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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NETCHOICE, Plaintiff, v. ROB BONTA, Attorney General of California, Defendant.	Case No.: 5:25-cv-03178 **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT** Hearing Date: October 22, 2026 Hearing Time: 9:00 a.m. Judge: Hon. Beth L. Freeman Courtroom: 1

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INTRODUCTION

California identifies no valid reason for this Court to abandon the cogent analysis in its preliminary-injunction opinion. This Court previously concluded that the federal INFORM Act and California Civil Code §1749.8(b) contain "incompatible" requirements: The former provides that online marketplaces "shall *only* be required to count" third-party sales "for which *payment was processed* by the online marketplace," while the latter requires online marketplaces to *also* count sales for which they *did not* process the payment. Dkt.44 ("PI.Op.") at 9-10 (quoting 15 U.S.C. §45f(f)(3)(B)). Per the INFORM Act's express-preemption clause, the federal requirement overrides the "conflict[ing]" state-law requirement. PI.Op.9-10. This Court already rejected California's argument that the INFORM Act's use of the verb "conflict" triggers the application of implied "conflict preemption" principles—holding that "conflict" should instead be given "its ordinary, contemporary, common meaning," PI.Op.9—and the state's argument fares no better the second time around. Moreover, NetChoice would still prevail even under the state's interpretation of "conflict" because §1749.8(b) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," given the INFORM Act's careful delineation of which third-party sales count toward the "high volume" threshold. *NetChoice v. Carr*, 2024 WL 3262633, at *4-5 (N.D. Ga. June 30, 2024), *appeal pending*, No. 24-12273 (11th Cir.). The Court should reaffirm that §1749.8(b) is preempted.

This Court also concluded that California Civil Code §1749.8.9(a), (b)(1)(A), and (b)(1)(D) are expressly preempted by §230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. §230. PI.Op.14. The Ninth Circuit has repeatedly held that CDA §230 preempts state laws that necessarily require online services to monitor or moderate third-party content. *See, e.g.*, *Est. of Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1177 & n.3 (9th Cir. 2024). As the Court explained, §1749.8.9(b)(1)(D) expressly requires online marketplaces "to *monitor* listings in order to affirmatively prevent and detect organized retail crime"; §1749.8.9(a)'s requirement to alert law enforcement if an online marketplace "should know" that a third party is attempting to sell a stolen item "can be fulfilled only by monitoring third-party sellers' online content"; and §1749.8.9(b)(1)(D) requires online marketplaces to "moderate third-party content, deciding whether to publish or to withdraw it from the platform." PI.Op.14. The state's contrary arguments are meritless, as they defy both the statutory text and the well-settled rule that a "should know" standard necessarily presupposes an underlying duty to investigate. The Court should reaffirm its prior conclusion that CDA §230 preempts §1749.8.9(a), (b)(1)(A), and (b)(1)(D).

Lacking any persuasive argument that the Court erred in construing SB 1144 at the preliminary-injunction stage, California asserts that no NetChoice member has standing to challenge SB 1144. That argument is specious. It is well established that plaintiffs have standing to challenge a "regulation [that] 'is directed at [plaintiffs] in particular' and 'requires them to make significant changes in their everyday business practices.'" *Stavrianoudakis v. U.S. Fish & Wildlife Serv.*, 108 F.4th 1128, 1141-42 (9th Cir. 2024). That describes this case to a T. The fact that NetChoice members are "subject to the coercive effect of SB [1144]" and would need to spend money to comply with its requirements is "all that is required for Article III standing." *Meland v. WEBER*, 2 F.4th 838, 847 (9th Cir. 2021). Moreover, even assuming *arguendo* that NetChoice must show "a genuine threat of imminent prosecution," Dkt.74 ("AG.Br.") at 5, it has done so based on the Attorney General's representations that SB 1144 applies to NetChoice members and refusal to stay enforcement of SB 1144. After all, "a failure to *disavow* enforcement is sufficient to establish a credible threat of prosecution" under a newly enacted statute. *Imperial Sovereign Ct. of Mont. v. Knudsen*, 170 F.4th 820, 835 (9th Cir. 2026); *accord NetChoice v. Skrmetti*, 2026 WL 2546423, at *9-10 (6th Cir. Aug. 28, 2026). California's argument that NetChoice lacks associational standing to raise as-applied claims is weaker still. Neither law nor logic requires NetChoice to submit "declarations from [all] of its members" that are potentially subject to SB 1144, or to provide additional details about how its members "disseminate third-party content" or "structure their online marketplace feeds." *Contra* AG.Br.8-9. No additional facts are needed to hold SB 1144 invalid.

California also lacks any persuasive response to NetChoice's vagueness and First Amendment claims. Underscoring the statute's vagueness problems, California refuses to say whether the statutory definition of "online marketplace" covers social-networking services such as Facebook, Reddit, and X, or whether the requirement to count offline sales sweeps in purchases made through a third-party advertisement or a small-business page on Facebook or Nextdoor. And the state cannot wish away SB 1144's glaring First Amendment problems by pretending that it "impose[s] no mandate to engage in content moderation" and does not "require[] platforms to review for and suppress harmful speech based on [its] content." AG.Br.24-25. This Court has already held otherwise. *See* PI.Op.14. The Court should adhere to its prior analysis and grant NetChoice's motion for summary judgment on all its claims.

ARGUMENT

I. NetChoice Has Standing To Challenge SB 1144 On Behalf Of Its Members.

It is well settled that an organization may sue "on behalf of its members" when (1) at least one member would "have standing to sue in [its] own right"; (2) "the interests at stake are germane to the organization's purpose" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members." *Satanic Temple v. Labrador*, 149 F.4th 1047, 1050 (9th Cir. 2025). The state does not dispute that NetChoice satisfies the second requirement, *compare* Ex.B ¶¶4-9, *with* AG.Br.5-9, and its efforts to dispute the first and third requirements are unavailing.

A. Several NetChoice Members Would Have Standing to Sue in Their Own Right.

To establish Article III standing, a plaintiff must "demonstrate an injury in fact, causation, and redressability." *Labrador*, 149 F.4th at 1050. When the plaintiff is "one of the objects of" a government regulation, "there is ordinarily little question" that the plaintiff has standing to challenge it. *Meland*, 2 F.4th at 845; *accord Mirabelli v. Bonta*, 607 U.S. 492, 498 (2026) (per curiam); *Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 112 (2025). Standing "is established when, for example, the challenged regulation 'is directed at [plaintiffs] in particular' and 'requires them to make significant changes in their everyday business practices.'" *Stavrianoudakis*, 108 F.4th at 1141-42.

