IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NETCHOICE, LLC,	*	
	*	
Plaintiff,	*	
v.	*	
	*	
	*	Case No. 1:24-cv-02485-SDG
CHRISTOPHER M. CARR, in his	*	
official capacity as Attorney General	*	
of the State of Georgia,	*	
	*	
Defendant.	*	

DEFENDANT'S RESPONSE AND OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Organized retail crime costs businesses, and ultimately consumers, billions of dollars per year. To combat those crimes, Georgia enacted the Georgia Inform Consumers Act in 2022. The Georgia Act, like its federal doppelganger, is designed to protect consumers by making online transactions more transparent and to deter the online sale of stolen, counterfeit, or unsafe merchandise. To that end, it requires online marketplaces to collect basic identifying and contact information from "high-volume third-party seller[s]." O.C.G.A. § 10-1-941(a).

NetChoice does not challenge these collection requirements, which mirror the federal statute. *See* 15 U.S.C. § 45f(a)(1)(A). Instead, NetChoice's challenge is limited to Georgia's recent amendment to the definition of "high-volume third-party seller," via Georgia Act 564. But Act 564 is unremarkable and simply closes a loophole in which sellers could avoid the disclosure requirements by collecting payments for their goods outside of the online marketplace.

According to NetChoice, this reasonable change poses an existential threat to the world of online sellers and possibly even the First Amendment itself. But contrary to NetChoice's hyperbole, Act 564 is neither preempted nor unconstitutional, and NetChoice's suit is plainly premature. The Court should deny NetChoice's motion for a preliminary injunction.

BACKGROUND

A. Statutory background

Retail theft is a serious and persistent problem in the United States. According to one survey, theft cost American retailers more than $72 billion (roughly 65% of their total product loss) in 2022. *See* Nat'l Retail Fed'n, *2023 Retail Security Survey* 6 (Sept. 26, 2023), https://bit.ly/3z9qZn9. Retail theft leads to reduced profits, job losses, store closures, higher prices, and lost tax revenue. *See id.* at 7; Jason Metz, *The Impact of Retail Theft on Small Businesses and States*, Forbes (June 10, 2024), https://bit.ly/3z5i7Pk; Michael Hanson, *Study: Retail Theft Balloons to Over $68 Billion* (Nov. 18, 2021), https://bit.ly/3Xt3qj1. And Georgia, unfortunately, is not immune to the problem. The State loses an estimated $3 billion to retail theft annually. *See* Off. of the Ga. Att'y Gen., *Carr: We're Creating Georgia's First Statewide Organized Retail and Cyber Crime Unit* (May 7, 2024), https://bit.ly/4bbAwqS.

In 2022, Georgia enacted the Inform Consumers Act to discourage organized retail theft. *See* 2022 Ga. Laws 560. The Act requires online marketplaces to gather identifying and contact information from certain "high-volume third-party sellers." O.C.G.A. §§ 10-1-941, -942 (requiring a bank account number, contact information, a business tax identification number, a working email address, and a

phone number).[1] Originally, "high-volume third-party sellers" included any seller who, in a 12-month period, "enter[s] into 200 or more discrete sales or transactions of new or unused consumer products" totaling $5,000 gross revenue "in this state" "through the online marketplace and for which payment was processed by the online marketplace or through a third party."[2] *Id.* § 10-1-940(a)(2).

The Act discourages the sale of stolen property through online marketplaces by ensuring that new or unused products come from legitimate businesses. This model was so attractive that many States, and ultimately the federal government, enacted their own acts. Mem. in Supp. Prelim. Inj. 6–7, ECF No. 2-1. The federal act is, in all material respects, identical to Georgia's 2022 Act. *See* 15 U.S.C. § 45f.

But the 2022 Georgia law, unfortunately, left one loophole for retail criminals to evade its strictures: the Act did not cover sales or transactions that are made on the online marketplace but for which *payment* is collected outside the marketplace. *See* O.C.G.A. § 10-1-940(a)(2). Thus, for example, a sale on Facebook Marketplace or Nextdoor would not count if the buyer paid in cash.

