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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NETCHOICE, Plaintiff, **v.** **ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, in his official capacity,** Defendant.	Case No. 5:25-cv-03178 **DEFENDANT'S NOTICE OF CROSS-MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT** Date: October 22, 2026 Time: 9:00 a.m. Dept: 1, 5th Floor Judge: Hon. Beth Labson Freeman Trial Date: N/A Action Filed: April 9, 2025

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NOTICE OF MOTION

Defendant Rob Bonta, in his official capacity as Attorney General of the State of California, hereby cross-moves for summary judgment under Federal Rule of Civil Procedure 56. This motion is scheduled for a hearing at 9:00 a.m. on October 22, 2026. ECF No. 55.

Defendant seeks summary judgment in its favor as to each of Plaintiff's claims.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Senate Bill 1144, which modified Title 1.4D of the California Civil Code, is the Legislature's effort to close gaps in the regulatory regime for preventing online sales of stolen goods. The Legislature's earlier version of Title 1.4D required online marketplaces to collect certain identifying information from "high-volume third-party sellers," defined as sellers who used those marketplaces to process payment for more than 200 sales of greater than $5,000 over the preceding 24 months. SB 1144 amended Title 1.4D in several respects. Among other things, it requires: (a) in calculating whether sellers qualify as "high-volume," all sales that utilized the online marketplace be included, even if payment was not processed through the marketplace; (b) online marketplaces must establish and maintain a policy prohibiting the sale of stolen goods, as well as procedures for individuals to contact the marketplaces and the marketplace to contact law enforcement; and (c) those policies and procedures must be posted on the marketplace's website.

Plaintiff NetChoice—a trade association of online businesses—seeks to permanently enjoin several provisions of Title 1.4D as amended by SB 1144, and it demands summary judgment on its claims that those provisions are: (1) preempted by either 15 U.S.C. § 45f (the "INFORM Act") or 47 U.S.C. § 230 ("section 230"), (2) unconstitutionally vague; and (3) unconstitutional under the First Amendment. But each of Plaintiff's claims fail.

To start, Plaintiff lacks standing. The Court has already noted that Plaintiff must demonstrate that there is a genuine threat of imminent prosecution to bring its pre-enforcement challenge. But Plaintiff ignored that observation and made no attempt to justify its pre-enforcement challenge in its summary judgment papers. That failure, alone, ought to bar all of Plaintiff's as-applied and facial challenges to the amended Title 1.4D. And Plaintiff's as-applied claims fail for another reason: Plaintiff cannot demonstrate associational standing because the Court cannot resolve Plaintiff's claims without the individual participation of each of Plaintiff's members—who operate different online marketplaces that function in materially different ways. Defendant is therefore entitled to summary judgment on all of Plaintiff's claims because the Court has no jurisdiction to hear them.

Moreover, even if the Court reaches the merits, Defendant is entitled to summary judgment on Plaintiff's preemption claims. California Civil Code section 1749.8(b) is not preempted by 15 U.S.C. § 45f. Section 45f preempts only those state laws that "conflict" with it, and the record does not show that Plaintiff's members cannot comply with both section 1749.8(b) and 15 U.S.C. § 45f, or that section 1749.8(b) frustrates any objectives of 15 U.S.C. § 45f. Nor does section 230 preempt California Civil Code section 1749.8.9. The challenged law does not treat online marketplaces as publishers of third-party information because it does not require online marketplaces to engage in content moderation. Although in granting Plaintiff's motion for preliminary injunction this Court ruled that Plaintiff was likely to succeed on its preemption claims, the Court is not bound by that decision on summary judgment.

Plaintiff's constitutional vagueness and First Amendment claims likewise fail. Plaintiff challenges commonsense, widely understood terms like "utilizing," "platform," and "should know" that a person of ordinary intelligence could easily understand in the context of the statute. And on the First Amendment, Plaintiff fails to establish that Title 1.4D as amended burdens any First Amendment interests. Even if it did, its requirement that online marketplaces and some high-volume third-party sellers provide certain factual, uncontroversial information to consumers violate the First Amendment because the disclosure of that information—which is reasonably related to a substantial government interest—is properly regulated commercial speech. This Court should therefore grant Defendant's motion for summary judgment and deny Plaintiff's competing motion.

BACKGROUND

I. TITLE 1.4D

On September 30, 2022, Governor Newsom signed Senate Bill 301, codified at California Civil Code section 1749.8 through section 1749.8.5, Title 1.4D. Title 1.4D requires, *inter alia*, online marketplaces to mandate disclosures from high-volume third-party sellers. In particular, high-volume third-party sellers must make certain disclosures to online marketplaces, and the subset of those high-volume sellers with very high revenues must also make certain consumer-facing disclosures. *See generally* Cal. Civ. Code §§ 1749.8.1, 1749.8.2. For purposes of these requirements, the original, unamended version of Title 1.4D defined a "high-volume third-party seller" as a third-party seller who completed at least 200 transactions worth a total of more than $5,000 over the preceding 24 months for which payment was processed by the online marketplace directly or through its payment processor. *Id.* § 1749.8(b) (prior to amendment). An "online marketplace" was defined as a consumer-directed, electronically accessed platform if (1) the platform included features that facilitated the sale and delivery of physical consumer products, (2) third-party sellers used those features, and (3) the platform had a contractual relationship with consumers. *Id.* § 1749.8(c) (prior to amendment).

On August 16, 2024, Governor Newsom signed Senate Bill 1144, which amended Title 1.4D. The bill was designed "to stop theft from retail stores and community theft by curtailing the sale of stolen property on online marketplaces." S.B. 1144 (2023-2024 Reg. Sess.) § 1. It revised the definition of "high-volume third-party seller" to include a third-party seller who enters 200 or more sales "utilizing the online marketplace" for the sale of new or unused consumer products worth a total of $5,000 or more, even if the marketplace did not process payments for those sales directly or through its payment processor. Cal. Civ. Code § 1749.8(b). It also amended the definition of "online marketplace" to encompass a "consumer-directed, electronically accessed platform that includes features that allow for, facilitate, or enable a third-party seller to engage in the sale, purchase, payment, storage, shipment, or delivery of a consumer product in this state," without requiring those features to be used by third-party sellers or a contractual relationship between the platform and the consumers. *Id.* § 1749.8(c). The bill also added requirements for online marketplaces to "alert local, regional, or state law enforcement agencies in California" if they "know[] or should know that a third-party seller is selling or attempting to sell stolen goods to a California resident." *Id.* § 1749.8.9(a). In addition, the amendments require online marketplaces to "[e]stablish and maintain a policy prohibiting the sale of stolen goods," to "provide a mechanism" to allow individuals to notify the online marketplace that a seller may be selling stolen goods, to "provide a mechanism" to allow online marketplaces to communicate with law enforcement in a timely and confidential manner, and to "maintain internal written policies, systems, and staff to monitor listings in order to affirmatively prevent and detect organized retail crime." *Id.* § 1749.8.9(b).