Several NetChoice members, including Facebook, Nextdoor, and OfferUp, readily satisfy this standard. These NetChoice members are undisputedly objects of SB 1144 because the statute directly regulates their operation of online marketplaces. *See* Ex.B ¶¶9-10; Ex.C ¶¶25-38; Ex.D ¶¶17-22; Ex.6. The statute directly injures them by requiring them to make significant (and costly) changes to their business practices, and that injury is plainly redressable through declaratory and injunctive relief. *See* Ex.B ¶¶11-13; Ex.C ¶¶37-49; Ex.D ¶¶23-32. This Court recognized as much in its prior opinion by holding that NetChoice members "will be forced to incur unrecoverable costs to comply with SB 1144" and issuing a preliminary injunction to prevent this irreparable injury. PI.Op.16. Notably, the state's summary-judgment brief does not contest the irreparable-injury requirement.

The state instead claims that Article III requires a showing that NetChoice members face "a 'genuine threat of imminent prosecution'" under SB 1144. *See* AG.Br.5-7. But that type of showing is needed only when a plaintiff seeks to challenge "a proscriptive statute," such as a "law[] prohibiting discrimination on the basis of marital status," *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1137, 1139 (9th Cir. 2000) (en banc), or a "prohibition on unannounced audio recordings," *Project Veritas v. Schmidt*, 125 F.4th 929, 939 (9th Cir. 2025). No such showing is needed when, as here, a *prescriptive* statute "requires [plaintiffs] to make significant changes in their everyday business practices." *Stavrianoudakis*, 108 F.4th at 1141. As the Ninth Circuit recently explained, "'it would strain credulity' to hold that a government enactment requiring a regulated entity to change its practices 'does not require action immediately enough to constitute an injury-in-fact.'" *Meland*, 2 F.4th at 846-47 (quoting *Texas v. EEOC*, 933 F.3d 433, 448 (5th Cir. 2019)). In short, the undisputed reality that NetChoice members are "subject to the coercive effect of SB [1144]" and would need to spend money to comply with its requirements is "all that is required for Article III standing." *Id.* at 847.

Assuming *arguendo* that NetChoice needs to show something more—i.e., that its members face "a genuine threat of imminent prosecution" under SB 1144, AG.Br.1—NetChoice has made that showing. NetChoice members undeniably have "a concrete plan to violate the law in question." *Project Veritas*, 125 F.4th at 941. As NetChoice explained in its discovery responses, "[e]ach affected member concluded that attempting to comply with SB 1144 would require it to restructure its operations at substantial burden and cost," so—instead of incurring those costs—the companies "worked with NetChoice to bring the present lawsuit" and obtained a preliminary injunction. Ex.14 at 3-4. NetChoice members are *not* currently in compliance with SB 1144, and, while the state disputes *how much* it would cost them to comply, it does not dispute that there would be meaningful compliance costs. *See* Ex.14 at 3-4; Ex.B ¶¶12-14; Ex.C ¶¶42-49; Ex.D ¶¶23-32; *cf.* Dkt.74-1 ¶¶3, 12, 14, 21, 27 (state's expert conceding that SB 1144 requires NetChoice members to alter their practices, insisting only that compliance would not be "unduly burdensome"). Regardless of the precise amount, these costs constitute an injury-in-fact. *See* PI.Op.16; *Van v. LLR*, 61 F.4th 1053, 1064 (9th Cir. 2023) ("Any monetary loss, even one as small as a fraction of a cent, is sufficient to support standing.").

The record also establishes that, but for this Court's intervention, NetChoice members would face "a 'substantial threat' of enforcement," *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 489 (9th Cir. 2024). California emphasizes that no "enforcement authority has 'communicated a specific warning or threat to initiate proceedings' under [SB 1144]" and that there is no "history of past prosecution or enforcement." AG.Br.7. Those observations are virtually meaningless, however, because SB 1144 did not take effect until July 1, 2025, and the state was preliminarily enjoined from enforcing it less than two weeks later. "[W]here, as here, plaintiffs 'challeng[e] a new law whose history of enforcement is negligible or nonexistent, … a failure to *disavow* enforcement is sufficient to establish a credible threat of prosecution.'" *Knudsen*, 170 F.4th at 835; *accord Antonyuk v. James*, 120 F.4th 941, 1005 (2d Cir. 2024) ("Courts have 'not place[d] the burden on the plaintiff to show an intent by the government to enforce the law against it' but rather 'presumed such intent in the absence of a disavowal by the government.'"). That principle dooms California's argument, as California has expressly declined to disavow enforcement here: Last year, this Court told the state that it "would appreciate a stay" of enforcement to give it "six or eight weeks" to prepare its preliminary-injunction order, Dkt.37 at 87:17-88:8, yet the state refused to agree to stay enforcement for even that brief period, *see* Dkt.38. *See Skrmetti*, 2026 WL 2546423, at *9-10 (because state's refusal to agree to stay its enforcement of a recently enacted law constituted a "refus[al] to disavow enforcement," plaintiffs had "a credible fear of enforcement").

In sum, this Court should reject California's effort to prevent NetChoice from challenging SB 1144 even as the state insists that its statute covers NetChoice members (Facebook, OfferUp, and Nextdoor) and refuses to disavow enforcement. The state's contention that these NetChoice members are not injured by SB 1144 "strain[s] credulity"; the state's own expert has conceded that the statute "requir[es] [them] to change [their] practices" under threat of significant financial penalties. *Meland*, 2 F.4th at 846-47; *see* Dkt.74-1 ¶¶12-22, 27. Because SB 1144 imposes affirmative legal obligations on these companies, they plainly have standing to challenge it—and, under longstanding principles of associational standing, NetChoice may bring that challenge on their behalf.

B. This Suit Does Not Require Participation of Individual NetChoice Members.

This Court's precedents make clear that when an association "assert[s] a facial challenge" and seeks "declaratory and injunctive relief, … neither the claim nor the relief requires the individual participation of the association['s] members." *Nat'l Ass'n of Home Builders v. City of Los Angeles*, 116 F.3d 485, at *1 (9th Cir. 1997) (table). The state accordingly concedes that NetChoice has associational standing to bring facial challenges to SB 1144. California asserts, however, that NetChoice lacks standing to bring its four as-applied claims, supposedly because those claims require "participation of individual members." AG.Br.7-9. California is incorrect.

First, NetChoice claims that California Civil Code §1749.8(b) and (c) are preempted by the federal INFORM Act "as applied to any NetChoice member that operates an online service that can be 'utiliz[ed]' for third-party sales without processing the payments for those sales." Dkt.73 at 9 ("MSJ"). The state provides no reason why participation of individual NetChoice members would be needed to adjudicate this as-applied preemption claim—and there is none. To be sure, some NetChoice members operate services that "process consumers' payments to sellers online" (e.g., Amazon and Etsy), while others operate services that "allow sellers to market items online but sell them offline" (e.g., Facebook Marketplace and OfferUp). AG.Br.8. But NetChoice is not challenging §1749.8(b) and (c) as applied to the former type of service, as those services must already comply with comparable obligations under the federal INFORM Act (and had to do so under the original California analog, before SB 1144's enactment). NetChoice instead argues that the INFORM Act preempts §1749.8(b) and (c)—as amended by SB 1144—to the extent that those provisions require NetChoice members to count *offline* transactions when determining who is a "high volume third-party seller." *See* MSJ.9-11. That is a pure question of law that NetChoice is well-equipped to pursue on behalf of its members, as the preemption analysis does not turn on any member-specific facts. *Cf. Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 651-54 (9th Cir. 2021) (association had standing to bring as-applied preemption claim on behalf of its members).

