UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

NETCHOICE,

Plaintiff,

v.

ALAN WILSON, in his official capacity as the South Carolina Attorney General,

Defendant,

and

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina,

Intervenor-Defendant.

Civil Action No. 3:26-cv-00543-SAL

PLAINTIFF NETCHOICE'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTRODUCTION

Defendants assert broad authority to regulate the digital "public square" because they say it has become more "dangerous." Resp.1.[1] But regulating the "essential venues" for speech must satisfy the First Amendment, and Defendants do not come close. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). They cite dissenting opinions as law, offer no evidence the Act will address any harm (much less in narrowly tailored fashion), and ignore the benefits of the speech their Act directly constrains. Their rhetoric mirrors what governments have tried to argue for half a century: their Act regulates only "conduct," *Chiles v. Salazar*, 2026 WL 872307, at *8, 10 (U.S. Mar. 31, 2026), and "seeks to protect children," *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011). This case is no different: protected speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 795.

Defendants retreat to arguments about standing and the facial-challenge analysis in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), contending their law is so broad that facial review is impossible. Resp.1. But NetChoice has standing, as courts have repeatedly held, and *Moody* only requires a court to interpret a law's scope and weigh the unconstitutional applications against any "plainly" legitimate sweep. 603 U.S. at 723. That analysis is straightforward here: South Carolina squarely designed this Act to regulate speech, targeting websites that publish speech and expressive activities like "playing . . . videos" and "promoting" "*content*," §§ 39-80-10(3), (12) (emphasis added). This "record amply demonstrates that the [State] deliberately set about to achieve the suppression of publications deemed 'objectionable.'" *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). Thus, there is no plainly legitimate sweep, and Defendants identify none.

[1] This Reply cites Plaintiff's opening brief as "Mem."; Defendants' Response as "Resp."; the parties' opening declarations as "Decl."; and Plaintiff's reply declarations as "Supp. Decl." Other citation formats follow the conventions in Plaintiff's opening brief. *See* Mem.11 at n.3.

The Act fails for several independent reasons beyond the First Amendment. It is vague, as the Ninth Circuit recognized last month for a similar law. *NetChoice, LLC v. Bonta*, 170 F.4th 744, 765 (9th Cir. 2026) ("*Bonta-AADC II*"). Section 230 preempts it. *See M.P. ex rel. Pinckney v. Meta Platforms, Inc.*, 127 F.4th 516, 525 (4th Cir. 2025). COPPA preempts it as well, with the FTC last year expressly *rejecting* identical COPPA restrictions as harmful to the internet and potentially unconstitutional. Mem.35-36. The Act also raises serious Commerce Clause burdens, Mem.39, and imposes extraordinary, unrebutted compliance burdens without time to comply. Mem.42.

The remaining factors are met. The irreparable harms, equities, and public interest all favor an injunction. Without one, the Act would immediately require deeply disruptive and potentially irreversible changes to websites nationwide that would come into force before the Court can rule.[2]

ARGUMENT

I. NetChoice has standing on behalf of both its members and their users.

Defendants do not dispute that NetChoice satisfies the first two prongs of associational standing. Resp.6; *see* Mem.16 n.4. As to the third prong, constitutional claims of this type do not "traditionally require" individualized participation, as Defendants assert. Resp.6. Although suits for "*damages*" sometimes do, "an action seeking prospective declaratory and injunctive relief"—such as NetChoice's challenge here—is "the very type of relief for which associational standing was originally recognized." *Ass'n of Am. R.Rs. v. Hudson*, 144 F.4th 582, 590 (4th Cir. 2025).

Defendants' invocation of *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1015 (9th Cir. 2025) ("*Bonta-SB976*"), does not support a contrary result. The Ninth Circuit there joined many other courts in recognizing NetChoice's associational standing to bring both facial and as-applied claims. *Id.* As to the single as-applied claim for which the court questioned standing, that analysis turned

[2] To aid the Court, NetChoice is providing a chart mapping each challenged provision and theory.

on whether the court would need to examine each member's personalization algorithm to determine whether they "respond solely to how users act online." *Id.* at 1014. Of course, *Moody* easily recognized, without extensive fact development, that the algorithms at issue did *not* "respond solely to how users act online." 603 U.S. at 736 n.5.[3] And this Act restricts even "partially" automated personalization. § 39-80-10(12). But to eliminate doubt, NetChoice submitted unrefuted evidence explaining that personalization systems generally involve "expressive and editorial judgments about how best to present information to users" and "expressive judgment calls" that do not respond solely to user behavior. Weber Decl. ¶¶ 39, 42; Cleland Decl. ¶ 53; *see* Weber Supp. Decl. ¶¶ 17-29. No more is required. Regardless, in this Circuit, "whether a legal question requires a fact-specific analysis is a separate question from whether an association may sue on behalf of its members." *Hudson*, 144 F.4th at 589.