II. THE INFORM ACT

On December 29, 2022, Congress passed the INFORM Act, which added Section 45f to Title 15 of the United States Code. Section 45f, like Title 1.4D, addresses the problem of online resale of stolen items. Like Title 1.4D, it requires high-volume sellers to provide online marketplaces with identifying information, 15 U.S.C. § 45f(a)(1)(A), and provide a reporting mechanism for consumers to report suspicious marketplace activity to the marketplace, *id.* § 45f(b)(3). Its definitions of "high-volume third-party seller" and "online marketplace" are substantively similar to those in the original form of Title 1.4D. Section 45f also contains a clause entitled, "Relationship to State Laws," which states that "[n]o State or political subdivision of a State, or territory of the United States, may establish or continue in effect any law, regulation, rule, requirement, or standard that conflicts with the requirements of this section." *Id.* § 45f(g).

III. PROCEDURAL HISTORY

Plaintiff filed suit on April 9, 2025, and on April 14, 2025, moved to preliminarily enjoin enforcement of Title 1.4D as amended by SB 1144. In July 2025, the Court granted Plaintiff's motion on the basis that Plaintiff was likely to succeed on its claims that 15 U.S.C. § 45f preempted California Civil Code section 1749.8(b) and that section 230 preempted California Civil Code sections 1749.8.9(a), (b)(1)(A), and (b)(1)(D). *See* ECF No. 44 ("PI Ord.") at 17. The Court nonetheless held that Plaintiff was unlikely to succeed on its claim that 15 U.S.C. § 45f preempted California Civil Code section 1749.8(c). *Id.* at 11-12. The Court did not address whether Plaintiff was likely to succeed on its First Amendment claim. *Id.* at 15-16. Following the Court's decision, Plaintiff amended its complaint to include a vagueness claim and clarify the scope of its First Amendment claim. ECF No. 46 ("First Amended Complaint" or "FAC"). Plaintiff filed its motion for summary judgment on July 19, 2026. ECF No. 73.

OBJECTIONS TO EVIDENCE

Defendant hereby lodges the following objections to various pieces of evidence submitted in support of Plaintiff's summary judgment motion:

Exhibit B (Cleland Decl.), ¶¶ 10-14 – speculation, offering improper legal conclusions, and offering improper opinion testimony.

Exhibit C (O'Connell Decl.), ¶¶ 14, 15, 17, 39 – speculation; *id.* ¶¶ 32, 35-36 – offering improper legal conclusions; *id.* ¶¶ 33, 34, 37, 38, 42-45, 47-49 – speculation, offering improper legal conclusions, and improper opinion testimony; *id.* ¶ 41 – speculation and lack of personal knowledge; and *id.* ¶ 46 – speculation and offering improper opinion testimony.

Exhibit D (Garnett Decl.), ¶¶ 8, 31-32 – speculation; *id.* ¶ 20 – speculation and improper opinion testimony; *id.* ¶ 21 – offering and improper legal conclusion; and *id.* ¶¶ 22-30 – speculation, offering improper legal conclusions, and offering improper opinion testimony.

Exhibit E (Sieff Decl.), Exs. 9-13 – hearsay; *id.*, Exs. 16-18 – hearsay and relevance.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING A PRE-ENFORCEMENT CHALLENGE ON BEHALF OF ITS MEMBERS

A. Plaintiff's Members Have No Injury-in-Fact Because Plaintiff Fails to Show that Its Members Face a Genuine Threat of Imminent Prosecution

To demonstrate standing in a pre-enforcement challenge to a statute, a plaintiff must show a "genuine threat of imminent prosecution." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc); *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). To meet that standard in this case, Plaintiff must show that its members (1) intend "to engage in a course of conduct arguably affected with a constitutional interest," (2) "proscribed by a statute," and (3) "there exists a credible threat of prosecution thereunder." *See Driehaus*, 573 U.S. at 159. The last element is evaluated based on three factors: whether (1) Plaintiff's members "have articulated a concrete plan to violate the law in question," (2) "the prosecuting authorities have communicated a specific warning or threat to initiate proceedings" against Plaintiff's members, and (3) there is a "history of past prosecution or enforcement" of the challenged law. *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022).

Here, Plaintiff has not even attempted to argue that its members face a genuine threat of imminent prosecution—an omission the Court also noted in its PI order. *See* PI Ord. at 7. That litigation choice dooms not only Plaintiff's as-applied challenges (as this Court already correctly concluded, *see id.*), but also its facial challenges. As *Driehaus* makes clear, Plaintiff must show that its members face a genuine threat of imminent prosecution to demonstrate that they have "a sufficiently imminent injury for the purposes of Article III." 573 U.S. at 152. In other words, this test concerns the "irreducible constitutional minimum" of standing, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation marks and citation omitted), without which this Court has "no business deciding" *any* aspect of Plaintiff's case, "or expounding the law in the course of doing so," *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 438 (2017) (internal quotation marks and citation omitted). And that test applies no less to a facial challenge than it does to an as-applied challenge. *See Nat'l Shooting Sports Found. v. Bonta*, 23-cv-0945-AGS-KSC, 2026 WL 886298, at *2 (S.D. Cal. Mar. 31, 2026) (applying *Driehaus* factors to facial challenge). Because Plaintiff does not claim that it meets this minimum threshold to establish the Court's jurisdiction, the Court should grant summary judgment in Defendant's favor on that basis alone.

