IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NETCHOICE, *Plaintiff*, v. JONATHAN SKRMETTI, in his official capacity as the Tennessee Attorney General & Reporter, *Defendant.*	Case No. 3:24-cv-01191

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

NetChoice is not the first plaintiff to convince a "unanimou[s]" series of "courts across the country" to enjoin state laws that protect children. Mot. (Doc. 9) at 1. Another unanimous series of courts enjoined state laws banning certain medical procedures for minors, until Tennessee took an emergency appeal and the Sixth Circuit stayed (and then reversed) two of those preliminary injunctions. *L.W. v. Skrmetti*, 83 F.4th 460, 497 & n.5 (6th Cir. 2023) (White, J., dissenting), *cert. granted*, 144 S.Ct. 2679 (2024). The Sixth Circuit rejected those plaintiffs' attempts, on a fast-moving preliminary injunction, to use the Fourteenth Amendment to *Lochner*-ize medicine. *Id.* at 471, 491 (majority). This Court should reject NetChoice's similar attempt to use "the First Amendment" to *Lochner*-ize the internet. *Lichtenstein v. Hargett*, 83 F.4th 575, 592 (6th Cir. 2023).

Though NetChoice stresses that it has won cases in district courts (for now), it seems to forget that the Supreme Court recently vacated a decision in its favor. In *Moody v. NetChoice*, the Court stressed that "legislatures" are "generally" empowered to address the "unprecedented dangers" of social media. 144 S.Ct. 2383, 2393 (2024). It vacated a decision affirming a preliminary injunction against a state's law, faulting NetChoice for not carrying its burden under the stringent test for facial challenges. *Id.* at 2394. NetChoice makes the same error here, plus several more. As in *Moody*, it treats all provisions, platforms, functions, and users as a monolith, without trying to distinguish or weigh the law's constitutional versus unconstitutional applications. NetChoice also violates the limits on associational standing by trying to bring as-applied claims and by asserting the rights of absent third parties (including children, without their parents' permission). NetChoice also phones it in on irreparable harm, an easy ground for denying its motion that's independent of the merits.

This Court should use its discretion to deny NetChoice's request for a preliminary injunction—a drastic and extraordinary remedy that's never awarded as of right. As in *L.W.*, Tennessee's law should go into effect, and this case should be decided in the normal course.

BACKGROUND

Social media's devastating effects on children, according to the U.S. Surgeon General, is "the defining public health crisis of our time." Exs. 41, 14. Tennessee, like several States and countries, responded by passing a law that empowers parents. NetChoice is suing to block any such law.

A. Social-media companies create a public-health crisis that is devastating children.

Social-media companies have devastated one generation, and are working on the next. With the popularity of smartphones, children now have nonstop access to the internet. Exs. 10-11. Social-media platforms like YouTube and Instagram are ready to profit from this unprecedented access. These companies make money by forcing account holders, including children, to accept complex contracts that let the platform track them and sell their data. Janssen Decl. ¶¶16-19, 22; Exs. 30-39. These companies also make money from advertisers, which requires a steady stream of visits. *E.g.*, Ex. 29. Exploiting the fact that minors' brains are not fully developed, these companies created features designed to hook children. Ex. 15; Kaliebe Decl. ¶¶33-34, 177. Their platforms are then a haven for sexual predators, pornography, and cyberbullying. LEOs Decl. ¶¶14-24; Janssen Decl. ¶¶20-21.

The companies no longer deny that their platforms have serious negative effects. The research now proves that excessive social-media use *causes* bad health outcomes for minors. Kaliebe Decl. ¶¶29-32, 153-60; Ex. 15 at 113-72; Ex. 14 at 4, 7. Those outcomes include loss of sleep, decreased attention spans, worse academic performance, depression, anxiety, self-harm, and even suicide. Kaliebe Decl. ¶¶27-29, 69-91, 109-52; Ex. 15 at 113-41; Exs. 16-20. Research also shows that social-media platforms are rife with pornography, cyberbullying, and predators. Kaliebe Decl. ¶¶35-36, 92-108. Child predators prefer these platforms to lure, groom, sextort, and otherwise victimize kids. LEOs Decl. ¶¶13-16, 22-23; Janssen Decl. ¶¶20-21. The Surgeon General agrees that social media is "not sufficiently safe for children and adolescents" and is filled with "malicious actors who target" them. Ex. 14 at 4, 9.

Self-regulation is not working. The platforms' own tools are lackluster. These tools miss harmful content and mislead parents, hampering their ability to regulate their children's social-media use. *See, e.g.*, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, 2024 WL 4532937, at *6 (N.D. Cal. Oct. 15); Allen Decl. ¶¶47-60; Kaliebe Decl. ¶¶161-72. And social-media companies have little interest in improving their own tools. *E.g.*, Ex. 25. As for the tools provided by third parties, they are easily circumvented. *See* Allen Decl. ¶50; Kaliebe Decl. ¶¶165-70. If a minor can't figure out how to circumvent them, he can easily find the instructions online. Allen Decl. ¶50.

Governments have been forced to step in. Other countries already require social-media companies to verify the age of account holders and to get consent from minors' parents. Allen Decl. ¶¶16-25, 61-62. These requirements help parents know about and control their child's accounts, decreasing the risks of sexual exploitation and other harms. LEOs Decl. ¶25; Kaliebe Decl. ¶¶36-40, 182. Age verification also helps prevent predators from pretending to be minors, a common way to facilitate sex crimes. LEOs Decl. ¶16. Most agree that similar regulations are needed here. Around 85% of parents support "laws requiring children under 18 to obtain parental permission before joining social media platforms" and "laws that would grant them complete access to their children's accounts." Ex. 12. Strong majorities of all adults agree. Allen Decl. ¶52; Ex. 13. States are currently "engaged in thoughtful debates over this issue, as the recent proliferation of legislative activity across the country shows." *L.W.*, 83 F.4th at 471; *see* Janssen Decl. ¶¶11-12. Similar legislation has been proposed in Congress, with many bipartisan sponsors. *See* Protecting Kids on Social Media Act, S.1291 & H.R.6149, 118th Cong. (2023-24). And the Surgeon General approves of these legislative efforts. Ex. 14 at 13-15.

B. Tennessee responds by passing the Act.

On May 2, 2024, Tennessee enacted the Protecting Children from Social Media Act. The Act covers "social media platform[s]," defined as "a website or internet application" that "[a]llows a person

to create an account" and "[e]nables an account holder to communicate with other account holders and users through posts." T.C.A. §47-18-5702(9)(A); *see* §5702(7), (2) (defining "post" and "content"). The Act gives examples that don't meet this definition, like "interactive gaming" and "educational entertainment." §5702(2), (9)(B). And it excludes platforms that "primarily provid[e] career development opportunities." §5702(9)(B)(v). The Act regulates accounts: Many social-media platforms let non–account holders visit and see their websites, *see* Mot.4, and the Act does not require platforms to do anything regarding those users, T.C.A. §47-18-5702(10).