To address that issue, Georgia enacted Act 564—the Combatting Organized Crime Retail Act—which goes into effect on July 1, 2024. *See* Mem. Ex. A, ECF

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[1] Online marketplaces include websites that facilitate the sale of consumer products and have a "contractual or similar relationship with consumers governing their use of the platform to purchase consumer products." O.C.G.A. § 10-1-940(a)(3)(C).
[2] High-volume third-party sellers with gross revenue of $20,000 must also disclose identifying and contact information to consumers. O.C.G.A. § 10-1-942.

No. 2-2 (“Act 564”). Act 564 makes a few grammatical edits to the statute and redefines “high-volume third-party sellers” to remove the necessity of payment through the marketplace or a third-party payment processor. Act 564 § 2(2). Now, transactions need only be “made by utilizing the online marketplace,” *id.*, to count for purposes of identifying high-volume third-party sellers.

This was hardly a “radical” change. *Contra* Mem. at 8. Act 564 does not require online marketplaces to hunt down transactions that occur elsewhere. It simply amends the definition to include all sales and transactions “entered into” by utilizing the marketplace—even where payment is not processed there. Act 564 § 2(2). And of course, the definition applies only to high-volume sellers of new or unused products, excluding the vast majority of those who use these websites.

B. Online marketplace practices.

Certain marketplaces, like Amazon, eBay, and Etsy, require all sales and transactions to be processed through their online portals, so data collection is virtually effortless. Mem. at 3. Others, like Facebook Marketplace and Nextdoor, permit sellers to post products for sale and then consummate the transaction online via messaging or public posts. *Id.* at 4.

Online marketplaces have extensive control over their own services and can track all sales that are in fact agreed to on their sites. Facebook, for example, requires sellers to ensure that all “Seller Content,” including all descriptions,

prices, applicable taxes, and fees are "true, accurate, and complete at *all times*." It "relies on both automated and human review to enforce its terms and policies at scale," including those terms that, for example, prohibit the sale of adult products, alcohol, or drugs. O'Connell Decl. ¶¶ 21–22, ECF No. 2-4. Failure to comply with its "Community Standards" can result in "the removal of listings and other content, rejection of product tags, or suspension or termination of access to any or all Facebook, Instagram, or WhatsApp commerce surfaces or features." Meta, *Terms and Policies* (accessed June 20, 2024), https://bit.ly/3VB1mTC.

C. Procedural history

NetChoice, an internet company trade association, Mem. at 3, filed this lawsuit on June 6, 2024, and immediately filed a motion for a preliminary injunction, arguing that Act 564 is preempted by federal law, unconstitutionally vague, and unconstitutional under the First Amendment.

ARGUMENT AND CITATION OF AUTHORITY

Preliminary injunctions are "an extraordinary remedy." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To secure preliminary relief, NetChoice must show (1) that it is likely to succeed on the merits of its claim, (2) that it will likely suffer irreparable harm absent a preliminary injunction, (3) that its potential injury outweighs the potential hardship on the State if an injunction were granted, and (4) that an injunction is in the public interest. *See Swain v. Junior*, 958 F.3d

1081, 1088 (11th Cir. 2020) (per curiam). NetChoice cannot overcome this high bar. It will not succeed on the merits because Georgia's law is not preempted, is not vague, and does not regulate speech. And even if there were some chance that NetChoice could ultimately prevail, the equities weigh heavily against granting an injunction at this time.

I. NetChoice is unlikely to succeed on the merits of its claim.

The first factor is "critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). NetChoice must show that it is likely to succeed on the merits before it is entitled to preliminary relief. *See Barber v. Gov. of Ala.*, 73 F.4th 1306, 1317 (11th Cir. 2023). And that requires a "strong likelihood of success," not just a "mere possibility." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317–18 (11th Cir. 2019). But NetChoice cannot succeed because the law is not on its side.

A. The federal INFORM Consumers Act does not preempt Georgia's law, which imposes additional, not conflicting, requirements.