In any event, even setting aside Plaintiff's lack of briefing on the issue, the record does not independently demonstrate that Plaintiff's members face a genuine threat of imminent prosecution. Indeed, nothing in the record shows the kind of "credible threat of prosecution" that might establish pre-enforcement standing. *Driehaus*, 573 U.S. at 159. Plaintiff's declarations claim only that its members would have "significant difficulty" complying with Title 1.4D as amended by SB 1144, Mot., Pl.'s Ex. B ¶ 12, or that doing so would be "extremely burdensome," *id.*, Pl.'s Ex. C ¶ 37, or "next to impossible," *id.*, Pl.'s Ex. D ¶ 23. But many of these claims of burden are pure speculation and not rooted in fact. *See* Def.'s Ex. 1 (Egelman Report) ¶ 27. And none of these declarations on their own articulate the "when, to whom, where, or under what circumstances" of a "concrete plan" to violate Title 1.4D. *Unified Data Srvs.*, 39 F.4th at 1211. In fact, each declaration takes pains to demonstrate how Plaintiff's members *would* comply with the amended Title 1.4D. *See* Mot., Pl.'s Ex. B ¶¶ 12-13; *id.*, Pl.'s Ex. C ¶¶ 42-49; *id.* Pl.'s Ex. D ¶¶ 27-32. That they characterize these efforts as burdensome or costly does not evince an intent to cease compliance with Title 1.4D and risk facing liability. *Ass'n of Am. R.R. v. Cal. Off. of Spill Prevention and Response*, 113 F. Supp. 3d 1052, 1058 (E.D. Cal. 2015) (finding that plaintiffs' invocation of compliance costs was insufficient to establish concrete plan to violate statute). Moreover, *nothing* in the record shows that any enforcement authority has "communicated a specific warning or threat to initiate proceedings" under the amended version of Title 1.4D, or that there is a "history of past prosecution or enforcement." *Thomas*, 220 F.3d at 1139. Given this paltry record, Plaintiff has shown no threat of prosecution beyond the "mere existence" of the amended provisions of Title 1.4D—meaning Plaintiff cannot establish standing to support this pre-enforcement challenge. *Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022).

B. Plaintiff Does Not Have Associational Standing to Bring Its As-Applied Claims

Plaintiff purports to bring both facial and as-applied challenges for each of its claims—though it is not consistent in doing so. *See* FAC ¶¶ 78, 99, 101, 114; *id.*, Prayer for Relief, ¶ 1; Mot. at 9; *but see* Mot. at 14-17 (not specifying whether vagueness challenge is facial or as applied), 17, 22 (only describing First Amendment claims as "as applied"). To the extent Plaintiff brings as-applied challenges on behalf of its members, those claims should be rejected. As this Court has already found, Plaintiff did not "meaningful[ly]" show how it had standing to bring its as-applied challenges, PI Ord. at 7, and Plaintiff's Motion and attached declarations do not even attempt to rebut that conclusion. Nor could they. Plaintiff only alleges it has associational, not organizational, standing. FAC ¶ 9. But associational standing requires, among other things, that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). And where a plaintiff's "as-applied claims and the relief they seek . . . require individualized proof," that plaintiff does not satisfy the test for associational standing because the participation of individual members is required. *Ass'n of Christian Sch. Int'l v. Stearns*, 362 F. App'x 640, 644 (9th Cir. 2010). Such is the case here.

To begin, the Ninth Circuit recently held that Plaintiff did not have associational standing to bring as-applied challenges on its members' behalf in another case in part because it only included declarations from some of its members. *See NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1013-14 (9th Cir. 2025) (*NetChoice II*). There is no reason to come to a different conclusion here. Plaintiff claims that Title 1.4D burdens many of its members yet submitted declarations from only two (Meta and OfferUp). *See* Pl.'s Exs. C, D. And while the First Amended Complaint alleges that "[n]o individual participation of members is necessary in this purely legal challenge," FAC ¶ 12, the motion itself explains that each of Plaintiff's members operates differently. *See* Mot. at 3-4 (describing that some members process consumers' payments to sellers online and others allow sellers to market items online but sell them offline). Indeed, it is unclear whether some of its members (e.g., Amazon and Etsy) would even have standing to bring Plaintiff's claims independently, given that Plaintiff suggests Title 1.4D as amended does not impact them. Mot. at 6-7 ("It is relatively easy for a payment processer (like Amazon or Etsy) to identify high-volume sellers using existing records of online transactions they process.").

While *NetChoice II*'s rationale undermines all of Plaintiff's as-applied claims, it is particularly instructive concerning Plaintiff's First Amendment claim, which alleges a violation of the "expressive activity of disseminating a curated compilation of speech regarding items that third parties are lawfully offering to sell." Mot. at 17. In *NetChoice II*, the Ninth Circuit found no associational standing because determining whether the regulated activity was in fact expressive required "determin[ing] whether an algorithmic feed is expressive, which requires review of *each* member's algorithm and how it functions." 152 F.4th at 1014 (emphasis in original) (citing *Moody v. NetChoice*, 603 U.S. 707, 723-26 (2024)). And a similar problem exists here: Plaintiff's two declarations from members Meta and OfferUp are insufficient to permit this Court to determine whether *each* NetChoice member's online marketplace is in fact expressive. And the declarations by themselves do not demonstrate how Meta and OfferUp disseminate third-party content. *See infra* p. 21. Further, Plaintiff's own assertions highlight significant differences in how its members structure their online marketplace feeds. *Compare* Mot., Pl.'s Ex. B ¶ 6 ("[M]embers, including Amazon and Etsy, operate e-commerce marketplaces where consumers can purchase products from third-party sellers practically anywhere in the country and complete the sale online") *with id.* ¶ 7 ("In contrast, Facebook Marketplace, Nextdoor, and OfferUp . . . enable users to market items online and then sell them offline (often for cash) to buyers in their local community."). That its members meaningfully vary in how they curate their online marketplace feeds forecloses any associational standing to raise this asserted First Amendment interest.

II. CAL. CIV. CODE § 1749.8(b) IS NOT PREEMPTED BY THE INFORM ACT

To establish that the INFORM Act preempts Title 1.4D's definition of "high-volume third-party seller," Plaintiff faces a heavy burden. "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Moreover, "the case for federal pre-emption" is "less persuasive" when "coordinate state and federal efforts exist within a complementary administrative framework[ ] and in the pursuit of common purposes." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1225 (9th Cir. 2020). Further, because Plaintiff does not have associational standing to bring an as-applied preemption claim, *see supra* pp. 7-9; PI Ord. at 7, it must satisfy the more stringent facial-attack standard; that is, it must show that "no set of circumstances exists under which [section 1749.8(b)] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Plaintiff does not meet that standard. Although the Court determined at the preliminary injunction stage that Plaintiff was likely to succeed on its claim that 15 U.S.C. § 45f preempts California Civil Code section 1749.8(b), *see* PI Ord. at 8-11, this Court is not bound by that decision. *See City of Anaheim v. Duncan*, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981) ("[A] decision on a preliminary injunction does not constitute the law of the case and the parties are free to litigate the merits."). And here, Plaintiff's additional briefing fails to demonstrate that 15 U.S.C. § 45f's preemption clause invalidates California Civil Code section 1749.8(b). As relevant here, preemption can be "express"—*i.e.*, Congress can explicitly *say* that a federal law preempts state regulations of some kind—or it can arise through a "conflict," where a state law "confers rights or imposes restrictions that conflict with [a] federal law." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 477, 478 (2018). In cases like this one, where 15 U.S.C. § 45f's preemption clause prevents the enactment or enforcement of any state law which "conflicts" with the Act, the "express" and "conflict" preemption "inquiries . . . effectively collapse into one." *Jones v. Google LLC*, 73 F.4th 636, 644 (9th Cir. 2023) (internal quotation marks and citation omitted).

