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28 **UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

NETCHOICE,

Plaintiff,

v.

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

Defendant.

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

**PLAINTIFF’S SUPPLEMENTAL BRIEF  
REGARDING ASSOCIATIONAL  
STANDING**

Date: December 17, 2024

Time: 9:00am

Judge: Hon. Edward J. Davila

Courtroom: San Jose, Courtroom 4, 5th Floor

1 Plaintiff NetChoice has associational standing to bring as-applied First Amendment claims  
2 on behalf of its members with websites regulated by California Senate Bill 976 (“Act”).  
3 NetChoice’s request for “declaratory and injunctive relief” does not “require[] individualized  
4 proof” and is “thus properly resolved in a group context.” *Hunt v. Wash. State Apple Advert.*  
5 *Comm’n*, 432 U.S. 333, 344 (1977). At core, whether the government can regulate access to un-  
6 disputedly protected speech on NetChoice’s covered member websites is not a question that re-  
7 quires the participation of NetChoice members as parties. The Western District of Texas—in an  
8 analogous case involving NetChoice raising both as-applied and facial challenges—concluded as  
9 much. *Comput. & Commc’ns Indus. Ass’n v. Paxton*, 2024 WL 4051786, at \*9 (W.D. Tex. Aug.  
10 30, 2024) (“CCIA”). Otherwise, there is no question that NetChoice meets the other two jurisdic-  
11 tional elements for associational standing: NetChoice’s members would have had standing to sue  
12 in their own right and seeking relief for its members is “germane” to NetChoice’s purpose. *Hunt*,  
13 432 U.S. at 343. That is why each of the five courts in the country to have considered the issue has  
14 concluded that NetChoice has associational standing to seek redress for its members’ First Amend-  
15 ment injuries. *See NetChoice, LLC v. Reyes*, 2024 WL 4135626, at \*7 (D. Utah Sept. 10, 2024);  
16 *CCIA*, 2024 WL 4051786, at \*8-9; *NetChoice, LLC v. Fitch*, 2024 WL 3276409, at\*5-6 (S.D.  
17 Miss. July 1, 2024); *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 548-51 (S.D. Ohio 2024);  
18 *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at \*9 (W.D. Ark. Aug. 31, 2023). This case pro-  
19 vides no reason to depart from that unanimous consensus. Accordingly, this Court can and should  
20 hold that the Act is both facially unconstitutional and unconstitutional as applied to NetChoice’s  
21 covered members.

## 22 ARGUMENT

23 NetChoice meets all three requirements for associational standing: “(a) its members would  
24 otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane  
25 to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires  
26 the participation of individual members in the lawsuit.” *Hunt*, 432 U.S. at 343. “Although the first  
27 two requirements are constitutional in nature, the third is prudential.” *Or. Advoc. Ctr. v. Mink*, 322  
28 F.3d 1101, 1109 (9th Cir. 2003) (citation omitted).

1           Importantly, the arguments raised in NetChoice’s as-applied challenge do not vary depend-  
2           ing on the specific circumstances of how this law is applied to different covered members. Rather,  
3           NetChoice’s claims involve application of a categorically *unconstitutional* law to NetChoice’s  
4           covered members for which the analysis is clear and uniform. In other words, the as-applied chal-  
5           lenge here goes only to the scope of relief, which is limited to just NetChoice’s covered members.  
6           *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (claim had “characteristics” of as-applied  
7           challenge where it did “not seek to strike the [law] in all its applications, but only to the extent it  
8           covers referendum petitions”).

9           The analysis in this supplemental brief will start with the third prong of associational stand-  
10          ing concerning the participation of individual members, which is the prong at issue in the case  
11          cited in this Court’s order requesting supplemental briefing. *See* ECF 25 (citing *Ass’n of Christian*  
12          *Schs. Int’l v. Stearns*, 362 Fed. App’x 640, 644 (9th Cir. 2010)).

