UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NETCHOICE,

Plaintiff,

v.

KEITH ELLISON, in his official capacity, as Attorney General of Minnesota

Defendant.

Civil No. 0:25-cv-02741-NEB-SGE

MEMORANDUM OF LAW IN SUPPORT OF NETCHOICE'S MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: November 18, 2026
Time: 12:00 PM

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INTRODUCTION

The First Amendment "does not go on leave when social media are involved." *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 719 (2024). The government may not require a newspaper to publish detailed reports on how it chooses what stories to run. Nor, therefore, may it require social media companies to publish detailed reports on how they choose what content to show users. Still less may the government dictate that those reports employ the State's slanted categories and vague terms. Yet that is exactly what Minnesota's Prohibiting Social Media Manipulation Act (the "Act")[1] attempts to do. The Act defies the "fixed star in our constitutional constellation," *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943)—that "no official . . . may command our tongues," *Chiles* v. *Salazar*, 607 U.S. 627, 640 (2026). California recently tried the same gambit, deploying disclosure mandates as an indirect (but unsubtle) means of pressuring social media companies to change their editorial practices. That law was enjoined, *X Corp.* v. *Bonta*, 116 F.4th 888 (9th Cir. 2024), and Minnesota's should be too.

The Act weaponizes compelled "transparency requirements." Transparency laws outside of the speech context—e.g., laws requiring restaurants to disclose their Health Department inspection grades or oil companies to disclose their methane emissions—can accomplish their goals (e.g., cleaner kitchens; less methane production) without infringing

[1] The Act is codified at Minnesota Statutes §§325M.30–34, available at https://www.revisor.mn.gov/statutes/cite/325M, and attached as Exhibit 1 to the Fernandez Declaration. Unless otherwise indicated, emphases in quotes are added and internal citations and quotations are omitted.

First Amendment rights. But the Act pressures social media companies—such as NetChoice members subject to the Act ("Members")—to change their First Amendment-protected editorial policies and practices, and that infringes the free-speech rights of both Members and their users. The Act's legislative history confirms and the State itself concedes that one of the Act's purposes is to pressure Members to change how they determine what content to show their users. *See* Cleland Ex. 11 (Minnesota OAG 30(b)(6) Dep. Tr.) ("30(b)(6) Tr.") 162–63.

The Act results directly from the two-part Report of Attorney General Keith Ellison ("Defendant"), entitled *Minnesota Attorney General's Report on Emerging Technology and Its Effects on Youth Well-Being*,[2] the central premise of which is that Minnesota must address what the Attorney General claims are the "manipulative and addictive functional design features" of many social media platforms. AG 2025 Report 4. The AG Reports recommended regulations that would have directly dictated editorial choices—choices that the Supreme Court has held are protected by the First Amendment. *See Moody*, 603 U.S. 707. Specifically, the AG Reports proposed that the State:

- Ban design features that relate to "revenue and usage maximization," rather than to the "explicit choices" of "users";

[2] *See* Fernandez Ex. 19 ("AG 2024 Report," https://www.ag.state.mn.us/Office/Reports/EmergingTechnology.pdf); Fernandez Ex. 18 ("AG 2025 Report," https://www.ag.state.mn.us/Office/Reports/EmergingTechnology_2025.pdf); Cleland ¶20, Exs. 3, 5.

- Mandate default privacy features that would supposedly limit unwanted communications, because users "often do not understand enough about their choices to provide consent";
- Mandate that algorithms stop prioritizing content that maximizes engagement (i.e., that people actually engage with) and instead prioritize content that people say they want to engage with;
- Compel disclosures regarding limits on the number of posts users can make to prevent "a small group of motivated partisans" or "untrusted users" from "dominat[ing] . . . conversation[s]" or "target[ing] or influenc[ing] others"; and
- Compel disclosures of product experiments that might reveal additional efforts to (in the AG's view) "manipulate" users to make choices they do not want to make. AG 2024 Report 23–25; AG 2025 Report 31–34.

When introduced, the bill that ultimately became the Act adopted all of these policy recommendations. *See* Cleland ¶21. The enacted version pursues the same ends by a different route: five compelled disclosure requirements that seek, unmistakably, to pressure Members to make the State's desired editorial changes. That is impermissible under the First Amendment. *See NRA of Am.* v. *Vullo*, 602 U.S. 175, 190 (2024) (the State is prohibited from doing "indirectly what [it] is barred from doing directly"). The Act's final version requires:

- Disclosures about how Members impose limits on user engagement and whether and how the Members' proprietary algorithms reduce certain account activity before the account reaches an activity limit (**§325M.33(1)**);
- Disclosures about how Members' proprietary algorithms assess and weigh the quality of content, users' preferences about content, and other variables in the "algorithmic ranking system" (**§325M.33(2)**);
- Detailed statistics about how often account holders (a) send invitations and messages; (b) comment, reshare, like, vote for, or otherwise react to content; (c) post new user-generated content; (d) disseminate user-generated content; and (e) otherwise interact on social media websites (**§325M.33(3)**);
- An explanation of how Members determine whether notifications are time-sensitive or non-time-sensitive, and detailed statistics about how many such notifications are sent to users daily and between 11pm–7am (**§325M.33(4)**); and
- Descriptions of all product experiments conducted on 1,000 users or more, including the experimental conditions and results (**§325M.33(5)**).