But there is no "express" or "conflict" preemption here. To establish a "conflict" within the meaning of 15 U.S.C. § 45f, Plaintiff must establish either that it would be *impossible* for its members to comply with both state and federal requirements, or that the state law "stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (emphasis added) (internal quotation marks and citation omitted). But here, Title 1.4D's and 15 U.S.C. § 45f's definitions of "high-volume third-party seller" track each other in all respects but one. Under 15 U.S.C. § 45f, the 200 or more discrete sales or transactions that count toward the federal act's definition include "only" those "sales or transactions made through the online marketplace and for which payment was processed by the online marketplace." 15 U.S.C. § 45f(f)(3). For Title 1.4D, the 200 or more discrete sales or transactions that count toward the state act's definition include those that are "entered into . . . *utilizing*" the online marketplace. Cal. Civ. Code § 1749.8(b) (emphasis added). That difference does not raise any preemption concerns: It is not impossible for online marketplaces to simultaneously comply with 15 U.S.C. § 45f and Title 1.4D, nor does Title 1.4D pose any obstacle to 15 U.S.C. § 45f's purposes.

First, these provisions do not conflict because it is possible—in fact, frictionless—for an online marketplace to comply with both statutes simultaneously. "Impossibility pre-emption is a demanding defense," and the burden for demonstrating impossibility rests with the party asserting preemption. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). The Supreme Court has "refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 314 (2019). Accordingly, it is not impossible to comply with two different state and federal laws merely because complying with a stricter state standard would impose additional burdens or costs on a regulated party. *See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1114 (9th Cir. 2022) (holding that foie gras sellers could comply with differing federal law and state law by exiting California's market).

Against this backdrop, online marketplaces can comply with both Title 1.4D and 15 U.S.C. § 45f simultaneously. Because the provision Plaintiff challenges is merely a definition, one must look to how the definition affects the statutes' substantive requirements to determine whether compliance with both statutes is possible. As a representative example, consider the requirement shared by both statutes that an online marketplace must "disclose to consumers in a clear and conspicuous manner on the product listing of any high-volume third party seller a reporting mechanism that allows for electronic and telephonic reporting of suspicious marketplace activity to the online marketplace." 15 U.S.C. § 45f(b)(3); *see also* Cal. Civ. Code § 1749.8.2(b) (substantially similar). If an online marketplace disclosed a reporting mechanism for every product listing of a high-volume third-party seller as defined by Title 1.4D, it will have necessarily complied with the disclosure requirement of 15 U.S.C. § 45f for each product of the high-volume third-party sellers counted under that statute. This same principle would apply to each of the substantive requirements of both statutes—because transactions "utilizing" the online marketplace inevitably include transactions made "through" the online marketplace, complying with Title 1.4D's provisions regarding high-volume third-party sellers will necessarily result in compliance with similar substantive provisions of 15 U.S.C. § 45f.

Second, there is no obstacle preemption because Title 1.4D does not defeat the purposes of 15 U.S.C. § 45f. In obstacle preemption, the state or local law must yield to the federal regulation only "[i]f the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks and citation omitted). Mere "tension" between the federal and state or local law is insufficient. *MetroPCS California, LLC v. Picker*, 970 F.3d 1106, 1118 (9th Cir. 2020). Rather, a conflict exists "only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *General Mills, Inc. v. Jones*, 530 F.2d 1317, 1325 (9th Cir. 1975) (internal quotation marks and citation omitted).

There is no such conflict here. Rather, the statutes are aligned in their primary goal to deter online sales of illegal goods. *Compare* Def.'s Ex. 2, Attach. 1 ("The goal of the INFORM Consumers Act is to add more transparency to online transactions and to deter criminals from acquiring stolen, counterfeit, or unsafe items and selling them through those marketplaces") *with* S.B. 1144 (2023-2024 Reg. Sess.) § 1 ("[I]t is the intent of the Legislature to stop theft from retail stores and community theft by curtailing the sale of stolen property on online marketplaces."). Plaintiff does not, and cannot, show how Title 1.4D undermines this purpose. That fact, alone, counsels heavily against finding preemption. *See Chevron U.S.A, Inc. v. Hammond*, 726 F.2d 483, 497 (9th Cir. 1984) ("Where both the legislative schemes . . . reflect a policy choice favoring the same goal . . . the court should be reluctant to infer preemption. It would be particularly inappropriate because the basic purposes of the state statute and the federal Act are similar.") (internal quotation marks, original alterations, and citation omitted). That Title 1.4D's regulations encompass more conduct than 15 U.S.C. § 45f does not change this conclusion. *See, e.g.*, *Beffa v. Bank of the West*, 152 F.3d 1174, 1177 (9th Cir. 1998) (provision of Expedited Funds Availability Act that provided that it "shall supersede any provision of the law of any State . . . which is inconsistent with this chapter" did not express a "desire to preempt state laws or causes of action that supplement, rather than contradict, EFAA").

Title 1.4D also does not undermine 15 U.S.C. § 45f's intent to limit how sales or transactions are calculated for purposes of complying with its *own* provisions. Though 15 U.S.C. § 45f limits the number of sales or transactions counted for the purpose of defining "high-volume third party seller" to "only" those processed through and by the online marketplace, the immediately preceding clause clarifies that the significance of the "only" clause is "[f]or purposes of calculating the number of discrete sales or transactions or the aggregate gross revenues under subparagraph (A)." 15 U.S.C. § 45f(f)(3)(B). To be sure, "only means only," PI Ord. at 10 (quoting *NetChoice, LLC v. Carr*, No. 1:24-cv-02485, 2024 WL 3262633, at *3 (N.D. Ga. June

30, 2024)), but Congress's use of "only" here exclusively limits what online marketplaces are expected to do under 15 U.S.C. § 45f—not what states and localities are expected to do when crafting their own laws. Thus, 15 U.S.C. § 45f's statutory structure makes clear that Congress merely intended to limit online marketplaces' obligations under federal law. Nothing about Title 1.4D's additional obligations under California law undermine, defeat, or frustrate that purpose.

