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*.	Civil Action No. 3:24-cv-01191

PLAINTIFF NETCHOICE'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND RENEWED MOTION FOR PRELIMINARY INJUNCTION

NetChoice's members need relief now. Tennessee House Bill 1891 ("Act") has been in effect for 24 days, causing NetChoice members and their users irreparable harm. The parties agree that they can largely rest on the preliminary injunction briefing. ECF 48 at 4; ECF 54 at 1. That is because the relevant law has not changed since NetChoice filed its preliminary injunction motion. Supreme Court precedent and multiple district court decisions addressing similar laws demonstrate the Act is unconstitutional. ECF 9. The new cases Defendant cites are not to the contrary.

The Act taking effect has already irreparably injured First Amendment rights. NetChoice told this Court in October that if the Act were "to go into effect," its member "Nextdoor expect[ed] that it would have to bar users under 18." ECF 48-3 ¶ 37. Upon the Act's January 1, 2025, effective date, that is what happened: Nextdoor updated its policies to provide that "[i]ndividuals who are under the age of 18 are not permitted to create an account . . . starting on January 1, 2025, if they are residents of the State of Tennessee." ECF 48 at 3 (citation omitted).

Defendant's opposition relies on inapposite cases and minimizes the First Amendment harms that NetChoice members face.

1. NetChoice members will continue to suffer irreparable harm without immediate relief from this Court. ECF 9 at 24-25; ECF 35 at 15; ECF 48; ECF 49 at 24-25.

First, covered NetChoice members face the continued irreparable harm of having to choose between complying with an unconstitutional law or risking significant monetary penalties—$1,000 per violation—for noncompliance. ECF 48 at 3; ECF 49 at 8. Violation of members' First Amendment rights "unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (citation omitted). Again, Nextdoor provides a striking example: Now minors in Tennessee cannot offer their babysitting or lawncare services, discuss local events with their neighbors, or get safety alerts for their area on Nextdoor. Rather than

acknowledge those harms, Defendant baselessly claims that Nextdoor has not done enough. ECF 54 at 10-11. Furthermore, NetChoice submitted unrebutted evidence that asking for even users' ages can deter them from creating accounts—let alone asking for identification or documentation. *See* ECF 48-3 ¶¶ 22-28. This record evidence shows that "[c]ompliance" would not "prove Tennessee right" that "the Act's reforms did not decrease the number of new accounts." ECF 54 at 12. Instead, age-verification would further chill protected speech.

Although Defendant spends much of his opposition declaring that NetChoice members are not in compliance, he claims that risk of enforcement "between now and a decision on the preliminary injunction" is "speculative." ECF 54 at 2, 13. But Defendant has not disclaimed his intent to enforce the Act against NetChoice members *or* to hold them liable for any violations incurred prior to a decision on the preliminary injunction. The law is clear that NetChoice members need not wait until enforcement before challenging the Act. ECF 45 at 1-2.[1]

Second, the Act imposes unrecoverable compliance costs. ECF 9 at 24-25; ECF 48 at 3; ECF 49 at 25. Defendant continues to obfuscate this issue by claiming that NetChoice members' compliance costs are recoverable because they can sue Tennessee officials in their personal capacities. ECF 54 at 11. Defendant's own counsel is presumably not conceding that Defendant could be *personally* liable for the compliance costs of NetChoice's members. But if so, that is wrong on the law: Courts have recognized that the likelihood of a qualified immunity defense is sufficient to make costs unrecoverable.[2]

[1] To the extent any NetChoice members are purportedly not in compliance with the Act, ECF 54 at 3-4, NetChoice submitted declarations stating how difficult compliance would be, ECF 48-4 ¶¶ 21-26; ECF 48-3 ¶ 37. Thus, any purported noncompliance is a foreseeable outcome of the State's attempt to impose burdensome and unconstitutional requirements for covered services to overhaul their businesses and lose their rights.

