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

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

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Georgia's brief confirms that its novel law will accomplish little while imposing enormous burdens, thus underscoring the need for preliminary relief. Far from "clos[ing] a loophole" in the Georgia Inform Consumers Act ("GICA"), Resp.1, Act 564 radically expands GICA by forcing online classifieds platforms to collect information about third-party sales for which the platform does not process the payment. That directly defies the federal INFORM Act's command that such platforms "shall *only* be required to count sales" for which they *do* process the payment, 15 U.S.C. §45f(f)(3)(B) (emphasis added)—an eminently sensible constraint, since those are the only transactions into which online marketplaces have the requisite visibility. Because the federal Act expressly preempts state laws that "conflict[] with" this directive, *id.* §45f(g), Act 564 is invalid. Georgia's contention that the federal Act's *express*-preemption provision merely codifies one narrow form of *implied* "conflict preemption" flouts plain meaning, ignores statutory context, renders the provision superfluous, and misstates implied-preemption doctrine.

Act 564 also violates the First Amendment. The law plainly triggers at least intermediate scrutiny because, unlike the INFORM Act, which regulates the non-speech conduct of processing payment, it singles out NetChoice members for special regulatory burdens solely because they engage in the expressive activity of publishing third-party speech. Act 564 flunks intermediate scrutiny, and even the

less-demanding *Zauderer* standard: Even crediting the state's non-obvious limiting constructions, Act 564 places enormous burdens on NetChoice members, forcing them to monitor private communications and essentially commandeering them to regulate third parties on the state's behalf. And, especially with the state's limiting constructions, Act 564 is a comically circuitous (and patently ineffectual) means of "combatting organized retail crime." Finally, Act 564 employs vague standards in a context that demands specificity. This Court should preliminarily enjoin the Act.

ARGUMENT

I. NetChoice Is Likely To Succeed On The Merits Of Its Claims.

A. The Federal INFORM Act Preempts Act 564.

The federal INFORM Act's express-preemption clause prohibits any state from "establish[ing] or continu[ing] in effect any law, regulation, rule, requirement, or standard that conflicts with [the federal law's] requirements." 15 U.S.C. §45f(g). The INFORM Act further provides that, when determining who is a "high-volume third party seller," "an online marketplace shall *only* be required to count sales or transactions ... for which payment was processed by the online marketplace." *Id.* §45f(f)(3)(B) (emphasis added). Only means only, and it unambiguously excludes counting cash sales or sales otherwise consummated offline. Act 564 defies that federal command. Because the two rules "conflict," *id.* §45f(g), Act 564 is invalid.

Georgia concedes that the verb "conflict" often means "differ[] from," *see* Conflict, *Merriam-Webster Dictionary*, https://archive.ph/xo7Dg, but asserts that it

can also mean "clash," "be incompatible or at variance," or "come into opposition." Resp.8. But either way, a federal directive to count only certain sales and a state command to count additional sales "clash" and are "incompatible." Georgia also ignores the fundamental rule that "words must be read and interpreted in their context, not in isolation." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (alterations omitted). When, as here, "conflict" is paired with "requirement," "rule," or "standard," it typically carries a broader meaning. Courts routinely describe legal requirements that are divergent—but not incompatible—as "conflicting requirements."[1] The same goes for "conflicting rules"[2] and "conflicting standards."[3]

This Court's decision in *Heat Technologies, Inc. v. Papierfabrik August Koehler SE*, 2020 WL 12309512, at *3 (N.D. Ga. June 5, 2020), is illustrative. That case involved the express-preemption clause of the Georgia Trade Secrets Act ("GTSA"): "[T]his Article shall supersede conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." O.C.G.A. §10-1-767(a). In interpreting the word "conflict," the Court did not limit

[1] *See, e.g.*, *Pharm. Care Mgmt. Ass'n v. Gerhart*, 852 F.3d 722, 730 (8th Cir. 2017); *Waks v. Empire Blue Cross/Blue Shield*, 263 F.3d 872, 875 (9th Cir. 2001).
[2] *See, e.g.*, *Figueroa v. Foster*, 864 F.3d 222, 229 (2d Cir. 2017); *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 976 (1st Cir. 1995).
[3] *See, e.g.*, *Smith v. Illinois*, 469 U.S. 91, 95 & n.3 (1984); *N. Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301-02 (4th Cir. 2010); *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 430 (6th Cir. 2009); *Dunkins v. Thigpen*, 854 F.2d 394, 397 n.7 (11th Cir. 1988).