In substance, the Act requires three main things: age verification, parental consent, and parental supervision. A social-media company must "verify the age of an individual" who wants to open an account (age-verification provision, §5703(a)). If the individual is reasonably believed to be under 18, §5702(4), then the company must get parental consent before letting him open an account (parental-consent provision, §5703(a)(2)-(3), (b)). The company must let a parent "revoke consent" (revocation provision, §5703(b)), but need not otherwise "reverify" age or parental consent, §5703(a)(3). The company also cannot "retain personally identifying information that was used to verify age or parental consent." §5703(c). And finally, social-media companies must provide parents with the ability to supervise, modify, or revoke their child's account (parental-supervision provision, §5704).

The Act's effective date is January 1, 2025. If companies violate it, Tennessee's attorney general can investigate and sue them for civil penalties. §5705(a). Unlike many of the laws that NetChoice has challenged so far, *see* Mot.1, Tennessee's has no criminal penalties, and Tennessee does not specify what methods a company must use to verify age or parental consent, Janssen Decl. ¶¶13-15.

C. NetChoice sues on behalf of eight specific websites.

NetChoice, a trade association whose members run major online platforms, broadly opposes regulation of the internet. Doc. 1 ¶13. Before suing Tennessee, NetChoice lobbied against the Act and

urged the governor to veto it. Ex. 40. Yet NetChoice waited five months after its passage to bring this suit. It raises facial and as-applied challenges under the First and Fourteenth Amendments, arguing that the Act chills speech and is void for vagueness. It now moves for a preliminary injunction, asking this Court to enjoin the Act's enforcement against seven of its members who run eight social-media platforms: "(1) Dreamwidth; (2) Google (YouTube); (3) Meta (Facebook and Instagram); (4) Nextdoor; (5) Pinterest; (6) Snap Inc. (Snapchat); and (7) X." Mot.3. NetChoice asks for a ruling by "December 31," one day before the Act's effective date. Doc. 8 at 1.

ARGUMENT

Preliminary injunctions are "'drastic.'" *D.H. v. Williamson Cnty. BOE*, 638 F. Supp. 3d 821, 829 (M.D. Tenn. 2022). They are "the exception," not "the rule." *Higuchi Int'l v. Autoliv ASP*, 103 F.4th 400, 404 (6th Cir. 2024). They must be denied unless the movant makes a "'clear showing'" of likely success, irreparable harm, and the equities. *L.W.*, 83 F.4th at 471. And because they are "never awarded as of right," district courts have considerable discretion to deny preliminary injunctions even when those factors are present. *Winter v. NRDC*, 555 U.S. 7, 24, 32 (2008). Any relief also cannot be overbroad in scope. *L.W.*, 83 F.4th at 489.

This Court should deny NetChoice's request to block a whole state law from coming into force, an "extraordinary and precipitous nullification of the will of the people." *Wash. Grange v. Wash. Republican Party*, 552 U.S. 442, 458 (2008). NetChoice has not clearly shown a likelihood of success against any provision, let alone all of them. And this Court needn't reach that question because NetChoice fails to show irreparable harm. The remaining equities also favor Tennessee. At a minimum, any injunction should be tailored—not statewide, association-wide, or Act-wide.

I. NetChoice has not clearly shown likely success on the merits for any provision.

Though a court can deny a preliminary injunction without reaching the merits, it cannot grant one unless the plaintiff clearly shows that it's likely to prevail. *Enchant Christmas Light Maze v. Glowco*, 958 F.3d 532, 539 (6th Cir. 2020). That includes a clear showing of likely standing. *Murthy v. Missouri*,

144 S.Ct. 1972, 1986 (2024). Because NetChoice is not regulated by the Act and claims no injuries to itself, it invokes only "associational standing." Mot.9. To have it, NetChoice must prove its members would have standing to sue on their own, the suit is germane to its purpose, and "'neither the claim asserted nor the relief requested requires the participation of individual members.'" *AAPS v. FDA*, 13 F.4th 531, 537 (6th Cir. 2021). NetChoice must make this showing for "each" claim, remedy, and part of the law it challenges. *Davis v. Colerain Twp.*, 51 F.4th 164, 171 (6th Cir. 2022).

Going "provision by provision" and "claim-by-claim," *Nat'l Fed'n of the Blind of Tex. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011) (cleaned up); *Price v. Medicaid Dir.*, 838 F.3d 739, 746 (6th Cir. 2016), NetChoice has not carried its burden. Based on NetChoice's presentation so far, this Court is not likely to hold that the age-verification and parental-consent provisions violate the First Amendment. NetChoice makes no developed argument against the parental-supervision provision. And its challenges to the definition of "social media platform" likely fail.

A. Age verification and parental consent (§5703(a)(1)-(2))

Our "largely unamendable constitution" did not withdraw Tennessee's power to make companies get parents' permission before contracting with minors. *L.W.*, 83 F.4th at 485. NetChoice's challenges to the age-verification and parental-consent provisions invalidly assert the rights of nonparties. Its facial challenge does not meet the stringent test for overbreadth. And any as-applied challenges are neither justiciable nor persuasive.

1. NetChoice doesn't explain how the age-verification and parental-consent provisions implicate its *members'* right to free speech. It doesn't argue that the act of verifying someone's age involves speech. And though the Act prevents minors from opening accounts without parental consent, T.C.A. §47-18-5703(a)-(b), its members have no right to associate with unknown minors (let alone behind their parents' backs), *see Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989). Its members also host the speech of third parties, which *Moody* reiterates is generally not expressive. 144 S.Ct. at 2401,

2406 (citing, *e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)). Though *Moody* holds that Facebook and YouTube were speaking when they moderated content on their homepages, the laws there regulated content moderation. *See id.* at 2395-96. Tennessee's law does not. It does not dictate how social-media platforms moderate content, or even what speech they host or who they can show it to. *Cf. Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (law banned certain sales of speech); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (law criminalized certain publications of speech). Nor does barring certain minors from creating social-media accounts—minors who might never post, whose posts will be their own speech, and whose contents the platforms don't even know—burden a platform's "own" content moderation. *Moody*, 144 S.Ct. at 2400-03, 2408. Whatever free-speech right that social-media companies might have here is neither sufficiently explained nor grounded in *Moody*, making a preliminary injunction on that theory improper. *See L.W.*, 83 F.4th at 471.

