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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

META PLATFORMS, INC.,
Plaintiff-Appellant,

v.

ROB BONTA, *In His Official Capacity as Attorney General of California*,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 5:25-cv-09792-EJD (Davila, J.)

AMICUS BRIEF OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE

The Computer & Communications Industry Association ("CCIA") is a nonprofit trade association whose members include online services that host, organize, and present speech created by their users. CCIA and its members have a direct interest in the laws governing or limiting their own speech and the speech of their users. In particular, CCIA and its members have an interest in ensuring the robust application of First Amendment protections against content-based regulation and preventing the development of laws based on incorrect understandings of the interactions of human judgments and decision-making and algorithms in the course of editing and curating speech online. A list of CCIA members is available here: https://ccianet.org/about/members.

The Software & Information Industry Association ("SIIA") is the principal trade association for those in the business of information. SIIA's membership includes nearly 400 software companies, platforms, data and analytics firms, and digital publishers that serve nearly every segment of society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information. SIIA and its members also have a particular interest in the full and predictable application of the First Amendment. A list of SIIA members is here: https://www.siia.net/about-us/member-companies.

CCIA and SIIA ("the Associations") have direct interests in the question this appeal presents: whether a website's use of algorithms to implement its editorial and curatorial judgments—including judgments informed by user preferences—forfeits the First Amendment's protections for those judgments. The Associations submit this brief to help the Court understand how this software works, and why it is a tool for carrying out protected editorial judgments rather than a substitute for the human judgment behind them.[1]

INTRODUCTION & SUMMARY OF THE ARGUMENT

This appeal concerns whether website operators lose the protections of the First Amendment if they use algorithms to implement operators' editorial and curatorial judgments at the scale the modern Internet demands. Among those

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. In response to Defendant's inquiry, Amici informed Defendant that Meta and Google are members of CCIA and SIIA, but that any dues they may have paid as members was not intended to fund preparing or submitting this particular brief. *See* Fed. R. App. P. 29(a)(4)(E); *id.* advisory committee's note to 2010 amendment (discussing former subdivision (c)(5)) (A "party's or counsel's payment of general membership dues to an amicus need not be disclosed."). Nonetheless, Defendant informed Amici that it does not consent to the filing of this amicus brief and Amici therefore have concurrently filed a motion for leave to file the brief. Defendant further instructed Amici to inform the Court that Defendant "defers to the Court's determination whether to allow the filing of this proposed amicus brief given that two of the Plaintiffs-Appellants in this action, Meta and Google, are paying members of the proposed amici the Computer & Communications Industry Association and the Software & Information Industry Association. *See* Fed. R. App. P. 29(a)(4)(E)."

judgments is what content a particular user might find interesting based on the user's viewing history and other information. The district court erred when it concluded that website operators' editorial and curatorial judgments are not "expressive" when they rely on "predictive algorithms" that incorporate users' preferences to "suggest content" that "will be engaging, or 'interesting' to users." 1-ER-9.[2] Amici CCIA and SIIA submit this brief to explain how these algorithms actually work and why using them to organize, prioritize, and recommend the immense volume of third-party content online is quintessentially protected editorial discretion.

First, algorithms are tools for human expression, not independent decisionmakers. When the people who operate social media platforms, online marketplaces, or video-sharing platforms decide what content to feature and what to demote or remove, the websites' software developers translate those human judgments into code that can be applied to the potentially billions of posts uploaded each day. The "key" to that process "is prioritization of content, achieved through the use of algorithms." *Moody v. NetChoice, LLC*, 603 U.S. 707, 734 (2024). Some algorithms involve simple rule-based programs, and others depend on machine-learning models such as large language models that produce

[2] Amici are citing to the Excerpts of Record submitted by Google LLC and YouTube, LLC. *See* Dkt. 11.

outputs influenced by parameters that developers establish. Either way, the choices that a website's operator makes about which signals to weigh and how to rank what its users see are as varied—and as expressive—as the websites themselves. That is why no two services curate alike: YouTube elevates reliable sources on topics where accuracy matters, Facebook prioritizes content likely to spark conversation, Instagram rewards original creators, and TikTok curates content meant to inspire creativity by interspersing diverse and varied content with content similar to what users have already enjoyed.