[2] *See, e.g.*, *New Jersey Staffing All. v. Fais*, 2023 WL 4760464, at *7 (D.N.J. July 26, 2023),

Regardless, NetChoice members are suffering irreparable harm. If the First Amendment violation is already clearly established (to defeat qualified immunity), they suffer irreparable harm in the loss of First Amendment freedoms. If it is not already clearly established (but still violates the First Amendment), then qualified immunity would bar recovery.

2. The Supreme Court's decision in *TikTok Inc. v. Garland*, 2025 WL 222571 (U.S. Jan. 17, 2025), was expressly limited to one service that posed unique national security concerns from "a *foreign adversary's control* over a communications platform." *Id.* at *4 (emphasis added). The Court repeatedly emphasized the narrowness of its holding. *E.g.*, *id.* at *1 ("Our analysis must be understood to be narrowly focused."); *id.* at *5 (describing the "challenged provisions" as "impos[ing] TikTok-specific prohibitions due to a foreign adversary's control over the platform"); *id.* at *6 ("[W]e emphasize the inherent narrowness of our holding . . . TikTok's scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government's national security concerns.").

The Act here, by contrast, is the kind of "law targeting any other speaker" that *TikTok* concluded "would by necessity entail a distinct inquiry and separate considerations." *Id.* So Defendant wrongly says that *TikTok* shows the Act does not regulate expression. ECF 54 at 7. Unlike a law requiring divestment of a specific foreign-controlled company for national security reasons, the Act restricts access to myriad websites posing no such concerns. ECF 35 at 9.[3]

Despite *TikTok*'s unique context, the Court still "recognized a number of . . . First

aff'd, 110 F.4th 201 (3d Cir. 2024); *Firetree, Ltd. v. Creedon*, 2008 WL 2078152, at *15 (M.D. Pa. May 15, 2008); *Blum v. Schlegel*, 830 F. Supp. 712, 726 (W.D.N.Y. 1993*), aff'd*, 18 F.3d 1005 (2d Cir. 1994).

[3] Defendant also argues *TikTok* supports its secondary effects argument. ECF 54 at 6. But *TikTok* simply makes passing references to cases like *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), for general First Amendment principles. And as NetChoice has explained, this case is about regulating access to speech itself, not regulating the secondary effects of speech. ECF 35 at 10-11.

Amendment interests" that are at issue here. *TikTok*, 2025 WL 222571, at *4. For websites, that includes "content moderation, content generation, access to a distinct medium for expression, association with another speaker or preferred editor, and receipt of information and ideas." *Id.*; *id.* ("An entity 'exercising editorial discretion in the selection and presentation' of content is 'engaged in speech activity.'" (quoting *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024))); *id.* at *10 (Gorsuch, J., concurring in the judgment) ("[S]peakers of all kinds routinely make less-than-transparent judgments about what stories to tell and how to tell them. Without question, the First Amendment has much to say about the right to make those choices."). For users, the Court recognized the harms from restricting their access to online services, which it observed "burdens those users' expressive activity in a non-trivial way." *Id.* at *4. That was all true, even though the *TikTok* law was facially a "regulation of corporate control." *Id.* Here, the Act is facially a regulation of access to speech—not foreign corporate control. Defendant's repeated insistence that the Act is a regulation of "contract" (ECF 54 at 7-8) also ignores the effects on expression. *See* ECF 35 at 9.

Nor did *TikTok* change the governing precedent for what constitutes a content-based law. ECF 49 at 15-18. Tellingly, the Supreme Court declined to decide whether an exclusion for certain content-based categories of websites—"product reviews, business reviews, or travel information and reviews"—made the divestiture law content-based because that provision did not apply to TikTok. *TikTok*, 2025 WL 222571, at *5. Here the Act's content-based exclusions for "career development opportunities" and "reviewing products offered for sale," § 47-18-5702(9)(B)(v), (vii), are plain content-based criteria for regulation. ECF 49 at 15-16.

