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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 NETCHOICE,

21 Plaintiff,

22 v.

23 ROB BONTA, in his official capacity as
24 Attorney General of California,

25 Defendant.

Case No. 5:24-cv-07885-EJD

**PLAINTIFF’S REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: December 17, 2024

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Judge: Hon. Edward J. Davila

Courtroom: San Jose, Courtroom 4, 5th Floor

27 **PLAINTIFF’S REPLY IN SUPPORT OF**
28 **MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

1
2 California Senate Bill 976 (“Act”) uses a content-based and speaker-based coverage defi-
3 nition to restrict access to speech protected from government interference on disfavored websites
4 through parental-consent and age-assurance requirements. In so doing, it affects a wide range of
5 speech activities, with harms to both NetChoice’s covered member websites *as well as their re-*
6 *spective users*. Defendant’s opposition does not once address the Act’s effects on users’ rights.
7 Instead, Defendant focuses largely on minimizing the scope of the Act’s effects on speech. And
8 his central argument relies on the erroneous assertion that the Supreme Court’s holding in
9 *Moody*—protecting “organizing,” “presenting,” and “display” of “third-party speech” through
10 “personalized” feeds—somehow may not apply to this Act’s restrictions on personalized feeds.
11 *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2393, 2402 (2024). That argument misreads *Moody*
12 (which analyzed many of the same website feeds that are regulated by the Act here) and a wealth
13 of other First Amendment precedent. Defendant also largely fails to address the Act’s other speech
14 restrictions.

15 Defendant has not demonstrated that the Act’s speech restrictions satisfy the First Amend-
16 ment’s demanding standards. Accordingly, the Act here is much like the state laws that courts
17 across the country have preliminarily enjoined. And, without an injunction before the end of the
18 year, NetChoice members and their users will be irreparably harmed. This Court therefore should
19 preliminarily enjoin enforcement of the Act before its January 1, 2025, effective date.

ARGUMENT

I. NetChoice is likely to succeed on the merits of its challenges to the Act.

A. NetChoice’s challenge to the Act’s age-assurance requirements is ripe.

22 NetChoice’s challenge to the Act’s age-assurance requirements is ripe. Mot. 15-16 (dis-
23 cussing §§ 27001(a)(1)(B), 27002(a)(2), 27006(b)-(c)). There is no dispute that some
24

25 NetChoice members are subject to the Act’s age-assurance regulations. And NetChoice
26 raises “[l]egal questions that require little factual development.” *Haw. Newspaper Agency v. Bron-*
27 *ster*, 103 F.3d 742, 746 (9th Cir. 1996) (citation omitted). These legal questions constitute a present
28 controversy because covered NetChoice members must develop their means of compliance, which

1 is a “costly, *time-consuming*, and resource-intensive” process. Cleland Decl. ¶ 29 (emphasis
2 added). Indeed, compliance is so difficult that NetChoice member Dreamwidth contends it would
3 not be possible at all. Paolucci Decl. ¶¶ 14-18. And there is little doubt that the Defendant “Attor-
4 ney General will seek to enforce the requirements of” the Act against NetChoice’s members. *Bron-*
5 *ster*, 103 F.3d 742 at 747. He has already pursued actions based on similar legal theories against
6 NetChoice members. *See* ECF 1 ¶ 17.

7 Defendant’s main argument is that a challenge to the age-assurance requirements is not
8 ripe because those provisions are not effective until January 1, 2027. Opp. 6-7. Defendant ignores
9 that NetChoice is challenging multiple provisions in the Act, and, even as to the age-assurance
10 requirement, the Supreme Court has concluded that lawsuits challenging laws that will not take
11 effect for even four years can be ripe. *New York v. United States*, 505 U.S. 144, 175 (1992). That
12 is especially true where (as here) compliance is a time-intensive process, *id.*, as the uncontested
13 record evidence here supports, *see* Cleland Decl. ¶ 29; Paolucci Decl. ¶¶ 14-18. And Defendant
14 does not explain why the Court cannot address this provision now, rather than in a duplicative
15 lawsuit to be filed a year from now. The age-assurance requirements are now law, and members
16 will need to take steps to come into compliance with them before the Act takes effect if they are
17 not enjoined.