Second, those expressive choices are protected by the First Amendment. The First Amendment has long protected the "exercise of editorial control and judgment" over the speech of others, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and its "basic principles … do not vary" when a new medium—or a new tool—emerges to carry out a speaker's expressive choices, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quotations omitted). Nor do those principles vary when a website operator's decision about what content to prioritize takes into account user preferences and characteristics. Predicting what a reader will find worthwhile is the essence of a recommendation, and recommendations—like the reviews, ratings, and references that courts routinely treat as protected opinion—are expression. That a website curates with an eye toward engagement, and ultimately advertising revenue, changes nothing

because speech with "an economic motive" is no less constitutionally protected. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The protection extends to a website's decision to rank content based on a user's own actions and demographics: the First Amendment protects "the use of algorithms" that "select[] and rank[]" content "based on a user's expressed interests and past activities." *NetChoice*, 603 U.S. at 734-735.

Finally, the district court's conclusion that the First Amendment does not protect website operators' curation of a "personalized feed" based on a user's viewing history and other information creates profound uncertainty for a wide array of websites, far beyond social media platforms. Modern online services, from marketplaces to streaming platforms to news aggregators, present third-party content informed by users' preferences and characteristics. The district court's decision offered no administrable line between protected and unprotected content moderation, leaving a large number of websites guessing whether their content moderation is protected by the First Amendment.

ARGUMENT

I. SOFTWARE DEVELOPERS DESIGN AND USE ALGORITHMS AS TOOLS TO EXECUTE AND AMPLIFY A WEBSITE'S EXPRESSION BY CURATING AND MODERATING THIRD-PARTY CONTENT AT SCALE

A. Algorithms Are Tools That Humans Use To Implement Editorial Judgments

Recent years have seen extraordinary growth in the number, diversity, and reach of online communications services. Each service has its own personality, defined by the content- and subject-matter policies set by its leaders, operators, and employees and by their judgments about which third-party content to prioritize—the newest, the most local, the most popular, the most provocative, and so on. Given the volume of content posted daily online, automated moderation and curation are the only feasible ways for service providers to implement these editorial judgments. Approximately 456,000 X posts are shared *every minute*, and more than 300 million photographs are uploaded to Facebook and over 20 million videos are uploaded to YouTube *every day*.[3] Human moderators alone cannot

[3] Marr, *How Much Data Do We Create Every Day?*, https://bernardmarr.com/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/ (last visited Sept. 15, 2026); *Official Blog*, YouTube, https://blog.youtube/press (last visited Sept. 15, 2026).

review, assess, and curate the "huge surge of user-generated content" that the modern Internet has facilitated.[4]

Accordingly, when the people who operate a website decide what kinds of user-created content to promote, demote, or remove, they turn to their software developers to make it happen. The developers' task is to translate the operator's editorial judgments into code by designing algorithms that pre-program methods of moderation and curation according to the operator's policies and preferences. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 735 (2024) (recognizing that "platforms write algorithms to implement [their content-moderation] standards"). An algorithm, at bottom, is "a specific step-by-step procedure for solving a problem or accomplishing some end."[5] Developers create "automated algorithms, which include heuristic-based and rule-based techniques."[6] These algorithms operate on inputs that are selected by developers and assigned relative weights—degrees of influence on the result—depending on the context and the human judgments they

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[4] Darbinyan, *The Growing Role of AI in Content Moderation*, Forbes (June 14, 2022), https://www.forbes.com/councils/forbestechcouncil/2022/06/14/the-growing-role-of-ai-in-content-moderation/?streamIndex=0.

[5] *Algorithm*, Merriam-Webster, https://www.merriam-webster.com/dictionary/algorithm (last visited Sept. 15, 2026).

[6] Singhal et al., *SoK: Content Moderation in Social Media, from Guidelines to Enforcement, and Research to Practice*, in 2023 IEEE 8th Eur. Symp. on Sec. & Priv. (EuroS&P) 2 (2023), https://arxiv.org/pdf/2206.14855.

are designed to implement.[7] Rule-based algorithms must be exact, telling a computer precisely what to do, in what order, and in response to precisely defined inputs; every action taken, including every response to any given input, is built into the algorithm during programming.[8] Algorithms may be used to implement a website's decisions about which content to feature prominently and for whom; which content to demote, whether across the board or among certain users; which content to flag for further human review; and which content to remove altogether.[9] Algorithms may do this, for example, by promoting, demoting, flagging, or removing content that contains certain predefined keywords. Algorithms rely on human inputs and decision-making rules to decide how to sort human-created content.