NetChoice also has standing to assert users' rights because "the violation of those rights adversely affects" NetChoice members. *NetChoice v. Fitch*, 134 F.4th 799, 805-07 (5th Cir. 2025); *see* Mem.16 n.4. Laws that restrict how websites disseminate speech also restrict users' *access* to speech. The constitutional "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). So, this analysis is "quite forgiving." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). First Amendment litigants also can "challenge a statute" even when their own expressive rights are not violated because "the statute's very existence may cause *others* . . . to refrain from" speech. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (cleaned up). That "bookstores" were plaintiffs in *American Booksellers*, Resp.9, made no difference there or in *Brown*.

[3] This majority discussion was not "dicta," Resp.17, and regardless, it would bind this Court "almost as firmly" as outright holdings, *Yanez-Marquez v. Lynch*, 789 F.3d 434, 450 (4th Cir. 2015).

II. NetChoice is likely to succeed on the merits.

A. NetChoice is likely to succeed on its First Amendment claims.

1. The Act facially violates the First Amendment.

a. By its plain terms, the Act regulates speech. It targets both "content" and content-delivering "features" and use of "data" that South Carolina disfavors. § 39-80-10(3), (12), (15). Online design, content selection and presentation, and data use are essential components of the expressive process. Mem.6-8; *e.g.*, *Moody*, 603 U.S. at 731; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568-70 (2011) ("restraints" on "information" burden the "right to speak"). Defendants' own declarations expressly defend the Act in terms of the "content" it regulates and the "features that alter [that] content." Edelson Decl. ¶¶ 11, 48. That micro-management of the "speech process" to serve the State's own views, *Citizens United v. FEC*, 558 U.S. 310, 336 (2010), subjects the Act to heightened First Amendment scrutiny on its face, *Moody*, 603 U.S. at 740.

Defendants' contrary framing—that the Act "generally regulates conduct, not speech"—ignores the Act's text. Resp.2. Disabling "comments," "recommendations," "notifications," "ranking" of "content," "visibility" of information, "search . . . indexing," and "videos," all regulates speech. §§ 39-80-10(3), (12), 39-80-30; *see Moody*, 603 U.S. at 727. Moreover, the Act goes even further, restricting speech based on its assumed "effects" on listeners. *E.g.*, Edelson Decl. ¶ 48; *see* Mem.17-18. None of this is conduct. "The First Amendment is no word game," and "labels" do not vitiate its protections. *Chiles*, 2026 WL 872307, at *2 (cleaned up); *Sorrell*, 564 U.S. at 570.

Nor is it relevant that the Act sometimes creates burdens instead of bans. Resp.7. "[F]or fully protected speech, 'the distinction between bans and burdens makes no difference.'" *Free Speech Coal. v. Paxton*, 606 U.S. 461, 493 n.12 (2025) (citation modified). Further afield, Defendants' arguments about patents are non sequiturs. Resp.17, 19. Cameras and the printing press are patented, but States cannot regulate their "design" to suppress the speech they enable.

Finally, Defendants' lead "original public meaning" argument fails because it asks the Court to elevate Justice Thomas's dissent in *Brown* over the majority's square holding. Resp.9-10. *Brown* held *on originalist grounds* that governments lack a "free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794-95 & n.3. That rule governs here.

b. *Moody* does not insulate the Act from facial review. It merely reaffirmed that a court must interpret a law's "scope" by assessing which "activities" and "actors" the law regulates, which "applications violate the First Amendment," and how those "measure . . . against the rest." 603 U.S. at 724-25. That analysis is straightforward here because this Act regulates speech on its face. As to activities, the Act regulates—in all applications—the "display [of] content," "videos," "gameplay," "visible" "engagement," "appearance altering filters," "disliked media," and how websites "rank content" and use "data." § 39-80-10(3), (6), (12), (15). As to actors, it focuses on the websites and features that minors are likely to access (and for the most amount of time), which are overwhelmingly expressive,[4] and it exempts entire categories of non-expressive services (physical products, financial services, insurance, healthcare) and preferred speakers (non-profits and governments) from its scope. Mem.11-15, 21. Such "speaker-based restrictions combined with content-based restrictions" are "constitutionally suspect" on their face. *Fusaro v. Cogan*, 930 F.3d 241, 252 (4th Cir. 2019). And Defendants concede the Act aims to "limit[] the time a user spends" on expressive websites. Resp.19. Where a law's "overriding justification" is to restrict expression, and its text does so in substantial applications, facial scrutiny is warranted. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 811 (2000); *e.g.*, *NetChoice v. Griffin*, No. 5:25-cv-5140, ECF 69 at *18 (D. Ark. Apr. 20, 2026) (facial relief appropriate because the "First Amendment implications do

[4] Defendants do not refute that the services minors are most likely to access, and for the longest periods, are those that involve expressive activity. Weber Decl. ¶ 12; *cf. Bonta-AADC*, 170 F.4th at 758 (acknowledging this "may well be the case" but was "not . . . in the record").

not change from platform to platform within the general categories of" restrictions). That is true for each set of challenged provisions here.

