

No. 25-146

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**In the United States Court of Appeals  
for the Ninth Circuit**

NETCHOICE,

*Plaintiff-Appellant,*

*v.*

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

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Northern District of California  
Civil Action No. 5:24-cv-07885-EJD

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**PLAINTIFF-APPELLANT NETCHOICE'S  
PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant NetChoice states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

/s/ Scott A. Keller  
Scott A. Keller

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## INTRODUCTION

The panel’s opinion creates intra- and inter-circuit conflicts on critical questions of First Amendment protections for online speech and associational standing. Fed. R. App. P. 40(b)(2). This Petition raises the following questions:

1. Whether the First Amendment protects websites’ expressive interests in offering online personalized feeds when those feeds implement websites’ independent community guidelines and do not disseminate speech “solely” based on user preference.
2. Whether the First Amendment protects users’ rights to access social media personalized feeds, regardless of how websites’ specific algorithms operate.
3. Whether trade associations can raise as-applied claims on behalf of their members for prospective declaratory and injunctive relief when asserting First Amendment claims whose pertinent facts do not depend on individualized proof of how each member’s unique algorithm operates.

Here, the panel upheld the district court’s refusal to preliminarily enjoin California Senate Bill 976’s (“Act”) parental-consent requirement for minors to view personalized feeds offering “distinctive expressive offering[s]” of fully protected speech. *Moody v. NetChoice, LLC*, 603 U.S. 707, 738 (2024); Op.16-19, 31-33. In so doing, the panel misconstrued precedent explaining that websites have rights to organize, disseminate, and display content on

their services. *Moody*, 603 U.S. at 735. And the panel also overlooked separate First Amendment doctrine that States cannot prevent minors from accessing protected speech “without their parents’ prior consent.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 795 n.3 (2011); see *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017); 3-ER-310 to -312.

The panel’s First Amendment errors led it to erroneously hold that plaintiff NetChoice lacks associational standing to challenge California’s parental-consent requirements as applied to six websites operated by NetChoice members: Facebook, Instagram, Nextdoor, Pinterest, X, and YouTube. Op.16-19. The panel incorrectly reasoned that, under *Moody*, NetChoice’s as-applied claims required individualized proof about how each website’s particular “algorithm” operates. Op.17-18. From that incorrect premise, the panel concluded NetChoice failed the “prudential” third prong of the associational-standing doctrine. Op.17-19.

The panel’s First Amendment reasoning and associational-standing holdings create multiple inter- and intra-circuit conflicts. On the First Amendment, the panel failed to properly construe and apply the Supreme Court’s and this Court’s precedent, which hold that websites engage in First-Amendment-protected expression when they provide “distinct expressive offering[s]” presenting “personalized,” “customized,” “curated,” or “individualized” “feeds” to users. *Moody*, 603 U.S. at 718, 734, 738. As this Court previously recognized, websites’ “deci[sions]” about “how [content] will be ordered and organized” are “expressive choices.” *Children’s Health*

*Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 759 (9th Cir. 2024) (quoting *Moody*, 603 U.S. at 740).

*Moody* already held that personalized feeds reflect expressive editorial choices when these websites apply “independent content standards” and make “user-agnostic judgments” in deciding whether, and how, to disseminate protected speech in feeds of expressive content. 603 U.S. at 736 n.5. This curation, personalization, and dissemination creates a new form of protected expression “distinct[.]” from those individual pieces of content. *Id.* at 738. The First Amendment protects these feeds, even if their “algorithms” “most often” rely on a “user’s expressed interests and past activities” to help websites determine the “selection and ranking” of content. *Id.* at 734-35. *Moody* made clear that the First Amendment protects these feeds all the same—as long as the website has its own “independent content standards” *Id.* at 736 n.5.

Here, un rebutted record evidence shows that the six NetChoice member covered services implement publicly available “[c]ommunity [g]uidelines” implementing such independent content standards. *Id.* at 734-36; see 3-ER-313, 327, 353. No additional facts can change this. So California’s regulation of the same personalized feeds deemed protected in *Moody* cannot stand under the First Amendment.

The panel, however, misconstrued *Moody* and incorrectly held that a “fact intensive” inquiry was needed to place each “algorithm” on a “spectrum” to determine whether those six websites’ feeds are “expressive.”