18 Nor does it matter that the government may later promulgate *regulations* detailing technical
19 means for websites to engage in age assurance. The non-technical substance of the age-assurance
20 requirements already violates the First Amendment: *Any* barrier or requirement for users to trade
21 their anonymity for access to protected speech will chill their speech in violation of the First
22 Amendment. *E.g.*, *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *17 (W.D. Ark. Aug. 31,
23 2023) (citing *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003)); *ACLU v. Mukasey*,
24 534 F.3d 181, 197 (3d Cir. 2008). No technical particularities described in implementing regula-
25 tions could cure that violation. Nor do the technical requirements matter to the NetChoice members
26 that have stated they lack resources to engage in *any* form of age assurance. Paolucci Decl. ¶¶ 14-
27 18.

B. NetChoice is likely to succeed on the merits of its First Amendment challenges.

1. The Act’s provisions regulate speech—not non-expressive activity—by burdening the dissemination and consumption of speech on covered websites and by compelling speech.

“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 n.1 (2011). Each of these steps in the speech process is protected by the First Amendment. And this Act regulates all of them. Defendant incorrectly contends that presenting personalized feeds of protected speech may not be protected “expressive” activity. *Cf.* Opp. 9. This argument is incorrect. In any case, Defendant does not address the Act’s other speech restrictions. Defendant’s other arguments are similarly unavailing.

a. The Act plainly regulates speech multiple times over, affecting both NetChoice covered members’ rights and their respective users’ rights. So the Act plainly affects “expressive” activity. Opp. 9.

The Act restricts the dissemination and consumption of speech by imposing age-verification and parental-consent requirements to view personalized feeds or to receive notifications at particular times of day. §§ 27001(a), 27002(a), (b)(2), 27006(b)-(c). It likewise regulates speech by imposing defaults on the speech available on minors’ accounts, *e.g.*, by disabling by default certain feedback mechanisms or limiting the visibility of minors’ accounts. § 27002(b)(1), (3)-(5). All of these provisions restrict protected speech. And wherever the government “restricts” *access* to protected speech, it bears the burden of demonstrating that its restrictions satisfy the First Amendment’s demanding standards. *FEC v. Cruz*, 596 U.S. 289, 305 (2022). Defendant’s discussion of the First Amendment interests at stake in the case gives short shrift to the many ways that the Act violates established First Amendment doctrine.

Users have a First Amendment right to *receive* protected speech on online services—and to communicate with others on them—unimpeded by government interference. *See Brown*, 564 U.S. at 792 n.1. NetChoice expressly raised the rights of its members’ users, which Defendant has not contested. *See* Mot. 10 (citing *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392-93 (1988)). “[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S.

1 748, 756 (1976). Defendant completely ignores the Act’s effect on users’ rights. Such rights are
2 not limited to engaging in speech; they extend to access to speech as well. That is why minors have
3 a First Amendment right to access protected speech without government-mandated parental con-
4 sent. *Brown*, 564 U.S. at 795 n.3. And both adults and minors may access protected speech without
5 first engaging in age assurance. *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004); *Reno v. ACLU*, 521
6 U.S. 844, 882 (1997).

7 *Covered websites* additionally have the right to display protected speech, including through
8 the use of personalized feeds and notifications. *E.g.*, *Moody*, 144 S. Ct. at 2393, 2400-01; *In re*
9 *Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, 702 F. Supp. 3d 809, 837 (N.D. Cal.
10 2023) (“[T]he timing and clustering of notifications . . . is entitled to First Amendment protec-
11 tion.”). As is true of traditional publishers, States cannot “prevent[] [a website] from compiling
12 the third-party speech it wants in the way it wants, and thus from offering the expressive product
13 that most reflects its own views and priorities.” *Moody*, 144 S. Ct. at 2394. “[L]aws curtailing their
14 editorial choices must meet the First Amendment’s requirements.” *Id.* at 2393.

15 Websites also have a First Amendment right against compelled speech. That is especially
16 true of the Act’s mandate (§ 270005) that covered websites “publicly condemn” themselves and
17 adopt the labeling of their services and feeds as “addictive.” *See Nat’l Ass’n of Mfrs. v. SEC*, 800
18 F.3d 518, 530 (D.C. Cir. 2015). This provision does not compel mere commercial speech. Forcing
19 a website to adopt a pejorative label is not commercial speech. *Id.* Neither does disclosing how
20 many minors and their parents have chosen particular means of speech dissemination “propose a
21 commercial transaction.” *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1119 (9th Cir. 2024) (quoting
22 *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)); *see X Corp. v. Bonta*, 116 F.4th
23 888, 900 (9th Cir. 2024) (same). So the commercial-speech doctrine, or some other lesser form of
24 First Amendment scrutiny, does not apply here.

25 **b.** Defendant’s central argument is that covered websites disseminating speech through
26 *personalized feeds* is not necessarily protected by the First Amendment under *Moody*. *See* Opp. 8-
27 10. This argument does not address the Act’s other speech regulations at all. Even as to personal-
28 ized feeds, it misreads *Moody*.