13          **I. NetChoice’s as-applied challenges do not require the participation as parties of**  
14          **individual members regulated by the Act, so NetChoice satisfies the third, prudential**  
15          **prong of the associational-challenge analysis.**

16          **A.** This Court can resolve NetChoice’s as-applied claims without “the participation of in-  
17          dividual members” as parties. *Hunt*, 432 U.S. at 343. “[N]either [1] the claim asserted nor [2] the  
18          relief requested requires” members’ participation as parties in this lawsuit. *Id.*

19          *First*, “the *claim[s] asserted*” do not “require[] the participation of individual members in  
20          the lawsuit.” *Id.* (emphasis added). The Western District of Texas concluded as much in an analo-  
21          gous as-applied challenge brought by NetChoice. *CCIA*, 2024 WL 4051786, at \*9.

22          NetChoice’s First Amendment claims raise legal arguments for which the relatively few  
23          relevant facts are common to all regulated NetChoice members. Specifically, the Act imposes a  
24          variety of unconstitutional restrictions and burdens on undisputedly protected speech under bind-  
25          ing Supreme Court precedent: (1) it requires age assurance for all users and parental consent for  
26          minors to view the kinds of “personalized” feeds of protected, expressive content that the Supreme  
27          Court has held are entitled to First Amendment protection, *see Moody v. NetChoice, LLC*, 144  
28          S. Ct. 2383, 2403 (2024); (2) it imposes the same restrictions on access (age assurance and parental  
        consent) to receive notifications—that is, messages with protected speech—at particular times of

1 day; (3) it imposes a variety of default limitations on the speech minors can engage in on their  
2 accounts; and (4) it compels speech. *See* ECF 2 at 10-16. Moreover, the Act targets websites for  
3 regulation using a content-based and speaker-based coverage definition. *Id.* at 16-19.

4 Resolving these claims requires this Court only to construe the Act’s requirements and  
5 judge them against binding First Amendment precedent. It can do so without the participation of  
6 individual members as parties because the Act “imposes relatively uniform requirements on all  
7 Plaintiffs’ covered members.” *CCIA*, 2024 WL 4051786, at \*9. Indeed, Defendant has attempted  
8 to justify the Act by arguing the Act “aim[s] solely at curbing the harmful effects of certain online  
9 mechanisms.” ECF 18 at 18. Put another way, Defendant contends that the Act applies to discrete  
10 actors and activities. That makes the constitutional analysis straightforward. For instance, the Act’s  
11 improper “tailoring” “does not vary between covered” websites. *CCIA*, 2024 WL 4051786, at \*9.

12 More generally, the claims at issue here should require little factual development. In fact,  
13 the Supreme Court has held that First Amendment claims should “entail minimal if any discov-  
14 ery”—let alone individualized examinations into similarly situated services—“to allow parties to  
15 resolve disputes quickly without chilling speech through the threat of burdensome litigation.” *FEC*  
16 *v. Wis. Right To Life, Inc.*, 551 U.S. 449, 469 (2007) (controlling plurality op. of Roberts, C.J.).

17 Some examples are illustrative. In *Brown v. Entertainment Merchants Ass’n*, the Supreme  
18 Court held that the First Amendment prohibited a California law requiring minors to secure paren-  
19 tal consent before buying or renting “violent video games.” 564 U.S. 786, 789, 805 (2011). That  
20 case was brought by organizations “representing the video-game and software industries.” *Id.* at  
21 789. Associational standing was not even questioned in the case. Nor would it have been if the  
22 organizations argued that law was unconstitutional only “as applied” to their members, *e.g.*, spe-  
23 cific video game stores or particular video game developers. Nothing about adjudicating the law’s  
24 unconstitutional parental-consent requirement “require[d] the participation of individual members  
25 in the lawsuit.” *Hunt*, 432 U.S. at 343. That was true even though there were undoubtedly some  
26 differences among the plaintiffs’ members, including: differing business practices of video game  
27 stores and developers, diverse technical aspects of different video games (*e.g.*, graphics, subject  
28 matter, gameplay), and potentially myriad other *irrelevant* distinctions.