These compelled disclosure requirements violate the First Amendment many times over. The Act pressures Members to change their editorial decisions about how to curate and disseminate speech to users—seeking to swap Members' judgments with those of the State—and engages in content-based discrimination. It compels non-commercial speech that is neither purely factual nor uncontroversial, and thus no exception applies here to the longstanding rule that content-based speech regulations trigger strict scrutiny. Not only will the Act fail to further its purported interests of (i) "informing consumers about how social media platforms operate" and (ii) "empowering the legislature to identify and monitor emerging issues and risks posed by social media platforms," Kurtzberg Ex. 2 at 2–3, it will actually undermine those interests.

In addition to its First Amendment problems, the Act violates the Takings Clause by forcing Members to divulge, without compensation, proprietary trade secrets and confidential business information about their content algorithms, safety and user-notification procedures, and product experimentation that, if made public, would destroy Members' competitive advantages. Cleland ¶¶156–82; Srivastava ¶¶130–46.

The Act's compelled disclosure requirements are also unconstitutionally vague, because they utilize undefined terms in ways that encourage arbitrary and discriminatory enforcement. And by regulating commerce that is wholly outside Minnesota, the Act violates the ban on extraterritorial economic regulation under the Dormant Commerce and Due Process Clauses.

The Court should enjoin the Act's enforcement.

STATEMENT OF FACTS

I. The Act's Statutory Scheme and Application to Members

The Act's compelled disclosure requirements apply to "social media platform[s]" (§325M.33), defined as an "electronic medium, including" "browser-based or application-based interactive computer service[s]" and "Internet website[s]" "that allow[] an account holder to create, share, and view user-generated content for a substantial purpose of social interaction, sharing user-generated content, or personal networking." §325M.31(j).

Under that definition and the Act's "scope" requirements under §325M.32, the Act could reasonably be understood to apply to, at least, the following Members: (1) X Corp. (X); (2) Google (YouTube); (3) Discord; (4) Meta (Facebook and Instagram); (5) Nextdoor; (6) Pinterest; (7) Reddit; (8) Snap Inc. (Snapchat); (9) Automattic (Tumblr); and (10) TikTok USDS JV and TikTok, Inc. Cleland ¶6; Srivastava ¶12. In addition, under §325M.31(j)(1)–(13), excluded from the Act's definition of "social media platform" are, e.g.: (1) search engines; (2) internet service providers; (3) email services; (4) streaming, gaming, or e-commerce sites; (5) business communication tools; (6) advertising networks; (7) telecommunications carriers; (8) broadband services; (9) education or safety groups; (10) teleconferencing or video-conferencing tools; (11) cloud computing services; (12) technical support platforms; and (13) creative professional platforms.

Under Section 325M.33, Members must "publicly and conspicuously post" on their websites five categories of information:

- ***First***, an explanation of how the Member "limits excessive account interactions,"[3] including (i) "the maximum limit on the number of times that a user can engage in each

[3] "Account interactions" are "any action that a user can make within a social media platform that could have a negative impact on another account holder," include "but are not limited to: (1) sending messages or invitations to users; (2) reporting users; (3) commenting on, resharing, liking, voting, or otherwise reacting to users' user-generated content; and (4) posting user-generated content or disseminating user-generated content to users," and do not include "[a]ctions that have no impact on other users, including viewing user-generated content or public content." §325M.31(d).

specific kind of account interaction in an hour, day, week, and month," and (ii) "whether and how the [Member] engages in any reduction in the ability of accounts to affect other users when the user engages in a high number of account interactions that is below the maximum limit[.]" **§325M.33(1)**.

- ***Second***, an explanation detailing how the Member (i) "assesses the quality of content," (ii) "assesses users' expressed preferences regarding content," and (iii) "utilizes" those "assessments" in "each of the [Member's] algorithmic ranking system[s], including how the assessments are weighted in relation to other signals in the algorithmic ranking system[.]" **§325M.33(2)**.
- ***Third***, "statistics on the [Member's] use with respect to the tenth, 25th, 50th, 75th, 90th, 95th, 99th, and 99.9th percentile of all [Member] account holders for each distinct type of account interaction or engagement, including but not limited to:" (i) "sending invitations or messages to other [Member] account holders," (ii) "commenting on, resharing, liking, voting for, or otherwise reacting to content," (iii) "posting new user-generated content," (iv) "disseminating user-generated content to other [Member] account holders," and (v) "time spent on the platform." **§325M.33(3)**.
- ***Fourth***, an explanation of how the Member "determines whether a notification is time sensitive and how many time-sensitive and non-time-sensitive notifications are sent to users including:" (i) "how many time-sensitive and non-time-sensitive notifications are sent with respect to the tenth, 25th, 50th, 75th, 90th, 95th, 99th, and 99.9th percentile of all [Member] account holders in a given day," and (ii) "how many time-sensitive and

non-time-sensitive notifications are sent with respect to the tenth, 25th, 50th, 75th, 90th, 95th, 99th, and 99.9th percentile of all [Member] account holders during each hour between the hours of 11:00 p.m. and 7:00 a.m." **§325M.33(4)**.