1 *Moody* held that “social media” websites “engage[] in expression” through their “organiz-
2 ing,” “presenting,” and “display” of protected “third-party speech.” 144 S. Ct. at 2393, 2402. In
3 particular, the Court held that the First Amendment protects “compiling and curating” protected
4 speech in “personalized” “feeds.” *Id.* at 2393, 2401, 2403. “[D]ecision[s]” about “which third-
5 party content . . . [to] display, or how the display will be ordered and organized,” are “expressive
6 choices” that “receive First Amendment protection.” *Id.* at 2394, 2406. The “feeds” that the Court
7 considered—Facebook’s News Feed and YouTube’s homepage—are two of the NetChoice mem-
8 ber feeds that the Act seeks to regulate here. *Id.* at 2403. That is why, after *Moody*, the District of
9 Utah concluded that the “speech social media companies engage in when they make decisions
10 about how to construct and operate their platforms . . . is protected” by the First Amendment.
11 *NetChoice, LLC v. Reyes*, 2024 WL 4135626, at *8 (D. Utah Sept. 10, 2024).

12 True, the Supreme Court said that *Moody* did “not deal [] with feeds whose algorithms
13 respond *solely* to how users act online.” 144 S. Ct. at 2404 n.5 (emphasis added). Even assuming
14 for the sake of argument that different First Amendment principles might apply to laws that regu-
15 late feeds that operate “solely” based on “how users act online,” the Act is not such a law. *Id.*
16 Instead, the Act’s definition of “addictive feed” extends to any algorithm “based, in whole or in
17 part, on information provided by the user, or otherwise associated with the user or the user’s de-
18 vice.” § 27000.5(a). Moreover, covered NetChoice members do not display content to users based
19 “solely” on “how users act online.” *Moody*, 144 S. Ct. at 2404 n.5. That is not how content-mod-
20 eration algorithms work. To the contrary, uncontested record evidence shows that covered
21 NetChoice members display content in feeds according to their own editorial policies developed
22 by humans, which include efforts to “prioritize minor safety and display only age-appropriate con-
23 tent.” Cleland Decl. ¶ 8; *id.* ¶ 23 (detailing content-moderation efforts); *e.g.*, Davis Decl. ¶¶ 12,
24 34-35; Veitch Decl. ¶¶ 21, 24-30. Other covered members’ personalized feeds remain protected
25 by the First Amendment, just as the Court held regarding the Facebook and YouTube main pages
26 in *Moody*. 144 S. Ct. at 2403.

27 Defendant’s rationale pays no heed to this right. All manner of movies, music, books, and
28 other writing are created and produced because people want it. Under Defendant’s theory, the

1 government could ban “vast quantities of constitutionally protected speech” for both minors and
2 adults simply because they choose to receive it in a personalized form. *Griffin*, 2023 WL 5660155,
3 at *17. The First Amendment and *Moody* allow no such thing.

4 c. Defendant erroneously argues that *Brown*’s holding that governments lack “the power
5 to prevent children from hearing or saying anything *without their parents’ prior consent*,” 564
6 U.S. at 795 n.3, is somehow limited only to content-based speech regulations, Opp. 15. But minors
7 have a “*constitutional right* to speak or be spoken to without their parents’ consent.” *Brown*, 564
8 U.S. at 795 n.3 (emphasis added). That protection applies equally to content-based and content-
9 neutral requirements. Otherwise, it would “vitate the rule that ‘only in relatively narrow and well-
10 defined circumstances may government bar public dissemination of protected materials to’” mi-
11 nors. *Id.* at 802 (citation omitted). California’s law in *Brown* would still have violated the First
12 Amendment if it banned *all* video games without parental consent, not just the “violent” ones. *Id.*
13 Regardless, the Act is both content-based and speaker-based, as discussed below.

14 d. Defendant refers to covered websites’ dissemination of protected speech as “digital
15 mechanisms” or “digital content-delivery features” to contend they should receive lesser First
16 Amendment protection. Opp. 5, 14. This argument fares no better. It is akin to saying that the
17 government can regulate video games or “Saturday morning cartoons” under the guise of regulat-
18 ing the “mechanisms” of displaying graphics. *Brown*, 564 U.S. at 795 at 790. As the Supreme
19 Court has repeatedly recognized, “the basic principles of freedom of speech and the press . . . do
20 not vary when a new and different medium for communication appears.” *Id.* (cleaned up); *accord*
21 *Moody*, 144 S. Ct. at 2403 (same). Speech does not lose its First Amendment protections when it
22 evolves from text to audiovisual, from classic to contemporary, or from analog to digital. Here,
23 that means that the “First Amendment . . . does not go on leave when social media are involved.”
24 *Moody*, 144 S. Ct. at 2394.

