators' exercise of editorial discretion).

The ACLU points to *Turner* as support for their argument that Plaintiffs can invoke the First Amendment without showing that SB 976 interferes with their expression. ACLU & ACLU of Northern California Amici Curiae Br. at 10. Yet, *amici* admit, as they must, that the law at issue in *Turner* burdened the cable operators' *own* expression. *Id.* They hedge that this expression was only of a "limited nature." *Id.* But expression of a "limited nature" is still expression. As discussed in Part I.B.ii., Plaintiffs do not even engage in this "limited" level of expression through their use of behavioral profiling algorithms because these algorithms do not select and rank user posts based on any expressive qualities. As a result, *Turner* is inapposite.

Even if SB 976 were said to burden Plaintiffs' distribution of speech, the law is, at most, a content-neutral regulation of the manner in which information is distributed, and its constitutionality should be no more controversial than the time, place, and manner restrictions that have been historically upheld under the First Amendment. *See*

generally Brett Frischmann & Susan Benesch, *Friction-in-Design Regulation as 21st Century Time, Place, and Manner Restriction*, 25 Yale J.L. & Tech. 376 (2023).

SB 976 won't "drive certain ideas or viewpoints from the marketplace," either by directly suppressing a certain viewpoint or by restricting "discussion of an entire topic." *Project Veritas v. Schmidt*, 125 F.4th 929, 949 (9th Cir. 2025) (internal quotation marks and citations omitted). The law targets a harm that occurs regardless of the message, topic or viewpoint of any content. And it leaves ample alternative distribution methods open for Plaintiffs, including various personalized and user-agnostic means of distributing users' posts in algorithmic feeds.

CONCLUSION

For the foregoing reasons, EPIC respectfully urges the Court to affirm the district court's order.

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