Op.18. But all that *Moody* reserved judgment on was hypothetical “feeds whose algorithms respond *solely* to how users act online . . . *without any regard to independent content standards.*” *Id.* (emphases added). There is no reasonable argument that is what any NetChoice member at issue here does.

The panel’s misreading of this recent Supreme Court First Amendment precedent threatens broad consequences. The panel’s “spectrum” test for when websites engage in protected expression cannot be cabined to just parental-consent requirements for minors. It would equally threaten to cast a pall of uncertainty over First Amendment protections *for adults*—or *all online speech* with personalized feeds.

The panel’s associational-standing holding was based on its erroneous understanding of the First Amendment and creates more intra- and inter-circuit conflicts. The panel ignored this Court’s instruction that this “third [standing] requirement is fulfilled” when an associational plaintiff “requests only declaratory and injunctive relief, which ‘do not require individualized proof.’” *Stavrianoudakis v. United States Fish & Wildlife Serv.*, 108 F.4th 1128, 1143 (9th Cir. 2024) (quoting *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001)). Here, that is all NetChoice requests on behalf of its six regulated members. *See* 3-ER-409 to -10.

At base, the panel’s decision inverts the First Amendment’s presumption that speech is protected and the government bears the burden of demonstrating that speech can be regulated. And it threatens to supplant the efficient mechanism of trade associations representing the shared interests of

their members on important First Amendment issues with a haphazard scheme under which every website (or user) must individually sue to be certain that the First Amendment protects them.

This Court should grant rehearing to resolve a series of important intra- and inter-circuit conflicts.

## STATEMENT

A. NetChoice is a leading internet trade association. The Act regulates six websites operated by NetChoice members: (1) Facebook; (2) Instagram; (3) Nextdoor; (4) Pinterest; (5) X; and (6) YouTube. *See* 3-ER-314.<sup>1</sup> What qualifies these websites for regulation is the shared way they “engage[] in expression”: “display[ing],” “compil[ing,] and curat[ing]” protected “third-party speech.” *Moody*, 603 U.S. at 716, 728, 732, 738, 740. The scale of fully protected speech on those websites is “staggering,” with “billions of posts or videos.” *Id.* at 719, 734.

To help users access the content that is most relevant to them, these websites display speech on “feeds” that are “personalized” to each user. *Id.* at 734. For some users, feeds might prioritize sports; for others, politics. In any case, members “implement [] standards” that “detail the messages and

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<sup>1</sup> NetChoice has 41 members—not “over one hundred,” as the panel said. Op.17; *see* NetChoice, About Us, <https://perma.cc/S7UU-WWE3>. Only six websites (belonging to five members) are at issue in NetChoice’s as-applied challenges.

videos that the platforms disfavor” to determine what content is permissible. *Id.* at 735.

Whatever the feeds contain—and precisely however they are constructed—they are undisputedly collections of fully protected speech that are “distinct[.]” from the individual underlying pieces of content that comprise them. *See id.* at 738.

**B.** The Act, however, would prevent covered websites from presenting content to minors in personalized feeds without parental consent. Relevant here, the Act regulates services with feeds where “multiple pieces of media generated or shared by users are . . . recommended, selected, or prioritized for display to a user based, in whole or in part, on information provided by the user, or otherwise associated with the user or the user’s device.” § 27000.5(a), (b)(1).<sup>2</sup>

For those websites, the Act imposes two parental-consent requirements. First, “[i]t shall be unlawful . . . to provide” such feeds to a minor user unless “[t]he operator has obtained verifiable parental consent to provide” the feed. § 27001(a). Second, the Act requires covered websites to implement a “default” setting limiting minors’ access to those feeds to “one hour per day unless modified by the verified parent.” § 27002(b)(2).

**C.** NetChoice challenged the parental-consent requirements (among other provisions), bringing both a facial challenge and as-applied challenges

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<sup>2</sup> All statutory citations are to the California Health & Safety Code.

on behalf of its members' six regulated websites. 3-ER-289. The district court partially granted and partially denied NetChoice's motion for preliminary injunction. 1-ER-39. NetChoice moved for an injunction pending appeal, and on January 28, 2025, a motions panel granted that motion. Dkt. 11.