- ***Fifth***, a description of "all product experiments that have been conducted on 1,000 or more users, including a description of the experimental conditions and the results of the product experiment for all experimental conditions on users' viewing or engaging with content that:" (i) "users indicate to be high or low quality," (ii) "users indicate complies or does not comply with the users' expressed preferences," or (iii) "violates [Member] policies." **§325M.33(5)**.

Defendant "may investigate and bring an action against a social media platform for an alleged violation of section 325M.33." §325M.34(a). According to the State, under Minnesota Statutes §8.31, Defendant's authority to enforce the Act and investigate potential violations of it are "broadly construed," and Defendant may issue civil investigative demands and seek injunctive relief, civil penalties of up to $25,000 per violation, and payment of costs and fees. 30(b)(6) Tr. 240–44.

II. The Act Compels Disclosure of Unexplainable Processes

Members' content algorithms and safety and user-notification procedures rely on neural networks and other similar machine-learning models in ways that will make any disclosures under §§325M.33(1)(ii), 325M.33(2), and 325M.33(4) incomprehensible and meaningless to consumers and to the State.

As Dr. Jaideep Srivastava explains in his declaration, neural networks' decisions emerge from billions of learned parameters, rather than explicit rules. Srivastava ¶99. Neural networks have internal logic that develops rapidly and continuously. *Id*. Thus, even the engineers who build, maintain, and ultimately control these systems cannot fully explain why a neural network makes any particular decision. *Id*.

Neural networks make decisions using billions of interconnected calculations that cannot be reduced to simple, human-understandable explanations. *Id*. Accordingly, disclosures about these processes as required by the Act would either be so simplified as to be meaningless (e.g., "we use machine learning to rank content, provide notifications, and detect spam") or so complex as to be incomprehensible to anyone without advanced expertise in machine learning. *Id*. ¶15.

Section 325M.33(2) requires Members to explain how they "assess[] the quality of content" and "assess[] users' expressed preferences," including "how the assessments are weighted in relation to other signals in the algorithmic ranking system." But Members do not "assess" content quality through explicit or explainable rule-based systems. *Id*. ¶121. Neural networks make these assessments through training on billions of user interactions and reliance on millions or billions of weights that have no human-interpretable meaning. *Id*. ¶122. Accordingly, Members cannot publish meaningful explanations of "how assessments are weighted," because there may be billions of such weights, they interact non-linearly with one another, are constantly changing, and vary from user-to-user. *Id*.

Section 325M.33(4), which requires Members to explain how they "determine[] whether a notification is time sensitive," suffers from a similar issue. Members use neural networks or other similar machine learning models to predict which notifications a user is likely to find valuable based on hundreds of thousands of input signals, such as a user's historical response times and activity patterns. *Id.* ¶124. The model's process evolves so quickly, and is so user-specific, that no human-readable explanation could meaningfully describe how it determines whether a notification is "time sensitive," as the Act requires. *Id.* ¶125.

Section 325M.33(1)(ii) requires Members to explain "whether and how" they "engage[] in any reduction in the ability of accounts to affect other users when the user engages in a high number of account interactions that is below the maximum limit." But Members use neural networks and similar machine-learning models to make these decisions too, such that they cannot be distilled into explanations that could be posted publicly and understood by consumers or the government. *Id.* ¶¶127–28. Specifically, using hundreds of behavioral signals and engagement patterns, the network or model produces a probability score indicating whether the account is likely engaged in problematic behavior. *Id.* ¶127. In addition, because the system is being constantly retrained on new data, these predictive scores can become obsolete from one moment to the next. *Id.* ¶128.

Accordingly, §§325M.33(1)(ii), 325M.33(2), and 325M.33(4) compel information that cannot be distilled in any meaningful way into public-facing disclosures.

III. The Act Will Produce Unreliable, Inconsistent, and Misleading Information

A. Problematic Definitions of "User" and "Account Holder" and Inconsistent Use of those Terms

The Act distinguishes between "users" (people who use the service in Minnesota) and "account holders" (people who use the service anywhere in the world) but (i) provides no reliable or uniform way to determine who qualifies as a Minnesota "user"; (ii) defines "account holder" in a way that sweeps in account holders worldwide, such that the Act's required statistics about "all platform account holders" will reveal little to nothing about the experiences of Minnesotans on social media; and (iii) utilizes "user" and "account holder" inconsistently and in ways that will produce misleading disclosures. Fernandez ¶31–46; Cleland ¶63–86.