NetChoice instead relies on the free-speech rights of its members' "users," claiming these regulations burden individuals' right to access and speak on social media. *E.g.*, Mot.11-15. Importantly, the age-verification and parental-consent provisions are prospective: Because the Act governs accounts "created on or after January 1, 2025," its provisions do not affect individuals who already have accounts. T.C.A. §47-18-5702(1); *accord* Mot.22. So NetChoice is really asserting the constitutional rights of *non*-users who might later become users, but who won't want to verify their age or get parental consent. *See* Mot.9 ("prospective" users). Yet parties usually "'must assert [their] own legal rights and interests.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). NetChoice thinks its members can use third-party standing to assert the rights of these future users, and then NetChoice can use associational standing to assert the rights of its members asserting the rights of these third parties. This novel theory of standing likely doesn't work.

NetChoice cannot "double stac[k]" exceptions to the rule that parties must assert their own rights. *AAPS*, 13 F.4th at 547 (cleaned up). Stacking associational standing on third-party standing

would let the rights of third parties be asserted by private associations who have "no injury of their own," something the law forbids. *Hollingsworth v. Perry*, 570 U.S. 693, 710-11 (2013). NetChoice cites no "history" for what is essentially *fourth*-party standing. *Fox v. Saginaw Cnty.*, 67 F.4th 284, 298 (6th Cir. 2023). And the text of §1983, NetChoice's only cause of action, rejects it. Section 1983 makes state actors liable in a suit brought by "the party injured." 42 U.S.C. §1983; *see Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir. 1984) (language makes action "*personal* to the injured party"). While associational standing arguably gets around this problem (because the injured party is present as a member of the association), allowing associations to sue on behalf of *non*-members recreates it. At a minimum, the Sixth Circuit has never approved this double stacking, *AAPS*, 13 F.4th at 547, so NetChoice can't make the "clear showing" needed for a preliminary injunction, *L.W.*, 83 F.4th at 471.[1]

Even conflating NetChoice with its members, the platforms lack third-party standing to represent future users. No "hindrance" prevents a platform's adult users from asserting their own rights. *Kowalski*, 543 U.S. at 130. The Act does not "punis[h]" any conduct by users, *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), and individuals who want access to social media can, and often do, sue on their own, *Amato v. Wilentz*, 952 F.2d 742, 754 (3d Cir. 1991); *e.g.*, *Alario v. Knudsen*, 704 F. Supp. 3d 1061 (D. Mont. 2023); *Lindke v. Freed*, 601 U.S. 187 (2024). Nor do social-media platforms have a "close relationship" with users. *Kowalski*, 543 U.S. at 130. No platform can have a *close* relationship with millions. And there's "no relationship at all" with prospective users, who aren't even users yet. *Id.* at 131. These platforms, whose goal is to maximize profits, also have "conflicts" of interest that "strongly counsel against third party standing." *Amato*, 952 F.2d at 750; *see Harris v. Evans*, 20 F.3d 1118, 1124 & n.10, 1123 & n.7 (11th Cir. 1994) (en banc). Users want not just access, but

[1] This double stacking was not presented in *Virginia v. American Booksellers Association*, since the plaintiffs there included individual "Virginia bookstores." 484 U.S. 383, 389 n.3 (1988). Nor was it presented in *Brown*, where the associations asserted the free-speech rights of their actual members. 564 U.S. at 789-90.

protections from harm and abuse. Yet these platforms use addictive features that hurt users; violate their privacy and exploit their data; and lead them to pornography, predators, traffickers, and even death. Kaliebe Decl. ¶¶27-36, 67-68, 175-77; LEOs Decl. ¶¶17, 20-21, 24; Janssen Decl. ¶¶9-10, 19-24; Exs. 1-8, 14-15, 22-24, 26-27. Far from aligned with Tennesseans, NetChoice's biggest members have been sued by Tennessee. *Tennessee v. Meta Platforms*, No. 23-1364-IV (Tenn. Ch. Davidson Cnty.); *see* Exs. 44-66.

NetChoice cannot get around this problem by invoking First Amendment overbreadth. Overbreadth does not relax the rule that conflicts of interest defeat third-party standing. *See Munson*, 467 U.S. at 956-58. And crucially, no case lets litigants use overbreadth to assert the rights of third-party *minors*. Though NetChoice cites *American Booksellers*, the plaintiffs there asserted "the First Amendment rights of bookbuyers"—specifically, "the adult population." 484 U.S. at 393; *see Harris*, 20 F.3d at 1124 (*American Booksellers* found third-party standing for "adult book buyers"). Minors, by contrast, have no rights that they can assert in court without their parents. *Smith v. OFFER*, 431 U.S. 816, 841 n.44 (1977). NetChoice tries to assert their rights without first getting their parents' permission; in fact, it's primarily concerned with minors whose parents *object*. Yet overbreadth is supposed to vindicate the rights of third parties who would rather stay silent than sue, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), not to create rights that don't exist or to replace lawsuits that couldn't be filed, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004); *Parent/Pro. Advoc. League v. Springfield*, 934 F.3d 13, 34 (1st Cir. 2019). (Overbreadth claims also must be "facial," *United States v. Glaub*, 910 F.3d 1334, 1340 (10th Cir. 2018), so this doctrine wouldn't let NetChoice use third-party standing for "as applied" claims, *cf.* Mot.9-10.)

2. No matter whose rights it asserts, NetChoice has not clearly shown that the age-verification and parental-consent provisions are likely overbroad. Facial overbreadth is "hard to win." *Moody*, 144 S.Ct. at 2397. Courts must define the provision's total "scope," determine "which of [its] applications

violate the First Amendment," and then decide whether the "unconstitutional applications are substantial compared to its constitutional ones." *Id.* at 2398, 2394. The burden to make the necessary showings under this "disfavored" doctrine falls on the challenger. *Id.* at 2409; *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 340 (6th Cir. 2009) (en banc). NetChoice has not carried that burden.

NetChoice does the same thing that led the Supreme Court to vacate its Eleventh Circuit win in *Moody*: It "focuse[s]" on certain "applications" while "disregard[ing] the requisite inquiry into how [the Act] works in all of its applications." 144 S.Ct. at 2409. NetChoice focuses on only one subset of users: adults who would stay off social media if they had to verify their age. Mot.11-13. And it focuses on only one subset of social media: the fact pattern in *Moody*, where Facebook and YouTube were moderating content on their homepages. Mot.5-7, 10-11. NetChoice provides no "fact[s]" or arguments about any other user, "platform," or "function"—let alone quantifies or weighs the Act's constitutional versus unconstitutional applications. *Moody*, 144 S.Ct. at 2411 (Barrett, J., concurring); *accord id.* at 2411 (Jackson, J., concurring) (stressing the need for this showing). NetChoice's undeveloped arguments and incomplete record fail to "carry its burden" to preliminarily enjoin a law as overbroad. *Id.* at 2409 (majority); *accord Connection*, 557 F.3d at 338-39.