The merits panel largely agreed with the district court's analysis about the Act's parental-consent requirements. The panel first concluded: "it was not an abuse of discretion to find that NetChoice lacked associational standing on behalf of its members" to bring as-applied claims to the Act's parental-consent requirements. Op.19. It reasoned that NetChoice failed the "final, prudential requirement" for associational standing. Op.17. This holding rested on the panel's First Amendment ruling that: "Personalized algorithms might express a platform's unique message to the world, *or* they might reflect users' revealed preferences to them. Knowing where *each* NetChoice member's algorithm falls on that spectrum reasonably requires some individual platforms' participation." Op.18. For similar reasons, the panel concluded that NetChoice had not carried its burden to demonstrate likelihood of success on its facial challenge. Op.31-33.

## REASONS FOR GRANTING REHEARING

### **I. The panel violated Supreme Court and Circuit precedent holding that disseminating and accessing websites' curated personalized feeds are protected by the First Amendment.**

The panel made two critical errors that could affect all manner of First Amendment litigation. First, it improperly applied *Moody* and Circuit precedent, replacing *Moody's* brightline curation rules for an amorphous

“spectrum” standard that fails to provide litigants with guidance about what online speech is protected by the First Amendment. Second, the panel failed to apply the Supreme Court’s decisions in *Brown* and *Packingham*.

**A. The panel erroneously limited *Moody*’s holding about when feeds are expressive, while providing no workable alternative test for courts to apply.**

1. *Moody* provided an objective test to determine whether an online service “present[s] a curated compilation of speech” protected by the First Amendment’s protections for editorial discretion. 603 U.S. at 728. If a service “implement[s]” “[s]tandards” that “detail the messages and videos that the platforms disfavor,” that service is engaged in First-Amendment-protected editorial expression. *Id.* at 735. That analysis just requires evidence that a website is using independent content-moderation decisions that affect the content that “show[s] up in [a] feed[.]” *Id.* at 736 n.5. And the Court recognized that the “products” of these choices (the feeds) are themselves “distinctive expressive offering[s]” separate from their component pieces of content. *See id.* at 716, 738.

That is true even if websites use “algorithms” to “implement” those policies. *Id.* at 734. And it is true even if the “the selection and ranking [of content in the feeds] is *most often* based on a user’s expressed interests and past activities.” *Id.* at 734-35 (emphasis added). Indeed, *Moody* repeatedly referred to protected “feeds” as being “personalized,” “customized,” “curated,” or “individualized.” *Id.* at 718, 734, 738. This Court, likewise, has held that “deci[sions]” about “how [content] will be ordered and organized,” are

“expressive choices.” *Health Def.*, 112 F.4th at 759 (quoting *Moody*, 603 U.S. at 740).

Here, the six websites NetChoice raises as-applied claims for all undisputedly satisfy *Moody*’s standard. Unrebutted record evidence shows that “NetChoice members publish and enforce bespoke content-moderation policies,” 3-ER-313, restricting content regardless of what user is interacting with the service:

- Meta, Community Standards, <https://tinyurl.com/4kvd3n4s>; 3-ER-353;
- Nextdoor, Community Guidelines, <https://perma.cc/XLL2-K7ZQ>;
- Pinterest, Community Guidelines, <https://perma.cc/8VWD-GNER>;
- X Help Center, The X Rules, <https://tinyurl.com/mrx48vk9>; and
- YouTube Help, YouTube’s Community Guidelines, <https://tinyurl.com/28fhfy2b>; 3-ER-327.

Further, *Moody* held that “Facebook’s Community Standards and YouTube’s Community Guidelines detail the messages and videos that the platforms disfavor” and represent “user-agnostic judgments about what kinds of speech . . . are not worthy of promotion”—so “Facebook’s and YouTube’s main feeds” do not fall into the reserved scenario of feeds “respond[ing] solely to how users act online.” 603 U.S. at 735, 736 n.5. It is thus beyond reasonable dispute that these websites’ personalized feeds engage in the “curat[ion]” of speech *Moody* that held protected. *Id.* at 728.

Those are the “pertinent” facts for the First Amendment analysis, and they are “the same across the board.” *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618 (2021). The Act’s parental-consent requirements thus “raise the same First Amendment issues” in every application to any website with an independent content-moderation policy. *X Corp. v. Bonta*, 116 F.4th 888, 899 (9th Cir. 2024). At absolute minimum, the panel erred in holding that NetChoice cannot raise as-applied claims about Facebook’s and YouTube’s personalized feeds.