The Supreme Court has identified three different types of preemption: conflict, express, and field. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 477 (2018). "Field preemption occurs when federal law occupies a 'field' of regulation so comprehensively that it has left no room for supplementary state legislation." *Id.* at 479 (quotation omitted). Express preemption occurs when Congress explicitly *says* that it preempts state regulation of some kind. *Id.* at 478. And "conflict" preemption occurs whenever a state law "confers rights or imposes

restrictions that conflict with the federal law." *Id.* at 477. Absent clear evidence otherwise, courts must presume that Congress did *not* preempt overlapping state laws, especially when—as here—Congress legislates "in a field which the States have traditionally occupied." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The federal INFORM Act does not conflict with Georgia's law, and it is not a close question. NetChoice has not even argued that the federal statute preempts the *field* of internet regulation, nor could it. So NetChoice is left to argue for some type of conflict or express preemption. Here, conflict and express preemption collapse into one because the INFORM Act bars States from enforcing "any law … that conflicts with the requirements" of the Act. 15 U.S.C. § 45f(g). Courts evaluating preemption claims under federal statutes that bar "conflicting" laws simply apply conflict preemption principles. *See, e.g.*, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281–82 (1987) (Title XI's statutory prohibition of "inconsistent" state laws is a case of conflict preemption); *OPIS Mgmt. Res., LLC v. Sec'y, Fla. Agency for Health Care Admin.*, 713 F.3d 1291, 1294 (11th Cir. 2013); *Texas v. Becerra*, 89 F.4th 529, 543 (5th Cir. 2024).

Applying well-established conflict preemption principles, there is no preemption here. State and federal laws conflict only when "it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (quotation omitted). But it is quite

possible to comply with both Georgia's law and the INFORM Act, as neither "forbids an action that [the other] requires." *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486–87 (2013). In fact, they *both* require online marketplaces to collect information from high-volume sellers, and they both require *exactly* the same information. *See* 15 U.S.C. § 45f(a)(1)(A) & (b)(1); O.C.G.A. §§ 10-1-941(a), 942(a). Georgia's law simply covers a slightly larger set of high-volume sellers. So if a marketplace complies with Georgia law, it necessarily fulfills its obligations under federal law. And that is the *opposite* of a conflict.[3]

NetChoice's primary argument to the contrary shows desperation rather than persuasion. NetChoice points to dictionary definitions for the notion that "conflict" can sometimes mean "different from," and since Georgia's law is "different from" the federal Act, it must be preempted. *See* Mem. at 12. To say this argument aloud is to refute it. Nearly all state law is "different" from federal law, but the vast majority of it is not preempted. In ordinary language, the term "conflict" refers to incompatibility or contradiction. *See New Oxford Am. Dictionary* 365 (3d ed. 2010) ("be incompatible or at variance; clash"); *Am. Heritage Dictionary of the English Language* (accessed June 20, 2024), https://bit.ly/45qgYxW ("come into opposition"). Proving the point, unlike the many cases finding preemption when federal and state law are "irreconcilably" at odds, *Carson v. Monsanto Co.*, 92

[3] NetChoice wisely does not argue that Georgia's law is an "obstacle" to Congress's purposes. *Wyeth*, 555 U.S. at 563. The statutes are complementary.

F.4th 980, 997 (11th Cir. 2024) (quotation omitted), NetChoice has not identified a single case in which a court understood the term "conflict" to prohibit merely *non-identical* laws. To the contrary, States can impose "additional or different" obligations without "[c]onflicting" with federal law. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459–60 (2012); *see also California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

Congress knows how to broadly preempt overlapping state laws when it wants to. It frequently preempts state laws that are "relate[d] to" or "cover" the same subject as federal law. *See, e.g.*, 29 U.S.C. § 1144 (Employee Retirement Income Security Act); 49 U.S.C. § 14501 (Federal Aviation Administration Authorization Act); 49 U.S.C. § 41713(b)(1) (Airline Deregulation Act); 49 U.S.C. § 20106(a)(2) (Federal Railroad Safety Act). Other times, it preempts any law that is "in addition to" or "different" than federal requirements. *See, e.g.*, 7 U.S.C. § 136v(b) (Federal Insecticide, Fungicide, and Rodenticide Act); 21 U.S.C. § 360k(a) (Medical Device Amendments of 1976); 21 U.S.C. § 678 (Federal Meat Inspection Act). Or it prohibits States from enforcing rules that are "not identical to" federal standards. *See, e.g.*, 21 U.S.C. § 343-1(a) (Food, Drug, and Cosmetic Act); 42 U.S.C. § 5403(d) (National Manufactured Housing and Safety Standards Act). But Congress chose not to do so here.