Second, NetChoice claims that CDA §230 preempts California Civil Code §1749.8.9(a), (b)(1)(A), and (b)(1)(D) "as applied to any NetChoice member that operates an 'online marketplace' within the meaning of the statute." MSJ.9; *see* MSJ.11-14. Again, the state provides no reason why NetChoice cannot bring this as-applied challenge on behalf of its members. To be sure, this claim pertains to a broader group of NetChoice members' online services, including *both* e-commerce platforms (e.g., Amazon and Etsy) *and* classifieds platforms (e.g., Facebook Marketplace and OfferUp). And, to the extent that the statute's vague definition of "online marketplace" could be read to include "social-networking services such as Facebook, Nextdoor, Reddit, and X," MSJ.7, this claim covers them as well. But there is no reason to require "declarations from" all these members—let alone their formal "participation" as parties to the litigation. *Contra* AG.Br.8. Because §1749.8.9(a), (b)(1)(A), and (b)(1)(D) are expressly preempted by CDA §230 (another pure question of law), California cannot apply those provisions to *any* NetChoice member, regardless of which members count as "online services" and how any specific member operates.

Third, NetChoice claims that all operative provisions of SB 1144 are unconstitutionally vague as applied to its members. This claim does not require participation of individual members either. *See Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 972 (9th Cir. 2003) (noting that associational plaintiff may pursue claim that challenged "ordinance would be impermissibly vague as applied to its own members"). The Court can readily assess whether §1749.8(b) and (c) "provide adequate guidance about which [NetChoice members'] services and what sales are covered," MSJ.15-16, and whether §1749.8.9(a), (b)(1)(A), and (b)(1)(D) provide sufficiently clear standards for monitoring third-party content in order to detect and prevent unlawful activity, MSJ.16-17, without requiring additional NetChoice members to submit declarations or become parties to the litigation.

Finally, NetChoice claims that all operative provisions of SB 1144 violate the First Amendment as applied to NetChoice members that operate an "online marketplace." MSJ.17, 22. There is no genuine dispute that online marketplaces such as Amazon, Etsy, Facebook Marketplace, Nextdoor, and OfferUp "disseminat[e] a curated compilation of speech regarding items that third parties are lawfully offering to sell." MSJ.17; *see* Ex.B ¶¶6-8; Ex.C ¶¶8-11; Ex.D ¶¶11-13; Ex.1; Ex.2. And the challenged provisions plainly burden that First Amendment activity—regardless of any details or "var[iation] in how [these companies] curate their online marketplace feed," AG.Br.9. Plus, the challenged provisions implicate the First Amendment in several other ways, including by compelling online marketplaces and their users to speak and by burdening users' protected speech. MSJ.18-19, 22-23. Those facts readily distinguish this case from *NetChoice v. Bonta*, 152 F.4th 1002 (9th Cir. 2025), which involved a law directly "regulating how internet platforms allow minors to access personalized recommendation algorithms." *Id.* at 1009. Given the focus of *that* law, the Ninth Circuit found no "abuse of discretion" in the district court's decision that "it needed more information—and the participation of individual members—to adjudicate NetChoice's 'fact intensive' claims about all of its members' algorithms and the appropriate relief." *Id.* at 1014. Here, by contrast, the Court can easily resolve NetChoice's as-applied First Amendment challenge without any fact-intensive assessment of "how [online marketplaces] disseminate third-party content" because the law burdens protected activity regardless of the form that expression takes. *Contra* AG.Br.8. Accordingly, the "prudential" considerations animating *Bonta*, 152 F.4th at 1013-14, do not counsel in favor of requiring the participation of individual NetChoice members here. NetChoice has thus established associational standing to raise each of its as-applied claims.

II. SB 1144 Is Expressly Preempted By Federal Law And Unconstitutional To Boot.

California's desire to gin up a threshold issue is understandable, as this Court has already considered the merits and issued a well-reasoned decision explaining that all challenged provisions of SB 1144 are preempted by federal law. There is no reason for this Court to depart from its prior analysis at summary judgment; NetChoice's preemption claims present the exact same legal questions that this Court resolved in its prior opinion, and neither side contends that there is any factual issue that could necessitate a trial. Moreover, while this Court reasonably limited its analysis to preemption at the preliminary-injunction stage, *see* PI.Op.15-16, NetChoice has also demonstrated that SB 1144 is unconstitutionally vague and that it violates the First Amendment. NetChoice is accordingly entitled to summary judgment on Counts I, II, III, and IV of its amended complaint.

A. The Federal INFORM Act Expressly Preempts California Civil Code §1749.8(b).

The federal INFORM Act contains an express-preemption clause forbidding any "State" from "establish[ing] or contin[uing] in effect any law, regulation, rule, requirement, or standard that conflicts with" any of its requirements. 15 U.S.C. §45f(g). Two of the INFORM Act's core requirements are that "online marketplace[s]" (i) must keep track of third-party sales and (ii) "shall *only* be required to count sales or transactions … for which payment was processed by the online marketplace." 15 U.S.C. §45f(f)(3)(B) (emphasis added). As this Court held in its prior opinion, California Civil Code

§1749.8(b) stands "in opposition" to and is "incompatible" with the latter requirement: It requires online marketplaces to count *not only* transactions for which they process payment *but also* "transactions made outside of the online marketplace." PI.Op.10. That is a clear and direct conflict. Pursuant to the INFORM Act's express-preemption clause, the federal INFORM Act's requirement that online marketplaces "shall only be required to count" online transactions overrides the "conflict[ing]… requirement" that California seeks to impose. 15 U.S.C. §45f(f)(3)(B), (g).

The state's counterarguments are unpersuasive. At the outset, the state asserts (with minimal analysis) that the INFORM Act's use of the word "conflict," *id.* §45f(g), triggers the application of implied "conflict preemption" principles. AG.Br.10. That reading is inconsistent with well-established rules of statutory construction. For one, "[w]hen a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560, 566 (2012); *accord* PI.Op.9. Here, the INFORM Act neither defines "conflict" nor uses the phrase "conflict preemption." The statute instead deploys "conflict" as a verb—in the middle of a broad, express-preemption clause. That hardly suggests a congressional desire to *limit* the INFORM Act's preemptive force to a subset of implied-preemption principles. *Cf.* 18 U.S.C. §848 (disclaiming field preemption and limiting statute's preemptive force to scenarios where "there is a direct and positive conflict" between federal and state law); 45 C.F.R. §160.202(1)-(2) (expressly codifying impossibility preemption and obstacle preemption). Simply put, California fails to identify anything resembling the "persuasive proof of congressional intent" that would be needed to "depart from the ordinary meaning of an undefined [statutory] term." *Trim v. Reward Zone USA LLC*, 76 F.4th 1157, 1161 (9th Cir. 2023).