2. But the panel instead held that the First Amendment demanded a “fact intensive” inquiry into where websites’ “algorithms” fall on a “spectrum” — without providing any alternative test for courts in the Circuit to apply. Op.17-18.

Eschewing *Moody*’s objective and straightforward test based on whether a website has independent content standards, the panel said “some personalized recommendation algorithms may be expressive, while others are not, and that inquiry is fact intensive”; “the more an algorithm implements human editorial directions, the more likely it is to be expressive for First Amendment purposes.” Op.18, 32. But the panel did not provide any objective factors for courts to consider. Nor did it explain precisely where on the “spectrum” a feed becomes “expressive.” Op.18.

To reach this erroneous conclusion, the panel relied on *Moody* footnote 5’s reservation of judgment about altogether different kinds of hypothetical feeds “that ‘respond[] solely to how users act online,’ merely ‘giving them the

content they appear to want.’” Op.18 (emphasis added) (quoting *Moody*, 603 U.S. at 736 n.5). But *Moody* only hypothesized about websites that operated “without any regard to independent content standards.” 603 U.S. at 736 n.5 (emphasis added). And it expressly excluded situations where a website “make[s] . . . user-agnostic judgments about what kinds of speech” are or are not permitted from that reservation of judgment. *Id.*

In other words, *Moody* established a binary distinction between (1) protected feeds like NetChoice’s members’ that *both* implement independent “[c]ommunity [g]uidelines” and “often” display speech based on user’s interests and past activities, at 734-36; versus (2) feeds that “respond *solely*” to user preferences without reference to community guidelines, *id.* at 736 n.5 (emphasis added), for which a different First Amendment analysis may apply.<sup>3</sup> The panel replaced *Moody*’s objective binary test with an indeterminate “spectrum” test. Op.18.

The panel’s decision conflicts with *Moody* and—absent this Court’s intervention—would mean that NetChoice, its covered members, members’ users, and other websites will have little guidance about what they need to show for their feeds to have First Amendment protection in the Ninth Circuit. The panel opinion’s indeterminacy invites the lower courts to subject

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<sup>3</sup> Such hypothetical feeds would remain protected by the First Amendment. “[I]t is hardly unusual for publications to print matter that will please their subscribers.” *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir. 1991) (en banc).

litigants to the “open-ended rough-and-tumble of factors” that First Amendment standards “must eschew.” *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 469 (2007) (controlling plurality op.) (citation omitted). Similarly, it contravenes the First Amendment’s demand for “minimal if any discovery.” *Id.*

**B. The panel erred by failing to apply *Brown* and *Packingham* to the Act’s parental-consent requirement for minors to access personalized feeds of fully protected speech.**

The panel erred for an independent reason: The Act *restricts* minors’ ability to access personalized feeds full of protected speech, which is governed by *Packingham* and *Brown*—not *Moody*.

*Packingham* held that people have a First Amendment right to “access” social media free from governmental restraint. 582 U.S. at 108. Such websites can be important “sources for knowing current events . . . and otherwise exploring the vast realms of human thought and knowledge.” *Id.* at 107. Personalized feeds help distill content from those “vast realms,” *id.*, that may be most relevant or useful to individual users. *Moody*, 603 U.S. at 738. And *Brown* held that minors have the “right to speak or be spoken to without their parents’ consent.” 564 U.S. at 795 n.3. Put together, minors presumptively have a First Amendment right to access fully protected speech online, including personalized feeds.

This right does not hinge on how the particular service *itself* curates First Amendment speech; a minor would have just as much of a right to view protected speech on an unmoderated message board as she would on websites that make “a wealth of user-agnostic judgments about what kinds of

speech” to display. *Moody*, 603 U.S. at 736 n.5. *Moody*’s sole relevance here is its recognition that “social-media” websites’ curation—however it is implemented—results in “distinctive expressive offering[s]” of feeds of protected speech. *Id.* at 738.

Under the proper First Amendment analysis, the Act’s restrictions on minors’ access to protected speech would shift the burden to the government to demonstrate that the law is constitutional. This Court has said that “we *presumptively protect all speech* against government interference.” *United States v. Alvarez*, 617 F.3d 1198, 1205 (9th Cir. 2010) (emphasis added), *aff’d*, 567 U.S. 709 (2012). Whenever the State attempts to “restrict[]” access to speech, “the Government bears the burden of proving the constitutionality of its actions.” *FEC v. Cruz*, 596 U.S. 289, 305 (2022) (citation omitted). Consequently, “the government must bear the burden of proving that the speech it seeks to prohibit is unprotected.” *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 n.9 (2003).