Those who operate websites and platforms also use algorithms that may incorporate machine learning, including large language models, to accomplish their editorial choices. Machine-learning tools can process language contextually by

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[7] *Automatically Generating and Ranking Results*, Google, https://www.google.com/search/howsearchworks/how-search-works/ranking-results (last visited Sept.15, 2026).

[8] *Inputs and Outputs*, BBC, https://www.bbc.co.uk/bitesize/articles/z7wckty (last visited Sept. 15, 2026).

[9] *Our Approach to Facebook Feed Ranking*, Meta (June 11, 2025), https://transparency.meta.com/features/ranking-and-content/; *Types of Content We Demote*, Meta (July 2, 2025), https://transparency.meta.com/features/approach-to-ranking/types-of-content-we-demote.

recognizing patterns.[10] Developers create the machine-learning tools and assemble annotated datasets to train those tools to identify particular content characteristics. This training is iterative and shaped by the developers at every step.[11] Developers can use machine learning to identify nuanced similarities between pieces of content along predefined parameters—for instance, content like what a user has previously engaged with. These tools can also be supplied with a website's policies and examples of violative and non-violative content, and directed to identify similar material. To that end, developers design "precise, task-specific instructions" that "guide models toward accurate" outputs, including through step-by-step decision-making processes.[12] Thus, website operators can use machine learning to implement content-moderation policies and curatorial objectives at the scale required.

B. Prioritizing And Ranking Third-Party Content Are Expressive

The editors at newspapers and magazines exercise editorial judgment in deciding which stories to feature on the front page, which advertisements to run in

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[10] *AI Demystified: Introduction to Large Language Models*, Stan. Univ. Info. Techs. (Dec. 13, 2024), https://uit.stanford.edu/service/techtraining/ai-demystified/llm.

[11] Palla et al., *Policy-as-Prompt: Rethinking Content Moderation in the Age of Large Language Models*, in Proceedings of the 2025 ACM Conference on Fairness, Accountability, and Transparency 840 (2025), https://dl.acm.org/doi/10.1145/3715275.3732054.

[12] *Id.* at 842.

which markets, and which news to carry only in a local edition. The people operating websites make the same fundamental editorial decisions, deploying algorithms to carry them out at scale. Just as a print publication prioritizes particular stories, website operators "use … algorithms" to "prioritiz[e]" and "rank[]" the "billions of posts or videos … that could wind up on a user's customized feed or recommendations list," including on the basis of "a user's expressed interests and past activities," "features of the communication or its creator," and a provider's "Standards and Guidelines." *NetChoice*, 603 U.S. at 734-740. Social media websites, for example, use algorithms to organize the enormous volume of content created by their users on other users' feeds. The algorithm's role is to sort, prioritize, and deliver third-party content to each user—not to create new content of its own. These decisions on how to sort content merely reflect human judgments about what kind of content to prioritize—whether content that is popular, new, from particular communities, and so on. *See id.* at 738 (explaining that "curating … feeds … create[s] a distinctive expressive offering" resting on "a wealth of choices" about "which messages are appropriate and which are not (or which are more appropriate and which less so)").

In general, website operators recommend, prioritize, and rank human-created content to users through a series of steps. First, they may identify the relevant universe of content that might be shown to a particular user. The operator may

decide to narrow that universe based on a set of rules and policies; the user's own actions (such as whom the user follows); and predictions about the user's likely interests.[13] Second, the website's developers may identify potentially thousands of "signals" that they deem relevant to predicting what content a given user most wants to see.[14] Those signals can include, for example, the user's past activities, the user's social networks and relationship to the content's creator, as well as information about the creator, the content itself, and how other users have interacted with it.[15] Third, the website's developers may use algorithms to predict, based on those signals, what content the user is most likely to want to see or to engage with, and rank and display it accordingly.[16]

Algorithms do not identify and prioritize content based on what they "think" a user will like but based on an assessment of factors developers have identified as relevant to identifying content a user may want to see. Algorithms recommend

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[13] Mosseri, *Instagram Ranking Explained*, Instagram (May 31, 2023), https://about.instagram.com/blog/announcements/instagram-ranking-explained (last visited Sept. 15, 2026); *Our Approach to Facebook Feed Ranking*, *supra* note 9; *Facebook Help Center*, Facebook, https://www.facebook.com/help/1257205004624246; Goodrow, *On YouTube's Recommendation System*, YouTube Blog (Sept. 15, 2021), https://blog.youtube/inside-youtube/on-youtubes-recommendation-system.