First, the reasonable-care provision targets alleged "harms" that always require content judgments. Mem.18-22. Websites must ask whether content may cause reactions (such as "compulsive usage," "anxiety," "depression," "emotional distress," "offens[e]," or "discrimination"") or result in "financial or physical injury" and alter their presentations accordingly. Defendants call this "design," but a mandate based on a "listeners' reaction to speech" is a content-based speech restriction. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (similar); *Counterman v. Colorado*, 600 U.S. 66, 82 (2023) (First Amendment forbids negligence liability for even unprotected speech); Mem.18. Even where compliance might encompass additional considerations, such as identity theft risk, § 39-80-20(A)(5),[5] that inquiry would not replace the need for content judgments. And this provision exempts "information regarding [harm] prevention," which is itself a content distinction. § 39-80-20(C). So, if a website publishes *any* content, this provision requires content judgments in every application.

Second, the personalization restrictions restrict speech in all applications because they regulate how websites "suggest, promote, or rank *content*." § 39-80-10(12). Defendants concede this analysis always depends on whether "content" is "interesting" to a user. Resp.16. That ends *Moody*'s two-step inquiry. 603 U.S. at 724. In every application, the Act targets "actors" whose "activities" consist of disseminating "interesting" "content." The Act is not "justified without reference to the content of the regulated speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

Defendants' only response is to speculate that systems that "merely respond to user interactions[] might not be" expressive. Resp.7, 16. But *Moody* rejected that argument there, *see* 603

[5] Even "identity theft" risk turns on *what* information the service facilitates.

U.S. at 736 n.5, and unrebutted evidence here shows that *no* personalization systems respond solely to user behavior. Weber Decl. ¶¶ 33-34; 43-46; Cleland Decl. ¶ 53. Further, this Act restricts even "partially" automated systems, § 39-80-10(12). Defendants' separate contention that "maximizing user engagement" does not "implicate speech," Resp.16, is dangerous and wrong. Much speech is "designed to entertain as well as to inform" and the "line between [those objectives] is . . . elusive." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Indeed, "draw[ing] the reader into the story" is the *hallmark* of "successful" speech. *Brown*, 564 U.S. at 798; *Winters v. New York*, 333 U.S. 507, 510 (1948) ("one man's amusement [is] another's doctrine").

Third, the default-setting and disablement requirements likewise restrict speech in substantial applications. Mem.23-25. Comments, reactions, autoplay, notifications, filters, and engagement metrics either *are* speech or are inextricably connected with it—in all applications. *E.g.*, Edelson Decl. ¶¶ 45-46 (contrasting "beautification" with "cartoon ears"—both "content"). Defendants argue that the Act "simply require[s] an opt-in" to these features, Resp.20, but that is no defense. The First Amendment places the "burden . . . upon the *viewer*" to opt out. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (emphasis added). And Defendants' attempted analogy to "slot machines," Resp.20, fails because gambling is not expressive—and speech (including games) is protected, *Brown*, 564 U.S. at 789.

Fourth, the mandatory reporting provisions are unconstitutional in substantial applications because they compel non-commercial speech, and compelled speech is expressive by definition. *See* Mem.25-26. Once again, Defendants do not even raise a *Moody*-style denominator argument for these provisions, nor could they, because there is no non-expressive sweep to weigh here.

In combination, the Act forces websites to predict whether protected speech might cause "harm" and disable features that make speech available, thus pressuring services to suppress lawful

content rather than risk liability. That is not a "mash-up," Resp.22; it is exactly the state-directed private censorship the First Amendment forbids. *NetChoice LLC v. Bonta*, 113 F.4th 1101, 1118 (9th Cir. 2024) (law "deputize[d] covered businesses into serving as censors for the State").

c. The challenged provisions fail any level of First Amendment scrutiny. As to strict scrutiny, Defendants offer no "direct causal link between" the harms the Act targets and the "features" it regulates. *Brown*, 564 U.S. at 799. Even for the Act's conceded target of "social media," Edelson Decl. ¶ 30, mere "correlation" or "some effect" between speech and the recited harms (*e.g.*, "fear of missing out" and "social comparison," *id.* ¶¶ 31, 50) "is not compelling." *Brown*, 564 U.S. at 800. Defendants must offer more than the bare assertion that "[b]eing addicted to social media sites is harmful," Resp.44—particularly when their Act applies *far more broadly* than social media.

The Act is also seriously underinclusive. It purports to target specified "harms to minors," Resp.14-18, yet exempts wide categories of activities equally capable of causing those harms. Traditional television, video games, and books (along with hobbies, dancing, and many other things) might cause "compulsive" use. Physical products can cause financial and physical harms. And data practices among local governments and healthcare providers can cause breaches of minors' records that give rise to identity theft. Mem.20-21. But the Act regulates none of these things. Such "wildly underinclusive" scope "when judged against [the Act's] asserted justification, . . . is alone enough to defeat it." *Brown*, 564 U.S. at 802. Nor do Defendants show they ever tried less restrictive alternatives, so their assertion that such alternatives are not "working," Resp.15, fails. All of this more than suffices for *Moody*: "if a plaintiff shows that a statute is content based and the government fails to show that the restriction satisfies strict scrutiny, the plaintiff prevails on their facial challenge." *Imperial Sovereign Ct. of Mont. v. Knudsen*, 170 F.4th 820, 845 (9th Cir. 2026).