1 Similarly, a publishers’ trade association would be able to bring “as-applied” First Amend-  
2 ment claims challenging a law requiring parental consent and age assurance to purchase books or  
3 newspapers. *Cf. Virginia v. Am. Booksellers, Inc.*, 484 U.S. 383, 388 n.3 (1988). The court would  
4 not need “individualized proof” of the publishers’ editorial practices, bookbinding techniques, or  
5 distribution supply chains to adjudicate such a First Amendment claim.

6 *Second*, “because [NetChoice] seeks declaratory and prospective relief rather than money  
7 damages, its members need not participate directly in the litigation.” *Alaska Fish & Wildlife Fed’n*  
8 *& Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987). “[C]ourts regularly allow  
9 membership organizations and trade associations to bring suit on behalf of their members when  
10 they seek to enjoin enforcement of a statute or regulation, rather than damages.” *CCIA*, 2024 WL  
11 4051786, at \*9; *see Warth v. Seldin*, 422 U.S. 490, 515 (1975) (“whether an association has stand-  
12 ing to invoke the court’s remedial powers on behalf of its members depends in substantial measure  
13 on the nature of the relief sought”). Here, all NetChoice requests is declaratory and injunctive  
14 relief. *See* ECF 1 pp.31-32 (Complaint prayer for relief).

15 As a result, courts often permit organizations to raise “as-applied” constitutional challenges  
16 on behalf of their members. *See, e.g., Coal. for Indep. Tech. Rsch. v. Abbott*, 706 F. Supp. 3d 673,  
17 686 (W.D. Tex. 2023) (“Plaintiff has brought a challenge to Texas’s TikTok ban [for all public  
18 employees] *as applied to public university faculty*, who are both academics and public employees.”  
19 (emphasis added)); *Cal. Rifle & Pistol Ass’n, Inc. v. City of Glendale*, 644 F. Supp. 3d 610, 615  
20 (C.D. Cal. 2022) (permitting organization’s as-applied Second Amendment claim on behalf of  
21 members); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1134 (N.D. Ala. 2020) (permitting  
22 as-applied challenges on behalf of organization members to voting regulations); *Pietsch v. Ward*  
23 *Cnty.*, 446 F. Supp. 3d 513, 530 (D.N.D. 2020), *aff’d*, 991 F.3d 907 (8th Cir. 2021) (permitting  
24 organization to bring as-applied procedural due process claim on behalf of members); *N.H. Motor*  
25 *Transp. Ass’n v. Rowe*, 324 F. Supp. 2d 231, 235 (D. Me. 2004) (permitting as-applied preemption  
26 claim on behalf of organization’s members); *Nat’l Ass’n of Coll. Bookstores, Inc. v. Cambridge*  
27 *Univ. Press*, 990 F. Supp. 245, 250 (S.D.N.Y. 1997) (“association-wide facts sufficient to prove  
28 an element of the plaintiffs’ claim could be shown”).

1           **B.** Here, NetChoice’s legal arguments do not vary based on the specific factual character-  
2 istics of certain websites. That makes this case unlike the fact-dependent claim in *Ass’n of Chris-*  
3 *tian Schools*, cited in this Court’s order requesting supplemental briefing. ECF 25. That case in-  
4 volved as-applied First Amendment claims about the University of California’s “review and ap-  
5 proval of high school courses in order to qualify applicants for” admission. *Ass’n of Christian*  
6 *Schs. Int’l*, 362 Fed. App’x at 643. The Ninth Circuit concluded that whether any one course was  
7 unconstitutionally rejected “require[d] ‘individualized proof’” about the courses that were rejected.  
8 *Id.* at 644 (citation omitted). In other words, whether the government violated the First Amendment  
9 depended on the specific facts about particular courses and the schools that offered them.

10           There are no similarly relevant distinctions among NetChoice members here that would  
11 alter the underlying constitutional merits analysis. Nor are there any relevant differences among  
12 the *users* of different websites, whose access to these websites will be uniformly burdened by the  
13 Act. *See Am. Booksellers*, 484 U.S. at 388 n.3.