NetChoice's remaining arguments fare no better. NetChoice, for example,

says the federal law must preempt because, on NetChoice's view, it aims to prevent "duplicative or overlapping actions." Mem. at 14. But nothing in the text of the federal law supports that conclusion. True, it bars States from bringing duplicative actions to enforce *the federal act* when the Federal Trade Commission has already done so, 15 U.S.C. § 45f(d)(4), but it says nothing about States enforcing their *own* laws regulating online marketplaces. And "in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests." *Kansas v. Garcia*, 589 U.S. 191, 212 (2020). (NetChoice's argument would also suggest that even Georgia law as it exists *right now* would be preempted, because it allows for parallel state and federal actions.)

Likewise, NetChoice's claim that the federal Act establishes an exclusive "nationwide framework" for online marketplaces has no basis in the text. Mem. at 7; *see also id.* at 14–15. Of course, "every subject that merits congressional legislation is, by definition, a subject of national concern." *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990) (quotation omitted). But the "mere existence of a federal regulatory or enforcement scheme," even a "detailed" one, "does not by itself imply pre-emption of state remedies." *Id.*

While there should be no need, if the Court were unsure, the presumption against preemption would win the day. NetChoice's preemption argument is barely colorable; it *certainly* has not shown that Congress "clear[ly] and manifest[ly]"

intended preemption here. *Wyeth*, 555 U.S. at 565 (quotation omitted).

B. Georgia's law is not vague.

NetChoice argues that Act 564 is unconstitutionally vague because it does not explicitly define what it means to "utilize" an online marketplace or when a sale occurs "in this state." *See* Mem. at 22–24. But a term is not vague merely because it is not defined within the statute. *United States v. Sepulveda*, 115 F.3d 882, 886 n.9 (11th Cir. 1997). A vagueness claim requires not just "an imprecise" statute, but one that is so indecipherable as to specify "no standard of conduct … at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). And before declaring vagueness, courts must exhaust the traditional tools of statutory interpretation. *United States v. Bronstein*, 849 F.3d 1101, 1106–08 (D.C. Cir. 2017). Finally, "[t]he degree of vagueness that the Constitution tolerates … depends in part on the nature of the enactment." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Laws like Georgia's—economic regulations with civil penalties—are "subject to a less strict vagueness test" than criminal laws. *Id.*[4]

Applying the usual tools of statutory interpretation, the meaning of Georgia's law is clear: a seller utilizes an online marketplace to enter into a

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[4] NetChoice argues that Georgia's law is subject to a more exacting vagueness test because, in its view, Act 564 burdens speech. *See* Mem. at 22. But Georgia's law does not regulate any constitutionally protected speech. *See infra* Part I.C. And even if the law does touch on some commercial speech, it still is not vague.

transaction if the seller and buyer form an agreement to sell using the marketplace's website. This means they must agree on the relevant terms—product, quantity, and price—through their communications on the website, though they may *effectuate* the transaction (i.e., exchange money and product) elsewhere.

Under the amended statute, a sale counts towards the high-volume-seller threshold only if the seller (1) "entered into 200 or more discrete sales or transactions" (2) "of new or unused consumer products" (3) "of an aggregate total of $5,000.00 or more" (4) "by utilizing the online marketplace." Act 564 § 2(2). NetChoice focuses almost exclusively on the term "utilize," but in context the remaining terms make clear that the statute reaches transactions actually agreed to on the marketplace. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."). It is not sufficient that the website be "utilized"—parties must have "entered into" specific types of transactions by utilizing the marketplace. So, under Georgia's updated law, online marketplaces must account for transactions in which the parties used the website to agree on the terms of the sale. If, on the other hand, the parties make initial contact through the website but negotiate the terms of the sale offline, or if a user clicks a third-party advertisement that takes them to another website entirely, *see* Mem. at 23 (posing these hypotheticals), then the transaction was not "entered

into … utilizing" the marketplace. Act 564 § 2(2).