The state's crabbed reading of §45f(g) also runs headlong into the canon against superfluity. *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("[A] 'cardinal principle' of interpretation [is] that courts 'must give effect, if possible, to every clause and word of a statute.'"). As noted, "conflict preemption" is a form of *implied* preemption. Because "principles of implied preemption" emanate from the Supremacy Clause, they apply even "when Congress has been *silent* with respect to pre-emption." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 532 (1992) (Blackmun, J., concurring) (emphasis added). Here, Congress was decidedly not silent about preemption; the federal INFORM Act includes a broad express-preemption clause. Yet under California's reading, that clause would accomplish nothing; the exact same implied conflict-preemption principles would apply with or without it. California has no explanation for why Congress would have taken the trouble to enact §45f(g) if it did not intend to preempt anything beyond what the Supremacy Clause would already preempt in the face of congressional silence. The far more logical explanation is that Congress meant for "conflict" to carry its ordinary meaning in §45f(g), and thus to preempt the patchwork of state laws regarding high-volume sellers on online marketplaces that actually existed in late 2022. *See* MSJ.4-6.

The state notes that Congress has used even broader language in other express-preemption clauses. But its observation that a handful of other statutes forbid states from "impos[ing] 'additional' or 'different' requirements from federal law," AG.Br.13, is no reason to give "conflicts" anything other than its ordinary meaning in §45f(g). Congress has used a wide variety of formulations in express-preemption clauses. That substantial variation undercuts any suggestion that it uses a particular phrase when it wants to preserve a uniform federal standard. *See, e.g.*, 7 U.S.C. §136v(b) (states may not enact requirements "in addition to or different from" federal requirements); 29 U.S.C. §1144(a) (preempting all state laws "relat[ing] to" a particular subject); 42 U.S.C. §1320d-7(a)(1) (federal requirements "shall supersede any contrary provision of State law"). In the INFORM Act, Congress made crystal clear that it wanted online marketplaces to be responsible for tracking *only* those sales for which they process payment, 15 U.S.C. §45f(f)(3), and it sensibly preempted any state law "that conflicts with th[at] requirement[]," *id.* §45f(g). As a state law that sweeps in additional sales, §1749.8(b) plainly fits the bill.

California suggests that "Congress's use of 'only'" in §45f(f)(3)(B) was "merely intended to limit online marketplaces' obligations under federal law," "not what states and localities [may] do when crafting their own laws." AG.Br.12-13. But that reading of the INFORM Act ignores §45f(g), which expressly commands that "[n]o State or political subdivision of a State" may enact "any law … that conflicts with" §45f(f)(3)(B). If §45f(g) does not preempt California's command that online marketplaces must count sales for which they *do not* process the payment, then it is hard to imagine what it would preempt.

The state's reliance on *Jones v. Google*, 73 F.4th 636 (9th Cir. 2023), is also misplaced. That case involved the Children's Online Privacy Protection Act ("COPPA"), which does not even use the word "conflict"; that statute instead forbids states from "impos[ing] … liability" for certain data-collection practices in a manner that is "inconsistent with [COPPA's] treatment of those [practices]." *Id.* at 639 (quoting 15 U.S.C. §6502(d)). The Ninth Circuit held that COPPA's preemption clause does not bar "state law claims based on underlying conduct that also violates COPPA" because such laws merely "supplement" or "require the same thing" as COPPA. *Id.* at 641-42. *Jones* is nothing like this case. SB 1144 does not "require the same thing" as the INFORM Act or proscribe conduct that would also violate the INFORM Act. It instead foists upon online marketplaces an entirely distinct obligation to keep track of third-party sellers' *off-platform* transactions, even though the INFORM Act expressly states that marketplaces "shall *only* be required" to keep track of *on-platform* transactions. 15 U.S.C. §45f(f)(3)(B) (emphasis added). As another federal court explained in holding that the INFORM Act preempts a materially identical provision of Georgia law, these requirements "conflict" with each other under "[a]ny ordinary meaning" of that term. *Carr*, 2024 WL 3262633, at *3. Far from "ask[ing] the Court to find that 'conflict' does not mean 'conflict,'" AG.Br.13, NetChoice simply asks the Court to enforce §45f(g) as written. The state's arguments, by contrast, would deprive the INFORM Act's preemption clause of any force. This Court should reaffirm that the term "conflict" should be "construe[d] … in accordance with its ordinary, contemporary, common meaning." PI.Op.9. And because the state no longer advances any argument that it can prevail under the ordinary meaning of conflict, *compare* AG.Br.9-14, *with* Dkt.30 at 10, that should end the inquiry.

Even assuming *arguendo* that §45f(g) could plausibly be interpreted as superfluously codifying implied "conflict preemption" principles, *but see supra* pp.8-10, that would not change the bottom line. Although this Court's prior opinion did not reach this issue, the *Carr* court correctly held that §1749.8(b) is preempted not only under express-preemption principles, but under "obstacle" preemption principles as well. 2024 WL 3262633, at *4-5. Under the Supreme Court's "conflict preemption" jurisprudence, a state law is invalid if (1) "it is impossible for a private party to comply with both state and federal law"; *or* (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). California spends considerable energy arguing that NetChoice members can simultaneously comply with both the INFORM Act and SB 1144, *see* AG.Br.10-11, but that is not (and has not ever been) disputed. The salient point is that §1749.8(b) is invalid not only under the plain meaning of "conflict" but under "obstacle" preemption principles as well. *See Carr*, 2024 WL 3262633, at *4-5.

To determine "what constitutes an unconstitutional obstacle" to federal law, a court must "examin[e] the federal statute as a whole and identify[] its purpose and intended effects." *Chamber of Com. v. Bonta*, 62 F.4th 473, 482 (9th Cir. 2023). The *Carr* court correctly explained that the federal INFORM Act charts a "calibrated middle path": It requires an online marketplace to collect and maintain information about third-party transactions, but only when the marketplace already possesses (or can readily obtain) that information by virtue of the payment-processing role it has chosen to take on. 2024 WL 3262633, at *5. Confirming that Congress did not intend to saddle classifieds platforms like Facebook Marketplace, Nextdoor, and OfferUp with an onerous obligation to monitor third parties' in-person, cash transactions, the INFORM Act specifies that an online marketplace "shall only be required" to account for transactions consummated through the marketplace or its payment processor. 15 U.S.C. §45f(f)(3)(B). As amended, §1749.8(b) "poses an unconstitutional obstacle" to Congress' balanced approach by attempting to force classifieds platforms to investigate private parties' independent off-platform dealings—the very thing Congress said they are *not* required to do. *Carr*, 2024 WL 3262633, at *4. And that obstacle is particularly pronounced because "the internet's boundary-less nature" means that even one more aggressive state law could disrupt Congress's design throughout the entire nation. *Cf. Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003).