14           That NetChoice has associational standing to bring these as-applied First Amendment  
15 claims is wholly consistent with *Moody*. *Moody*’s vindication of “social media” websites’ First  
16 Amendment rights does not also stand for the proposition that there will *always* be material differ-  
17 ences among NetChoice members. Defendant may attempt to argue otherwise, but the Western  
18 District of Texas in *CCIA* recently considered and rejected this argument. “*Moody* is not a case  
19 about standing” and “did not alter the standing analysis for associations.” *CCIA*, 2024 WL  
20 4051786, at \*8; *id.* (“*Moody*’s majority opinion does not mention standing or the requirement of  
21 individual participation.”). Regardless, this case is unlike *Moody* because NetChoice’s claims  
22 “do[] not seriously turn on . . . members’ particular activities.” *Id.* at \*9. Although Defendant has  
23 argued that *Moody* requires evaluation of each covered member’s “algorithms,” ECF 18 at 10-12,  
24 that argument misreads *Moody* for the reasons NetChoice has explained, *see* ECF 29 at 4-6. Noth-  
25 ing about the precise technical means by which covered members personalize content in feeds is  
26 relevant to whether the government can require age assurance or parental consent to access those  
27 feeds. Under *Moody*, engaging in curation or “personalization” of third-party content is what trig-  
28 gers First Amendment protection. *See id.* at 4. And *Moody* certainly does not suggest that the Act’s

1 other unlawful regulations of speech are constitutional. *Id.*

2 Plus, even when a challenge conceivably “require[s] individualized or detailed inquiries  
3 into members’ activities, [] that does not automatically necessitate those members’ participation.”  
4 *CCIA*, 2024 WL 4051786, at \*8. The “parties’ briefing and,” if necessary, “discovery will likely  
5 provide sufficient information to make individualized inquiries where needed.” *Id.* at \*8-9.

6 C. In any event, this prong of the associational-standing analysis is not jurisdictional, but  
7 rather “prudential.” *Or. Advoc. Ctr.*, 322 F.3d at 1109 (citation omitted). This prong of the associ-  
8 ational-standing test “focuses importantly on matters of administrative convenience and efficiency  
9 and is assessed by examining both the relief requested and the claims asserted.” *CCIA*, 2024 WL  
10 4051786, at \*8 (cleaned up).

11 And “with the exact same Plaintiffs as in *Moody*, there is no prudential reason why Plain-  
12 tiff[’s] members must participate in this suit” as parties. *Id.* at \*9. And there certainly is no reason  
13 to deny NetChoice’s pending Motion for Preliminary Injunction (ECF 2) on this basis. Multiple  
14 members have participated as declarants in the briefing on that motion.

15 **II. NetChoice meets the two jurisdictional requirements for associational standing,**  
16 **because its covered members would have standing to challenge the Act and**  
17 **challenging the Act is germane to NetChoice’s organizational purpose.**

18 NetChoice meets the two jurisdictional requirements for associational standing. ECF 2 at  
19 10.

20 *First*, “there is little question” that the “members would have standing to sue in their own  
21 right.” *CCIA*, 2024 WL 4051786, at \*8. Those members include “social media companies and  
22 digital service providers who are regulated by” the law; “[a]s objects of the regulation, those mem-  
23 bers would have standing to sue.” *Id.*; *see* ECF 1 ¶ 15; 2-2 ¶ 26; 2-3 ¶ 5; 2-4 ¶ 56.

24 *Second*, NetChoice sues “to protect an interest germane to [its] organizational pur-  
25 poses”: the Act “interfere[s] with [NetChoice’s] mission[] to promote online commerce, speech,  
26 and accessibility for internet services” by impeding users’ access to online speech. *CCIA*, 2024  
27 WL 4051786, at \*8; *see* ECF 1 ¶¶ 12, 24; 2-2 ¶¶ 3-4, 37-38.

28 **CONCLUSION**

NetChoice requests a preliminary injunction before the Act takes effect on January 1, 2025.



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