Statutory history confirms that reading. Before Act 564, Georgia's law covered transactions "entered into … through the online marketplace and for which payment was processed by the online marketplace or through a third party." O.C.G.A. § 10-1-940(a)(2). As NetChoice agrees, a transaction counted only if it was entered into on the marketplace's website *and* the marketplace processed the payment (or used a third-party processor). *See* Mem. at 7, 9. Act 564 eliminates that processing requirement, and it switches from "through" to "by utilizing" to clarify that change—since payment need not be processed "through" the website, it makes more sense to use the slightly broader "utilize."

The statute simply does not capture transactions that are completed wholly offsite but are simply *advertised* on a website.[5] That said, even if the statute were to be read that broadly, that does not make it vague. It just makes it *broad*, and there is nothing unconstitutional about that.

NetChoice next mistakenly insists it is not clear what transactions are covered by the limiting phrase "in this state." *See* Mem. at 23–24. On its most natural reading, that phrase covers transactions where either the buyer or the seller

[5] For what it is worth, the legislative history does not support that view, either. *See* Hearing on S.B. 472 Before the H. Agric. & Consumer Affs. Comm., 157th Gen. Assemb., Reg. Sess. (Ga. 2024) (statement of bill sponsor Sen. John Albers), https://bit.ly/4b5PdMq at 1:22:15–33 ("[T]his bill … closes a very simple loophole … to make sure we are including [cash transactions] so we don't have anybody falling through the cracks.").

is located in Georgia—i.e., "in this state." O.C.G.A. § 10-1-940(a)(2). But again, even if the Court disagrees with that conclusion, the does not mean the statute is *vague*. It just means the statute requires interpretation. And courts, including Georgia courts, regularly construe and apply the phrase "in this state" in many different contexts. *See, e.g.*, *Aircraft Spruce & Specialty Co. v. Fayette Cnty. Bd. of Tax Assessors*, 294 Ga. App. 241, 243–44 (2008); *State v. Maybee*, 235 Or. App. 292, 300–04 (2010); *Baldewein Co. v. Tri-Clover, Inc.*, 233 Wis. 2d 57, 61–77 (2000). Different contexts sometimes lead to different results, but there are "gray areas in the interpretation of many statutes," *Martin v. Lloyd*, 700 F.3d 132, 137 (4th Cir. 2012), and creative lawyers will always be able to offer competing interpretations of an undefined statutory term. *See United States v. Williams*, 553 U.S. 285, 305–06 (2008). Deciding between competing plausible interpretations is the *point* of statutory construction; it is not evidence of unconstitutional vagueness. *Martin*, 700 F.3d at 137. Online marketplaces have "fair notice" of their obligations under the statute. *Williams*, 553 U.S. at 304.

C. Georgia's law does not violate the First Amendment.

NetChoice's First Amendment argument is wrong twice over. First, Act 564 does not regulate NetChoice or its members' speech *at all*. It regulates their business practices but does not compel them to speak or restrain them from speaking in any manner. Second, even if NetChoice could somehow assert the

rights of third-party sellers (who are required to disclose their basic contact information), that required disclosure would easily satisfy scrutiny under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). None of this should be a surprise: the law operates *exactly* as the federal INFORM Act and Georgia's current law already operate, and NetChoice does not complain about those statutes. The only difference here is that Act 564 slightly expands the *number* of high-volume third-party sellers. That expansion does nothing to offend the First Amendment; at most, it means that certain third-party sellers are now covered who would not otherwise be. That is not a constitutional violation.