California's efforts to resist that conclusion are unavailing. It insists that SB 1144 and the federal INFORM Act do not "conflict" because both advance the same general "goal" of "deter[ring] online sales of illegal goods." AG.Br.12. The *Carr* court correctly rejected that argument under the well-established principle that "the fact of a common end hardly neutralizes conflicting means." 2024 WL 3262633, at *4 (quoting *Crosby*, 530 U.S. at 379-80); *see, e.g.*, *Arizona v. United States*, 567 U.S. 387, 406 (2012) (state law "impos[ing] criminal penalties on aliens who seek or engage in unauthorized employment" was conflict-preempted, even though it "attempt[ed] to achieve one of the same goals as federal law"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003) (state law imposing disclosure requirements on insurers was conflict-preempted, even though it promoted the federal government's "goal" of "obtaining compensation for Holocaust victims"). Subsections 45f(f)(3)(B) and (g) reflect a clear "federal decision" about the "right degree" of regulation to impose on online marketplaces vis-à-vis monitoring high-volume third-party sellers. *Carr*, 2024 WL 3262633, at *4. By "adopt[ing] a different and more expansive scope of what online marketplaces are required to do in precisely the manner the INFORM Act prohibits," SB 1144 defies Congress' intent. *Id.* at *5. "Despite the laws' similar goal, their means nonetheless conflict." *Id.*

Finally, the state's contention that NetChoice's INFORM Act preemption claim does not satisfy the "stringent facial-attack standard," AG.Br.9, is wrong in both its premise and its conclusion. As explained, NetChoice has properly alleged—and established—that §1749.8(b) is invalid "as applied to any NetChoice member that operates an online service that can be 'utiliz[ed]' for third-party sales without processing the payments for those sales," MSJ.9. *See supra* p.6; *see* Dkt.46 at 36. In all events, California's summary-judgment brief fails to identify any non-preempted application of "SB 1144 Section 3's amendment to California Civil Code § 1749.8(b)," underscoring that, as this Court held at the preliminary-injunction stage, the amendment is "invalid in all its applications." PI.Op.10-11. This Court should award NetChoice summary judgment on Count I of its amended complaint.

B. Section 230 of the CDA Expressly Preempts §1749.8.9(a), (b)(1)(A), and (b)(1)(D).

The Ninth Circuit has repeatedly held that 47 U.S.C. §230(c)(1) preempts any state law imposing a "duty [that] would necessarily require an internet company to monitor third-party content." *Est. of Bride*, 112 F.4th at 1177 n.3. As this Court correctly held at the preliminary-injunction stage, California Civil Code §1749.8.9(a), (b)(1)(A), and (b)(1)(D) do just that. *See* PI.Op.14-15. "Most obviously, [section] 1749.8.9(b)(1)(D) 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.'" PI.Op.14. Section 1749.8.9(a) builds on this monitoring requirement, imposing a duty to alert law enforcement whenever an online marketplace "knows or should know"—"[b]ased on information obtained through the required monitoring"—"that a third-party seller is selling or attempting to sell stolen goods to a California resident." PI.Op.14. And §1749.8.9(b)(1)(A) requires online marketplaces to not only passively monitor but also actively "moderate third-party content" by removing listings for stolen goods and "suspen[ding] or terminat[ing]" the accounts of third parties who "knowingly sell[] stolen goods." PI.Op.14. The three challenged provisions thus create a unified scheme that treats online marketplaces "as a publisher or speaker of third-party content," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009), by requiring them to monitor and moderate third-party listings. Binding precedent "make[s] clear" that these provisions "fall within Section 230's preemption clause." PI.Op.15.

California spends just three sentences arguing that §1749.8.9(b)(1)(D) is not preempted, *see* AG.Br.17, and that argument falls flat. Despite elsewhere conceding that "[t]he 'relevant question' is whether the challenged provisions 'necessarily require an internet company to monitor third-party content,'" AG.Br.14—which §1749.8.9(b)(1)(D) expressly does—the state suggests that §230 *permits* states to require online services "to 'monitor' [third-party] listings," so long as the law "does not proscribe, mandate, or even discuss the *content* of the listings." AG.Br.17. The lone case that the state cites for this proposition—*HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019)—does not remotely support it. To the contrary, *HomeAway* reaffirmed that §230 *precludes* states from "requir[ing] an internet company to monitor third-party content," but found that the challenged ordinance "d[id] not require" such monitoring. *Id.* at 682. That holding does not help California here, because §1749.8.9(b)(1)(D) *does* require regulated websites to monitor third-party content. Moreover, §1749.8.9(b)(1)(D) requires NetChoice members to monitor (and act upon) posts *based on* their content, *contra* AG.Br.17, as the only way for a marketplace to determine whether a given post relates to "organized retail crime" is to examine what it says. To be clear, NetChoice members strongly support California's goal of combatting crime and spend considerable resources developing and enforcing standards of conduct and assisting law enforcement. *See, e.g.*, Ex.C ¶¶18-24; Ex.D ¶¶10-16. But §230 does not allow California to compel them to "monitor third-party content" for potential indicia of retail crime, under threat of liability if a factfinder determines that they did not devote sufficient resources to "affirmatively prevent[ing] and detect[ing]" such activities. PI.Op.14-15.

The state's efforts to defend §1749.8.9(a) similarly fall flat. Imposing liability based on what an actor "[s]hould know" (sometimes called constructive knowledge) "indicates that the actor is under a duty … to use reasonable diligence to ascertain the existence or non-existence of the fact in question." Restatement (Second) of Torts §12, cmt.a (Aug. 2026); *accord* Restatement (Second) of Agency §9, cmt.e (Oct. 2024); *Lee v. Amazon.com*, 291 Cal.Rptr.3d 332, 352-53 (Cal. Ct. App. 2022) ("proof of constructive knowledge"—i.e., "[k]nowledge that one using reasonable care or diligence should have"—"rests on a defendant's duty to discover information"). For example, a store owner can be held liable for failing to remedy a hazard about which he "should have known" only because he has an underlying duty to "mak[e] reasonable inspections of the portions of the premises open to customers." *Ortega v. Kmart Corp.*, 36 P.3d 11, 14-15, 17 (Cal. 2001). Similarly, §1749.8.9(a)'s imposition of liability under a "should know" standard necessarily implies a duty to inspect third-party posts for evidence of attempted sales of stolen goods—a duty that §1749.8.9(b)(1)(D) makes explicit. Indeed, the state concedes that a "should know" standard "rests on a defendant's duty to discover information." AG.Br.16. Citing a single, 90-year-old case, the state avers that "such [a] duty exits [sic] only when 'some element of conspicuousness or notoriety' suggests that further investigation is prudent." AG.Br.16. Even assuming that is an accurate statement of present-day California law, *but see Ortega*, 36 P.3d at 14-15; *Lee*, 291 Cal.Rptr.3d at 352-53; Cal. Civ. Code §19, it does not change the reality that §1749.8.9(a) necessarily requires monitoring of third-party content and is thus preempted by §230.