Plaintiff hardly addresses any of these conflict-preemption standards. Instead, it asks the Court to find that "conflict" does not mean "conflict." They argue that any two things that "differ," "clash," are "at variance," or are not "in agreement or accord" must be in "conflict" under 15 U.S.C. § 45f. Mot. at 9. They therefore contend that 15 U.S.C. § 45f imposes a "single, nationwide framework," *id.* at 5, and that any deviations from that framework conflict with federal law. But the Ninth Circuit has rejected similar arguments. In *Jones v. Google*, 73 F.4th 636 (9th Cir. 2023), for example, the court analyzed a federal preemption clause that invalidated "inconsistent" state laws. Reviewing multiple prior decisions addressing similar statutory language, the Ninth Circuit held that state laws that supplement federal law—and do not stand as obstacles to federal law—are "not inconsistent" with federal law. *Id.* at 642 (citing cases) (quotation marks and citations removed).

Given that longstanding caselaw, Congress's decision to use the word "conflict" is fatal to Plaintiff's claim. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Grp., Inc.*, 555 U.S. at 76. Although Congress knows how to broadly preempt state laws which impose "additional" or "different" requirements from federal law, *see*, *e.g.*, 7 U.S.C. § 136v (a "State shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different* from those required under this subchapter") (emphasis added), it declined to follow that course in 15 U.S.C. § 45f, choosing instead to more narrowly preempt only those state laws that actually "conflict" with federal law. And where, as here, legislators did not adopt "obvious alternative" language, "the natural implication is that they did not intend" the alternative. *See Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) (quotation omitted).

Plaintiff nevertheless claims that the preemption clause should be read broadly because it "defines its scope as broadly as possible," including "every 'State,' 'political subdivision of a State,' and 'territory of the United States.'" Mot. at 10. But there is nothing notable about that language: Defendant is not aware of any preemption clause that only partially applies to certain areas of the country. Plaintiff similarly contends that 15 U.S.C. § 45f's preemptive force should be read broadly because it preempts "any law, regulation, rule, requirement, or standard" whether now "in effect" or later "establish[ed]." *Id.* But this language simply acknowledges that state "law" can come in many different forms (e.g., statutory, regulatory, or judge-made) and can either be currently in effect or enacted later. These arguments would expand the preemptive effect of 15 U.S.C. § 45f beyond its plain text and should be rejected.

III. SECTION 230 OF THE CDA DOES NOT PREEMPT §§ 1749.8.9(a), (b)(1)(A), OR (b)(1)(D)

To determine whether section 230's immunity applies, a court undertakes an "exacting analysis" to "avoid exceeding the scope of the immunity provided by Congress." *Est. of Bride v. Yolo Techs.*, 112 F.4th 1168, 1176 (9th Cir. 2024) (internal quotation marks, original alteration, and citation omitted). Section 230 immunity applies only to attempts to treat an "interactive computer service . . . as a publisher or speaker" of third party-content. *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 738 (9th Cir. 2024) (internal quotation marks and citation omitted). The "relevant question" is whether the challenged provisions "necessarily require an internet company to monitor third-party content." *Id*. at 741 (internal quotation marks and citation omitted).

Although this Court concluded at the preliminary injunction stage that section 230 preempted three provisions of section 1749.8.9, the Court should reconsider that preliminary conclusion—not least because subsequent Ninth Circuit authority discussed below bears directly on some of the statutory language at issue. At the outset, Plaintiff's summary judgment brief fails to seriously engage, as required, with the specific duty that each challenged aspect of Title 1.4D imposes. *See, e.g.*, *Calise*, 103 F.4th at 739 (describing section 230 immunity as "a difficult and complex issue that requires" a "claim-specific" analysis). Plaintiff attempts to put forth broad principles of section 230 and then hand-wave at the particulars of each challenged provision of

Title 1.4D. *See* Mot. at 11-14. But that is insufficient. The Court must instead closely scrutinize each of the challenged provisions to determine whether they "necessarily require [Plaintiff's members] to monitor third-party content" in violation of section 230. *Calise*, 103 F.4th at 741 (internal quotation marks and citation omitted). Because none of those provisions do, Plaintiffs' section 230 preemption claim fails.

First, Plaintiff challenges section 1749.8.9(a), which requires an online marketplace to "alert local, regional, or state law enforcement agencies in California if it knows or should know that a third-party seller is selling or attempting to sell stolen goods to a California resident." Recent Ninth Circuit precedent establishes that notification provisions like section 1749.8.9(a) do not treat platforms as publishers, and so are not preempted. In *Doe 1 v. Twitter, Inc.*, which postdates this Court's preliminary injunction order, the court held *not* preempted a cause of action based on a federal statutory requirement that platforms notify the National Center for Missing & Exploited Children once it had "actual knowledge" of child pornography content on the platform. 148 F.4th 635, 647-48 (9th Cir. 2025). The court reasoned that such a mandate did not require Twitter to "scour its platform for content triggering" the reporting duty, or even to "review reported child pornography." *Id*. at 648. Instead, if Twitter acquired knowledge of child pornography on the platform—which could result from Twitter's voluntary, non-mandated content moderation efforts—section 230 did not preempt a duty to report that knowledge as required by statute. *Id*. Thus, 1749.8.9(a) is not preempted to the extent that it requires an online marketplace to notify law enforcement once it knows that a third-party is selling stolen goods.

Nor does the "should know" language in section 1749.8.9(a) change that preemption conclusion. Like the "actual knowledge" provision at issue in *Doe I*, the "should know" mandate does not necessarily require online marketplaces to "monitor[] third-party sellers' online content." *See* PI Ord. at 14. Instead, under California law, statutory language imposing liability based on facts that an entity "should know" invokes the concept of "constructive knowledge." *See Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200, 228 (2022). "'Constructive knowledge' means '[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.'" *Id*. (internal quotation marks and citation omitted).

"[C]onstructive knowledge rests on a defendant's duty to discover information," *id*., but such duty exits only when "some element of conspicuousness or notoriety" suggests that further investigation is prudent. *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 364 (1936). Plaintiff does not argue that holding it to "constructive knowledge" in this context runs afoul of section 230. And in any event, if "should know" were to pose any section 230 issue, the Court could sever those words from section 1749.8.9(a)—which would preserve the Legislature's intent in enacting SB 1144. *See, e.g.*, *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 575 (9th Cir. 2014) (affirming order severing discrete words from ordinance, because "their omission would not affect the meaning of the remaining text").

Plaintiff's preemption challenge to section 1749.8.9(b)(1)(A) also fails. That provision requires online marketplaces to "[e]stablish and maintain a policy prohibiting the sale of stolen goods on the online marketplace, which shall include consequences for knowingly selling stolen goods on the online marketplace, including, but not limited to, suspension or termination of the seller's account." Cal. Civ. Code § 1749.8.9(b)(1)(A). Here too, compliance does not *necessarily* require online marketplaces to act as a publisher or speaker of third-party content. Instead, a marketplace need only draft a policy prohibiting the sale of stolen goods (something that involves no monitoring of third-party content whatsoever) and suspend or terminate the accounts of those users who knowingly engage in this illegal activity. To satisfy this latter obligation, an online marketplace need not *necessarily* monitor third-party content; it could instead act in response to notifications from other marketplace users or law enforcement. *See id.* §§ 1749.8.9(b)(1)(B), (b)(1)(C) (unchallenged provisions of Title 1.4D).