it to laws that are literally "incompatible" with the GTSA. It instead recognized that GTSA's preclusion of "conflicting" laws bars all "claims that rely on the same allegations as those underlying [a] claim for misappropriation," including those involving information that "[does] not qualify as a trade secret." *Heat Techs.*, 2020 WL 12309512 at *5-7 & n.46. Here too, Congress' preemption of requirements that "conflict" with those in the INFORM Act encompasses laws that, like Georgia's, buck its command that "an online marketplace shall only be required to count sales" for which the online marketplace processed the payment. 15 U.S.C. §45f(f)(3)(B). Indeed, the conflict here is even more stark. Whatever may be said of a federal requirement to do something and a state requirement to do more, a federal requirement to count *only* certain transactions cannot be supplemented by a state requirement to count *additional* transactions without creating a clear conflict.

Georgia insists that this *express*-preemption clause should be read to cover only the narrowest form of *implied* "conflict preemption," under which "State and federal laws conflict only when 'it is impossible for a private party to comply with both.'" Resp.7 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000)). But that argument would deprive §45f(g) of any force, as Georgia concedes that there is always preemption in such scenarios even without any express-preemption clause. Resp.7. Georgia's argument thus runs headlong into the rule that "[a] statute should be construed to give effect to all its provisions, 'so

that no part of it will be inoperative or superfluous, void or insignificant.'" *Victor Elias Photography, LLC v. Ice Portal, Inc.*, 43 F.4th 1313, 1319 (11th Cir. 2022). Georgia has no explanation for why Congress would have enacted §45f(g) if it did not intend the clause to preempt anything beyond what the Supremacy Clause already covers.[4]

Instead, Georgia points to cases involving not express-preemption provisions, but savings provisions—or, as Justice Scalia put it, "*antipre-emption* provisions, prescribing that nothing in [the relevant federal statute] shall be deemed to pre-empt state law unless certain conditions are met." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987) (Scalia, J., concurring); *see also Texas v. Becerra*, 89 F.4th 529, 543 (5th Cir. 2024) (cited at Resp.7) (interpreting provision stating that "[t]he provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section"). But the difference between an anti-preemption provision and an express-preemption provision is self-evident. The former has meaning because it modifies ordinary implied-preemption principles; the latter has meaning only if it preempts laws beyond those preempted by statutory silence. Georgia is thus left with neither

[4] The state's reading makes particularly little sense because it is hard to imagine a state passing some sort of anti-regulatory law that could not be obeyed simultaneously with the federal INFORM Act. The far more logical explanation for §45f(g) is that Congress wanted to preempt the patchwork of state laws regulating online marketplaces that actually existed in late 2022. *See* Mem.5-8, 14-15.

precedent nor explanation for why Congress would add an express-preemption provision that accomplished nothing at all.

Moreover, even if §45f could plausibly be interpreted as just superfluously codifying implied "conflict preemption" principles, Georgia misstates those principles. As the very case from which it purports to derive its narrow "impossibility" test reiterates (in the very same sentence it quotes, no less), a state law "conflict[s]" with a federal one not only "where it is impossible for a private party to comply with both state and federal law," but also where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 372-73; *see also, e.g.*, *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1274 (11th Cir. 2013) (same). Georgia offers no reason to think Congress meant to cover only the first form of conflict preemption, and the plain text of the INFORM Act belies any such claim.[5]

Georgia notes that Congress has used even broader language in other express-preemption clauses. *See* Resp.9. But the fact that Georgia has unearthed nearly a half dozen different formulations undercuts its claim that there are some specific words Congress employs when it wants to preserve a uniform federal standard. And

[5] That same principle dooms the state's reliance on *OPIS Management Resources, LLC v. Secretary, Florida Agency for Health Care Administration*, 713 F.3d 1291 (11th Cir. 2013), because that case involved HIPAA regulations that interpreted the relevant statutory preemption clause to cover *both* of those traditional conflict-preemption categories. *Id.* at 1294.