25 Defendant’s attempt to analogize the Act’s restrictions on online speech to regulations of
26 tobacco and gambling, *e.g.*, Opp. 1, 17, are inapposite and “weak,” *Griffin*, 2023 WL 5660155, at
27 *16, because tobacco and gambling do not involve free speech rights. Minors have a First Amend-
28 ment right to engage in speech; they lack a constitutional right to engage in the nonexpressive

1 conduct of smoking and gambling. At any rate, this argument has been rejected already by the
2 Supreme Court: California in *Brown* unsuccessfully argued that restrictions on minors’ access to
3 protected speech are akin to restrictions for using tobacco and gambling. *See* Pet. Br. at 22-23,
4 *Brown v. Ent. Merchs. Ass’n*, 2010 WL 2787546 (U.S. July 12, 2010) (“*Cal. Brown Br.*”) (“pur-
5 chase tobacco”; “play bingo for money”).

6 **2. The Act’s content-based and speaker-based speech regulations trigger**
7 **strict scrutiny.**

8 **a.** The Act triggers strict scrutiny because its central coverage definition regulates speech
9 based on content and speaker. Mot. 16-19.

10 The Act discriminates based on the “topic discussed”—*i.e.*, content—so it need not also
11 discriminate based on “the idea or message expressed,” as Defendant argues. Opp.13-14 (quoting
12 *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022)). The Act’s most
13 obvious content-based distinctions are clear on the face of the law, and are unaddressed by De-
14 fendant. The Act excludes websites that present or facilitate “*consumer reviews* of products,
15 sellers, services, events, or places.” § 27000.5(b)(2)(A) (emphasis added). In other words, if the
16 “topic discussed,” *Reagan*, 596 U.S. at 69, on a website is “consumer reviews,”
17 § 27000.5(b)(2)(A), the websites can use whatever feeds they choose. Other websites, however,
18 must comply with the Act’s onerous restrictions on speech—harming those websites and their
19 users. This “exception[] to the Act for product review websites” is “easy to categorize as content
20 based.” *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 557 (S.D. Ohio 2024); *see Barr v. Am. Ass’n*
21 *of Pol. Consultants, Inc.*, 591 U.S. 610, 619-20 (2020) (controlling plurality op.) (content-based
22 exceptions trigger strict scrutiny). The Act’s coverage also turns in part on whether websites “allow
23 users to *interact socially* with each other.” Cal. Bus. & Prof. Code § 22675(e)(1)(A). Such require-
24 ments are also content-based, as multiple courts have recognized. *See* Mot. 17 (collecting cases).
25 By singling out social interaction, the Act excludes other forms of communication.

26 Beyond the content-based distinctions on the face of the law, at least one of the Act’s stated
27 “purpose[s] or justification[s]” is based on the “topic discussed” on the websites. *Reagan*, 596 U.S.
28 at 69, 73-74. Defendant’s declarant Dr. Radesky admits that reducing access to covered websites
is an attempt to reduce access to content-based categories of speech, such as “violent, scary, or

1 sexualized images.” *See* Radesky Decl. ¶¶ 61.b-e, 91. Although covered websites already engage
2 in content moderation to address such speech, Mot. 4, the government itself cannot target protected
3 speech for regulation without satisfying strict scrutiny.

4 In addition, the Act is speaker-based because it distinguishes among different kinds of
5 online services. *See* Mot. 17-18. In short, the Act’s decisions to exclude websites featuring “con-
6 sumer” reviewers or content created by the websites themselves means that the Act “distin-
7 guish[es] among different speakers, allowing speech by some but not others.” *Nat’l Inst. of Fam.*
8 *& Life Advocs. v. Becerra*, 585 U.S. 755, 777-78 (2018) (cleaned up).

9 **b.** Defendant contends it is irrelevant whether the Act is speaker-based because the Act
10 purportedly regulates the “secondary effects” of covered websites. Opp. 14-15 (citation and em-
11 phasis omitted). But this secondary-effects doctrine is rarely applied and has covered only physical
12 “zoning ordinance[s]” applied to “adult bookstores” purveying material *unprotected for minors*.
13 *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (controlling op. of Kennedy, J.).
14 The Supreme Court in *Reno* held that restrictions on access to online speech are not analogous to
15 zoning ordinances regulating physical property. 521 U.S. at 867-68. It has been the law for more
16 than a generation that States cannot “cyberzon[e]” the Internet by imposing “restriction[s] on
17 speech.” *Id.* In addition, States “may not regulate the secondary effects of speech by suppressing
18 the speech itself . . . by reference to secondary effects.” *Alameda*, 535 U.S. at 445 (Kennedy, J.).
19 Yet the Act does just that and does not limit itself to unprotected speech for minors.