Moreover, that marketplaces may remove posts from their platforms in response to being notified that certain users have knowingly sold stolen goods does not mean that the law treats them as publishers under section 230. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (no preemption, even if challenged law "in operation and effect . . . forces [platforms] to *remove* third-party content") (emphasis in original). Just as in *HomeAway.com*, section 1749.8.9(b)(1)(A) "does not proscribe, mandate, or even discuss the *content* of the listings that the Platforms display on their websites." *Id*. (emphasis added); *see also*

In re Zoom Video Communications Inc. Privacy Litigation, 525 F. Supp. 3d 1017, 1032 (N.D. Cal. 2021) (section 230 "allows . . . claims that . . . are content-neutral"). Liability under section 1749.8.9(b)(1)(A) does not turn on any aspect of the content of users' posts (which are, indeed, unlikely to announce facially that stolen goods are involved); instead, section 1749.8.9(b)(1)(A) merely requires online marketplaces to have and act upon policies to address the knowing sale of stolen goods. That duty implicates no content moderation.

Nor does section 230 preempt section 1749.8.9(b)(1)(D), which requires online marketplaces to "[m]aintain internal written policies, systems, and staff to monitor listings in order to affirmatively prevent and detect organized retail crime." While this subsection directs online marketplaces to establish policies, systems, and staff to "monitor" listings, it "does not proscribe, mandate, or even discuss the *content* of the listings" on online marketplaces. *HomeAway.com*, 918 F.3d at 683 (emphasis added). Instead, it requires that online marketplaces devote resources (in the form of written policies, systems, and staff) to prevent and detect retail crime, which an online marketplace can accomplish without regulating posts based on content.

IV. TITLE 1.4D'S PROVISIONS ARE NOT UNCONSTITUTIONALLY VAGUE

A statute is impermissibly vague only when it "fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Arce v. Douglas*, 793 F.3d 968, 988 (9th Cir. 2015) (citation omitted). "Due process does not require impossible standards of clarity." *Id.* (internal quotation marks and citation omitted). Rather, a statute must simply "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1019 (9th Cir. 2013) (internal quotation marks and citation omitted). Where a statute regulates business entities, the statute must only be clear enough such that a "business person of ordinary intelligence would understand" what conduct is prohibited. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982). Mere ambiguity or "uncertainty at the margins" is not sufficient to render a statute unconstitutionally vague. *Tingley*, 47 F.4th at 1089. "For facial vagueness challenges," the challenged law "just needs to be clear in the vast majority of its intended applications." *Id.* (internal quotation marks and citation omitted). Thus, a challenger seeking to invalidate a statute for vagueness carries a heavy burden. A statute is unconstitutionally vague only if it "specifie[s]" "no standard of conduct . . . at all." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (internal quotation marks and citation omitted).

Plaintiff does not seriously attempt to meet this demanding standard. It instead attempts to confuse the governing standard by suggesting that its vagueness challenges implicate constitutionally protected speech. *See* Mot. at 15. This Court should reject that suggestion. For one thing, Plaintiff primarily invokes speech of its members' users, which is permissible in a First Amendment overbreadth challenge but not in a vagueness challenge. *See Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158, 1168 (C.D. Cal. 2009) ("[A] party challenging a law on vagueness grounds vindicates his own rights."). Further, the definitional provisions of sections 1749.8(b) and (c) that Plaintiff challenges as vague impose on Plaintiff's members no requirements on their own. *See infra* pp. 21-22. And in any event, SB 1144 did not amend the provisions of Title 1.4D that control what information must be disclosed. *See id.* Similarly, its challenges to portions of sections 1749.8.9(a) and (b)(1)(D) do not concern speech and do not require online marketplaces to engage in content moderation. *See supra* pp. 14-17; *infra* pp. 24-25. Instead, the provisions Plaintiff challenges are civil regulations, which are subject to a "less strict vagueness test" *Hoffman Estates*, 455 U.S. at 498.

Properly understood, then, each of Plaintiff's vagueness challenges must fail. Plaintiff first challenges as vague Title 1.4D's definition of "online marketplace," which defines the term as a "consumer-directed, electronically accessed platform that includes features that allow for, facilitate, or enable a third-party seller to engage in the sale, purchase, payment, storage, shipment, or delivery of a consumer product in this state." Mot. at 15 (citing Cal. Civ. Code § 1749.8(c)). Plaintiff specifically faults the Legislature for not defining "consumer-directed" and "platform." *Id.*

But neither term raises any vagueness concerns. "Platform" refers to "an application or website that serves as a base from which a service is provided." *Platform*, Merriam Webster Dictionary, https://tinyurl.com/2w49s2t2 (last visited August 11, 2026). Section 45f—a federal law that Plaintiff does not challenge—uses the term "platform" in this manner several times without specifically defining the term. 15 U.S.C. § 45f. It is not plausible that online marketplaces, which operate on the internet, are unable to interpret the term "platform"—indeed, Plaintiff used the term multiple times in its interrogatory responses and one of its members is named Meta *Platforms*, Inc. *See, e.g.*, Mot., Pl.'s Ex. C; *id.* Ex. E, Ex. 14, at 7, 9. And the term "consumer-directed" is also straightforward. Though Title 1.4D does not separately define that term, its meaning is clear when looking to "the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Specifically, the definition of "online marketplace" concerns platforms with features that facilitate the sale of a "consumer product," and that term is defined in Title 1.4D as "tangible personal property that is distributed in commerce and normally used for personal, family, or household purposes." Cal. Civ. Code § 1749.8(a). Therefore, though it is possible that some users may purchase physical goods using many different platforms, Title 1.4D's definition of "online marketplace" is only concerned with those that are "directed" at consumers of physical goods.