The panel’s decision, however, inverts the First Amendment’s allocations of burdens. It requires websites to first show that the collections of indisputably protected speech they disseminate *also* reflect websites’ own expressive editorial choices under *Moody*.

But it was *Packingham*—not *Moody*—that addressed people’s right to access “social media,” and it established that people have a First Amendment right to “gain access to information” on websites like NetChoice’s members. *Packingham*, 582 U.S. at 107. *Packingham*’s holding did not turn on the

distinctions among regulated websites as unique as “Facebook,” “Twitter,” “Amazon.com, Washingtonpost.com, and Webmd.com.” *Id.* at 106-07. Nor did *Packingham* demand extensive fact-finding about those services. *Moody*, by contrast, concerned when “mandated access would alter or disrupt” the “expressive activity” of a private entity by “requir[ing] the platforms to carry and promote user speech.” 603 U.S. at 728 (emphasis added). Put another way, *Moody* was about the distinct First Amendment doctrine of state interference with editorial discretion and compelled speech dissemination. *Id.* at 725.<sup>4</sup>

The parental-consent requirement here interferes with *both* that right and the *additional* right of users to access fully protected speech on online services. Regardless of whether “personalized feeds are . . . a form of social media platforms’ [own] speech” (*Moody* said they are), *contra* Op.31, protected speech is displayed in websites’ feeds—and government cannot restrict access to protected speech without satisfying First Amendment scrutiny.

These problems are perhaps best illustrated from the perspective of users. *See* Op.28; *NetChoice, L.L.C. v. Fitch*, 134 F.4th 799, 807 (5th Cir. 2025) (“an online platform” can “assert[] its users’ First Amendment rights”). A user’s right to receive speech is the other side of the coin of a publisher’s right to disseminate speech. *See State Bd. of Pharmacy v. Va. Citizens Consumer Council*,

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<sup>4</sup> *Moody* also concerned another question not present here: whether the challenged law applies to different kinds of websites that might “fall on different sides of the constitutional line.” 603 U.S. at 726.

*Inc.*, 425 U.S. 748, 756 (1976) (“the protection afforded is to the communication, to its source and to its recipients both”).

Under the panel’s decision, a seventeen-year-old challenging the Act’s parental-consent requirements would need to perform “fact intensive” inquiries about the “algorithm” on *every online service* she has the right to access free from governmental restraint. Op.18. Hoping to meet such a burden could be “unrealistic,” Op.32, notwithstanding the teenager’s unquestioned right to access protected online speech under *Brown* and *Packingham*.

Worse, the panel’s rationale may not be limited to social media. The “algorithms” that concerned the panel are just computer code. The internet brims with computer code. The panel speculated that the law could presumptively be applied to “ESPN.com,” “wsj.com,” “neopets.com,” “chess.com,” and “any number of thousands of platforms.” Op.32 n.7. And the panel’s decision would make it the *plaintiff websites’* burden to prove that all this speech is sufficiently expressive. That reasoning inverts the First Amendment inquiry, and threatens to cast a chilling effect throughout the internet.

**II. The panel’s associational-standing holding—that NetChoice cannot raise as-applied First Amendment claims on behalf of six websites challenging California’s personalized feed parental-consent requirements—contravenes this Court’s and other Circuits’ precedents.**

The panel’s erroneous First Amendment holdings led it to incorrectly deny NetChoice associational standing to raise its as-applied claims to the

parental-consent requirements. And the panel's associational-standing ruling creates even more intra- and inter-circuit conflicts.

NetChoice has associational standing to seek declaratory and injunctive relief, both as-applied and facially on behalf of its regulated members: "(a) [I]ts members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The panel incorrectly held that NetChoice lacked associational standing under the third, "prudential" prong of this test. *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546, 553, 555 (1996). In so doing, the panel failed to recognize that the "third requirement is fulfilled" when an associational plaintiff "requests only declaratory and injunctive relief, which 'do not require individualized proof.'" *Stavrianoudakis*, 108 F.4th at 1143 (citation omitted); accord *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987).