[14] *Id.*

[15] *Id.*

[16] *Id.*

content according to human judgments regarding what kinds of content should be recommended. At each step, website operators and employees exercise their own subjective value judgments by deciding, among other things, which inputs or signals to feed into their algorithms, how much weight to give each, and how, where, and to whom to display the resulting content. Because these are expressive judgments, the way content is prioritized and ranked looks very different from one provider to the next.

YouTube's policymakers and developers, for example, design its recommendations to "connect billions of people around the world to content that uniquely inspires, teaches, and entertains."[17] The scale of that task is staggering because the content available on YouTube is immense. Today, over 20 million videos are uploaded daily.[18] And users have uploaded more than 20 billion videos on its platform since 2005.[19] YouTube must sift through billions of videos to surface those most relevant to each viewer. "Unlike other platforms," YouTube focuses its recommendations on content rather than on a user's "social network."[20]

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[17] Goodrow, *supra* note 13.

[18] *Official Blog*, YouTube, https://blog.youtube/press/ (last visited Sept. 15, 2026).

[19] Yang, *YouTube at 20: Platform Says More Than 20 Billion Videos Have Been Uploaded Since 2005*, NBC News (Apr. 23, 2025), https://www.nbcnews.com/tech/tech-news/youtube-20th-anniversary-20-trillion-videos-rcna202660.

[20] Goodrow, *supra* note 13.

Although YouTube once recommended content based on site-wide popularity, creating "one big 'Trending' page," it has shifted to models that recommend content based on each user's expressed or predicted interests.[21] And for topics "where accuracy and high quality are key—like news, personal finance and medical and scientific information—[it] elevate[s] high-quality voices" using signals of quality and reliability.[22] YouTube's curatorial algorithms thus prioritize viewer interest and reliability.

Facebook's designers built a social-networking service that sorts content based on, among other things, how likely a user is to comment on a post and "how likely the post is to spark a conversation."[23] There are 2 billion people active on Facebook who collectively upload more than 300 million photos per day, and post 510,000 comments and update 293,000 statuses every minute.[24] To organize that content, Facebook first identifies the posts shared by a user's connected "friends," and filters and sorts them based on signals about the user, the content, and whether the content—though not itself violative of any policy—may nonetheless be

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[21] *Id.*

[22] *Recommendations*, YouTube, https://www.youtube.com/howyoutubeworks/recommendations (last visited Sept. 15, 2026).

[23] *Our Approach to Facebook Feed Ranking, supra* note 9.

[24] Marr, *supra* note 3.

problematic, such as content that discusses self-harm or is sexually suggestive.[25] Facebook also sorts content based on what content is more likely to spark conversation. For example, Facebook may prioritize live videos over ordinary videos because live videos "tend to lead to more discussions."[26] And to help users build new connections, a personalized Facebook Feed displays a mix of content from people the user is friends with or follows together with content Facebook thinks the user will "be interested in from those … [the user] may want to know."[27] Facebook's curation is thus designed to foster connection and conversation.

Instagram has 600 million users, who collectively share 95 million photos and videos each day.[28] Instagram's operators, for their part, have expressly tuned its ranking algorithms to reflect the value they place on originality. Because "[o]riginal creators are the heart of Instagram," the service has updated its algorithms to recommend only original content, not content from "aggregators who primarily re-upload others' work"—regardless of how likely Instagram predicts a

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[25] *Id.*; *Facebook Help Center*, *supra* note 13.

[26] *No, Your News Feed Is Not Limited to Posts From 26 Friends*, Meta (Feb. 6, 2019), https://about.fb.com/news/2019/02/inside-feed-facebook-26-friends-algorithm-myth/.

[27] *Our Approach to Facebook Feed Ranking, supra* note 9.