the argument cuts both ways, as Congress also quite plainly "knows how to" enact an anti-preemption clause—*see, e.g.*, 42 U.S.C. §§1395dd(f), §2000h-4—yet it "chose not to do so here."[6] *Cf.* Resp.9. In all events, unlike with most of the state's statutes, no one is claiming Congress wanted to preempt "[n]early all state law" having to do with online marketplaces. *Cf.* Resp.8. But Congress made crystal clear that it wanted online marketplaces to be responsible for tracking *only* sales for which they process payment, 15 U.S.C. §45f(f)(2), as marketplaces naturally have the requisite visibility into those sales, and Congress sensibly preempted any state law "that conflicts with th[at] requirement[]," *id.* §45f(g). A state law that sweeps in additional sales plainly fits that bill.

With text, context, and precedent stacked up against it, Georgia is left invoking the presumption against preemption. *See* Resp.7, 10-11. But as the en banc Eleventh Circuit recently reminded, when "Congress has enacted an express-preemption provision, … no presumption against preemption applies." *Carson v. Monsanto Co.*, 72 F.4th 1261, 1267 (2023). And contrary to the state's remarkable claim that the federal INFORM Act "says nothing about States enforcing their *own* laws regulating online marketplaces," Resp.10, §45f(g) speaks to precisely that

[6] Notably, the INFORM Act does have a savings clause providing that §45f(d) should not be read to limit state officials' power to enforce other state laws. *See* 15 U.S.C. §45f(d)(6)(B). But that provision applies only to §45f(d), not to §45f(g), so it does not save enforcement actions premised on state requirements that conflict with the requirements of the INFORM Act.

question. This Court's task is thus simply to determine "the right and fair reading of" that express-preemption provision, without any thumb on the scale. *Torres v. Lynch*, 578 U.S. 452, 471-73 (2016). Georgia's view that §45f(g) merely codifies one narrow form of implied preemption flouts the ordinary meaning of "conflict[]," ignores statutory context, and renders the provision a nullity. NetChoice's view that §45f(g) preempts state requirements that are not in "agree[ment] or accord with" those imposed by the INFORM Act gives "conflict" its plain meaning, takes due account of statutory context, and gives effect to every one of the Act's provisions. Which of those readings is the better one "is not a close question." *Cf.* Resp.7.

B. Act 564 Runs Afoul of the First Amendment.

1. Act 564 Triggers Heightened First Amendment Scrutiny.

Act 564 plainly triggers First Amendment scrutiny. *See* Mem.15-18. The law singles out NetChoice members for burdensome regulation just because they are engaged in disseminating speech. It also compels speech, forcing "high-volume third-party sellers" to disclose personal information to NetChoice members, and requiring both sellers and platforms to make consumer-facing disclosures. On top of that, its onerous requirements will inevitably suppress speech on online marketplaces, burdening the First Amendment rights of all who use them.

Georgia insists that Act 564 burdens only NetChoice members' "business practices," not their speech. Resp.14. But those "business practices" *are* speech.

Unlike the federal INFORM Act, which is triggered by the non-speech activity of processing payments for commercial transactions, Act 564 is triggered by the bare act of publishing third-party communications about potential sales. That is not merely conduct; it is speech. Just as a newspaper engages in speech by publishing a classifieds section, NetChoice members engage in speech by operating online classifieds platforms. Like newspapers, they present "an edited compilation of speech generated by other persons."[7] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995). That expressive activity "fall[s] squarely within the core of First Amendment security." *Id.*

Whether the burdens the state imposes on those who operate classifieds platforms restrain or compel speech therefore makes no difference. *Cf.* Resp.16-17. Either way, Act 564 imposes "clear government burdens" on the expressive activity of operating a classifieds platform. *Cf.* Resp.16. And unlike the kinds of generally applicable "[b]uilding codes, taxes, [and] public safety laws" the state invokes, Resp.18, laws that single out those in the business of expression for special burdens "are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994).[8]

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[7] *See* Dkt.2-4 ¶¶8-11, 19-22, 45; Dkt.2-5 ¶¶11-12; Resp.4-5.