1. The relevant Georgia laws regulate conduct, not speech.

The First Amendment extends beyond written words to "inherently expressive" conduct, *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) (*FAIR*), but only if "[a] reasonable person would interpret [that conduct] as *some* sort of message," *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). Social media platforms may engage in protected expressive conduct when determining whether certain posts follow their terms of service or community guidelines, but not all website conduct is expressive. *NetChoice, LLC v. Att'y Gen., Fla*, 34 F.4th 1196, 1213–14 (11th Cir. 2022) (expressive conduct requires "editorial judgment"). Certain conduct, like providing a marketplace for commercial transactions between third parties, is just conduct

and is not protected by the First Amendment. *FAIR*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

Here, Act 564 regulates none of NetChoice's speech. Indeed, NetChoice cannot even *identify* any of its speech (or its members' speech) at issue. NetChoice complains that its members must "investigate and maintain information about third-party sales that occur entirely off-platform," "mandate and carry disclosures," and "verify the accuracy of such information and disclosures." Mem. at 16. Setting aside that some of that is wrong—they need not "investigate" sales that occur off-platform—*none of it* is speech. If it were, all business activity would be speech. Taxes would burden speech because they require businesses to keep records, civil rights laws would burden speech because they require businesses to investigate certain instances of alleged misconduct, and so forth.

NetChoice can identify no case law on its side. It cites cases that involve expressive conduct, *see, e.g.*, Mem. at 16–17 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557 (1995) and *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), but those cases involve clear government burdens on expression. In *Hurley*, a private parade did not want to include a gay pride organization because it would change the message of the parade. The Supreme Court held that the government could not overrule the "choice of a

speaker not to propound a particular point of view." 515 U.S. at 575. In *Miami Herald*, the newspaper challenged a Florida law which required a newspaper to give a candidate for office a free "right of reply" column. 418 U.S. at 244. It is hard to imagine anything more obviously burdensome to speech rights than a rule that demands a newspaper publish a certain point of view. Those cases have nothing in common with this one, where NetChoice cannot even explain what expression is being burdened.

The Eleventh Circuit's recent decision in *NetChoice* confirms the point. There, the court held that numerous facets of a Florida social-media regulation law were subject to heightened First Amendment scrutiny. 34 F.4th at 1222. But the requirement that websites "allow deplatformed users to access their own data stored on the platform's servers for at least 60 days" did not require *any* First Amendment analysis. *Id.* at 1223. Simply storing data and providing access to it was not speech, and it did nothing to burden social media websites' "editorial judgment." *Id.* The same is true here. NetChoice members are not limited in any respect in their ability to decide which posts to carry, which to reject, which to emphasize, what content can be in the posts, or anything else that would even *relate* to their "editorial judgment." *Id.* They just have to collect and maintain certain information, and collecting basic contact information does not communicate anything, much less "dictat[e]" a message from the State. *See*

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

NetChoice's argument appears to boil down to the notion that it will be *expensive* to carry out the Act's requirements, and so that will somehow indirectly burden their speech. Mem. at 17–18 (Act will "inevitably result in the suppression" of speech). But that is a nonstarter. That the regulations make business slightly *harder* does not mean they implicate the First Amendment. Building codes, taxes, public safety laws—all of these state regulations make running a business more expensive, but that does not mean they burden speech just because the business *also* happens to engage in speech. *Cf. Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

2. The disclosure requirements easily satisfy First Amendment scrutiny.

Even supposing that somehow NetChoice could assert the First Amendment rights of third-party sellers (it cannot) or that it is somehow being required to disclose something (it is not), it would not matter. The disclosures at issue are plainly valid regulations of commercial speech. *Zauderer*, 471 U.S. 626.

Under *Zauderer*, States may compel commercial disclosures if the speech is "factual and uncontroversial." *Id.* at 651. In those instances, the law must only be "reasonably related to the State's interest in preventing deception of consumers" and must not be "[u]njustified or unduly burdensome." *NetChoice*, 34 F.4th at

1230 (quotation omitted); *see also*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 775 (2018) ("[W]e do not question the legality of … purely factual and uncontroversial disclosures about commercial products.").