[28] Marr, *supra* note 3.

user would be to engage with it.[29] Under its originality policy, Instagram prioritizes images a user took, content a user designed, or content a user "materially edited" in a way that makes the user's "additions meaningfully enhance the content."[30] Instagram has, in its words, "invest[ed] in tools and systems to ensure original content gets the credit and distribution it deserves."[31] Instagram likewise wants to "reduce the possibility of [users] seeing something offensive" from an account they "haven't yet chosen to follow," and so declines to recommend content that, while permitted, "some people may consider … sensitive or offensive."[32] In these ways, Instagram has honed its algorithms to prioritize originality while respecting users' preferences.

TikTok has over a billion global users who upload 16,000 videos every minute.[33] TikTok's mission is to recommend content that "inspire[s] creativity and

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[29] *Rewarding Original Creators on Instagram*, Instagram for Creators (Apr. 30, 2026), https://creators.instagram.com/blog/rewarding-original-creators-on-instagram.

[30] *Id.*

[31] *Id.*

[32] *Instagram Ranking Explained, supra* note 13.

[33] Winter, *TikTok Statistics: 15 Facts for Marketers in 2026*, Shopify (July 29, 2026), https://www.shopify.com/blog/tiktok-statistics; Zote, *46 TikTok Stats To Inform Your 2026 Strategy*, Sprout Social (Mar. 9, 2026), https://sproutsocial.com/insights/tiktok-stats.

bring[s] joy."[34] It does this by using algorithms to recommend content that a user might be interested in and to deprioritize content that a user might not like. For example, TikTok considers a user's actions indicating a lack of interest in deciding what content to recommend. The fact that a user indicated "not interested" for a particular video, "ch[ose] to hide videos from a given creator or made with a certain sound," or "report[ed] a video that seems out of line with [TikTok's] guidelines" all contribute to future recommendations.[35] At the same time, TikTok "[i]nterrupt[s] repetitive patterns," because it recognizes the "risk of presenting an increasingly homogeneous stream of videos."[36] Thus, to keep feeds "interesting and varied," TikTok also seeks to "intersperse diverse types of content."[37] For example, TikTok "generally won't show two videos in a row made with the same sound or by the same creator."[38] It also does not "recommend duplicated content, content [users have] already seen before, or any content that's considered spam."[39] TikTok

[34] *How TikTok Recommends Videos #For You*, TikTok Newsroom (June 18, 2020), https://newsroom.tiktok.com/how-tiktok-recommends-videos-for-you?lang=en.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

considers this "an important and intentional component" of its recommendation approach.[40]

The differences between these services are not incidental. The choices carried out through algorithms—about which signals matter and how much they should count—reflect the mission and values chosen by company leaders, which is why no two services curate alike. Across these services, the same basic editorial work is performed through tools that allow the people who run websites to apply their curatorial judgments to billions of items of third-party content each day.

II. THE FIRST AMENDMENT PROTECTS EDITORIAL AND CURATORIAL DECISIONS BASED ON USER-EXPRESSED PREFERENCES

The First Amendment analysis rests on settled principles. For more than half a century, courts have protected the editorial judgments of those who gather and present the speech of others—newspaper editors deciding which stories to print, cable operators deciding which channels to carry, parade organizers deciding which contingents may march. The people who operate websites exercise that same judgment when they choose which third-party content to display and how to organize and prioritize it. As the Supreme Court confirmed in *NetChoice*, those curatorial choices are protected expression. *See infra* Part II.A. That protection

[40] *Id.*

attaches to the website operator's expressive compilation and curation, including when based in part on user-expressed preferences. *See infra* Part II.B.

The district court's rejection of Appellants' First Amendment argument reduces to the claim that this protection evaporates when a website considers user preferences in its editorial and curatorial decision making. Not so. Curation does not lose protection when content is ranked based on a user's own actions and demographics, or in pursuit of engagement and advertising revenue: predicting what an individual reader will value is the essence of a recommendation, and recommendations, like other expressions of opinion, are protected regardless of any economic motive. *See infra* Part II.B. Similarly, curation does not lose protection just because website operators use algorithms to effectuate their content-moderation and curation policies and preferences. Algorithms are tools that embed editorial judgments their human designers made in advance, and the First Amendment's protections do not diminish when a speaker adopts new tools to implement its expressive choices. *See infra* Part II.C.