Plaintiff additionally challenges Title 1.4D's definition of "high-volume third-party seller," which includes a person who receives at least $5,000 from at least 200 discrete sales "*utilizing* [an] online marketplace." Mot. at 15 (citing Cal. Civ. Code § 1749.8(b)). Plaintiff proclaims that Title 1.4D fails to provide online marketplaces with adequate guidance. *Id.* at 15-16. But "utiliz[e]" has a clear meaning—"to make use of." *Utilize*, Merriam Webster Dictionary, https://tinyurl.com/yh7jsfx8 (last visited July 28, 2026). Plaintiff hardly seems to disagree, as it does not make any effort to show that the term "utilizing" is difficult to understand. Rather, its objection appears to be that the ordinary, plain meaning of "utilizing" broadens the reach of the statute beyond what Plaintiff would prefer. *See* Mot. at 16 (describing the definition as encompassing "[c]ountless" sales). But the Legislature specifically intended to broaden the definition of "high-volume third-party seller" to close a "loophole" that allowed stolen goods to be sold inconspicuously on online marketplaces that do not process most of their payments online. *See* Def.'s Ex. 2, Attach. 2 at 9. Plaintiff's policy disagreement with this aspect of the statute does not make it vague—and certainly not unconstitutionally so.

Plaintiff next challenges Title 1.4D's requirement that an online marketplace alert law enforcement whenever it "should know" that a high-volume third-party seller is selling or attempting to sell stolen goods. Mot. at 16 (citing Cal. Civ. Code § 1749.8.9(a)). But "should know" is not vague. "The term *should have known* . . . is one way of saying that the reasonable person standard governs the question of unreasonable risk and foreseeability. So 'constructive notice' and 'should have known,' like foreseeability, both incorporate the reasonable person standard and are completely objective terms." *Petrey v. Princess Cruise Lines, Ltd.*, 173 F.4th 1110, 1116 (9th Cir. 2026) (emphasis in original) (citation omitted). Far from being vague, "should know" merely invokes the familiar concept that a person should be aware of facts they would have discovered with appropriate inquiry. *See* Cal. Civ. Code § 19. In fact, a scienter requirement, including for constructive knowledge with terms like "should know," counsels *against* vagueness because it removes the possibility that the online marketplace will inadvertently violate the statute. *See United States v. Lee*, 937 F.2d 1388, 1394-95 (9th Cir. 1991) (citing *Hoffman Estates*, 455 U.S. at 499).

Plaintiff finally challenges Title 1.4D's requirement that marketplaces maintain "internal written policies, systems, and staff to monitor listings in order to affirmatively prevent and detect organized retail crime." Mot. at 16 (Cal. Civ. Code § 1749.8.9(b)(1)(D)). Plaintiff claims that this term is vague because "there is no guidance about what policies or procedures will be deemed sufficient to satisfy this broad mandate." *Id.* This argument drifts far afield of a "vagueness" challenge; Plaintiff's argument reads more like a demand that the Legislature pre-clear a set of policies so online marketplaces can guarantee they will avoid liability. Whatever due process requires, it is certainly not that. In any event, the requirement here is not difficult to understand. It requires an online marketplace to have sufficient policies, systems, and staff to affirmatively prevent and detect organized retail crime, but it requires no more.

V. THE CHALLENGED PROVISIONS OF TITLE 1.4D DO NOT VIOLATE THE FIRST AMENDMENT

Plaintiff's litany of First Amendment challenges to various provisions of Title 1.4D also fail. At the outset, Plaintiff appears to raise only as-applied challenges to these provisions—for good reason. A facial First Amendment challenge would require Plaintiff to show that the law's "unconstitutional applications substantially outweigh its constitutional ones." *Moody*, 603 U.S. at 724. But Plaintiff leaves unchallenged whole swaths of the statute it asserts are unconstitutional (for example, Plaintiff does not challenge sections 1749.8(b) and (c) to the extent those provisions apply to online marketplaces that process payment online). Plaintiff also makes no showing that purported unconstitutional applications of the statutes it challenges "substantially outweigh" these unchallenged applications. *Moody*, 603 U.S. at 724; *see also Ariz. Att'ys for Crim. Just. v. Mayes*, 127 F.4th 105, 112 (9th Cir. 2025) ("law's unchallenged applications" included in *Moody* weighing analysis). Accordingly, Plaintiff has waived any facial challenge here. And its as-applied claims fare no better: Plaintiff lacks associational standing to bring its "as-applied" First Amendment challenges, *see supra* pp. 8-9; and even if it had standing, its claims would fail for the reasons discussed below.

A. Plaintiff's First Amendment Challenges to §§ 1749.8(b) and (c) Fail

Plaintiff first asserts a First Amendment injury on the basis that sections 1749.8(b) and (c) "burden covered NetChoice members' expressive activity of disseminating a curated compilation of speech regarding items that third parties are lawfully offering to sell." Mot. at 17. Even if Plaintiff had associational standing to assert this argument, the declarations from two of its members contain no information whatsoever about *how* those companies disseminate content. *See generally* Mot., Pl's Exs. C and D. Thus, those declarations cannot establish even that those two companies' so-called "curated compilation" of third-party speech is expressive. *See Meta Platforms Inc. v. Bonta*, No. 5:25-CV-09789-EJD, 2026 WL 2260373, at *5 (N.D. Cal. Aug. 5, 2026) (scrutinizing evidence that social media companies submitted to argue that their platforms are expressive, and concluding that they do not "convey an expressive message through their personalized feeds").

Plaintiff also argues that sections 1749.8(b) and (c) "compel speech" by requiring its members "to demand information about offline transactions from any user who might qualify as a high-volume seller." Mot. at 18. But sections 1749.8(b) and (c) themselves impose no data collection requirement. Instead, these definitional provisions extended an existing data collection regime to additional transactions and (according to Plaintiff) additional platforms. *See* Mot. at 4-5 (describing Title 1.4D prior to SB 1144); Cal. Civ. Code §§ 1749.8.1 and 1749.8.2 (information collection statutes, which SB 1144 did not amend). Given that Plaintiff does not challenge sections 1749.8.1 and 1749.8.2 directly, and its members have been subject to those requirements for years, its complaint about "compelled speech" tied to Title 1.4D makes little sense. In any event, the compelled speech doctrine is inapplicable, because it applies when the government requires an individual to *publicly* convey a "particular message." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 585 U.S. 755, 766 (2018); *see also Firestone v. Yellen*, No. 3:24-CV-1034-SI, 2024 WL 4250192, at *9 (D. Or. Sept. 20, 2024) (no compelled speech where the challenged state law "does not require Plaintiffs *publicly* to convey any particular message, let alone one with ideological implications") (emphasis added). Thus, a reporting requirement to the government "does not raise . . . constitutional concerns" because it is the government, "not the public" that "is [plaintiff's] only audience." *Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101, 1108 (D.C. Cir. 2011). So it is with Title 1.4D's data collection requirements.

Plaintiff's theory to the contrary would lead to the absurd result that First Amendment scrutiny applies to a whole host of data collection obligations (such as labor and employment forms or tax withholding forms). None of Plaintiff's cited cases support that extraordinary outcome. *See* Mot. at 18. All of those decisions addressed mandates to *publicly* disclose information, not obligations that a private entity simply collect and store information. *See NIFLA*, 585 U.S. at 760-61; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 784 (1988).