The Act fares no better under intermediate scrutiny. It fails at step one because the entire

point of the Act is "the suppression of free expression," so the speech burden is far from "incidental." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).[6] The Act fails at step two because the speech burdens are much "greater than is essential" for all the reasons above. *Id.* Further, by restricting core expressive techniques that help minors both discover content they want to see and *avoid* harmful speech, Weber Decl. ¶ 35, the Act again "burden[s] substantially more speech than is necessary," *Packingham*, 582 U.S. at 106; Mem.21. And although Defendants focus on "social media," *e.g.*, Edelson Decl. ¶ 31, the Act reaches much broader, covering all manner of streaming, online media, research platforms, and educational apps—as to which Defendants do not even attempt to defend the Act. *See* Weber Supp. Decl. ¶¶ 32-53.

2. At a minimum, relief is warranted for NetChoice members' social media, entertainment, communicative, and educational functions.

The Court also can award NetChoice relief as applied to the services in which its identified members engage, Cleland Decl. ¶¶ 7-15; Cleland Supp. Decl. ¶¶ 4-7. These services unquestionably involve expression, and the Act fails the relevant scrutiny as to them for all the reasons above. *See Doe v. Reed*, 561 U.S. 186, 194 (2010) (considering relief as applied to specified activities).

B. NetChoice is likely to succeed on its vagueness claims.

Defendants concede heightened vagueness review is required, Resp.22, as they must: laws burdening expression require "rigorous" vagueness review. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 687–90 (1968) (laws "aimed at protecting children from allegedly harmful expression" must "be clearly drawn and . . . precise"). Defendants assert that "greater tolerance" is warranted because the Act has only civil penalties. Resp.25. But where speech is concerned, "[w]hat a State may not constitutionally

[6] *Supra* at 7; *e.g.*, Edelson Decl. ¶ 24 (watching "fewer minutes per day"); *id.* ¶27 (less "new content"); *id.* ¶ 34 (less "engagement").

bring about by means of a criminal statute is likewise beyond the reach of its civil law." *NY Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). Defendants also wrongly contend that the Act's vague terms survive because they have a "legitimate sweep." Resp.22. Defendants do not even analyze the Act's sweep, much less show any part of it is legitimate. Regardless, a law is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct" is prohibited or authorizes "arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 52-56 (1999). This Act fails both prongs. Mem.27.

"Harms." Defendants contend that the Act's various "harms," § 39-80-20(A), are not vague because some are "defined," and NetChoice poses "single hypothetical[s]." Resp.25-26. But the definitions themselves are vague. Mem.28-31. And behind NetChoice's illustrative hypotheticals, none of which Defendants address, are countless more. Is checking email to distract from a tedious assignment "compulsive usage"? Sending texts during dinner? These are not "margin-probing" (Resp.25) but core questions websites must answer to avoid liability. Further, the Act speaks of a *single* "user," § 39-80-10(1), so the answers depend on both the normative assumptions of enforcement officials and the sensitivities of a particular user, meaning a website "accessed by millions of child users could face liability whenever any one of them experiences" a limit to a life activity "that a regulator deems" "substantial." *Bonta-AADC II*, 170 F.4th at 767.

The same defects arise for "psychological," "emotional," "financial," "offensive," and "physical" "harms." § 39-80-20(A)(2)-(7). In *Bonta-AADC II*, the Ninth Circuit addressed a similar law barring websites from using data in ways that were "materially detrimental to the physical health, mental health, or well-being of a child." 170 F.4th at 764. That standard was unconstitutional because "examples like sleep loss, distraction, or hurt feelings" raised "difficult questions" and the Act offered no "guidance as to the breadth of [regulated] conduct." *Id.* at 765. Same here.

Defendants only exacerbate this vagueness by referring to the Diagnostic and Statistical Manual of Mental Disorders (DSM). Resp.27. The DSM's 1,000+ references to "severe" simply prove the word is nuanced and context-dependent, not clear. And although the DSM describes symptoms of conditions like "anxiety"—such as "irritability" and "restlessness"— regulated entities do not need to know how to *diagnose* these conditions; they need to know how to *avoid* them.[7] Yet "researchers don't know exactly what causes" anxiety and depression, and they are likely a result of many "factors" such as "genetics."[8] The "State does not persuasively explain why [the DSM's] case-by-case standard[s]" enable websites to evaluate "a class of users that includes every [minor] anywhere[.]" *Bonta-AADC II,* 170 F.4th at 765.