NetChoice also ignores countless applications of the age-verification and parental-consent provisions that are lawful. To name a few: Social-media companies that are owned or controlled by foreigners who have no First Amendment rights—like TikTok, a former member of NetChoice. *Moody*, 144 S.Ct. at 2410 (Barrett, J., concurring); *see NetChoice v. Yost*, Doc. 45 n.7, No. 2:24-cv-47 (S.D. Ohio June 3, 2024). Social-media platforms that host users' pornographic content without verifying users' age—like Sharesome and ManyVids. *Free Speech Coal. v. Paxton*, 95 F.4th 263 (5th Cir. 2024); *see* Exs. 42-43. Platforms that do not engage in the kind of content moderation that *Moody* deemed expressive. 144 S.Ct. at 2398. And users who do not intend to use social media for protected expression, like adults posing as minors to sexually exploit children. Perhaps most broadly, these

provisions lawfully cover users who *support* age verification and parental consent (or who would still join a social-media platform that used them)—apparently the vast majority of Americans. Allen Decl. ¶52. These applications of the Act also count for purposes of assessing its facial validity, since they are instances where the Act "prohibits conduct" by social-media platforms. *L.A. v. Patel*, 576 U.S. 409, 418 (2015).

Though this Court could stop there, NetChoice is likely wrong even about its narrow applications. For users, not every regulation that hinders speech triggers the First Amendment, *Arcara v. Cloud Books*, 478 U.S. 697, 706 (1986), else States couldn't require Amazon to collect sales tax when books are bought and sold on its website, *Arsberry v. Illinois*, 244 F.3d 558, 564-65 (7th Cir. 2001). A person who is not directly regulated by a law cannot challenge it under the First Amendment by arguing that its effects "subjective[ly] 'chill'" his speech. *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972). That the law imposes "'some inhibitory effect'" on protected speech "is not enough." *Ft. Wayne Books v. Indiana*, 489 U.S. 46, 60 (1989); *accord Abbott v. Pastides*, 900 F.3d 160, 179 (4th Cir. 2018) (requiring a "'significant burden'"); *Harmon v. Beaumont ISD*, 2014 WL 11498077, at *4 (E.D. Tex. Apr. 7) (requiring "objective" chill to an "ordinary" person), *aff'd*, 591 F. App'x 292 (5th Cir. 2015).

NetChoice has not proven that age verification would stop an objectively reasonable adult from using social media for protected speech. Most adults support age verification. Allen Decl. ¶52. Showing ID is a routine part of daily life, including for constitutional rights like buying a gun, voting, or attending a political rally where alcohol is served. Janssen Decl. ¶26; *Indigo Room v. Ft. Myers*, 710 F.3d 1294, 1300 (11th Cir. 2013). And here, the Act doesn't even require "documentation," Mot.11-12; it leaves social-media platforms free to choose a method of age verification, including facial recognition or social vouching, Allen Decl. ¶¶8-9, 15-37; Janssen Decl. ¶¶13-15. Nor does the Act require users to sacrifice "'anonymity,'" Mot.12, 15; it *bans* social-media companies from retaining personally identifiable information, T.C.A. §47-18-5703(c); *see Connection*, 557 F.3d at 330 (no

confidentiality concern when information would remain hidden to the public). Any burdens imposed by the Act would not meaningfully add to what social-media companies already demand, *Connection*, 557 F.3d at 330, like creating an account and accepting terms of service that let the company track account-holders' every move and sell their information, Exs. 30-39; Janssen Decl. ¶¶16-19. That NetChoice can hypothesize rare cases, like adults "unable" to prove their age, Mot.12, does not make the Act *facially* unconstitutional, *Connection*, 557 F.3d at 339-40.[2]

Though NetChoice focuses on adults, the Act's provisions are broadly constitutional for minors too. Parents can regulate their children's access to social media; NetChoice doesn't claim that kids have a constitutional right to sneak and create secret accounts in defiance of their parents. *See L.W.*, 83 F.4th at 475. Though NetChoice says it can be hard to tell who someone's parent is, the Act does not dictate how social-media companies resolve that question, let alone require "'detailed proof.'" Mot.14-15. The problems that NetChoice identifies aren't that hard to resolve anyway—foster parents are obviously parents, consent from one "parent" is enough, etc. Janssen Decl. ¶15. Any unusual problem would support, at most, an as-applied challenge. *Connection*, 557 F.3d at 340-41.

The age-verification and parental-consent provisions do not implicate the First Amendment for minors in the first place. They do not prevent anyone from visiting or even using social media. *Cf. Packingham v. North Carolina*, 582 U.S. 98 (2017). They condition the creation of accounts, T.C.A. §47-18-5702(1), (10); §5703, the point at which social-media companies require users to agree to binding terms of service, *see* Janssen Decl. ¶¶16-19; *e.g.*, Exs. 31-39. Because parents' "decisions govern until the child reaches 18," *L.W.*, 83 F.4th at 475, the Act ensures that minors *actually consent* to these terms. Tennessee can presume that minors who lack parental consent do not want to create accounts (and

[2] *Ashcroft* and *Reno* did not hold that age verification objectively chills the speech of "adults or minors" who want to "access protected speech." Mot.12. The laws there criminalized posting certain speech online, and the plaintiffs were the platforms vindicating their *own* First Amendment right to post that speech. *See Ashcroft*, 542 U.S. at 661-64; *Reno v. ACLU*, 521 U.S. 844, 857-64 (1997).

contract away important rights and valuable data), just like it presumes that minors who lack parental consent do not want to get a tattoo, T.C.A. §62-38-211, or get hired as a journalist, §50-5-105. By barring certain contracts and requiring "informed consent," the Act regulates conduct, not speech. *NIFLA v. Becerra*, 585 U.S. 755, 769-70 (2018).[3]

The provisions' applications to the social-media giants that NetChoice focuses on, like Facebook and Instagram, are likely lawful as well. Under any level of scrutiny, these provisions "serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015). They protect "the physical and psychological well-being of minors." *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). There is a "direct causal link" between social media and harms to minors. *Brown*, 564 U.S. at 799; *see* Kaliebe Decl. ¶¶29-32, 153-60; Ex. 15 at 113-72. These provisions respond to those harms in the *most* tailored fashion, *cf.* Mot.22, by deploying the principle that "[p]arents usually do know what's best for their children," *L.W.*, 83 F.4th at 475. For the same reason, these provisions directly further Tennessee's interest in protecting parental authority. Contra NetChoice, Mot.19, that interest is valid, *see Ginsberg v. New York*, 390 U.S. 629, 638-41 (1968); *Frazier v. Winn*, 535 F.3d 1279, 1284-85 (11th Cir. 2008).