First, the Act provides no reliable or uniform way to determine who qualifies as a Minnesota "user." Under §325M.31(l), a "user" is "a natural person who is located in Minnesota and who holds an account or profile with a social media platform." And under §325M.32(b), Members "may determine whether an account holder is located in Minnesota" using: "(1) the account holder's own supplied address or location; (2) global positioning system-level latitude, longitude, or altitude coordinates; (3) cellular phone system coordinates; (4) Internet protocol device ['IP'] address; *or* (5) other mechanisms that can be used to identify an account holder's location." Members may use any one or more of those methods, including §325M.32(b)(5)'s open-ended catch-all, and may change which method(s) they use over time. The Act does not require Members to disclose which method(s) they used.

Further, the methods permitted under §325M.32(b) may not always accurately isolate Minnesota account holders. Section 325M.32(b)(4), for instance, would sweep in out-of-state account holders connecting through Minnesota-based IP addresses as they travel through Minnesota. Fernandez ¶35; Cleland ¶71. Conversely, this method would fail to capture Minnesota residents using a service while temporarily out-of-state, those using a virtual private network, and those whose mobile carrier assigns an out-of-state IP address. *Id*. Relying on account holders' self-reported addresses under §325M.32(b)(1) would exclude Minnesota residents who provide an inaccurate address (or no address), while including non-Minnesota account holders who falsely or mistakenly list Minnesota as their location. Fernandez ¶36; Cleland ¶72.

Second, §325M.31(c) defines "account holder" as "a natural person or legal person who holds an account or profile with a social media platform" and is not limited to account holders in Minnesota or even the United States. Minnesota "users" make up an extremely small portion of the total "account holders" worldwide of any Member—i.e., a fraction of a fraction of a percent. Cleland ¶79; Fernandez ¶39 (~0.22% of X account holders). Moreover, features available to account holders and account-holder activity often differ meaningfully country-to-country and even state-to-state. *Id*. Accordingly, §§325M.33(3)–(4)'s compelled disclosures will consist overwhelmingly of statistics about non-Minnesota account holders and will reflect little, if anything, meaningful about the experience of Minnesota users. Cleland ¶80; Fernandez ¶40.

Third, the Act inconsistently uses "account holder" and "user" within the same disclosure requirements. For example, §325M.33(4) requires Members to "explain whether a notification is time sensitive and how many time-sensitive and non-time-sensitive notifications are sent to ***users***" (i.e., Minnesota), but the percentile statistics that Members must produce under the same section concern "***all platform account holders***" (i.e., worldwide). Similarly, §325M.33(3) compels statistics about how often worldwide "***account holders***" "post[]" and "disseminat[e] ***user***-generated content" (i.e., content generated by Minnesotans).

B. No Uniform Method or Guidance for Activity and Notification Statistics

The Act also provides no uniform method or guidance for how Members should calculate the percentile statistics required under §§325M.33(3)–(4).

Section 325M.33(3), for example, requires "statistics on the platform's use," but omits what time period(s) should be used to calculate the percentiles or whether the statistics should be updated (and if so, how often). Nor does §325M.33(3) require a Member to disclose what methodology it used. Accordingly, Members will likely disclose statistics showing entirely different things.

Section 325M.33(4) requires statistics about notifications sent to users but similarly does not (i) provide a uniform method regarding the time period to be used to calculate the statistics or about whether or how often they should be updated or (ii) require Members to disclose the methodology used to calculate the statistics.

Section 325M.33(4)(i) instructs that the percentiles should be provided for notifications sent to account holders on a "given day," and §325M.33(4)(ii) instructs that the percentiles should be provided for "each hour between the hours of 11:00 p.m. and 7:00 a.m." However, §325.33(4)(i) does not instruct which day(s) a Member should use to calculate those percentiles, and notification statistics can look meaningfully different if taken from a day with outsized activity, e.g., Election Day. Cleland ¶140; Fernandez ¶22. Nor does §325.33(4)(i) state whether the "day" should actually be an average taken from a certain period. *Id.* Likewise, as to the "hourly" statistics required under §325M.33(4)(ii), there is no guidance about the period that should be used to calculate the statistics for each hour. Cleland ¶141; Fernandez ¶22. It is unclear if the number of notifications should be taken from a randomly selected day, an average over a month or year, or an absolute count over some other (unspecified) period. The Act again does not require Members to disclose how they calculated their published statistics.