20 **c.** The Act’s regulation of notifications also triggers strict scrutiny, and Defendant is wrong
21 to argue that it is a permissible “time, place, or manner restriction[.]” Opp. 19.

22 Editorial choices about how to present speech are not the “manner” of speech that govern-
23 ments may regulate under this doctrine. *E.g., Moody*, 144 S. Ct. at 2400-02 (collecting authorities
24 protecting the right to editorial discretion). Otherwise, governments would be allowed to regulate
25 how online newspapers, cable news, streaming services, and other private entities publish speech.
26 Defendant cites no authority for anything close to such sweeping governmental authority, nor
27 could he after *Moody*. Rather, the “manner” of speech that government can regulate is largely
28 limited to things like (1) amplification of sound to prevent public disruption; and (2) distance from

1 places that might be disturbed, such as schools. *Ward v. Rock Against Racism*, 491 U.S. 781, 784
 2 (1989) (amplification); *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972) (law preventing
 3 demonstrations within 100 feet of schools). That is why time, place, and manner restrictions tradi-
 4 tionally apply to speech over which listeners have no control in public places and commons—and
 5 public forums especially. *E.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009) (“tra-
 6 ditional public fora”; “public parks”).

7 Furthermore, the Act’s restrictions are not proper time, place, and manner regulations be-
 8 cause they are not “content[] neutral.” *Id.* If a law exempts websites featuring “consumer reviews,”
 9 § 27000.5(b)(2)(A), from complying with restrictions on the time, place, or manner of speech, that
 10 law must satisfy strict scrutiny. Time, place, and manner restrictions also cannot be speaker-based.
 11 *See, e.g.*, *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 55 (1983); *Ackerley*
 12 *Commc’ns of Ma., Inc. v. City of Somerville*, 878 F.2d 513, 520 (1st Cir. 1989).

13 Fundamentally, the justifications underlying time, place, and manner restrictions are inap-
 14 posite here, where minor users (and parents) *can control* their individual online experiences. The
 15 covered websites are publications of speech to individual and willing users. Specifically, users
 16 can: (1) sign up for and turn off the services; (2) decide what messages they want to see, and when;
 17 and (3) use the services without disrupting their neighbors, let alone the public. Unrebutted record
 18 evidence demonstrates that users can control whether the services use personalized feeds or send
 19 them notifications. *E.g.*, Mot. 4-5; Cleland Decl. ¶ 9; Veitch Decl. ¶ 45. Put another way, users of
 20 the covered websites are not “unwitting listeners or viewers.” *Cohen v. California*, 403 U.S. 15,
 21 21 (1971). And even if they were, users may “simply [] avert[] their eyes.” *Id.* That makes this
 22 case completely unlike the outlier situations addressing state regulations of “unwelcome” and
 23 “confrontational” “speech.” *Hill v. Colorado*, 530 U.S. 703, 717 (2000).

24 The Act is also unlike regulations of robocalls. *Cf.* Opp. 19. The Supreme Court has ex-
 25 plained that government can flatly ban robocalls. *Barr*, 591 U.S. at 633 (controlling plurality op.)
 26 (“A generally applicable robocall restriction would be permissible under the First Amendment.”).
 27 There is no such support for the proposition that government can ban certain forms of expression
 28 on “social media” websites. That is especially true given users’ ability to control whether, when,

1 and how they receive notifications—as explained above. That is why courts have uniformly held
 2 that notifications and personalized feeds are protected. *See supra* p.4. Under Defendant’s theory,
 3 however, the government could ban people from sending or receiving emails at particular times of
 4 day. This Court should reject that assertion of governmental authority.

5 3. The Act’s speech regulations fail strict scrutiny.

6 a. Defendant fails to show a sufficient governmental interest in restricting adults and mi-
 7 nors’ access to protected speech. Defendant claims that the Act’s speech restrictions “protect[] the
 8 physical and psychological well-being of minors.” Opp. 16; *id.* at 18. But Defendant fails to show
 9 a “causal link,” as the First Amendment demands. *Brown*, 564 U.S. at 799-800.