Though NetChoice questions whether these provisions are narrowly tailored, its arguments are not sufficient to preliminarily enjoin either one. NetChoice identifies only one narrower alternative: encouraging parents to use existing tools. Mot.20. But that alternative is "less effective than" the Act. *Ashcroft*, 542 U.S. at 666. These tools do not work, Allen Decl. ¶¶47-60, which is why the harms to minors have continued to worsen, Kaliebe Decl. ¶¶27-38, 165-72. The Act's solutions are not

[3] *Brown* does not hold otherwise. The law there banned the sale of video games to minors, and the plaintiffs there were vindicating the publishers' *own* right to distribute that speech. *See* 564 U.S. at 789-90. "A case like this one," where the challenged law "has the effect of decreasing the audience's demand" for the product, is "distinguishable from cases dealing with the State's direct imposition of financial burdens on the dissemination of particular kinds of speech." *Wine & Spirits Retailers v. Rhode Island*, 418 F.3d 36, 48 n.3 (1st Cir. 2005). The First Amendment is not implicated whenever a law makes it less likely that third-party speakers will *choose* a particular medium. *See id.* at 48-49.

"overinclusive." Mot.21-22. The age-verification provision must cover adults "[b]ecause it is never obvious whether an internet user is an adult or a child." *Free Speech Coal.*, 95 F.4th at 276. And Tennessee did not violate strict scrutiny by requiring parental consent for minors under 18, instead of some younger age. *See* T.C.A. §1-3-105 (setting "age of majority" at 18). NetChoice's attempt to challenge Tennessee's "line-drawing" is "exactly" what the Supreme Court forbid when it held that "narrow tailoring does not mean 'perfect' tailoring." *O'Toole v. O'Connor*, 802 F.3d 783, 791 (6th Cir. 2015). For the same reason, the Act's provisions are not "underinclusive" by covering only "*new* account holders." Mot.22. If they were retroactive, then NetChoice would be here challenging the Act as an ex post facto law that puts its members to the impossible task of checking billions of existing accounts. NetChoice cites no case suggesting that strict scrutiny puts States to that dilemma.

NetChoice's suggestion that these problems are not as severe for Dreamwidth or Nextdoor is irrelevant to its facial challenge. Because a "few alleged unconstitutional applications" do not prove substantial overbreadth, this Court can "assume … certain applications of the law would be unconstitutional but still reject a facial challenge." *Connection*, 557 F.3d at 340, 342. At the same time, NetChoice's sweeping arguments would implicate the federal Children Online Privacy Protection Act. COPPA requires social-media companies to get parental consent before collecting the personal information of individuals younger than 13. 15 U.S.C. §§6501-02. Most social-media companies, including NetChoice's covered members, comply with COPPA by simply barring all minors under 13 from making accounts. *E.g.*, Doc. 8-2 ¶8. That all of NetChoice's arguments apply to COPPA is even more reason not to grant a preliminary injunction.

3. NetChoice cannot pivot by challenging the Act's provisions only "as applied" to its members. Mot.9-10. Though NetChoice seeks only prospective relief, associational standing requires that "'*neither the claim asserted* nor the relief requested requires the participation of individual members.'" *Harris v. McRae*, 448 U.S. 297, 321 (1980) (emphasis added). That "claim asserted" part usually bars

associations from bringing as-applied claims. *See, e.g.*, *id.* (no as-applied free-exercise claim); *N.Y.S. NOW v. Pataki*, 261 F.3d 156, 171-72 nn.4-5 (2d Cir. 2001) (no as-applied due-process claim); *Minor I Doe v. Sch. Bd. for Santa Rosa Cnty.*, 264 F.R.D. 670, 688 (N.D. Fla. 2010) (no as-applied free-speech claim). As-applied claims contend that a law's "'application to a particular person under particular circumstances'" violates the Constitution. *Free Speech Coal. v. U.S. Att'y Gen.*, 974 F.3d 408, 422 (3d Cir. 2020). Associations cannot bring them because they "require an individualized inquiry for each association member," as the Third Circuit explained in another case where an association tried to bring as-applied free-speech claims against an age-verification law. *Id.*

Here, too, NetChoice likely lacks standing to bring as-applied claims. Those claims require a "fact-intensive" inquiry about whether and how the Act affects each member's speech—a question that will "vary" from "platform to platform." *Moody*, 144 S.Ct. at 2410-11 (Barrett, J., concurring). NetChoice's members, after all, represent "many different facets" of the social-media landscape and have platforms that present a "diversity of circumstances." *Free Speech Coal.*, 974 F.3d at 421-22. NetChoice's own declarations claim that two of its members are fundamentally different from other social-media platforms. *E.g.*, Doc. 8-3 ¶¶5-21; Doc. 8-4 ¶¶5-10. An as-applied challenge also requires proof of how each platform plans to implement age verification and parental consent, how that choice differs from what the platform does now, whether that mechanism objectively deters reasonable users from joining, and if so what alternative modes of compliance are available. NetChoice's obvious need for individualized proof might explain why it took great pains to raise only a "facial" challenge in *Moody*. 144 S.Ct. at 2394. Associational standing constrains it the same way here.

Nor does NetChoice brief any as-applied claim that would likely succeed. As explained, NetChoice's members cannot use third-party standing to bring as-applied challenges on behalf of future users. And NetChoice provides no evidence about any individual user. If it claims that the age-

verification and parental-consent provisions violate the First Amendment rights of one of its covered social-media platforms, they likely do not, for the same reasons given above. *Supra* I.A.1-2.

B. Parental supervision (§5704)

NetChoice makes no developed argument against the parental-supervision provision. The argument section of its brief has three subheaders claiming that three provisions of the Act regulate speech—none of which is the parental-supervision provision. *See* Mot.10-18. That provision gets only one sentence buried in a discussion of a *different* provision, where NetChoice asserts (in the most conclusory terms) that the parental-supervision provision "is a government regulation of speech." Mot.18. NetChoice does not explain whose speech the required tools limit or how. In fact, NetChoice states that "[s]ome" of its members "already" employ these tools, Mot.8 n.5, raising crucial questions about how this provision could injure those members or affect their speech, *see Prime Media v. Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007) ("standing with regard to [certain provisions] does not magically carry over to … other independent provisions"). NetChoice does not answer these questions, much less develop arguments or introduce evidence specific to the parental-supervision provision. It has not carried its burden on this provision and has forfeited any challenge to it at this stage. *Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 624 (6th Cir. 2013); *e.g.*, *CCIA v. Paxton*, 2024 WL 4051786, at *13 (W.D. Tex. Aug. 30) (deeming a challenge to a similar provision "not sufficiently developed at this stage").