IV. The Act Compels Disclosure of Trade Secrets

A. The Information, Developed at Great Expense, is Extremely Valuable, and its Disclosure Would Cause Competitive and Operational Harm

Sections 325M.33(1)(ii), 325M.33(2), 325M.33(4), and 325M.33(5) compel disclosure of Members' highly confidential, core trade secrets about their content algorithms, safety and user-notification procedures, and product experiments. Cleland

¶¶156–82; Srivastava ¶¶130–46. No Member would ever publicly disclose this information to the extent required by the Act. Cleland ¶162; Srivastava ¶130.[4]

The information compelled by these provisions is essential to each Member's competitive advantage in the social-media industry, is valuable because it is kept secret, and has been developed at Members' great expense. Cleland ¶164; Srivastava ¶149. Unsurprisingly, the State's own witness testified that social media content algorithms are the "unique engine that typically drives their product's profitability," and that it is "self-evident" platforms consider both their content algorithms and product experimentation data to be "trade secrets." 30(b)(6) Tr. 197–99.

The Act would force Members to disclose highly confidential trade secrets, as follows:

Section 325M.33(1)(ii) requires disclosure of "whether and how the [Member] engages in any reduction in the ability of accounts to affect other users when the user engages in a high number of account interactions that is below the maximum limit." No Members publish this information, which they treat as highly confidential, proprietary trade secrets. Cleland ¶162; Srivastava ¶132. Forced disclosure of this information would provide a roadmap for how Members identify sophisticated bad actors that intentionally operate below rate limits to avoid detection. *Id.*[5] Members have made significant

[4] There is one exception. In the spirit of radical transparency, X publishes core information about its content algorithm. Cleland ¶167; Srivastava ¶135.

[5] A "rate limit" is a cap Members place on the number of actions (e.g., posts) a user can perform within a given period. Cleland ¶20; Srivastava ¶23. Members impose rate limits to prevent spam, abuse, and other harmful behavior. *Id.*

investments in these detection methods. Cleland ¶164. If forced to disclose them publicly, competitors would replicate them and free-ride on Members' investments. *Id*.

Section 325M.33(2) requires the disclosure of highly confidential information about Members' recommendation algorithms. Other than X, Members treat this information as proprietary trade secrets and would never publish it. Cleland ¶167; Srivastava ¶135. Content algorithms—which determine what content appears in users' feeds, in what order, and with what priority—are each Member's "crown jewel." Cleland ¶168. Each Member invests heavily in its content algorithm. Cleland ¶168; Srivastava ¶132. If this information were made public, competitors would replicate Members' algorithms, free-riding on their investments. Cleland ¶168; Srivastava ¶135.

Section 325M.33(4) requires the disclosure of highly confidential information about Members' notification procedures. This information is integral to each Member's ability to provide users with valuable and engaging content; no Member would disclose this information to the extent §325M.33(4) requires. Cleland ¶172; Srivastava ¶132. They have made substantial investments in developing their user-notification procedures and methodologies. Cleland ¶174; Srivastava ¶132. If Members are forced to publish this information, competitors would replicate it and free-ride on their significant investments. Cleland ¶173; Srivastava ¶135.

Section 325M.33(5) compels highly confidential information about Members' product experiments. No Member would disclose this information publicly to the extent the statute requires. Cleland ¶177; Srivastava ¶132. Members conduct product experiments to guide decisions about significant aspects of their products, including whether and how to modify or improve their proprietary algorithms. *Id.* These experiments are essential to each Member's ability to innovate and remain competitive in an ever-evolving social media landscape. Cleland ¶178.

Forced disclosure of this information would give competitors a roadmap to Members' core innovation strategies—including which features they have tested, which experimental conditions they found promising, and which approaches they abandoned—all without incurring any of the substantial costs that Members invested in conducting those experiments. Cleland ¶179; Srivastava ¶135. Nascent social media platforms could thus effectively free-ride on Members' costly, highly sensitive research and development. Cleland ¶179.

B. Members Employ Robust Security Measures to Protect the Information

Members use robust legal, contractual, technical, and procedural controls to protect the information. Srivastava ¶¶137–46; Cleland ¶160. Members' legal and contractual controls include requiring employees to sign non-disclosure agreements mandating that the employee destroys or returns all confidential information before departing the company. Cleland ¶160; Srivastava ¶138. Members' technical controls include maintaining the information in segregated areas protected by complex passwords provided only to a select number of high-level employees on a strictly "need-to-know" basis. Cleland ¶160; Srivastava ¶¶140–41. Members' procedural safeguards include implementing "role-based access controls" ensuring that employees receive only the minimum level of access necessary to perform their duties. Cleland ¶160; Srivastava ¶141.

LEGAL STANDARD

To obtain a preliminary injunction, a plaintiff must establish that (1) it is "likely to succeed on the merits"; (2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) the "balance of equities tip[s] in [its] favor"; and (4) "an injunction [is] in the public interest." *Jones* v. *Jegley*, 947 F.3d 1100, 1104–05 (8th Cir. 2020).