TikTok's tailoring discussion is also unique. There, a law regulating only TikTok was properly tailored where the foreign-controlled entity itself was the purported harm. *TikTok*, 2025 WL 222571, at *8. Here, by contrast, the Act regulates all manner of social media. Defendant has

yet to justify that simultaneously underinclusive and overinclusive scope. *See* ECF 35 at 12-14. Moreover, Tennessee's Act does not involve national security, where courts traditionally defer to the federal government. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34 (2010). Where governments attempt to regulate minors' access to protected speech, there is no such deference and "ambiguous proof will not suffice." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 800 (2011).

3. The Sixth Circuit's order in *Free Speech Coalition v. Skrmetti*, Doc.23 at 1, No. 24-6158 (6th Cir. Jan. 13, 2025) (slip op.), also does not control here because it concerns age-verification to access *pornography* websites—which is speech that is already *unprotected for minors* and separately regulated by Tennessee. Restricting minors' (and adults') access to *protected* speech on social media websites is entirely different. True, NetChoice argued that *if* age-verification for pornography websites was unconstitutional, then age-verification for social media websites would certainly be unconstitutional. ECF 40. The opposite is not true, though. Nothing in *Free Speech Coalition* suggests that Tennessee can require people to provide IDs for age verification to discuss, say, public policy on Facebook, because that is unquestionably protected speech.

Consequently, the Sixth Circuit's facial-challenge analysis is distinguishable. As an initial matter, the analysis turned on the court's (unexplained) conclusion that requiring age verification for pornography websites is constitutional. *Free Speech Coalition*, slip op. at 5. That left the court only to consider plaintiff's "hypotheticals" about speech that could be potentially protected for minors. *Id.* Here, the Act's effect is clear: It covers an immense amount of protected speech. The parties agree on the range of regulated "actors" and "activities": services that disseminate user posts on an array of topics through feeds, boards, forums, and similar webpages. ECF 35 at 6. "With that scope clear, all aspects of the Act's speech regulations, 'in every application to a covered social media company, raise the same First Amendment issues.'" *Id.* (citation omitted).

Instead, it is *Defendant* who invites this court to "speculate about 'hypothetical' or 'imaginary' cases" to confuse the facial analysis. *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 450 (2008) (citation omitted). The Act does not have "many constitutional applications." ECF 54 at 8.[4] For instance, Defendant attempts to argue that the Act is somehow justified because it might reach pornography. Yet any such applications are "substantially outweigh[ed]" by the *billions* of pieces of protected content the Act will restrict access to. *Moody*, 603 U.S. at 724. That makes sense. The Act here is not designed to, nor tailored to, address pornographic content online. *Free Speech Coalition* demonstrates as much: Tennessee has a *separate* law barring minors from accessing pornography websites and requiring those websites to verify ages. § 39-17-912. Thus the State's concerns about online pornography are amply served by a more tailored solution.

Defendant also erroneously refers to the chilling effect of age verification on adults as "hypothetical," but this is a real First Amendment harm recognized by *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004), and *Reno v. ACLU*, 521 U.S. 844, 882 (1997). The Sixth Circuit's *Free Speech Coalition* order did not address these cases. Moreover, the chilling effect of age-verification is supported by uncontested record evidence from Nextdoor. *See* ECF 48-3 ¶¶ 22-28. It does not matter whether some adults would be willing to accept this unconstitutional burden: The First Amendment does not allow the government to put them to this choice.