10 Even the materials in Defendant’s one-sided submission reflect as much. For instance, the
 11 Surgeon General’s Advisory highlights multiple potential “benefits of social media use among
 12 children and adolescents.” Social Media and Youth Mental Health: The U.S. Surgeon General’s
 13 Advisory 6 (2023), <https://perma.cc/YQ76-J687> (“Advisory”) (capitalization altered), *cited at*
 14 Opp. 4; Feder Decl. ¶ 33; Radesky Decl. ¶¶ 11, 28; Act § 1(c) (legislative findings); *see Reyes*,
 15 2024 WL 4135626, at *12 (noting Surgeon General’s Advisory’s “nuanced view” of social media).
 16 Dr. Feder’s declaration admits: “study findings on social media use are not consistent, and some
 17 find no association between social media use and mental health problems.” Feder Decl. ¶ 34; *id.*
 18 ¶ 36 (“not all studies produce consistent findings”). Dr. Radesky underscores that—in addition to
 19 these inconsistent findings—the potential “harms to minors **vary in their prevalence and the mag-**
 20 **nitude of effect** that they have on a child or teen’s mental health.” Radesky Decl. ¶ 32 (emphasis
 21 in original).

22 In addition, “[n]early all of the research” cited by Defendant “is based on correlation, not
 23 evidence of causation.” *Brown*, 564 U.S. at 800 (citation omitted); *see Reyes*, 2024 WL 4135626,
 24 at *13 (noting same problem in similar evidence). The Surgeon General’s Advisory notes: “[m]ore
 25 research is needed to fully understand the impact of social media,” and “[m]ost prior research to
 26 date has been correlational.” *See* Advisory at 4, 11; Feder Decl. ¶ 52 (“this is an active area of
 27 research”). Dr. Feder’s own conclusions are supported by only speculative assertions and evidence
 28 of correlation. Feder Decl. ¶¶ 12, 14, 19, 28, 30, 34, 36, 37, 50, 51, 57, 58, 63, 66 (“tend to”;

1 “plausible explanations”; “positive correlation”; “likely to experience”; “higher odds”; “small but
 2 statistically significant correlation”; “is associated with”; “results are also consistent with other
 3 plausible alternative hypotheses”; “it is reasonable to conclude”; “it is plausible”; “suggests”; “can
 4 increase”). Further afield, Defendant’s declarants cite the purported effects of other technology
 5 left unregulated by the Act, like smartphones. *E.g., id.* ¶¶ 35, 56, 60; Radesky Decl. ¶¶ 39, 68
 6 (smartphones); *id.* ¶¶ 63-64 (infinite scroll and autoplay). At bottom, Dr. Feder concludes only
 7 that the Act “*could* improve children’s mental health.” Feder Decl. ¶ 16 (emphasis added); *id.* ¶ 51
 8 (“the size of these benefits is generally moderate”); *id.* ¶ 62 (“could result”). And he admits the
 9 multiple “limitations” in his conclusions, including that “none of the studies [he reviewed] is a
 10 perfect analog for the Act under consideration.” *Id.* ¶ 49; *see id.* ¶¶ 57 (“my own research does not
 11 examine these” personalized feeds and notifications); 60 (“I could not find any published studies
 12 on push notifications sent by social media platforms specifically”). This inconclusive evidence is
 13 not enough to justify the Act’s restrictions on access to protected speech. *Brown*, 564 U.S. at 799.

14 This is not the first time that California has raised a similar interest in regulating the pur-
 15 portedly harmful effects of new technology. Briefing in *Brown* also raised concerns about minors’
 16 developmental capacity, but such concerns did not overcome minors’ First Amendment rights.
 17 *Compare Cal. Brown Br.* at 8, 2010 WL 2787546, *with Opp.* 16-17; Radesky Decl. ¶¶ 50-53.

18 **b.** Defendant fails to show the Act is narrowly tailored. Because its “requirements are over-
 19 broad, overly restrictive, and underinclusive, they are properly enjoined on their face.” *Comput. &*
 20 *Commc’ns Indus. Ass’n v. Paxton*, 2024 WL 4051786, at *16 (W.D. Tex. Aug. 30, 2024). Simply
 21 because the Act is purportedly narrower than other States’ laws does not make the Act narrowly
 22 tailored. *Cf. Opp.* 8, 23.