Act 564 easily satisfies *Zauderer*. A high-volume third-party seller must disclose to the online marketplace purely factual identifying information. O.C.G.A. § 10-1-941(a); *see also* 15 U.S.C. § 45f (requiring same information). Similarly, high-volume third-party sellers above a certain threshold ($20,000 in gross revenues) must disclose to *consumers* their identity (name and physical address), a means of contact, and whether the high-volume third-party seller uses a different seller to supply the product. O.C.G.A. § 10-1-942(a); *see also* 15 U.S.C. § 45f. If images and messages warning about the negative health consequences of smoking are purely factual and uncontroversial, *see R.J. Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 872, 878–82 (5th Cir. 2024), then surely a business's name and contact information must be as well. Indeed, it is hard to imagine anything *less* controversial. Sellers' "constitutionally protected interest in *not* providing" their own contact information "is minimal." *Zauderer*, 471 U.S. at 651.

The requirements are also "reasonably related" to the State's interest and not unduly burdensome. NetChoice has conceded that the State "undoubtedly has a legitimate interest in … helping consumers avoid stolen or counterfeit goods." Mem. at 19. Retaining and disclosing identification information from high-volume

third-party sellers discourages bad actors from utilizing online marketplaces to sell stolen or counterfeit goods to consumers. And there is no meaningful burden here. A commercial actor knows its own identifying information and can pass it on to NetChoice or include that information in its postings at minimal cost. Certainly, it is no more difficult for commercial actors to disclose their contact information than it was for the attorney in *Zauderer* to disclose his fee structure. 471 U.S. at 629.

If Act 564 implicates a higher level of scrutiny, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), it would still survive. It is targeted at commercial transactions that occur through online marketplaces—i.e., "expression related solely to the economic interests of the speaker and its audience." *Pharm. Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). The Supreme Court has been clear that commercial speech is a separate category of speech and is subject to a different analysis. *Cent. Hudson*, 447 U.S. at 562. Under the *Central Hudson* analysis, a regulation of commercial speech must advance a substantial government interest and not be more extensive than necessary. *Id.* at 564.

NetChoice agrees that the State's interests—fighting organized retail crime and protecting consumers from fraudulent transactions—are "undoubtedly" legitimate. Mem. at 19. A wise concession. The ability to resell products online has significantly increased in recent years with the advent and proliferation of online

marketplaces. *See* Jason Brewer & Michael Hanson, *Organized Retail Crime, Counterfeits and Marketplaces*, Retail Indus. Leaders Ass'n (accessed June 20, 2024), https://bit.ly/3xpCfva. Yet there has been little to no scrutiny from the online marketplaces and little to no ability to trace listings back to the actual people or businesses involved. *Id.* ("The lack of transparency and accountability on marketplaces gives criminals the ability to hide behind fake scree[n] names and bogus business accounts."). Georgia plainly treats organized retail theft as a priority. For example, in 2021, the Georgia General Assembly made organized retail theft a felony, O.C.G.A. § 16-8-14.2, and the Attorney General announced the creation of the State's first statewide organized retail and cyber-crime unit in May 2024. *See* Off. of the Ga. Att'y Gen., *Carr: We're Creating Georgia's First Statewide Organized Retail and Cyber Crime Unit* (May 7, 2024), https://bit.ly/4bbAwqS.

NetChoice, even while acknowledging the State's interest, asserts that Act 564 will not *prevent* organized retail crime in its entirety. *See, e.g.*, Mem. at 20. That is a lightweight objection. Other laws prohibit organized retail crime. This law helps prevent it and discourage it. If a state law served an important interest only where it completely eradicates the problem, no law would ever survive.

The question then, is whether Act 564 is reasonably tailored; commercial speech regulations need "not be the least restrictive or least intrusive means" of

advancing the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A commercial speech restriction may be "a fit that is not necessarily perfect, but reasonable." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). And there is no requirement that the government present empirical evidence showing that the interest is advanced by the law; "anecdotes," "history, consensus, and 'simple common sense'" can justify the law. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555 (2001).

Act 564 is an important tool with a light touch. It critically undermines retail thieves' ability to earn a profit, and in a minimally burdensome way. The retention and disclosure of business-related information from high-volume third-party sellers ensures, at a minimum, that such sellers are operating under a valid name and significantly reduces the likelihood that individuals engaged in organized retail crime can leverage anonymous online marketplaces to sell stolen items.