ARGUMENT

I. NetChoice Will Likely Succeed on the Merits

A. The Act Violates the First Amendment

i. Strict Scrutiny Applies

The Act's compelled disclosure requirements engage in content- and speaker-based discrimination, and no exception applies to the longstanding rule that such regulations trigger strict scrutiny. *Nat'l Inst. of Fam. & Life Advocates* v. *Becerra ("NIFLA")*, 585 U.S. 755, 767 (2018); *see, e.g.*, *Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 754 (8th Cir. 2019) ("Laws that compel speech or regulate it based on its content are subject to strict scrutiny[.]"); *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

As demonstrated by the Act's legislative history and confirmed by the State itself, *see* Cleland ¶¶23–24; 30(b)(6) Tr. 162–63, the Act's compelled disclosure requirements seek to change how Members choose what speech to show users. Such compelled disclosure regimes are doubly problematic when applied to speech "gatekeepers" that make decisions about what speech others will have access to (e.g., social media platforms, bookstores, and movie theaters) because multiple layers of speech are affected—i.e., not only the gatekeeper's editorial judgments about what speech belongs on a given platform, but also the public's access to speech free of governmental interference. Such "speech about speech" triggers heightened First Amendment protection because efforts to regulate it threaten both editorial judgments about speech *and* the speech received by the public.

For example, *Smith* v. *California*, 361 U.S. 147 (1959), struck down, on First Amendment grounds, a Los Angeles ordinance that held a bookseller strictly liable for obscene books sold in his store. "[T]he bookseller's burden [under the law] would become the public's burden," the Supreme Court held. *Id.* at 153. The same concerns that motivated the Court to protect booksellers from the law in *Smith*—to avoid "self-censorship, compelled by the State," that "would be a censorship affecting the whole public," *id.* at 154—apply to §§325M.33(1)–(5).

For this reason, cases involving "speech about speech" trigger and fail heightened scrutiny, even when such laws simply require content ratings designed to pressure gatekeepers not to distribute certain content to certain users. *See Smith*, 361 U.S. at 153–54; *X Corp.*, 116 F.4th at 903 (striking down compelled disclosure requirements concerning content-moderation on social media); *Ent. Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 651–53 (7th Cir. 2006) (striking down law requiring sexual explicitness warnings on video games); *Book People, Inc.* v. *Wong*, 91 F.4th 318, 341 (5th Cir. 2024) (enjoining law requiring schoolbook vendors doing business with public schools to rate sexual explicitness of library materials).

Compelled transparency regimes may be unproblematic in non-speech contexts—e.g., laws requiring restaurants to disclose Health Department inspection grades or oil companies to disclose methane emissions—because such regimes can achieve their goals without harming First Amendment rights. But the same cannot be said of regimes, like the Act, that pressure Members to change the content they deliver and how they deliver it, which triggers multiple layers of free-speech rights. Indeed, the State concedes and the legislative history confirms that applying such "pressure" is precisely one of the goals of the Act. *See* 30(b)(6) Tr. 161–64.

It is not the role of the State, however, to determine whether Members should, for instance, prioritize a user's "expressed" or "stated preferences" (what users say they want), over a user's "revealed preferences" (what users' conduct reveals about what they want). *See* §325M.33(2). Under the First Amendment, those editorial judgments are left to Members, free of governmental interference. *Moody*, 603 U.S. at 741–42. The Act attempts to impermissibly influence Members' editorial judgments by pressuring them to adopt practices that the State deems better for users who interact with content for more time than the State deems healthy. That cannot be reconciled with *Moody*. *Accord* *Herbert* v. *Lando*, 441 U.S. 153, 174 (1979).

Washington Post v. *McManus*, 944 F.3d 506 (4th Cir. 2019), is instructive. The Fourth Circuit struck down, on First Amendment grounds, a Maryland law requiring, in the name of "transparency," online platforms to disclose data about purchasers of advertising and make it available to the government upon request. *Id.* at 511–12. Finding the law to contain a "compendium of traditional First Amendment infirmities" that brought "the state into an unhealthy entanglement with news outlets," the court emphasized that the law's "specter of a broad inspection authority, coupled with an expanded disclosure obligation," had the potential to "chill speech and [wa]s a form of state power the Supreme Court would not countenance." *Id.* at 513, 518–19. The same is true of the Act here.

Moreover, the Act engages in speaker-based discrimination. With one hand, the State regulates Members with the intent of "pressur[ing]" them to "change their product design practices." 30(b)(6) Tr. 162–63. And with the other, the State excludes "streaming services," "online video games," and other similarly situated speakers from the Act's purview, §325M.31(j)(4), that engage in the same user-engagement practices. *See* Cleland ¶¶45–46, 58. This selective application reveals the State's (i) particular disapproval of social media publishers based on their protected editorial choice to prioritize user engagement and social interaction and (ii) preference for "professionally produced" speech available on, say, Hulu or Disney+, over user-generated speech found on social media.