Even if NetChoice had challenged it, no challenge would likely succeed. As with the last two provisions, NetChoice does not explain how its *members*' speech is affected by the parental-supervision provision. It claims no First Amendment right in hiding "privacy settings" or in showing its content moderation to children despite any parent-imposed "time restrictions" or "breaks." §5704; *see CCIA*, 2024 WL 4051786, at *13 ("these provisions likely primarily regulate conduct"). As for users, this provision does not limit adults' social-media use at all. And NetChoice lacks standing to assert the rights of third-party minors. *Supra* I.A.2. Even for minors, the law is not facially overbroad: Children

aren't meaningfully deterred from creating social-media accounts because their parents might supervise them (parents can do that anyway), and children have no constitutional right to use social media free of parental limits. *Supra* I.A.2. NetChoice also lacks standing to bring as-applied claims, *supra* I.A.3, and it identifies no unconstitutional application anyway. Under any level of scrutiny, this provision protects children and empowers parents by giving them meaningful tools inside the platforms that are more effective than the external tools that are currently available. *Supra* I.A.2.

C. Definition of social media platform (§5702)

NetChoice's challenges to the Act's coverage definition—under the First Amendment and the vagueness doctrine—do not justify a preliminary injunction either. *See* Mot.15-18.

1. First Amendment

NetChoice cannot argue that, because the definition of "social media company" is supposedly content-based and speaker-based, "each provision of the Act regulating speech" violates the First Amendment. Mot.17. As outlined above, NetChoice does not explain how the Act's substantive provisions regulate its members' speech, has no standing to vindicate future users' speech, and does not prove that the Act chills those users' speech. *Supra* I.A-B. NetChoice also acknowledges that, even if the coverage definition were content-based or speaker-based, the only consequence would be that the Act's substantive provisions must satisfy "strict scrutiny." Mot.18. But NetChoice loses under strict scrutiny on each provision. *Supra* I.A-B. That the Act does not cover "gaming" does not change the answer. Mot.21. "[T]he First Amendment imposes no freestanding 'underinclusiveness limitation.' A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee*, 575 U.S. at 449 (cleaned up). The Act can and does address the social-media platforms that pose the greatest threat to children. LEOs Decl. ¶¶13-24; Janssen Decl. ¶¶16-24; Kaliebe Decl. ¶¶173-82, 21-40.

But in case it matters, the coverage definition does not trigger strict scrutiny. As one of NetChoice's authorities explains, it is "error" to conclude that "the First Amendment mandates strict

scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660 (1994). Laws that govern only certain speakers or topics remain "'content neutral'" when they are "'*justified* without reference to the content of the regulated speech.'" *BellSouth Corp. v. FCC*, 144 F.3d 58, 68-69 (D.C. Cir. 1998); *accord Connection*, 557 F.3d at 328. Tennessee's law is. If it covers expression at all, it "addresses the collateral or 'secondary effects' of the expression, not the effect the expression itself will have on others." *Connection*, 557 F.3d at 328. It is not plausibly motivated by a desire to censor certain content or punish certain platforms. *See Nat'l Ass'n of Theatre Owners v. Murphy*, 2020 WL 5627145, at *9-10 (D.N.J. Aug. 18); *Farm Lab. Org. Comm. v. Stein*, 56 F.4th 339, 349-50 (4th Cir. 2022). It regulates the covered social-media platforms because their "special characteristics" make minors particularly susceptible to sexual exploitation and other collateral harms. *Turner*, 512 U.S. at 661; *see* Janssen Decl. ¶¶20-21; LEOs Decl. ¶¶14-16. This Court owes "deference" to these "legislative judgments about the collateral effects." *Connection*, 557 F.3d at 334. (And because the Act would satisfy strict scrutiny, it would necessarily satisfy intermediate scrutiny. *Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995).)[4]

2. Vagueness

NetChoice does not claim that the Act's coverage definition is vague as applied to any member. It challenges the Act only "as applied" to its members who "*are* covered." Mot.9 (emphasis added). NetChoice is not confused whether the Act applies to its "covered members"—hence the word "covered." *E.g.*, Mot.25, 3. It concedes that the Act applies to "YouTube," "Pinterest," "Dreamwidth," "Facebook," "Instagram," "Nextdoor," "Snapchat," and "X," Mot.3, and it identifies no member that cannot tell whether the Act covers it. It certainly provides no "evidence" on this point. *Cf. NetChoice v. Griffin*, 2023 WL 5660155, at *14 (W.D. Ark. Aug. 31). Any as-applied challenge

[4] Texas's law in *Moody* defined "social media platform" similarly. *See* 144 S.Ct. at 2395 & n.2. If NetChoice were right that this definition makes "all of the Act's operative provisions content-based," Mot.15, then the Court would not have *rejected* NetChoice's facial challenge.

is thus forfeited and unsupported. *See Meriwether v. Hartop*, 992 F.3d 492, 518 (6th Cir. 2021). NetChoice also lacks standing to bring as-applied claims, as explained. *Supra* I.A.1.

For similar reasons, NetChoice cannot challenge the Act's coverage definition as vague on its face. A plaintiff who cannot bring an as-applied vagueness challenge—because "the statutory terms are not vague as applied" to him—cannot bring a facial vagueness challenge. *Holder v. Humanitarian L. Proj.*, 561 U.S. 1, 18-19, 21 (2010); *Meriwether*, 992 F.3d at 518. NetChoice suggests this rule doesn't apply when the law regulates speech, Mot.23-24, but the Supreme Court held otherwise in *Holder*, 561 U.S. at 21-24. (And the Act's provisions don't regulate speech either. *Supra* I.A-B.) Nor is NetChoice's facial vagueness challenge "ripe," given that its arguments turn on hypothetical applications to hypothetical platforms before Tennessee's authorities have implemented the Act. *Carman v. Yellen*, 112 F.4th 386, 401-04 (6th Cir. 2024); *Holder*, 561 U.S. at 24-25.