Perhaps recognizing as much, the state suggests that the Court should "sever" the phrase "or should know" from §1749.8.9(a), leaving just an actual-knowledge requirement. AG.Br.16. The state has forfeited this argument by gesturing towards it in a single sentence, without addressing any of the relevant criteria for severability under California law. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 (9th Cir. 2011) (en banc) (holding that the government "waived any argument regarding severability"); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) ("Issues raised in a brief which are not supported by argument are deemed abandoned."). Regardless, this severability argument lacks merit. To begin with, SB 1144 does not contain a severability clause, so there is no presumption in favor of severability. *See In re D.L.*, 310 Cal.Rptr.3d 562, 578 (Cal. Ct. App. 2023). Absent a severability clause, California cannot show "[v]olitional separability," which turns on whether the remaining portion of SB 1144 "would have been adopted by the legislative body had [it] foreseen the partial invalidation of the statute." *Id.* "[W]hen the main purpose of a statute is defeated by the unconstitutionality of part of the act, the whole act is invalid." *Abbott Lab'ys v. Franchise Tax Bd.*, 96 Cal.Rptr.3d 864, 873 (Cal Ct. App. 2009). Here, SB 1144's entire purpose is to "stop theft from retail stores and community theft." Ex.A §1. The legislature endeavored to achieve this goal by enacting several interlocking requirements: Online marketplaces must monitor third-party listings, report suspicious activity identified through that monitoring, and impose consequences on third-party users identified through the monitoring. *See* Ex.A §6. Redlining §1749.8.9(a) to eliminate the duty to monitor third-party listings and instead impose a freestanding duty to report *known* attempts to sell stolen goods—which online marketplaces already do of their own volition, *see, e.g.*, Ex.D ¶13—would do virtually nothing to further the legislature's goal of stopping real-world theft. That presumably explains why the legislature used the phrase "knows or should know" in the first instance. Simply put, the legislature considered and adopted SB 1144 §6 as a unified package, and there is absolutely no reason to think that it would have adopted a partial version of §1749.8.9(a) without also requiring online marketplaces to monitor third-party listings and impose consequences for attempts to sell stolen goods.

California's attempt to save §1749.8.9(b)(1)(A) also fails. As the Court previously held, this provision expressly requires online marketplaces to "moderate third-party content," as it plainly requires the deletion of third-party listings regarding stolen goods and suspension or termination of the offending third-party accounts. PI.Op.14. The state's suggestion that online marketplaces could perform this content-moderation without "monitor[ing]" any third-party content themselves, supposedly by "act[ing] in response to notifications from other marketplace users or law enforcement," AG.Br.16, misses the mark. First, the statutory command that an online marketplace "[e]stablish and maintain a policy prohibiting the sale of stolen goods" and to impose "consequences" on those who violate it, Cal. Civ. Code §1749.8.9(b)(1)(A), plainly contemplates that *the marketplace* will review the content of specific posts and assess whether to remove them—and suspend or terminate the related user accounts—for violating the policy. The state's suggestion that a marketplace could somehow discharge this duty without monitoring third-party content is fanciful, particularly since other provisions of §1749.8.9 (discussed above) specifically require such monitoring. In all events, §230 preempts not only monitoring requirements but also requirements to "moderat[e] [third-party] content in some way, whether through deletion, change, or suppression." *Est. of Bride*, 112 F.4th at 1180. And by its very terms, §1749.8.9(b)(1)(A) imposes liability for "fail[ing] to remove content," which "necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id.* at 1177 (quoting

Barnes, 570 F.3d at 1103). That is squarely prohibited by §230. This Court should reaffirm its prior holding and award NetChoice summary judgment on Count II of its amended complaint.

C. Key Provisions of SB 1144 Are Unconstitutionally Vague.

SB 1144 is also void for vagueness. Both on its face and as applied to NetChoice members, it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" and "encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). As amended, §1749.8(c) is vague about whether it regulates only online services that are specifically designed as "marketplaces" or extends to social-networking services more broadly. *See* MSJ.15. Section 1749.8(b) is vague about what sales must be counted, including whether it covers purchases resulting from clicking on third-party advertisements or contacting a small business through its page on Facebook or Nextdoor. And SB 1144 provides no guidance on how much monitoring of third-party content it requires, inviting arbitrary enforcement based on hindsight-driven allegations that an online service did not do enough to identify and report potential sales of stolen goods or "affirmatively prevent and detect organized retail crime." Cal. Civ. Code §1749.8.9(b)(1)(D); *see id.* §1749.8.9(a), (b)(1)(A).

California fails to demonstrate that SB 1144 is "clear enough" that a "business person of ordinary intelligence would understand" what it covers. AG.Br.17. The state begins by denying that the challenged requirements "implicate constitutionally protected speech," in hopes of persuading the Court to apply a "less strict vagueness test." AG.Br.18. But SB 1144's expansion of the high-volume third-party seller regime implicates speech several times over—including NetChoice members' speech and their users' speech. *See infra* pp.19-22. Moreover, *contra* AG.Br.18, Ninth Circuit precedent expressly permits plaintiffs "to raise the rights of third parties [when] alleging [both] vagueness and overbreadth." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). And the First Amendment implications of requiring online marketplaces to monitor third-party speech, inform law enforcement about suspicious speech, and suppress potentially unlawful speech are, if anything, even more pronounced. *See infra* pp.22-23. This is plainly a case where "rigorous adherence" to the void-for-vagueness doctrine "is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations*, 567 U.S. 239, 253-54 (2012).

On substance, California's brief is notable less for what it says than for what it does not say. The state carefully avoids taking any position on whether SB 1144's definition of "online marketplace" encompasses social-networking services such as Facebook, Reddit, and X. *Compare* AG.Br.18-19, *with* MSJ.15. It asserts that this statutory definition "is only concerned with [platforms] that are 'directed' at consumers of physical goods," AG.Br.19, but refuses to say whether a social-networking service that generates revenue by running advertisements for consumer products (e.g., Facebook or X) is "consumer-directed" within the meaning of §1749.8(c). The state similarly avoids addressing whether a host of offline transactions—e.g., purchases resulting from a third-party advertisement, a Facebook post, a Nextdoor business page, or a direct message on X—are made "utilizing" the relevant platform within the meaning of §1749.8(b). NetChoice does not merely have a "policy disagreement" with the California legislature's decision to "broaden" the statutory definitions of "online marketplace" and "high-volume third-party seller." *Contra* AG.Br.19. Its members genuinely have no idea which services and what sales the amended definitions cover—and the California Attorney General does not appear to know either. Subsections 1749.8(b) and (c) thus flunk the "person of ordinary intelligence" standard.