A. The First Amendment Protects Editorial And Curatorial Decision-Making

The First Amendment's protection here begins with a basic proposition: "[T]he creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). As the Supreme Court has put it, "if the acts of disclosing and publishing information

do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (cleaned up).

The choices that shape a compilation of others' speech—what to include, what to exclude, and what to emphasize—are themselves expressive. For more than half a century, the Supreme Court has recognized that the First Amendment protects the "exercise of editorial control and judgment" over third-party speech. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In *Tornillo*, that meant a newspaper was free to prioritize certain viewpoints regarding political candidates over others and could not be forced to publish a candidate's response to criticism it published. *Id.; accord New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964) (the First Amendment protects the selection of paid, non-commercial advertisements for inclusion in a newspaper). The Court extended the same principle to cable operators in *Turner Broadcasting System, Inc. v. FCC*, which "are entitled to the protection … of the First Amendment" because they "exercis[e] editorial discretion over which stations or programs to include in [their] repertoire[s]." 512 U.S. 622, 636 (1994) (quotations omitted). And in *Manhattan Community Access Corporation v. Halleck*, the Court reaffirmed that private parties who open their property to the speech of others may "exercis[e] editorial discretion over" that speech. 587 U.S. 802, 813 (2019). In exercising that discretion, "a narrow, succinctly articulable message is not a condition of

constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569-570 (1995).

Consistent with these precedents, the Supreme Court explained in *NetChoice* that online service providers' curation of third-party content is protected under the First Amendment because it "combin[es] 'multifarious voices' to create a distinctive expressive offering" based on judgments about "which messages are appropriate and which are not (or which are more appropriate and which less so)." 603 U.S. at 738. Those are "expressive choices" that "receive First Amendment protection." *Id.* at 740.

B. The People Operating Websites Engage In Protected Expressive Activity When Prioritizing And Ranking Content Based On User-Expressed Preferences To Create "Personalized Feeds"

This First Amendment protection extends to a website's curatorial and editorial decision to prioritize content that a user will prefer and find interesting because these curatorial and editorial decisions are themselves expressive. Indeed, choosing what content to include in a "compilation of [] speech of third parties" based on what will "generate[] … interest" with one's audience is a classic "exercise of journalistic discretion" protected by the First Amendment. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674, 682 (1998). The district court was wrong when it concluded that social media platforms with personalized feeds "are not making any decisions about what content will be 'interesting,'

because they are merely relying on predictive modelling to assess what users' characteristics and history on the platform suggest will keep these same users engaged." 1-ER-9. Websites' operators use information about users' characteristics to help decide what content the user might find popular or interesting. At bottom, an evaluation of what content will be "interesting" to a particular user or audience depends, at least in part, on understanding certain characteristics about the user or audience. The premise of the district court's holding is that an algorithm keyed to a user's own activity does not convey the judgment of the people who built it. That is wrong. A user's preferences and past activity do not dictate a single answer about what content to recommend. That information can support many different recommendations, and the choice among these recommendations reflects judgments that the algorithm's developers built into it. *See* Google Br. at 33. These algorithms simply carry out website operators' recommendations based on expressive judgments about what qualities make content likely to appeal to users based on what those particular users might, in the operators' judgment, find interesting. Courts across the country consistently recognize that recommendations—which are "subjective evaluation[s]" of quality or appeal—are a protected form of opinion. *See, e.g., Perfect Choice Exteriors, LLC v. Better Bus. Bureau of Cent. Ill., Inc*., 99 N.E.3d 541, 549-552 (Ill. App. Ct. 2018) (a "D-" rating assigned to a business is a "subjective evaluation" and a

constitutionally protected "expression[] of opinion"); *Marcus v. Swanson*, 539 P.3d 605, 611 (Kan. 2023) (a one-star customer rating "was an opinion" and not actionable); *Trahanas v. Northwestern Univ.*, 64 F.4th 842, 859 (7th Cir. 2023) (a letter withdrawing a recommendation for medical school contained "constitutionally protected statements of opinion").