23 As an initial matter, Defendant does not dispute that parents have many means to oversee
 24 their minor children online or that covered websites provide parental tools and engage in content
 25 moderation. To the contrary, one of Defendant’s own declarants acknowledges that covered web-
 26 sites allow users some control over their feeds. Egelman Decl. ¶ 51. Nor does Defendant dispute
 27 the effectiveness of existing private alternatives. Instead, Defendant says those means are insuffi-
 28 cient because they “are not enabled by default” and that “some of [NetChoice’s]m members do

1 not provide an option for users to disable addictive feeds.” Opp. 20. But “if a less restrictive means
2 is available . . . , the Government must use it.” *United States v. Playboy Ent. Grp.*, 529 U.S. 803,
3 815 (2000). Those less-restrictive alternatives need not be “perfect,” *Ashcroft*, 542 U.S. at 668-69;
4 nor does “the government . . . have a compelling interest in each marginal percentage point by
5 which its goals are advanced,” *Brown*, 564 U.S. at 803 n.9; *see Playboy*, 529 U.S. at 824 (“it is no
6 response” that a less restrictive alternative “may not go perfectly every time”).

7 Regardless, the Act’s coverage is also “seriously underinclusive” to address the State’s
8 purported concerns. *Brown*, 564 U.S. at 805; *see* Mot. 21-23. Defendant does not respond to many
9 of the Act’s tailoring flaws, except to argue that “the First Amendment imposes no freestanding
10 underinclusiveness limitation.” Opp. 21 (cleaned up). But here, the Act’s various exceptions for
11 all manner of Internet websites, feeds, and notification demonstrates that the Act is “wildly under-
12 inclusive when judged against its asserted justification, which . . . is alone enough to defeat it.”
13 *Brown*, 564 U.S. at 802.

14 For example, Defendant suggests that feeds and notifications may contain “advertise-
15 ment[s]” or “fraudulent spam.” Opp. 11. But media is replete with advertisements, from television,
16 to newspapers, to video games—not to mention many other websites left unregulated by the Act.
17 The potential presence of advertisements in feeds is not enough to restrict minors’ and adults’
18 access to speech: The State could not require age assurance or parental consent before people read
19 newspapers, even on the theory that newspapers contain more “advertisements” relative to books.
20 Nor is the Act properly tailored to address advertisements. For one, California has existing laws
21 regulating advertising. *E.g.*, Cal. Bus. & Prof. Code § 17500. Leaving that aside, the Act sweeps
22 further than necessary on covered websites because it requires age assurance and parental consent
23 to access *all* content on the services. Plus, the Act does not regulate advertisements on nearly
24 enough websites with advertisements or notifications. *See* Mot. 22. In addition, Defendant’s spec-
25 ulation that notifications may contain “fraudulent spam,” Opp. 11, is the kind of “hypothetical”
26 and “imaginary” consideration cannot defeat this pre-enforcement challenge, *Wash. State Grange*
27 *v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). Plus, it is contrary to the record
28 evidence about the kinds of protected speech that notifications contain. *See* Mot. 4-5.

1 Defendant’s submissions suggest that the Act addresses minors’ data privacy. *E.g.*, Egel-
 2 man Decl. ¶¶ 16-31, 38-49, 57-67; Radesky Decl. ¶¶ 42-45. But the Act does not directly regulate
 3 data privacy. And California already has comprehensive data-privacy regulations that are less re-
 4 strictive alternatives to the Act’s restrictions on speech. *See, e.g.*, Cal. Civ. Code §§ 1798.100-.199

5 In addition, many of the purported problems Defendant identifies come from Internet use
 6 in general, not specific use of “social media.” *See* Opp. 2 (“being online”; “use the Internet”;
 7 “spend more time online”), 5 (“time spent online”); Radesky Decl. ¶ 39 (“mobile games”). De-
 8 fendant cites nothing for the proposition that the government has a legitimate governmental inter-
 9 est in minimizing the time that minors engage in protected speech activities. At any rate, the Act
 10 does *nothing* to reduce the time minors spend on other websites, such as Hulu, news sites, gaming
 11 sites, messaging services, and myriad other online services. The Act thus “leav[e]s out and fail[s]
 12 to regulate significant influences bearing on the [State’s] interest.” *Griffin*, 2023 WL 5660155, at
 13 *16 (cleaned up). That is “enough to defeat” the Act. *Brown*, 564 U.S. at 802.

14 4. NetChoice’s facial First Amendment challenge is proper under *Moody*.

15 The Act’s speech regulations are both facially unconstitutional under the First Amendment
 16—and unconstitutional as applied to NetChoice’s covered members. A law is facially invalid
 17 where the “*pertinent facts* . . . are the same across the board” and those “pertinent facts” demon-
 18 strate that the law fails heightened First Amendment scrutiny. *Ams. for Prosperity Found. v. Bonta*,
 19 594 U.S. 595, 618 (2021) (emphasis added). That is why other courts—including the Ninth Cir-
 20 cuit—have held laws facially unconstitutional when all aspects of a law’s speech regulations, “in
 21 every application . . . raise the same First Amendment issues.” *X Corp.*, 116 F.4th at 899; *see*
 22 *Reyes*, 2024 WL 4135626, at *9 n.92 (similar).