California similarly offers little response to NetChoice's argument that SB 1144's mandate to "affirmatively prevent and detect organized retail crime" by monitoring, moderating, and informing law enforcement about third-party content is so open-ended as to invite arbitrary enforcement and chill large swathes of protected speech. *See* MSJ.16-17. The state's observation that "should know" is a "familiar concept" and that the challenged provisions are "not difficult to understand," AG.Br.20, misses the point. The statute's terms are so broad as to empower law-enforcement officials to bring an action against an online marketplace virtually any time they discover that a third party used it to sell a stolen item on the ground that the company did not dedicate sufficient "policies, systems, and staff" to monitoring third-party listings and thus "should [have] know[n]" about the unlawful activity. Cal. Civ. Code §1749.8.9(a), (b)(1)(D). That will inevitably result in arbitrary enforcement. And the state does not meaningfully dispute that the open-ended nature of this mandate will chill substantial quantities of lawful speech. *Compare* AG.Br.20, *with* MSJ.16-17. NetChoice is entitled to summary judgment on Count III of its amended complaint.

D. SB 1144 Also Runs Afoul of the First Amendment.

Finally, NetChoice is entitled to summary judgment on its claim that all operative provisions of SB 1144 violate the First Amendment as applied to NetChoice members. (As the state notes, NetChoice is not pursuing a facial First Amendment challenge.)

1. California Civil Code §1749.8(b) and (c) violate the First Amendment as applied to covered NetChoice members.

SB 1144's expansion of the high-volume, third-party seller regime plainly implicates the First Amendment. For one thing, it imposes significant burdens on NetChoice members—including, at a minimum, Facebook, Nextdoor, and OfferUp—that disseminate curated compilations of constitutionally protected third-party speech. MSJ.18. For another, it compels NetChoice members to demand sensitive information from third-party sellers and compels both NetChoice members and third-party sellers to make public-facing disclosures. MSJ.18. On top of all that, these burdens will inevitably chill constitutionally protected user posts and item listings—which again implicates the First Amendment rights of NetChoice members and their users alike. MSJ.18-19.

California attempts to evade First Amendment scrutiny by asserting that the record "contain[s] no information … about *how*" Facebook Marketplace, OfferUp, and Nextdoor's "Free and For Sale" feature "disseminate content." AG.Br.21. Not so: NetChoice introduced uncontroverted evidence that each of these online services has detailed policies regarding what third-party content it will—and will not—disseminate. *See* Ex.B ¶¶6-8; Ex.C ¶¶8-11; Ex.D ¶¶11-13; Ex.1; Ex.2. There is no genuine dispute about this widely known, publicly available fact. And the Supreme Court has squarely held that curating third-party content "in conformity with [such] content-moderation policies" is "expressive activity" that the First Amendment protects. *Moody v. NetChoice*, 603 U.S. 707, 719, 731 (2024). Moreover, even leaving aside such editorial judgments, each platform is in the business of publicly "disseminati[ng] information" about products lawfully offered for sale, which is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). The same goes for every other NetChoice member that operates a social-networking service (e.g., Facebook, Reddit, and X), to the extent 1749.8(c)'s vague definition of "online marketplace" sweeps in such services. So, applying the high-volume third-party seller to such NetChoice members unquestionably compels them to speak and to suppress third-party speech, implicating both their and their users' First Amendment rights. No further information is needed to conclude that §1749.8(b) and (c) burden free speech as applied to all NetChoice members that operate "online marketplaces" within the meaning of SB 1144.

It makes no difference that "sections 1749.8(b) and (c) themselves impose no data collection requirement," AG.Br.21. As the state concedes, "these definitional provisions extended an existing … regime to additional transactions" and "additional platforms" (e.g., OfferUp and Nextdoor's "Free and For Sale" feature, which do not process payments for third-party sales). AG.Br.21-22. NetChoice is well within its rights to challenge this expansion on behalf of its members, particularly since the burdens associated with attempting to gather information about offline transactions are much greater than those imposed by the pre-SB 1144 regime. *See* Ex.C ¶¶37-41; Ex.D ¶¶24-27. California suggests that SB 1144 creates only a "reporting requirement to the government." AG.Br.22. But by extending the preexisting regulatory regime to online services such as Facebook Marketplace, OfferUp, and Nextdoor, the expanded definitional provisions compel third-party sellers to convey sensitive personal information (e.g., bank account numbers and Social Security Numbers) to *private* companies, *see* Cal. Civ. Code §1749.8.1; Ex.D ¶27, and compel third-party sellers to make (and online marketplaces to carry) other disclosures to consumers, *see* Cal. Civ. Code §1749.8.2(a)-(b). Such compelled disclosures plainly implicate the First Amendment. *See, e.g.*, *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 197-99 (1999) (analyzing "compel[led] personal name identification" as compelled speech); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (applying strict scrutiny to law requiring "professional fundraisers" to disclose certain facts "to potential donors, before an appeal for funds").

California asserts that SB 1144's expanded high-volume third-party seller regime should be analyzed under the more forgiving standard announced in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). But *Zauderer* governs only laws that require those engaged in commercial activity to provide "information about the terms under which" the "services" they offer "will be available." *Id.* at 651. The regime challenged here not only requires disclosures but imposes considerable burdens (e.g., an information-gathering mandate) on online marketplaces and will inevitably suppress their users' speech. *See* MSJ.6-7, 18-19. Moreover, even if one considers "only [NetChoice's] claims of compelled speech," AG.Br.23, *Zauderer* is still inapposite because the challenged provisions require online marketplaces to disclose information about *someone else*'s speech or services. *Zauderer* has never been understood to apply in that context. *See Wash. Post v. McManus*, 944 F.3d 506, 515-17, 520 (4th Cir. 2019) (state law requiring "online platforms" to publicly post certain facts about advertisements they carry triggered heightened scrutiny because it "deter[red] hosting" that constitutionally protected speech). In fact, the Supreme Court has never applied *Zauderer* outside the context of correcting misleading advertising. It has instead consistently and repeatedly described *Zauderer* as limited to efforts to "combat the problem of inherently misleading commercial advertisements" by mandating "only an accurate statement." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *see also, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015) ("*Zauderer* is confined to advertising, emphatically and, one may infer, intentionally.").