Defendants' cited "research" does not help either, Resp.27, because it fails to connect anything the Act regulates to any harm the Act seeks to avoid. At best, the research suggests some design features on some websites can be associated with "regretful use," more "minutes per day" watching videos, "fear of missing out," "spending more," "social comparison," and undefined "problematic use patterns." Edelson Decl. ¶¶ 19, 24, 33, 34, 50. But the research contains no finding that the regulated features *cause* these effects, nor that any of them "substantially limit" any major life activity or cause the "severe," "highly offensive," and "material" harms listed in the Act. § 39-80-20(A); *see* Weber Supp. Decl. ¶¶ 38-43. And some of the research attributes the harm not to features but to "*content*" the State claims not to regulate. *Id.* ¶¶ 51-53; *e.g.*, Edelson Decl. ¶¶ 15, 16, 24, 27, 48. The research confirms the Act's content focus, but it adds no clarity.

Defendants also assert that the harms are clear because the Act uses terms "from tort law"

---

[7] *See* Nat'l Libr. of Med., *Anxiety Disorders*, in *Nursing: Mental Health and Community Concepts* (NCBI Bookshelf) (last visited April 17, 2026), https://perma.cc/B2PK-3Y7W.

[8] Cleveland Clinic, *Anxiety Disorders* (July 3, 2024), https://perma.cc/7T22-GRHH.

or other contexts, such as "severe" or "persistent." Resp.26-27. But borrowing "labels" from tort law provides no "talismanic immunity" for laws that must "satisfy the First Amendment." *NY Times Co.*, 376 U.S. at 269. That is why courts have repeatedly rejected efforts to transplant tort concepts to speech. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("outrageous" too "malleable" a standard for speech); *Hustler Mag. v. Falwell*, 485 U.S. 46, 55 (1988) (similar). Separately, although "emotional distress" can sometimes measure *damages* from clearly defined prohibitions, Resp.27 (citing cases), this Act uses it to define the unlawful conduct itself, thus imposing a standard that is impossible to ascertain *ex ante*. Defendants say the "reasonable" standard "remedie[s]" the ambiguity, but websites cannot know what care is "reasonable," if the "*what* that must be proven" is vague. *Bonta-AADC II*, 170 F.4th at 765; *see* Weber Supp. Decl. ¶¶ 58-63.

"Reasonable care." That is why NetChoice challenged the "reasonable care" standard as independently vague, particularly when it must address all "minors" together. *See id.* at 766. Defendants have no answer other than to construe the standard as referring to a "legitimate minority of normal, older adolescents." Resp.24. That is not an ascertainable standard, and Defendants cite no textual basis for it. They cite a case on an "interest of juveniles" in "sexual" material that specifically referred to "prevailing standards" and how material would be viewed "as a whole." *Commonwealth v. Am. Booksellers Ass'n*, 236 Va. 168, 172 (1988). But this Act, "by its plain terms[,] is not easily susceptible of [such] a narrowing construction." *Erznoznik*, 422 U.S. at 216.

"Design features" and "covered design features." Defendants also ignore plain text when they address design features. They say the Court should interpret "design features" to mean "engagement maximizing product mechanics that drive compulsive use and result in significant harm." Resp.28. That construction sweeps in all the ambiguities above and renders the term "covered design feature" surplusage. *See* § 39-80-10(3) (defined in terms of engagement). As to

"covered design features," Defendants contend the "list of examples" adds clarity. Resp.30. But they identify no shared attribute among the examples or even that all of them increase engagement.

"Necessary" and "disablement." Defendants argue that the term "necessary" reflects a "functional, service-specific inquiry" about whether a feature is "integral to providing the service in a usable form." Resp.29. This just restates the ambiguity. The answer always depends on the level of generality at which the question is asked. In one sense, *all* features are necessary (or integral) because they allow websites to distinguish themselves, moderate content, and appeal to their users. Weber Decl. ¶¶ 27-28. In another sense, no features are necessary—beyond the most rudimentary—because services can be redesigned in different (even if inferior) ways. So, this directive is like telling a newspaper it can only use the features that are "necessary." Are op-eds "necessary"? Puzzles? Comics? There is no discernable answer. Nor is it clear what websites must do to "disable" all such features by "default." Defendants here say it means to "allow a[n] opt-out," Resp.29, but earlier they say it means an "opt-in." Resp.20. And *allowing* users to opt-*out* is very different from "disabl[ing]" by "default." § 39-80-30(A), (C).

"Express preferences" and "dark patterns." Defendants argue that "expressed preferences" is not vague because it resembles criminal mens rea requirements. Resp.30. But whether a criminal defendant acted with a particular state of mind—often decided based on weeks of fact-finding—is not comparable to requiring *companies* to ascertain their customers' state(s) of mind. Nor do Defendants explain how websites can determine if a user's preference is "considered" and "freely given" in digital transactions. § 39-80-10(6). "Dark pattern" is vague for the same reason. It relies on subjective concepts like "autonomy" and "choice" that overlap with everyday convenience and persuasion. § 39-80-10(5); *see* Weber Supp. Decl. ¶¶ 54-57. Defendants argue it encompasses "deliberate[]" designs, Resp.32, but the Act hinges on "effect" not intent. § 39-80-10(5).