Courts have thus held that recommendations reflected in algorithmically generated rankings are protected expression. In *Search King, Inc. v. Google Technology, Inc.*, for example, the court held that a search engine's rankings are "opinions" entitled to "full constitutional protection," precisely because the ranking a given algorithm produces is a "fundamentally subjective" assessment of a website's "significance" to a "search query"—that is, an assessment of which websites a user is interested in seeing. 2003 WL 21464568, at *3-*4 (W.D. Okla. May 27, 2003); *see also Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-631 (D. Del. 2007) (dismissing, on First Amendment grounds, claims that sought to dictate how search engines rank and present their results). The algorithmic rankings challenged here are no different.

A recommendation does not lose its expressive character just because it takes account of the recipient's known preferences. Consider an academic reference for a clerkship. A letter stating "I recommend this student for a clerkship in your chambers" would be no less expressive if it rested on the

recommender's assessment that the student had similar qualities to others the judge had hired than if it rested solely on the recommender's own view of the student's writing. In either case, the recommendation conveys the recommender's judgment and subjective assessment of the student's suitability. A bookstore with multiple locations around the country illustrates the same point. To appeal to the interests of local residents, each branch might display different books on its shelves. The San Francisco location might feature books about artificial intelligence and technology, while the Cambridge location might feature textbooks for students to use. Even though these displays are tailored to each audience's expected preferences, they reflect the bookseller's protected editorial judgment about what its customers will find interesting.

Nor does it matter that filtering and ranking content may be designed to maximize user engagement and build a user base, which could, in turn, grow advertising revenue. "[T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as … website designers)." *303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023). Prioritizing a social-media post based on a prediction that a user will engage with the post (and thereby drive advertising revenue) is no different from a magazine placing its most sensational story on the cover to attract buyers at the newsstand. Similarly, studies confirm that newspaper editors devote follow-up coverage to online stories that

attract more clicks.[41] That choice may be profit driven, but no one would dispute it merits First Amendment protection. Indeed, a publisher who did not tailor content to user preferences and generate engagement would rapidly lose an audience.

Finally, curating content based on the information a website has about its users is independently protected because it reflects a decision about how to use information the provider possesses. The "right to speak" encompasses the right to decide how "the information" one "possesses" "might be used or disseminated." *Sorrell*, 564 U.S. at 568 (quotations omitted).

C. Using Algorithms To Implement Editorial And Curatorial Decisions Does Not Forfeit First Amendment Protection

"[T]he basic principles of freedom of speech and the press … do not vary" when "a new and different medium for communication appears." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quotations omitted). Nor do the First Amendment's protections diminish when a new medium calls for new tools to carry out a speaker's expressive choices. The operators of websites and platforms do not lose First Amendment protections just because they use algorithms to help implement their editorial and curatorial judgments. The use of such a tool does not alter the underlying expressive decisions.

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[41] Sen & Yildirim, *Click Bias in Editorial Decisions: How Does Popularity Shape Online News Coverage?* (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619440.

Given the volume of content online, "the use of algorithms"—including those that "select[] and rank[]" content "based on a user's expressed interests and past activities" as well as "features of the communication or its creator"—is "[t]he key to" how websites operate. *NetChoice*, 603 U.S. at 734-735. Indeed, without the ability to pre-program curatorial decisions through sophisticated algorithms, a person operating a website would lack any feasible means of filtering the flood of daily content into a digestible set of content reflecting each provider's unique values and mission. There is no allegation that the algorithms at issue here have free rein over Plaintiffs' moderation actions. As explained above, algorithms are tools that implement content-moderation and curation policies and preferences of the individuals who are in charge of the websites they administer. Algorithms that use machine-learning methods are shaped by the parameters set by their programmers—through, for example, model design, training, fine-tuning, and more. "[T]he algorithms themselves were written by human beings," and they "inherently incorporate the [website] engineers' judgments" about what content to surface. *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438-439 (S.D.N.Y. 2014) (quotations omitted). The relevant human judgments and editorial directions are simply made in advance: the website operator decides what content is valuable, relevant, or violative, and developers then build those judgments into algorithms through their model architecture, training data, and fine-tuning. The algorithms

thus apply the website's policies to new content guided by predefined parameters.[42] That an algorithm rather than a person implements those judgments no more forfeits their First Amendment protection than an editor forfeits editorial freedom by using software to select and arrange a page's content rather than pasting it up by hand.