[8] *See, e,g.*, *Minn. Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581-86 (1983) (invalidating paper and ink tax that "applie[d] only to certain publications protected by the First Amendment"); *Wash. Post v. McManus*, 944 F.3d 506, 515-

That said, the state's contention that Act 564 does not compel speech is wrong. The law compels third-party sellers to disclose potentially sensitive information to "online marketplaces" and make other consumer-facing disclosures. *See* O.C.G.A. §§10-1-941(a), 10-1-942(a). And it compels online marketplaces to disseminate both those disclosures and additional consumer-facing disclosures of their own. *Id.* §10-1-942(a), -943. Georgia does not seriously dispute this; it just states, without analysis, that NetChoice "cannot" assert third-party sellers' First Amendment rights. That is beside the point, given that the law compels speech by the marketplaces too. But it is also incorrect, as "[t]he usual rule ... that a party may assert only a violation of its own rights" does not apply in the First Amendment context. *Virginia v. Am. Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93 (1988); *see, e.g.*, *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *12 (W.D. Ark. Aug. 31, 2023).

2. Act 564 Cannot Survive Heightened Scrutiny.

Act 564 cannot survive intermediate scrutiny because it is not "narrowly tailored to achieve" any substantial governmental interest. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001). Georgia tries to minimize the Act's burdens by asserting that a sale is not "made by utilizing [an] online marketplace," Act 564 §2,

17 (4th Cir. 2019) (invalidating special burden on "online platforms"); *Pitt News v. Pappert*, 379 F.3d 96, 109-13 (3d Cir. 2004) (invalidating special burden on certain media); *Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607, 614-17 (1st Cir. 2021) (law that "singled out" cable operators warranted heightened scrutiny).

unless "the seller and buyer form an agreement"—including all "relevant terms" such as "product, quantity, and price"—"using the marketplace's website." Resp.11-12. But that reading still leaves Act 564 imposing massive burdens on classifieds platforms, while accomplishing almost nothing vis-à-vis illegal sellers who wish to skirt the law. As NetChoice explained in its opening brief, there is a fundamental difference between requiring companies to track and retain information about transactions in which they participate as a payment processor, and requiring companies to track and retain information about transactions in which they do not: Online marketplaces necessarily have visibility into the former that they typically lack into the latter, for while item listings are posted publicly, subsequent one-on-one communications between prospective buyers and sellers are often private. *See* Dkt.2-4 ¶¶14, 16, 38; Dkt.2-5 ¶¶8, 27-28. So to comply even with the state's view of Act 564, companies would still need to begin scrutinizing all manner of private communications made through their services, in hopes of determining whether a prospective buyer and seller "[have] form[ed] an agreement to sell," Resp.11-12.

That herculean task "would take an extraordinary amount of resources," likely making it "[in]feasible." Dkt.2-4 ¶40; *see id.* ¶34; Dkt.2-5 ¶¶25, 27-28. Indeed, there is not even a practical way to monitor some forms of communication that "us[e] [a] marketplace's website," Resp.11-12, such as audio or videochat and private messaging. *See* Dkt.2-4 ¶4. Even when online communications appear to reveal an

"agreement to sell," the parties may later change the terms or call off the deal without the platform's knowledge. And "[f]aced with the penalties that would accrue" should they fail to meet those near-impossible demands, marketplaces "might well conclude that the safe course is to avoid controversy" by refusing to publish any listing that might trigger the law's requirements. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974); *see* Dkt.2-4 ¶¶41-45; Dkt.2-5 ¶¶29, 31-21.

Georgia's narrowing construction still imposes all those burdens, while rendering the law largely useless in advancing the state's asserted interest. After all, if Act 564 reaches only sales where the buyer and seller "agree on [all] relevant terms ... through their communications on the website," Resp.12, then it is hard to see how it could have any meaningful deterrent effect on "retail crime." A bad actor who wishes to evade "high volume" status (and the attendant disclosure obligations) need only insist on stopping one step short of consummating the sale online, leaving the finalization of terms to occur in person along with the cash payment—which is how most people use classifieds platforms anyway. Indeed, Georgia itself recognizes that "the number of additional high-volume sellers ... captured by [Act 564] is likely to be low," Resp.24, making its claim that the law will "critically undermine[] retail thieves' ability to earn a profit," Resp.22, hard to take seriously. In reality, the state has much more direct and less burdensome ways of achieving its asserted goals—including by regulating third-party sellers directly instead of forcing NetChoice

members to do that work for it.[9] Far from engaging in the "careful[] calculat[ion]" of "costs and benefits" that narrow tailoring requires, *Lorillard Tobacco*, 533 U.S. at 561, the legislature "has gone about [its] task in too circuitous and burdensome a manner to satisfy [heightened] scrutiny," *McManus*, 944 F.3d at 510.