C. NetChoice is likely to succeed on its preemption claims.

Defendants mischaracterize the preemption inquiries for Section 230 and COPPA as "obstacle preemption" and err by appealing to the "presumption against preemption." Resp.33. Where a "statute contains an express pre-emption clause, [courts] do not invoke any presumption against preemption but instead focus on the plain wording of the clause, which [is] the best evidence of Congress' preemptive intent." *Puerto Rico v. Franklin Cal. Tax-free Tr.*, 579 U.S. 115, 125 (2016) (cleaned up). No presumption is appropriate anyhow because this Act "targets a federal domain." *Pharm. Rsch. & Mfrs. of Am. v. McCuskey*, No. 25-1054, 2026 WL 898259, at *7 (4th Cir. Mar. 31, 2026) ("*PhRMA*"). Through Section 230, COPPA, and other laws, Congress staked out a regime that protects the "staggering" amount of speech online. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). That does not change because the State grounds its speech-suppressing interests in "health and safety" at "a high level of generality." *PhRMA*, 2026 WL 898259, at *6-7.

1. Section 230 preempts the Act's application to websites that publish third party content.

Defendants advance many arguments against Section 230 preemption, but all have been tried and failed. They begin with a dissenting opinion to portray Section 230 as "narrow." Resp.34. But this Court is bound by majority opinions, which recognize Section 230's "broad immunity from *any* cause of action that would make [websites] liable for information originating with a third-party[].'" *Pinckney*, 127 F.4th at 524; *Zeran*, 129 F.3d at 331 ("§ 230's broad immunity").

Defendants cherry pick among Section 230's "purposes," arguing that Congress sought "to encourage the development of technologies which maximize user control over what information is received." Resp.35. In fact, Section 230's "purpose" is to prevent "intrusive government regulation of speech," to foreclose "the threat that tort-based [liability] pose[s] to freedom of speech in the . . . Internet medium," and to "keep government interference in the medium to a minimum."

Zeran, 129 F.3d at 330. And even focusing on Defendants' singular cited purpose, Congress sought to "encourage" development of technologies that enable users to control information they receive—which many websites and NetChoice members already offer. Mem.9-11. By contrast, this Act mandates those technologies, by default, across large numbers of websites. Worse, the Act mandates the State's preferred disablements and "defaults," thereby replacing "user control," Resp.35, with "what the State thinks parents ought to want," *Brown*, 564 U.S. at 804. That is not the "unfettered" internet Congress sought to promote. *Zeran*, 129 F.3d at 330.

Defendants also again wrongly contend the Act regulates only "use of a minor's data" and website "design and operation." Resp.37. *Pinckney* forecloses that argument, recognizing that "design" is "inextricably intertwined with [a website's] role as a publisher of third-party content." 127 F.4th at 525. Indeed, the Act defines covered "design" features to facially regulate how "content" is "display[ed]," "navigat[ed]," "play[ed]," "use[d]," and "engag[ed]" with. § 39-80-10(3)(a)-(d). Section 230 protects these publishing functions. Mem.34 (citing cases). The Act's regulation of data "use" suffers the same problem because "services must collect and use" data "to deliver content." Weber Decl. ¶ 27. The Act itself recognizes this, defining a "personalized recommendation system" as one that "suggest[s], promote[s], or rank[s] content" based on "data." § 39-80-10(12). So requiring "care" in the use of that data requires the same content judgments as in *Pinckney*.

Defendants rhetorically ask "how" the Act regulates publishing functions. Resp.37. As explained in NetChoice's opening memorandum (pp.24-25), the restrictions on "infinite scroll," "autoplay," and "time" directly burden how and when websites present third-party speech. *See Carafano Inc. v. Metrosplash.com*, 339 F.3d 1119, 1124-25 (2003) ("decision to structure the information provided by users"); *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 831 (N.D. Cal. 2023). The restrictions on displaying user messages, reactions,

comments, clicks, likes, account profiles, and location information directly treat the website as the publisher of that content. *See Carafano Inc.*, 339 F.3d at 1124-25 ("profiles"); *Herrick v. Grindr*, LLC, 765 F. App'x 586, 591 (2d Cir. 2019) ("matching and geolocation features"). The Act's limits on notifications and push alerts are similarly preempted because they restrict how websites may "alert users to third-party content." *In re Social Media*, 702 F. Supp. 3d at 833; *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) ("recommendations and notifications"). The restrictions on "gamification" and "appearance altering filters" hold websites liable for publishing tools that third parties can use to edit their content and make it interactive and engaging. *Cf. Brown*, 564 U.S. at 798 ("interactive" features are traditional aspect of publishing); *Est. of Bride ex rel. Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1181 (9th Cir. 2024) (Section 230 protects "tools" that "facilitate the . . . content of others"). And the restriction on personalization and recommendation systems to deliver content squarely target "editorial functions that are essential to publishing." *In re Social Media*, 702 F. Supp. 3d at 833. The Act calls all these things "design features," but they are publishing functions so Section 230 preempts them, which is also why there is no tension between Section 230 and the First Amendment. *Contra* Resp.35.[9]