NetChoice's claims to the contrary are based on a simple misreading of the statute. Online marketplaces need not investigate transactions that occur *offline*. Mem. at 23. As already explained, the transaction must occur on the online marketplace, even if payment and delivery are handled elsewhere.

With that detail cleared up, little remains of NetChoice's cries regarding burdens. To the contrary, both Facebook and OfferUp indicate that they already have policies and procedures in place to review listings and prevent listings that are

illegal or otherwise against the internal policies and procedures of the marketplaces. O'Connell Decl. ¶¶ 20–22, ECF No. 2-4; Garnett Decl. ¶¶ 11–12, ECF No. 2-5. Neither has explained how expanding those policies to include review of high-volume third-party sellers would be any more burdensome than the existing review process. Instead, they focus on hyperbolic situations, like being forced to restrict general posting on Facebook or investigating individuals selling a single used product (which are well outside the scope of the Act). O'Connell Decl. ¶ 36, ECF No. 2-4; Garnett Decl. ¶ 29, ECF No. 2-5.

The law need not represent "necessarily the single best disposition" but must be in "proportion to the interest served." *Fox*, 492 U.S. at 480 (quotation omitted). Act 564 will plainly help diminish retail crime, and it does so at a minimal cost to online marketplaces. This is exactly the kind of law that passes review under *Central Hudson*.

II. The equities lean against a preliminary injunction.

NetChoice's likely failure on the merits is the most important reason to deny an injunction, but the equities also tilt against it. To start, NetChoice relies for irreparable harm on the notion that its members must hunt down transactions that did not occur on their websites. Mem. at 24–25. But as explained, that is *not* the case. NetChoice's members need only monitor their own websites—a task they are well suited to carrying out. Facebook, for instance, provided evidence of its

extensive review teams, and it did not offer any evidence for why those same "automated and human review" teams could not monitor posts for new and unused consumer products to ensure high-volume third-party sellers comply. O'Connell Decl. at ¶ 22, ECF No. 2-4.

Moreover, the number of additional high-volume sellers now captured by the statute is likely to be low. Recall, the statute requires information only from sellers who engage in 200 discrete transactions of new or unused products over $5,000 in gross revenue in the State. NetChoice has provided no evidence to suggest that there are a large number of such sellers on member websites who are not already covered by the statute as it exists today (or that it would be particularly difficult to find those few). Common sense suggests that there are not many individuals and entities selling that much *new* merchandise through Facebook Marketplace. And even assuming, just for the sake of argument, that a NetChoice member *did* run afoul of the statute, a single violation, or even a few, would cost far, far less than NetChoice has already spent in filing this lawsuit. That is hardly the sort of harm worth overriding a State's sovereignty for.

Other factors lean heavily against NetChoice. For one, the harm to the State actually *is* significant and irreparable: "the inability to enforce its duly enacted [statutes] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). And NetChoice has *not* filed suit to challenge the federal

INFORM Act or Georgia's previous law, even though they are similar in nearly every respect.

Critically, NetChoice could have filed suit in state court to determine, definitively, the answers to most of the questions it raises here. At bottom, NetChoice's arguments boil down to the notion that its members do not know what to do. That is mistaken—the statute provides fair notice, is obviously not preempted, and doesn't touch their speech. But if there were some points needing clarification, NetChoice could have asked the Attorney General or filed a declaratory action in state court. NetChoice's decision to immediately jump to federal court and seek emergency relief is an error of its own making. "A federal court, without a showing of extraordinary circumstances, should not place itself in the position of holding a state statute, not yet construed by the state courts, to be unconstitutional where a permissible construction of the statute is possible." *See Cent. Ave. News, Inc. v. Minot*, 651 F.2d 565, 567 (8th Cir. 1981). This Court should not either.

CONCLUSION

The Court should deny NetChoice's motion.

Respectfully submitted, this 21st day of June, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1D, the undersigned counsel hereby certifies that the foregoing **RESPONSE AND OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCITON** complies with the font and point selections approved by the Court in Local Rule 5.1C. This document was prepared on a computer using Times New Roman font (14 point).

This 21st day of June, 2024.

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