Georgia seeks refuge in the less demanding *Zauderer* standard, *see* Resp.18-20, but that standard is inapplicable, and in all events does not help Georgia's cause. At the outset, Act 564 is nothing like a traditional disclosure requirement. It does not require someone engaged in commercial activity to provide "information about the terms under which" the "services" it is offering "will be available," *Zauderer v. Office of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). It requires *someone else* (i.e., an online marketplace) to compel those who provide a service (i.e., third-party sellers) to disclose certain information in *the latter group's* possession. *Zauderer* has never been understood to apply to efforts to require "neutral-third party platforms" to disclose information about *someone else*'s speech or services, *McManus*, 944 F.3d at 515-17, let alone to task platforms with sole legal responsibility for making sure *other* parties comply with disclosure mandates.

Moreover, *Zauderer* "has no application" when a government-mandated disclosure "is not limited to 'purely factual and uncontroversial information about

[9] That said, NetChoice members routinely partner with law enforcement on more effective means of combatting organized retail theft. *See* Dkt.2-4 ¶¶10-17.

the terms under which ... services will be available.'" *Nat'l Inst. of Fam. Life Advocs. v. Becerra*, 585 U.S. 755, 768-69 (2018). Requiring private parties to give a private company sensitive personal information such as a bank account number and Social Security Number is *neither* related to the terms on which services will be available *nor* uncontroversial. After all, a third-party seller could reasonably be concerned about whether the company will securely maintain its data or whether the company will be obliged to share it with the state. *See* Dkt.2-5 ¶¶19, 29, 32.

In all events, even under *Zauderer*, Georgia still "has the burden to prove that" Act 564's new requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 585 U.S. at 776. Georgia cannot carry that burden for the reasons already discussed: Act 564 imposes huge burdens on classifieds platforms and will have little, if any, deterrent effect on retail crime. *See supra* pp.11-13.

C. Act 564 Is Unconstitutionally Vague.

Georgia's counterargument on vagueness confirms that Act 564 "fails to provide a person of ordinary intelligence fair notice of what is prohibited," *United States v. Williams*, 553 U.S. 285, 304 (2008). Although Act 564 expands GICA's coverage from sales "made through [an] online marketplace" to sales "made by utilizing [an] online marketplace," Act 564 §2, Georgia asserts that "[i]t is not sufficient that the website be 'utilized'"; instead, the buyer and seller must "form an agreement" to" all "relevant terms" using "communications on the website,"

Resp.12. That is not likely how *any* "person of ordinary intelligence" would read the new law, and even Georgia recognizes that it could be read much more broadly, Resp.13. And while Georgia suggests that Act 564 "covers transactions where either the buyer or seller is located in Georgia," it does not explain exactly what that means, and it concedes that even that much is up for debate. Resp.13-14. The Constitution requires far more specificity from a statute that burdens constitutionally protected speech. *See* Mem.22-24.

II. The Other Preliminary Injunction Factors Overwhelmingly Weigh In Favor Of Maintaining The Status Quo.

Little more needs to be said about the equities, as Georgia effectively concedes that NetChoice is entitled to relief if it is likely to succeed on the merits. Georgia does not (and cannot) dispute that First Amendment injury and unrecoverable compliance costs constitute irreparable harm. *Compare* Mem.24-25, *with* Resp.24. And the equities unquestionably support preventing such harms by enjoining an unconstitutional law. Georgia is thus left faulting NetChoice for "seek[ing] emergency relief" rather than "clarification" from the state. Resp.25. But that argument is rather rich when the state would not stipulate to non-enforcement even for the brief period necessary to litigate this motion.

CONCLUSION

The Court should preliminarily enjoin Georgia from enforcing Act 564.

Respectfully submitted, this 26th 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 ***Memorandum In Support Of Motion For Preliminary Injunction*** 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 26th day of June 2024.

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