Accordingly, the Act triggers strict scrutiny.

ii. Neither Intermediate Scrutiny Nor *Zauderer* Applies

The Supreme Court has recognized certain narrow exceptions to the rule that content-based speech restrictions are subjected to strict scrutiny, but those exceptions do not apply here. Commercial speech, i.e., that which does no more than propose a commercial transaction, is subject to intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557 (1980). And *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), recognized that the government can compel commercial speakers to disclose purely factual and uncontroversial information, provided the requirement is reasonably related to preventing consumer deception and is not unjustified or unduly burdensome. Because the Act compels non-commercial speech, neither intermediate scrutiny nor the less-speech-protective *Zauderer* standard applies.

1. The Act Compels Disclosure of Non-Commercial Speech, Precluding Intermediate Scrutiny and *Zauderer*

The compelled disclosures under the Act do not involve commercial speech for several reasons:

First, the Act compels information that is not "'core' commercial speech," which is speech that "does no more than propose a commercial transaction." *Porous Media Corp.* v. *Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999); *accord, e.g.*, *U.S.* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001) (the "usual[ ] defin[ition]" of commercial speech is "speech that does no more than propose a commercial transaction"); *X Corp.*, 116 F.4th at 901. The Act's compelled disclosures are not "core" commercial speech because they do not propose a commercial transaction in any way.

Second, the Act's compelled disclosures fail all three factors from *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which apply in close cases where it is unclear whether speech is commercial. *See Porous Media Corp.*, 173 F.3d at 1120. Those factors are whether (i) the compelled speech "is an advertisement," (ii) the compelled speech "refers to a specific product or service," and (iii) the "speaker has an economic motivation for the speech." *Id.*

Here, the compelled disclosures—which deal with things like product experiments and the usage patterns of worldwide account holders—plainly "are not advertisements," and they do not "merely disclose existing commercial speech, so a social media company has no economic motivation in their content." *X Corp.*, 116 F.4th at 901. The Act is "different in character and kind" than, for instance, a law requiring the disclosure of Members' "*existing* TOS and content-moderation policies." *Id.* Nor do the Act's compelled disclosures refer to a product or service in the *Bolger* sense. The disclosures do not communicate the terms of a commercial transaction. For instance, they include no pricing, offer, or encouragement for a consumer to purchase a particular product. *Cf. Porous Media Corp.*, 173 F.3d at 1121 (speech referred to a particular product or service under *Bolger* when it "urged its readers to buy [its own] filter and not to buy [its competitor's]").

Thus, the Act compels the disclosure of *non-commercial* speech, precluding intermediate scrutiny and *Zauderer*. *See, e.g.*, *X Corp.*, 116 F.4th at 902 ("Even a pure 'transparency' measure, if it compels non-commercial speech, is subject to strict scrutiny.").

Third, intermediate scrutiny does not apply because, inasmuch as the Act compels disclosures in the context of commercial speech, that speech is "inextricably intertwined with otherwise fully protected speech," such that it does not "retain[] its commercial character" and must receive full protection under the First Amendment. *Riley* v. *Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988). In an effort to pressure Members to bend to the State's will about how content should be delivered to users, the Act forces Members to "recast" their policies and "practices in language prescribed by the State" and thus "implicitly opin[e]" on the propriety of their practices. *X Corp.*, 116 F.4th at 901.

For instance, §325M.33(2) requires Members to describe how they assess and weigh users' "expressed preferences" in their algorithmic ranking systems. *See also* §325M.33(5) (mandating disclosures about product experiments concerning the provision of content to users that "does not comply with the users' expressed preferences"). This forces Members to frame their editorial decision-making around the assumption that "expressed" (or "stated") preferences are the proper measure of the content users actually want to see. But the State's own Rule 30(b)(6) witness conceded that whether algorithms should prioritize "stated" preferences over "revealed" preferences is the subject of unresolved "broad public debate happening in courts and in legislatures and on social media itself and between people and everywhere else." 30(b)(6) Tr. 247–54; *accord*

Fernandez ¶63 (analyzing scholarship discussing this debate). Similarly, §§325M.33(1) and 325M.33(3) require disclosures about "account interactions," which the Act defines in negative terms as activity "that could have a *negative* impact on another account holder," §325M.31(d), even though those same interactions could have a positive impact on account holders.

The Act thus compels Members to speak using the *State's* preferred framing of hotly contested issues. Members and other social media companies are forced to describe their editorial decision-making through a distorted lens that they universally reject. That is the hallmark of the type of compelled speech that is subject to strict scrutiny.

2. *Zauderer* Does not Apply Because the Act Compels Speech that is Not Purely Factual and Uncontroversial

Zauderer also cannot apply because the Act compels information that is not (i) "purely factual" or (ii) "uncontroversial." 471 U.S. at 651.

Not Purely Factual. While the Supreme Court has not clarified what constitutes "purely factual" information under *Zauderer*, the qualifier "purely" strongly suggests that it does not apply to the disclosures about algorithmic content and notification curation, governance, and product experimentation compelled by the Act. As one leading commentator has explained, while it "might be a pure fact whether the publisher has an editorial policy," it "would not be a pure fact to disclose the policy's details, which remain subject to the publisher's editorial discretion." Kurtzberg Ex. 1.