Contra AG.Br.23, the Ninth Circuit has not announced a blanket rule that heightened scrutiny "does not apply to compelled, as distinct from restricted or prohibited, commercial speech." In fact, the very case that California cites for this purported rule concludes that "the *Zauderer* standard applies only if the compelled disclosure involves 'purely factual and uncontroversial' information" that "relate[s] to the product or service that is provided by an entity subject to the requirement." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844-45 (9th Cir. 2019); *accord Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 768-69 (2018). Requiring private parties to give a private company sensitive personal information such as a bank account number and SSN is plainly not "uncontroversial." *Contra* AG.Br.23. As the Ninth Circuit has explained, what matters is whether the compelled disclosures are "controversial from the subjective standpoint of the speakers." *See NAWG v. Bonta*, 85 F.4th 1263, 1278 (9th Cir. 2023). Here, they plainly are; a third-party seller could reasonably be concerned about whether the company will securely maintain its data or will be obliged to share it with the state. *See* Ex.D ¶¶27, 31. What is more, the disclosures that SB 1144 demands do not relate to a product or service offered by the directly regulated parties (online marketplaces) or even to the items offered by the third-party sellers. *Zauderer* does not apply.

In all events, SB 1144's disclosure regime is such a burdensome and circuitous means of combating theft that it would not satisfy the *Zauderer* standard—and thus fails intermediate or strict scrutiny *a fortiori*. Even under *Zauderer*, the state has the burden to prove that its disclosure requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 585 U.S. at 776. It cannot do so here. It is one thing to require someone engaged in commercial activity to provide "purely factual and uncontroversial information about the terms under which" the "services" it is offering "will be available." *Zauderer*, 471 U.S. at 651. It is another thing entirely to compel someone engaged in speech, but not sales or payment-processing activity, to collect and disseminate information about other speakers. *See McManus*, 944 F.3d at 511, 515-17, 520-21 (holding unconstitutional a law that required "online platforms" to disclose information about their advertisers). There is a world of difference between requiring *The Mercury News* to disclose the terms on which it sells subscriptions and forcing it to investigate and police all its advertisers and demand that they make various disclosures about themselves. SB 1144 jumps those tracks, requiring online services to somehow investigate and unearth information about third parties' off-platform transactions and to extract from anyone who meets the (expanded) "high volume" threshold information that the services themselves must then convey. To the extent this can even be understood as a "disclosure" requirement, it is the model of an "unduly burdensome" one. *NIFLA*, 585 U.S. at 776; *accord Zauderer*, 471 U.S. at 651. Any way one slices it, NetChoice is entitled to summary judgment on its claim that §1749.8(b) and (c) violate the First Amendment as applied to applied to all NetChoice members that operate an "online marketplace."

2. California Civil Code §1749.8.9(a), (b)(1)(A), and (b)(1)(D) violate the First Amendment as applied to covered NetChoice members.

It is equally clear that the other operative provisions of SB 1144 trigger—and fail—First Amendment scrutiny. *See* MSJ.22-23. Requiring NetChoice members "to monitor" third-party speech on their online marketplaces, "alert" government about certain types of speech, and then moderate and "impose consequences" for such speech, §1749.8.9(a), (b)(1)(A), and (b)(1)(D), undoubtedly implicates the First Amendment—regardless of any details about the "structure" or "expressive [nature]" of NetChoice members' online marketplaces, AG.Br.8-9, 24. Laws that "deputize[] covered businesses into serving as censors for the State" "invite[] First Amendment scrutiny." *NetChoice v. Bonta*, 113 F.4th 1101, 1118 (9th Cir. 2024). The state's effort to "distinguish[]" *Bonta* on the ground that it was considering a statute that "required platforms to review for and suppress harmful speech based on content," AG.Br.25, blinks reality. Just like the law in *Bonta*, §1749.8.9(a) and (b)(1)(D) require platforms to "monitor[] third-party content" and §1749.8.9(b)(1)(A) requires the suppression of particular types of speech. PI.Op.14. So, just like the challenged law in *Bonta*, these provisions "trigger[] review under the First Amendment." 113 F.4th at 1118.

Because the challenged monitoring, reporting, and moderation requirements all regulate speech based on its subject matter—i.e., whether the speech appears to be associated with "organized retail crime" or "selling stolen goods," Cal. Civ. Code §1749.8.9(a), (b)(1)(A), and (b)(1)(D)—they trigger strict scrutiny. *See, e.g.*, *Chiles v. Salazar*, 607 U.S. 627, 640-41 (2026). But even assuming *arguendo* that they regulate purely "commercial speech," they would still be subject to at least intermediate scrutiny. *See, e.g.*, *Bonta*, 113 F.4th at 1119. The state does not meaningfully argue that the challenged provisions can satisfy either standard, *see* AG.Br.25, and they plainly cannot. Ordering online marketplaces to monitor the contents of third-party sellers' listings and then report suspicious activity to law enforcement is not remotely tailored to California's stated interest in combatting theft, as the state could avoid regulating *any* speech by simply investigating and prosecuting theft directly. MSJ.23.

Lacking any plausible argument that the challenged provisions can survive heightened scrutiny, the state asserts that §1749.8.9(a) is "subject to rational basis scrutiny." AG.Br.25. That is risible. Forcing private parties to monitor the contents of other parties' speech and report back to law enforcement, under threat of liability if they miss something they "should" have discovered, Cal. Civ. Code §1749.8.9(a), is a far cry from the SEC disclosure requirements analyzed in *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108 (D.C. Cir. 2011). And the state's effort to minimize the burdens imposed by §1749.8.9(b)(1)(A) and (b)(1)(D) goes nowhere. The fact that NetChoice members *voluntarily* exert significant effort to prevent sales of stolen goods does not alter the reality that §1749.8.9(b)(1)(A) and (b)(1)(D) are content-based regulations of private speech that trigger heightened scrutiny. Because these regulations cannot withstand any form of heightened scrutiny, NetChoice is entitled to summary judgment on Count IV of its amended complaint.

III. The State Does Not Dispute That NetChoice Meets All Other Requirements For Declaratory And Injunctive Relief.

This Court previously held that NetChoice satisfies all other requirements for injunctive relief: Its members will be irreparably harmed absent an injunction, and the balance of the equities and public interest weigh in NetChoice's favor. *See* PI.Op.16-17. As NetChoice explained in its motion for summary judgment, "[n]othing in the summary-judgment record disturbs the Court's prior conclusion on this point." MSJ.24. The state fails to address the issue in its brief and has therefore waived any such argument. *See, e.g.*, *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 235 n.1 (2019) (deeming an argument waived where the defendant failed to raise an issue in the opposition brief); *see also Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1178 n.7 (9th Cir. 2016) (noting that a litigant "waived" an argument by failing to raise it in its brief in opposition to its adversary's motion for summary judgment). NetChoice is therefore entitled to summary judgment on Counts V and VI of its amended complaint.

CONCLUSION

This Court should grant NetChoice's motion for summary judgment, deny the state's cross-motion for summary judgment, declare all challenged provisions of SB 1144 invalid, and permanently enjoin enforcement of those provisions against any NetChoice member.

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