NetChoice's cursory vagueness arguments fail anyway. A law is facially vague only when it "is utterly devoid of a standard of conduct so that it simply has no core and cannot be validly applied to any conduct." *SisterSong v. Gov'r of Ga.*, 40 F.4th 1320, 1327 (11th Cir. 2022) (cleaned up). "[P]erfect clarity and precise guidance have never been required," even for laws "that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). The law is full of "flexible" "standards," *id.*, and "[c]lose cases can be imagined under virtually any statute," *United States v. Williams*, 553 U.S. 285, 306 (2008). Contra NetChoice, Mot.24, the Act is not vague because it fails to define common words like "primarily," "incidental," "predominantly," or "generally," *see Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio S.Ct.*, 894 F.3d 235, 247 (6th Cir. 2018). Those words have a "fairly ascertainable meaning" and have been "upheld" by prior cases. *CCIA*, 2024 WL 4051786, at *16-17 & n.15.[5] They

[5] *See, e.g.*, *CCIA*, 2024 WL 4051786, at *16-17 & n.5 ("primarily" and "incidentally" not vague); *United States v. Gibson*, 998 F.3d 415, 419-20 (9th Cir. 2021) ("primarily used by children" not vague); *United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 468-71 (S.D.N.Y. 1997) ("primarily useful" not vague); *McGowan*, 366 U.S. at 428 ("incidental" not vague); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513,

describe platforms that mostly have the specified features, while excluding platforms that mostly do not. *Id.* at *17. "Context" also matters when assessing vagueness. *Holder*, 561 U.S. at 24. These words all modify the overarching term "social media platform," a term that's already "commonly understood." *Moody*, 144 S.Ct. at 2394-95. The sophisticated "business people" who must decide whether the Act covers a platform will know "either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation." *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

The Act's coverage definition is not vague as applied to the main social-media platforms, let alone "'in all of its applications.'" *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 422 (6th Cir. 2014). NetChoice doesn't argue "arbitrary and discriminatory enforcement," *Meriwether*, 992 F.3d at 518, and it can't because enforcement turns on the platform's operations, not officials' "wholly subjective judgments," *Holder*, 561 U.S. at 20. Tellingly, NetChoice has "little (or no) actual confusion" about who is covered and not covered. *CCIA*, 2024 WL 4051786, at *17; *see* Mot.3 (listing, as covered, eight websites); Mot.21 & Doc. 1 ¶¶86, 92 (listing, as not covered, Hulu, LinkedIn, and Roblox). Any hypothetical difficulties with applying the Act's definition to other social-media platforms would not make the statute unconstitutionally vague. *Platt*, 894 F.3d at 251. Those issues can be addressed "on an as-applied basis" if a party who "does not know whether the law applies to them" ever emerges. *CCIA*, 2024 WL 4051786, at *17; *accord Holder*, 561 U.S. at 21-25; *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

NetChoice's vagueness "argument is a stretch," *CCIA*, 2024 WL 4051786, at *17, which is why even some of the courts that ruled for NetChoice didn't endorse this argument. The few cases that did endorse it, *see* Mot.24, are distinguishable. Tennessee has "substantially more room for

521 (1994) (collecting federal criminal statutes that say "primarily intended"); *Wiesenfelder v. Riley*, 959 F. Supp. 532, 535-37 (D.D.C. 1997) (applying a judge-made test that asked whether something was "predominantly internal"); *Ciba-Geigy Corp. v. EPA*, 874 F.2d 277, 280 (5th Cir. 1989) (applying a federal statute that used "generally").

imprecision" than other States because its law lacks "criminal" penalties. *Meriwether*, 992 F.3d at 518 (cleaned up); *see* T.C.A. §47-18-5705. Those other cases also had additional arguments, evidence, and statutory terms not present here. *See Griffin*, 2023 WL 5660155, at *14-15; *NetChoice v. Fitch*, 2024 WL 3276409, at *15 (S.D. Miss. July 1).

II. NetChoice has not carried its burden on the other preliminary-injunction factors.

A. Irreparable harm

Merits aside, this Court should deny NetChoice's motion based solely on its failure to prove irreparable harm. *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327-28 (6th Cir. 2019). NetChoice briefly notes two harms—unrecoverable compliance costs and chilled speech—but substantiates neither.

NetChoice cannot claim compliance costs as its irreparable harm. Mot.25. "[O]rdinary compliance costs are typically insufficient to constitute irreparable harm" because they can be recovered at the end of trial via "monetary damages." *Freedom Holdings v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (cleaned up); *SO Apartments v. San Antonio*, 109 F.4th 343, 353 (5th Cir. 2024). Though NetChoice cites cases where this rule doesn't apply because *federal* officials cannot be sued for damages, Mot.25, §1983 allows personal-capacity suits for damages against *state* actors, *Lewis v. Clarke*, 581 U.S. 155, 166 (2017).

NetChoice's compliance costs are also insufficiently proven. For many, if not all its members, the "complained of costs should already have been incurred." *AHA v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). Some platforms admit as much for parental supervision. Mot.4, 8 & n.5. And the others likely spent the resources needed for age verification and parental consent already—because they are multi-billion-dollar companies that study these things, because they are prepared to comply with laws like Tennessee's, or because they operate in other countries that require the same thing. Allen Decl. ¶¶8-14. Tellingly, NetChoice knew that Tennessee's law passed in May 2024. Ex. 40. Yet NetChoice waited five months to file this suit and wants relief by "December 31"—one day before the Act's effective date. Doc. 8 at 1. That these companies are not worried about coming into

compliance immediately on January 1, should their motion fail, proves that they've incurred these costs already. *AHA*, 625 F.2d at 1331. And NetChoice's five-month delay in filing this motion independently defeats its claim of irreparable harm. *See Pals Grp. v. Quiskeya Trading Corp.*, 2017 WL 532299, at *6 (S.D. Fla. Feb. 9) ("Courts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months." (collecting cases; cleaned up)).

NetChoice cannot claim irreparable harm in the form of chilled speech either. *Cf.* Mot.24-25. Its constitutional claims likely fail. *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Even if they had merit, they assert the rights of absent, third-party, future users. *Supra* I. Even if that were acceptable for "standing," the "irreparable harm" needed to get a preliminary injunction requires an imminent violation of the movant's *own* rights. *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 511 (2d Cir. 2005); *accord Nutrition Distribution v. Enhanced Athlete*, 2017 WL 5467252, at *2 (E.D. Cal. Nov. 14) ("'harms alleged against third parties are not relevant to the irreparable harm prong'"); *Corral v. Cuyahoga Cnty.*, 2024 WL 4475458, at *2 (N.D. Ohio Sept. 17) (same for "constitutional" harms). In all events, the notion that the Act's reforms will dissuade or prevent *future* users from using social media is not "'certain and immediate.'" *D.T.*, 942 F.3d at 327. And it's overly "'speculative.'" *Id.* NetChoice offers no proof that the Act's reforms objectively chill reasonable users from joining social-media platforms, *supra* I.A.2, I.B, and any "subjective chill" doesn't count as irreparable harm, *Greer v. Mehiel*, 2016 WL 828128, at *10 (S.D.N.Y. Feb. 24).