Multiple other Circuits have agreed. *E.g.*, *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 505 (5th Cir. 2021) ("Injunctive relief 'does not make the individual participation of each injured party indispensable to proper resolution.'" (cleaned up)); *Neighborhood Action Coal. v. City of Canton*, 882 F.2d 1012, 1017 (6th Cir. 1989) (citation omitted) ("seek[ing] injunctive relief" does "not require participation by the individual members").

Here, NetChoice “request[s] only injunctive and declaratory relief.” *Columbia Basin*, 268 F.3d at 799. “Because these forms of relief do not require” extensive “individualized proof,” *id.*, NetChoice’s “members need not participate directly in the litigation,” *Alaska Fish*, 829 F.2d at 938. Members’ direct participation certainly is not required to establish that the Act restricts users’ ability to access protected speech in contravention of *Packingham* and *Brown*. And the minimal factual showing required to establish that the Act *also* contravenes websites’ curatorial and editorial rights is hardly the kind of showing that would require *six separate lawsuits*. See, e.g., *NetChoice v. Uthmeier*, No. 4:21-cv-00220 (N.D. Fla.) (facial and as-applied challenges on remand from *Moody*); *NetChoice v. Paxton*, No. 1:21-cv-00840 (W.D. Tex.) (same).

This third prong generally precludes associational standing to seek “money damages,” because in such cases each affected entity’s financial harms will likely require significant individualized presentations. *Alaska Fish*, 829 F.2d at 938; see *Warth v. Seldin*, 422 U.S. 490, 515 (1975) (generally no standing when “an association seeks relief in damages”); *Ass’n of Am. Physicians & Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (similar); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 306-07 (1st Cir. 2005) (contrasting injunctive relief from damages).

NetChoice does not seek money damages. It requests only declaratory and injunctive relief that will require minimal factual presentations.

NetChoice therefore satisfies the third, “prudential prong of associational standing.” *Contra* Op.17.

The panel also erred by concluding that “some individual platforms’ participation” in discovery undermines associational standing. Op.18. Courts often recognize associational standing, even if it would require some amount of member participation.

The question is whether the claims would require “*excessive* participation” of members. *Borrero v. United Healthcare of N.Y., Inc.*, 610 F.3d 1296, 1306 (11th Cir. 2010) (emphasis added). And when the “case c[an] be proved by sample testimony,” the fact that some of that information may come from members cannot defeat associational standing. *Id.*; see *Ass’n of Am. Physicians & Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 551-53 (collecting cases from Third and Seventh Circuits). Here, “NetChoice’s ‘claims can be proven by evidence from representative injured members’ and ‘the participation of certain individual members does not thwart associational standing.’” *Fitch*, 134 F.4th at 805 (cleaned up). Rather, it would promote “administrative convenience and efficiency” to address the Act’s speech restrictions in this single lawsuit, as compared to numerous lawsuits by multiple members—or myriad users. *United Food*, 517 U.S. at 557 (citation omitted).

\* \* \*

Websites have a right to disseminate, and people have a right to access and engage with, fully protected speech free from governmental restraint.

See *Packingham*, 582 U.S. at 108. And the First Amendment protects websites' display of content via curated "personalized" feeds, even when they use "algorithms" to do so. *Moody*, 603 U.S. at 718, 734.

The Act's parental-consent requirements, however, would infringe minors' right to "right to speak or be spoken to without their parents' consent." *Brown*, 564 U.S. at 795 n.3; see *Packingham*, 582 U.S. at 107. To resist that straightforward conclusion, the panel imposed an unnecessary standing hurdle and relieved the government of its burden to justify its speech restrictions. Those errors should be corrected, both for the sake of this case and other cases Circuit-wide implicating these important issues.

### CONCLUSION

This Court should grant rehearing.

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### STATEMENT OF RELATED CASES

NetChoice is not aware of any related cases currently pending in this Court. *See* Ninth Circuit R. 28.2-6.

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### CERTIFICATE OF COMPLIANCE

This brief complies with the word length limits permitted by Ninth Circuit Rule 40-1(b), as it contains 4184 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f).

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## CERTIFICATE OF SERVICE

I hereby certify that I caused this document to be electronically filed on this 23rd day of September, 2025, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. All registered case participants will be served via the Appellate Electronic Filing system.

/s/ Scott A. Keller

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