4. Finally, NetChoice did not delay in filing this lawsuit or in seeking relief. NetChoice has been (successfully) challenging unconstitutional laws like Tennessee's across the country, and it challenged the Act here nearly *three months before* it went into effect. ECF 48 at 1 n.1. Defendant contributed to the so-called "delay" he now complains about by obtaining a two-week *extension* to

[4] Defendant misrepresents (ECF 54 at 8) NetChoice's discussion of federal law to say that NetChoice concedes that the Act is constitutional for minors younger than 13. ECF 35 at 13 n.10.

file his preliminary-injunction opposition—from October 18 to November 1. ECF 48 at 1-2. In all events, NetChoice's motion was fully briefed by November 19, 2024, and NetChoice's request for a ruling by December 31, 2024, was designed in a *joint filing* to give the Court "ample time to decide the motion before the Act's effective date." ECF 20 at 1. When the court took no action by January 1, 2025, NetChoice was forced to ascertain the status of the case, ECF 42, wait for a status conference, ECF 44, and wait for recusal and reassignment, ECF 47. NetChoice had no reason to expect that it would learn a week *after* the Act's effective date that the judge might recuse and the case would be reassigned.[5] By that time, the changed facts necessitated a TRO request.[6]

Defendant faults NetChoice for not seeking a TRO until after the Act took effect, claiming a TRO would disrupt the status quo. ECF 54 at 9-10. But NetChoice had no reason to seek a TRO before the extraordinary circumstances discussed above. Defendant also suggests that NetChoice is less entitled to a TRO than a preliminary injunction because it requires irreparable harm occurring between now and a future preliminary injunction hearing. ECF 54 at 10. But as explained, ECF 48-49, NetChoice's members and their users are experiencing irreparable harm *now*.

Accordingly, NetChoice requests that this Court issue a temporary restraining order as soon as possible and grant NetChoice's pending preliminary injunction motion.

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[5] The cases Defendant cites claiming that "unexplained delays defeat interim relief," ECF 54 at 13, are also distinguishable. *See Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 898 (6th Cir. 2024) ("no indication that [plaintiff] sought an expedited ruling" in course of *four-year* suit); *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 42, 50 (1st Cir. 2021) (seeking preliminary injunction of school admissions plan *nearly six weeks after* school had *closed* application process, which opened over three months before lawsuit was filed); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (waiting five months *after filing a complaint* to seek preliminary injunction); *Corizon, LLC v. Wainwright*, 2020 WL 6323134, at *11 (M.D. Tenn. Oct. 28, 2020) (seeking TRO *12 days* before requested deadline).

[6] Contrary to Defendant's suggestion, NetChoice did not "make new arguments and submit new evidence." ECF 54 at 1. NetChoice's memorandum in support of its TRO motion is nearly identical to its motion for a preliminary injunction. ECF 48 at 4.

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Respectfully submitted,

/s/ Steven P. Lehotsky

Steven P. Lehotsky*
Scott A. Keller*
Jeremy Evan Maltz*
LEHOTSKY KELLER COHN LLP
200 Massachusetts Avenue, NW, Suite 700
Washington, DC 20001
(512) 693-8350
steve@lkcfirm.com
scott@lkcfirm.com
jeremy@lkcfirm.com

Junaid Odubeko (Bar No. 023809)
BRADLEY ARANT BOULT CUMMINGS LLP
1221 Broadway Suite 2400
Nashville, TN 37203
(615) 244-2582
jodubeko@bradley.com

Joshua P. Morrow*
LEHOTSKY KELLER COHN LLP
408 W. 11th Street, 5th Floor
Austin, TX 78701
(512) 693-8350
josh@lkcfirm.com

Jared B. Magnuson*
LEHOTSKY KELLER COHN LLP
3280 Peachtree Road NE
Atlanta, GA 30305
(512) 693-8350
jared@lkcfirm.com

*admitted *pro hac vice*

Attorneys for Plaintiff NetChoice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically via the Court's CM/ECF system, causing electronic service upon the following on this the 24th day of January, 2025:

Thomas McCarthy
Cameron T. Norris
Thomas S. Vaseliou
Consovoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

Adam K. Mortara
Lawfair LLC
40 Burton Hills Blvd., Ste. 200
Nashville, TN 37215

/s/ Jeremy Evan Maltz
Jeremy Evan Maltz