B. Balance of equities and public interest

This Court could also deny a preliminary injunction based on its equitable discretion. *E.g.*, *Lion Apparel v. Cincinnati*, 2005 WL 5574422, at *2 (S.D. Ohio Feb. 22). The balance of harms and public interest—which "merge" here, Mot.25—warrant that result. *E.g.*, *Free Speech Coal. v. Paxton*, 144 S.Ct. 1473 (2024) (refusing to reinstate a preliminary injunction against an online age-verification provision).

As explained, any harm to NetChoice is minimal. Its constitutional claims are not yet proven, likely wrong, and at least debatable. *See Free Speech Coal. v. Paxton*, 144 S.Ct. 2714 (2024) (granting certiorari to resolve a circuit split on age-verification laws). Its compliance costs are recoverable later and largely incurred already. And its predictions of chilled speech are speculative and distant. *Supra* II. If any Tennesseans imminently wanted to create accounts without age verification or parental consent, they could do so before December 31. *See L.W.*, 83 F.4th at 491 (delayed effective date "lessen[s] the harm"). NetChoice also never weighs the offsetting *increase* in social-media usage that will occur when the Act's broadly popular reforms make parents and others feel safer. *See* Allen Decl. ¶14. If doubts remain, NetChoice's unexplained "delay" tips the equitable balance against it. *Benisek v. Lamone*, 585 U.S. 155, 158-60 (2018).

Any costs to NetChoice are dwarfed by the substantial harms that an injunction would inflict on Tennessee, its children, and the broader public. Preliminarily enjoining a State's democratically enacted statute inflicts "'irreparable injury.'" *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020). And here, Tennessee's elected leaders—acting with far more evidence, expertise, and accountability than a court on an abbreviated preliminary-injunction record—determined that the Act's protections were needed to protect the State's children from devastating harms. *See L.W.*, 83 F.4th at 491. Those harms include mental-health problems (depression, anxiety, and self-harm), loss of sleep, academic declines, and increased risk of sexual exploitation. Kaliebe Decl. ¶¶21-36, 69-160; Ex. 14 at 6-10; Ex. 15 at 113-41, 143-72; Ex. 16. Unlike monetary costs for a few companies or the annoyance that some users might feel about age verification, Tennessee's harms involve permanent, lifelong impacts that jeopardize the well-being of a generation. "Tennessee['s] … interests in applying these laws to [its] residents and in being permitted to protect [its] children from health risks weigh heavily in favor of [it]." *L.W.*, 83 F.4th at 491.

III. Any preliminary injunction should be appropriately tailored.

If this Court did issue a preliminary injunction, that relief could not "'exten[d] further than necessary.'" *Id.* at 490. It couldn't extend to "nonparties." *Id.* And it couldn't freeze enforcement of more of the law than necessary. *Labrador v. Poe*, 144 S.Ct. 921, 923 (2024) (Gorsuch, J., concurring).

As for parties, a preliminary injunction should protect only those platforms that are covered, identified members of NetChoice and for whom the law is likely unconstitutional. As-applied claims require as-applied relief; so if the Act were likely unconstitutional as applied to Nextdoor and Dreamwidth but not as applied to Facebook and Instagram, then an injunction should block its enforcement only as applied to Nextdoor and Dreamwidth. *Benezet Consulting LLC v. Pa. Sec'y*, 26 F.4th 580, 585 (3d Cir. 2022); *see Connection*, 557 F.3d at 342 ("A court may enjoin the unconstitutional *applications* of the law while preserving the other valid applications of the law."). Even if the Act were likely unconstitutional on its face, any injunction must be "party-specific and injury-focused." *L.W.*, 83 F.4th at 490. NetChoice has claimed injuries to seven current members who run eight websites covered by the Act. Mot.3. And NetChoice has moved for an injunction that bars enforcement against only those "covered members' websites." Mot.25; Doc. 8 at 1. So an injunction should not block enforcement of "the Act" generally. Mot.3; *see L.W.*, 83 F.4th at 490. Nor should it block enforcement with respect to "NetChoice" generally, allowing current nonmembers to join the association later (or rejoin, like TikTok) and take advantage of the injunction without proving an injury or a valid claim. Instead, any injunction should spell out the precise platforms for which enforcement is enjoined—"Facebook," "Instagram," and the other six named in NetChoice's papers. *See* Mot.3.

As for provisions, an injunction should bar enforcement of only those parts that are likely unconstitutional, letting Tennessee enforce as much of the rest as possible. Because facial invalidation must be a "last resort," courts cannot do it when "partial invalidation" would suffice. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). And under Tennessee law, "sections, clauses, sentences and parts"

of state statutes "are severable." T.C.A. §1-3-110. Courts should thus freeze enforcement of only the unconstitutional parts when the rest of the statute is something "'the legislature would have enacted.'" *Willeford v. Klepper*, 597 S.W.3d 454, 471 (Tenn. 2020); *e.g.*, *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 627-28 (6th Cir. 2018); *Memphis P.P. v. Sundquist*, 175 F.3d 456, 466 (6th Cir. 1999).

Applying severability here, much of the Act could remain. The parental-supervision provision (§5703(c)) is likely severable: Social-media platforms can adopt supervisory tools without age verification and parental consent, as many platforms do now, *see* Mot.4 & n.5; and keeping that provision furthers the legislature's goal of "[p]rotecting children," T.C.A. §47-18-5701. The revocation provision (§5703(b)) is also likely severable: Even if social-media platforms need not verify age or parental consent, they can still honor the revocations of *known* parents of *known* minors. *Brown*, 564 U.S. at 795 n.3. And if the Act's explanations of what does not count as a "social media platform" makes it unconstitutional (§5702(9), (2)), then those subsections likely can be severed too. The primary definition of "social media platform" (§5702(9)(A)) would remain; the Act's key provisions (age verification, parental consent, and parental supervision) could still be enforced; and the Act's scope would barely change. Almost everything that the Act specifies as not covered—gaming, online shopping, payment services, platforms where users don't create most content, etc.—would not fall under the "commonly understood" definition of "social media platform" anyway. *Moody*, 144 S.Ct. at 2394. Though severing §5702(9)(B) might make the Act cover "LinkedIn," Mot.21, no legal principle prevents severance from expanding the scope of a statute, *see, e.g.*, *Barr v. AAPC*, 591 U.S. 610, 632 (2020). And here, the legislature would have wanted to "protec[t]" more children by adding platforms, T.C.A. §47-18-5701, rather than leaving all children unprotected because some clarifying language was vague or content-based.

CONCLUSION

For all these reasons, this Court should exercise its discretion to deny NetChoice's motion.

Date: November 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 1, 2024, I e-filed this document with the Court, which automatically emailed everyone requiring notice.

/s/ *Cameron T. Norris*