Defendants also assert that the Act avoids Section 230 because it "directly regulates" websites, whereas Section 230 "is addressed only to the bringing of a cause of action." Resp.36. In fact, the Act has a cause of action—with treble damages and personal liability. § 39-80-80. And to the extent Defendants argue that Section 230 preempts only backward-looking tort liability rather than "direct[]" regulation, Resp.36, courts have rejected that "reasoning" because it "would altogether nullify Section 230." *CCIA v. Paxton*, 747 F. Supp. 3d 1011, 1043 (W.D. Tex. 2024).

[9] Specifically, Section 230 preempts liability for the same editorial choices that the First Amendment protects. *Zeran*, 129 F.3d at 330.

Defendants next contend the Act's ad restrictions avoid preemption because they prohibit "facilitating" third-party ads, not "'third-party advertising' itself." This is precisely what Section 230 forecloses: liability against "entities . . . that facilitate the speech of others." *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Carafano*, 339 F.3d at 1124.

Finally, Defendants invoke the Act's saving clause, Resp.36. That clause "would nullify the [Act's] clear and specific substantive provisions," *HIAS, Inc. v. Trump*, 985 F.3d 309, 325 (4th Cir. 2021), so "a reviewing court must ignore [it] and read the [Act's] operative provision to mean what it says." *League of United Latin Am. Citizens v. Exec. Off. of the President*, 780 F. Supp. 3d 135, 176 (D.D.C. 2025); *New York v. Trump*, 133 F.4th 51, 71 (1st Cir. 2025).

2. COPPA preempts the Act.

Defendants' COPPA arguments suffer similar defects. They wrongly default to "obstacle preemption" and isolate the word "inconsistent" to the exclusion of all else. Resp.34. But as courts have held, this is "an incomplete reading of [COPPA's] preemption clause," and the "Court must read the rest of the sentence beyond the word 'inconsistent.'" *Hubbard v. Google*, 508 F. Supp. 3d 623, 630 (N.D. Cal. 2020). The question is not whether COPPA and the Act are abstractly "consistent," but whether the Act imposes "liability" in connection with COPPA-described "activities" that is inconsistent with COPPA's "*treatment*" of those activities. *See id.*

It does. COPPA's regulatory scheme "describe[s]," *id.*, the "collection," "use," "disclosure," and "dissemination" of "personal information," all of which it permits if a parent consents. 15 U.S.C. § 6502(b)(1), (2)(E). Where parents do not consent, COPPA permits websites to "terminate service" to the child, rather than build disablement tools. *Id.* § 6502(b)(3). COPPA also specifies situations in which consent is not required, including as to personalization systems and notifications. Mem.35. This Act imposes liability on those same "activities" unless websites satisfy requirements COPPA does not impose, such as building disablement tools, new content delivery

systems (and opt-outs), data minimization requirements, and a duty of care. Defendants do not deny that these are "add[itional] requirements" beyond COPPA's regulatory scheme, nor that the FTC rejected virtually identical requirements under COPPA last year because they would restrict beneficial activity and "might violate the First Amendment." Mem.36-39.

Defendants' reliance upon *Jones v. Google*, 73 F.4th 636 (9th Cir. 2023), does not help them. That case held the state law at issue was not preempted because it was "identical" to COPPA. *Id.* at 639, 642. But the cases cited in *Jones* make clear that if a state law goes *beyond* theories "for which the [federal] regulations make [a defendant] responsible," it becomes "*inconsistent* with the [federal government's] careful assignment of liability" and is thus preempted. *Metrophones Telecoms, Inc. v. Glob. Crossing Telecoms, Inc.*, 423 F.3d 1056, 1078 (9th Cir. 2005) (emphasis added), *aff'd*, 550 U.S. 45 (2007); *see Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1132 (9th Cir. 2003) (finding no preemption because "the federal guidelines . . . require[d] the *same thing*" as the state law, so "[i]t is not as though the state law had one . . . standard, the federal program another"). Here, COPPA has one "standard" that *permits* activities; South Carolina has "another" that *restricts* them. That is not the "same" treatment; it is "inconsistent."