In short, editorial curation at the scale of the modern Internet cannot be separated from the tools that carry it out. To deny First Amendment protection based on the use of tools that make such curation possible would thus be to deny protection to the curation itself. The Supreme Court has repeatedly emphasized that those curation decisions must be protected. *E.g.*, *NetChoice*, 603 U.S. at 740; *Tornillo*, 418 U.S. at 258; *Hurley*, 515 U.S. at 569-570.

III. IF LEFT STANDING, THE DISTRICT COURT'S DECISION COULD HAVE NEGATIVE INDUSTRY-WIDE CONSEQUENCES

The district court's conclusion that "personalized feeds" are not protected by the First Amendment because they are not "expressive" creates uncertainty for many online service providers about whether their content-moderation decisions are protected by the First Amendment. Nothing in the district court's decision is limited to social media platforms or feeds curated for minors. If considering users' preferences and characteristics renders curation non-expressive, that conclusion

[42] Palla et al., *supra* note 11, at 842.

would not depend on the age of the user or the type of platform. That same logic might be used to deny First Amendment protections for personalization across a broad swath of websites and every user base—adults and minors alike.

The district court's holding potentially has ramifications for a wide range of websites and platforms that curate feeds for their users. A few examples include:

- Marketplace and e-commerce websites that prioritize products and listings based on user information.
- App stores and game distribution platforms that prioritize apps and games based on user information.
- Audio, video, and streaming platforms where users can listen to music and podcasts, and watch movies, TV shows, videos, and live streams. The content on these platforms may be prioritized based on user information (e.g., a user might be recommended a movie based on movies the user has previously watched) or information associated with the user's device (e.g., a user might be recommended shows in a certain language based on the user's IP address).
- Local discovery services for travel and navigation where recommendations and reviews may be sorted and prioritized based on the user's location.
- Long-read platforms that may sort newsletters, books, or articles based on user information.
- Professional and community networks that may sort news articles and news sites based on user characteristics and user location.
- Dating applications that recommend matches based on user preferences and characteristics (like demographics and location).

Under the district court's decision, these types of websites—and many others—will operate under uncertainty about whether their content-moderation decisions are protected by the First Amendment.

That uncertainty is heightened because the district court's decision is not clear on *how* protected content-moderation decisions can be distinguished or disaggregated from unprotected content-moderation decisions that contribute to "personalized feeds." And the distinctions the district court tries to draw are irrelevant for First Amendment purposes. The district court concluded that content moderation is expressive because it "reflects decisions about what content to be included or excluded consistent with often written standards." 1-ER-13. But personalization efforts reflect fundamentally similar decisions—they are decisions about what content to prioritize and deprioritize (i.e., what content to include or exclude) on a user's feed based on what that user might find interesting. That content moderation may seek to filter out objectionable content whereas personalization efforts seek to prioritize popular content makes no difference for whether those decisions are "expressive." Similarly unpersuasive is the district court's attempt to draw a temporal distinction between content moderation and personalization efforts—with the former serving as an "initial gating mechanism" and the latter happening "later" in the process. 1-ER-13-14. *When* these decisions are made in the content moderation process is irrelevant for determining whether

these decisions are expressive. And where and how a particular piece of content is displayed is often the product of both content moderation and personalization. YouTube's content-moderation policies illustrate this point. Its core content-moderation standards seek to avoid recommending low-quality content. As Google explains, whether content is high or low quality depends on both user-agnostic characteristics of the content *and* the user's characteristics. Thus, YouTube's content moderation and personalization efforts significantly overlap in that they both consider a user's perceived preferences and characteristics. *See* Google Br. at 45-46.

The district court's failure to provide clear boundaries delineating protected and unprotected content-moderation decisions makes it challenging, if not impossible, for websites to predict what decisions may be protected under the court's analysis. A website operator that does not know whether its content moderation is constitutionally protected cannot confidently design its product, assess state-law compliance, or predict liability for its content-moderation decisions. Worse still, website operators might be chilled as a result of the decision and shy away from innovative algorithmic tools, personalization efforts, and content moderation that would be valuable to the users of their website.

CONCLUSION

This Court should reverse the district court's order denying the motions for preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,221 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ *Emily Barnet*
EMILY BARNET

September 15, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Emily Barnet*
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