Finally, Plaintiff claims that sections 1749.8(b) and (c) will "chill" certain sellers from posting on online marketplaces because they do not want to disclose their personal information. Mot. at 18. But "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Plaintiff's theory of First Amendment injury knows no bounds. If it were sufficient to simply assert that a legal mandate unrelated to speech will suppress First Amendment activity, then sales taxes collected at bookstores, or applying building codes to the headquarters of a newspaper, would also implicate First Amendment interests. But Plaintiffs cite no authority for such a rule—its cases addressed statutes requiring a platform (such as a newspaper or website) to *publicly* display certain content. Mot. at 19; *see Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 243 (1974); *Wash. Post v. McManus*, 944 F.3d 506, 510 (4th Cir. 2019). Sections 1749.8(b) and (c) do nothing of the sort.

Even if the duty resulting from sections 1749.8(b) and (c) to collect and disclose ordinary identifying information burdened First Amendment interests, that burden would still be justified under the relevant standard of review. The government "may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest, and involves 'purely factual and uncontroversial information' that relates to the service or product provided." *CTIA - The Wireless Ass'n v. City of Berkeley, California*, 928 F.3d 832, 842 (9th Cir. 2019) (quoting *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985)). Here, Plaintiff does not dispute that the State's interest in enacting Title 1.4D is substantial. *See* Mot. at 23 (noting that the "state undoubtedly has a legitimate interest in combatting retail crime"). And there is no doubt that the basic identifying information that section 1749.8.2 requires high-volume sellers (that meet the definition in section 1749.8(b)) to disclose is "purely factual and uncontroversial." The only remaining question, then, is whether these purely factual disclosures are "reasonably related" to the State's interest in combatting theft. But that is not a demanding inquiry, and section 1749.8.2 easily meets it. *See, e.g.*, *CTIA - The Wireless Ass'n*, 928 F.3d at 846 ("We are not in a position to disagree with the conclusions of FCC and Berkeley that this compelled disclosure is 'reasonably related' to protection of the health and safety of consumers."); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 734 (9th Cir. 2017) (finding no First Amendment violation where "the disclosure requirements *have a relationship* to preventing deception") (emphasis added).

Plaintiff argues in response that intermediate scrutiny ought to apply. Mot. at 19. But Plaintiff's challenge to sections 1749.8(b) and (c) raises only claims of compelled speech, and the "intermediate scrutiny test does not apply to compelled, as distinct from restricted or prohibited, commercial speech." *CTA - The Wireless Ass'n*, 928 F.3d at 842. In any event, the statute's data collection and disclosure regime would satisfy intermediate scrutiny. Plaintiff argues that the statute's regime is "overinclusive" but cites only decisions where entities were prevented from engaging in First Amendment activity. *See* Mot. at 20-21. Those cases are inapposite; all the statute requires here is that online marketplaces require that all high-volume sellers provide certain factual, identifying information to the marketplace, and that the very high-volume subset of those sellers also make certain factual, identifying disclosures to consumers. That burden pales in comparison to those discussed in Plaintiff's cases. Indeed, while Plaintiff argues that it would be burdensome to apply these requirements to sellers who complete transactions offline, that evidence is largely speculative and superficial. *See supra* p. 6. Moreover, NetChoice members like Meta, OfferUp, and Nextdoor already collect this information—or could easily do so. *See* Def.'s Ex. 1 (Egelman Report) ¶¶ 15-20.

Nor can Plaintiff establish a First Amendment violation by asserting that the State has other tools (like criminal theft statutes) to deter retail crime, or that the data collection and disclosure regime challenged here will not itself solve retail crime. Mot. at 20-21. Commercial speech restrictions require only "a fit that is not necessarily perfect, but reasonable." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id*. Here, a limited obligation to disclose factual identifying information is a reasonable response to the recognized problem of online retail theft. *See* Def.'s Ex. 2, Attach. 3.

B. Plaintiff's First Amendment Challenges to §§ 1749.8.9(a), (b)(1)(A), and (b)(1)(D) Likewise Fail

Plaintiff also fails to establish that the challenged provisions of section 1749.8.9 implicate First Amendment interests. It first argues that the provisions burden "expressive activity by operating online services . . . that facilitate all manner of third-party speech." Mot. at 22. As explained, the record contains no evidence that even a single NetChoice member's online marketplace is expressive. *See supra* pp. 8-9.

Plaintiff also argues that sections 1749.8.9(a), (b)(1)(A), and (b)(1)(D) require online marketplaces to "serv[e] as censors" regarding the content on their platforms. Mot. at 23 (quoting

NetChoice, LLC v. Bonta, 113 F.4th 1101, 1118 (9th Cir. 2024) (*NetChoice I*)). But as discussed above, those sections impose no mandate to engage in content moderation. *See supra* pp. 14-17. *NetChoice I* is therefore distinguishable, because in that case the challenged statute required platforms to review for and suppress harmful speech based on content. 113 F.4th at 1118.

Even if there were a burden on First Amendment interests, it would be justified. A governmental reporting requirement like section 1749.8.9(a) is subject to rational basis scrutiny, and the statute easily survives. *See Full Value Advisors*, 633 F.3d at 1109 (applying test "akin to the general rational basis test" to First Amendment challenge to "disclosure the Government requires for its essential operations") (internal quotation marks and citations omitted); *see also Pharm. Rsch. & Mfrs. of Am. v. Stolfi*, 153 F.4th 795, 812 (9th Cir. 2025) (discussing *Full Value Advisors* approvingly). And the burdens imposed by section 1749.8.9(b)(1)(A) and (b)(1)(D) are minimal, whatever the standard of review. Plaintiff's members already have "polic[ies] prohibiting the sale of stolen goods on the online marketplace," *see* Mot., Pl.'s Ex. C ¶ 22; Pl.'s Ex. D ¶ 11, and section 1749.8.9(b)(1)(A) otherwise requires only that marketplaces apply those policies when the marketplace knows or should know that a user has violated the policy, *see supra* pp. 15-16). Finally, section 1749.8.9(b)(1)(D) requires only that a covered online platform devote resources to prevent and detect retail crime, *see supra* p. 17, which is something that online platforms already perform under their terms and conditions and voluntary moderation efforts, *see* Mot., Pl.'s Ex. C ¶ 23; Pl.'s Ex. D ¶¶ 12-13.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be denied, and Defendant is entitled to summary judgment on each of Plaintiff's claims.

Dated: August 12, 2026

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