Defendants also are wrong to contend that there is no preemption as applied to teens because (they say) "a law that covers collecting personal information from a child under 13 cannot be fundamentally at odds with a statute regulating minors aged 13 to 17." Resp.39. It would make no sense for Congress to foreclose more robust protections for *younger* users, while opening the door to a haphazard 50-state patchwork for older ones. *Contra* Resp.39. Nor did Congress do so. Section 6502(d) extends to any "operator" and any "commercial activities" related to activities "described" in COPPA, not just activities that COPPA specifically "regulates." So to the extent COPPA's framework permits some operators to use data freely without notice and consent—either

because they do not "actually know" the user is a child or because the user is *not* a child—that "treatment" preempts "inconsistent" state liability. *See Fraley v. Facebook*, 966 F. Supp. 2d 939, 948 (N.D. Cal. 2013) (COPPA might preempt state "requirement[s] for minors over the age of 13."), *aff'd*, 638 F. App'x 594 (9th Cir. 2016). This reading adheres to the text of Section 6502(d), common sense, and the legislative history through which Congress initially included, but then removed, regulations for teens. *See* Mem.38. And it harmonizes COPPA preemption with COPPA's "safe harbor," 15 U.S.C. § 6503, yet another congressional effort to ensure flexibility.[10]

D. NetChoice is likely to succeed on its Commerce Clause claim.

Defendants do not, and cannot, deny the immense burdens their Act imposes on websites and users nationwide—including direct, unavoidable extraterritorial impacts. Mem.39-41. Nor do they dispute that compliance would inevitably sweep in out-of-state users. Indeed, they cite a 2023 article recognizing that geolocation technologies "remain imperfect" and state regulation might well be "unduly burdensome, for small companies."[11] That is the case here, where the Act extends broadly to websites everywhere; requires them to re-"design" their services to the State's preferences; and directly impedes the flow of information across state lines. Pork sales are not analogous, including because they do not directly implicate the free flow of information. *Cf. Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 379 n.2 (2023) (Commerce Clause implicated when "national uniformity" needed to preserve "flow" of commerce); *id.* at 399 (Roberts, C.J.) (same).

[10] Defendants cite a 2025 Congressional Research Service (CRS) report stating without analysis that COPPA and other laws "set a federal floor" rather than a "ceiling," before acknowledging uncertainty about COPPA's preemptive scope. Resp.40. CRS is a research body that does not speak for a single legislator, much less a decades-past Congress. If Congress set a floor, it would have barred *relaxing* COPPA's requirements. Yet Congress barred inconsistent "*liability*," so the "CRS report must be rejected." *SEKRI, Inc. v. United States*, 166 Fed. Cl. 224, 232 (2023).

[11] Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 Tex. L. Rev. 1083 (2023), https://tinyurl.com/bp5789ar.

E. NetChoice is likely to succeed on its Due Process claim.

The Act gave websites no time to comply before exposing them to liability. Defendants fail to disprove that compliance with the Act "would take at least a year from start to finish, possibly much longer." *Compare* Weber Decl. ¶ 100; Baird Decl. ¶ 38; Cleland Decl. ¶¶ 48-49; Paolucci Decl. ¶¶ 4, 21, *with* McCoy Decl. ¶ 10 (asserting only that compliance is generally "possible"). *See* Weber Supp. Decl. ¶¶ 3-16. That is a due process violation, and Defendants' cited cases do not suggest otherwise. *Torres v. INS*, 144 F.3d 472, 475 (7th Cir. 1998), involved a filing deadline, not business redesign. And *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915), addressed due process "*before* a" regulation was enacted, *id.*, not post-enactment compliance time.

III. The remaining preliminary injunction factors favor NetChoice.

NetChoice satisfies the remaining requirements. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020). The Act forces extensive changes that will profoundly impact the businesses of many, Mem.42-43, whereas any harm to the State is minimal because websites already offer voluntary controls the State can promote while this case is litigated. Defendants fail to show their Act promotes the public interest when it would cut minors off from speech that is tailored to them. "[U]pholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Defendants contend that they have not threatened enforcement, Resp.44, but their refusal to disavow it is enough. *E.g.*, *Fox Television*, 567 U.S. at 255 (the Constitution "does not leave [regulated parties] . . . at the mercy of noblesse oblige"). Finally, NetChoice seeks injunctive relief only for its members, so *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025), is inapposite.

CONCLUSION

This Court should grant the motion for preliminary injunction.

Dated: April 20, 2026

Respectfully submitted,

/s/ Lucy Dinkins

Lucy Dinkins (Fed I.D. # 11961)
James H. May (Fed I.D. # 11355)
Kathleen M. Stoughton (Fed I.D. # 12161)
WYCHE, P.A.
807 Gervais Street, Suite 301
Columbia, SC 29201
Telephone: (803) 254-6542
Facsimile: (803) 254-6544
jmay@wyche.com
ldinkins@wyche.com
kstoughton@wyche.com

Serena M. Orloff*
Scott A. Keller*
Jeremy E. Maltz*
Jonathan E. DeWitt*
LEHOTSKY KELLER COHN LLP
200 Massachusetts Avenue, NW,
Suite 700
Washington, DC 20001
Telephone: (512) 693-8350
serena@lkcfirm.com
scott@lkcfirm.com
jeremy@lkcfirm.com
jdewitt@lkcfirm.com

Joshua P. Morrow*
LEHOTSKY KELLER COHN LLP
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
Telephone: (512) 693-8350
josh@lkcfirm.com

*admitted *pro hac vice*