23 The Act regulates, restricts, and burdens speech—and thus is “directed narrowly and spe-
 24 cifically at expression or conduct commonly associated with expression.” Opp. 7-8 (quoting *Rou-*
 25 *lette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996)). Next, the parties agree on the range of
 26 “actors” regulated by the Act: websites that display “feeds” of “personalized” and “curated com-
 27 pilation[s]” of user-generated “third-party speech.” *Moody*, 144 S. Ct. at 2399-2400, 2403. Thus,
 28 the concerns raised in *Moody* about whether the law at issue there covered other potential actors

1 and activities (such as ridesharing services) are clearly not present here. *See id.* Similarly, the par-
2 ties agree that all users must engage in age-assurance before receiving notifications at certain times
3 of day or before viewing personalized feeds. *See* Opp. 4-5. Likewise, the parties agree that minors
4 need to mount the separate hurdle of parental content to access that protected expression. *See id.*

5 In short, none of the questions about the scope of the law or the First Amendment’s ap-
6 plicability to different services or features are present here.

7 **C. NetChoice is likely to succeed on the merits of its claim that the Act is**
8 **impermissibly vague.**

9 The Act’s central coverage definitions are unconstitutionally vague. Mot. 24. The parties
10 agree on the prevailing standard for this vagueness challenge: whether the Act “reaches a substan-
11 tial amount of constitutionally protected conduct.” *Vill. of Hoffman Ests. v. Flipside, Hoffman*
12 *Ests., Inc.*, 455 U.S. 489, 494 (1982). But Defendant’s arguments that the Act meets this standard
13 only highlight the vagueness inherent to this coverage definition.

14 NetChoice member Dreamwidth explained that it lacks sufficient guidance about whether
15 its feeds—which are not personalized based on user preferences—nevertheless submit Dream-
16 width to regulation under the Act’s conflicting tests for regulated feeds. Cleland Decl. ¶ 27; Pao-
17 lucci Decl. ¶ 12. In response, Defendant does not “concede” that Dreamwidth is covered or con-
18 firm that it is not covered. Opp. 24. Instead, Defendant merely states that the Act’s tests “are dis-
19 junctive.” *Id.* That does nothing to clarify the overlap (if any) between regulated feeds “based . . .
20 on other information associated with the user or the user’s device” and unregulated feeds based on
21 “specific media or media by the author, creator, or poster of the media . . . [the] user expressly and
22 unambiguously requested” § 27000.5(a)(4). If Defendant, tasked with enforcing the Act, cannot
23 clarify this area of confusion as to one NetChoice member, there are many more websites across
24 the Internet that will lack sufficient guidance.

25 **II. The remaining factors support granting NetChoice a preliminary injunction.**

26 If not enjoined, the Act will irreparably harm NetChoice’s members. Mot. 25. First,
27 NetChoice’s covered members and their users face irreparable First Amendment harms. *See id.*

1 Second, NetChoice’s covered members will incur unrecoverable compliance costs for which sov-
2 ereign immunity would likely bar recovery. *See id.* Defendant does not contest the record evidence
3 that compliance costs may be impossible for some NetChoice members. *Id.*

4 The Court should enjoin each of the Act’s speech restrictions challenged in this lawsuit.
5 To begin, if it enjoins enforcement based on the Act’s central coverage definition, then the other
6 provisions of the Act are not severable. In any event, the Act’s requirements are interdependent.
7 Each provision “must stand on [its] own, unaided by the invalid provisions. . . nor inextricably
8 connected to them by policy considerations. They must be capable of separate enforcement.”
9 *Bonta*, 113 F.4th at 1125 (citation omitted). All provisions rely on age assurance and parental
10 consent to effectuate the Act’s age-based restrictions and the parental-oversight options. Moreo-
11 ver, if the Act’s limitations on users’ access to feeds and notifications is enjoined, the compelled
12 disclosures—which “explicitly refer to” the Act’s limitations, *id.*—serve no purpose, § 270005.
13 This Court should also not “sever” the Act’s obvious content-based coverage exceptions, as that
14 would only broaden the First Amendment harms by restricting more speech.

15 **CONCLUSION**

16 NetChoice respectfully requests a preliminary injunction against enforcement of the Act
17 against its covered members before the Act takes effect on January 1, 2025.

DATED: December 9, 2024

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