The Act forces Members to publish explanations about, e.g., (i) how they assess the "quality of content" and "users' expressed preferences regarding content," and how they weigh those assessments in their "algorithmic ranking system" (§325M.33(2)); (ii) how they determine whether notifications qualify as "time-sensitive" (§325M.33(4)); and (iii) whether and how they limit account activity, even before the account reaches a rate limit (§325M.33(1)(ii)). These provisions call for highly subjective, "contextual analyses" that are "anything but the mere disclosure of factual information." *Wong*, 91 F.4th at 340; *see also* Srivastava ¶¶20, 100–29 (explaining that these processes cannot be distilled into human-understandable disclosures).

The Act's compelled disclosures are also not purely factual because they will be "misleading to the ordinary consumer," for several reasons. *Nat'l Ass'n of Wheat Growers* v. *Bonta*, 85 F.4th 1263, 1273 (9th Cir. 2023). Misleading disclosures are not "purely factual" as a matter of law, are not reasonably related to preventing consumer deception, and thus cannot be subject to *Zauderer* review. *Id.* at 1276–77.

First, the compelled disclosures under §§325M.33(3)–(4) will mislead Minnesota consumers because the Act fails to provide a required or uniform methodology for defining Minnesota "users," *see* §325M.32(b) (permitting almost any method), and fails to require that Members disclose what methodology they use. Different methodologies will be applied by different Members without consumers knowing this, making any comparison of statistics about Minnesota "users" misleading. Moreover, the disclosures about Minnesota "users" may, in many instances, not even be about Minnesotans at all. *See* Cleland ¶¶65–75; Fernandez ¶¶32–36. *Second*, the disclosures will, in fact, consist of information about users worldwide, and thus the statistics will provide little to no information relevant to the experience of most Minnesotans. *See* Cleland ¶¶76–81; Fernandez ¶¶37–40. *Third*, the statistics compelled by §§325M.33(3)–(4) will be misleading and difficult to compare across Members because the Act provides no guidance for how Members should calculate the statistics or whether they should be updated (and if so, how often), and the Act does not require Members to disclose the methodology they used. Cleland ¶¶82–86; Fernandez ¶¶20–30. *Fourth*, the compelled disclosures under §§325M.33(1), 325M.33(2), and 325M.33(5) will be uncomparable across Members and thus misleading because they erroneously presuppose universally accepted definitions of "excessive account interactions," "quality of content," and "high or low quality." *See* Cleland ¶¶97–101, 104–10, 151–54; Fernandez ¶¶47–57. *Fifth*, Members use complex neural networks and other machine-learning models to produce the types of judgments covered by the disclosures in §§325M.33(1)–(2) and (4), so any disclosures made under these sections would be incomprehensible or, at least, confusing and misleading to the average consumer. *See* Srivastava ¶¶119–29.

Accordingly, the Act compels speech that is not "purely factual," precluding review under *Zauderer*.

Not Uncontroversial. The Act's compelled disclosures are also controversial, further precluding *Zauderer* review. The disclosures (i) concern politically controversial issues of persistent nationwide and global disagreement and debate; (ii) frame discussion of these issues on the State's terms, forcing Members to make statements fundamentally at odds with their missions and businesses; and (iii) will result in controversy and public scorn for Members—by the State's design—so that Members will be pressured to change their editorial practices.

First, the disclosures concern highly controversial topics, as significant scholarship demonstrates. For instance:

- Some scholarship suggests a correlative link between social media use and harm, while much other scholarship finds no such connection.
- Some scholarship suggests notifications are an effective marketing tool, while other scholarship focuses on the emotional effects of push notifications on users, including "positive" emotional states.
- Some scholarship defends product experiments as a beneficial tool, even when conducted without users' informed consent, while other scholarship raises ethical concerns.
- Scholarship supports the notion that users' "expressed preferences" may not always match the content that users actually engage with. Fernandez ¶63; *accord* 30(b)(6) Tr. 252–54.

The State itself concedes that intense debate exists about whether emerging technologies used by social media companies are good or bad for people on average. *See, e.g.*, AG 2025 Report 8 (explaining that "[o]ver the past year, this debate has grown in the public consciousness"). Yet the Act's disclosures are framed around the view that social media use is likely harmful—e.g., by defining neutral-sounding terms like "account interactions" as "actions" that "could have a negative impact" on other account holders

(§§325M.31(d), 325M.33(1), (3)) or mandating disclosures solely about "expressed preferences" ((§§325M.31(i), 325M.33(2), (5))—and the State concedes that the disclosures are designed, in part, to "pressure" Members to "change their product design practices." 30(b)(6) Tr. 161–64. Similarly, the State concedes that whether algorithms should prioritize "stated" preferences over "revealed" preferences is the subject of "broad public debate happening in courts and in legislatures and on social media itself and between people and everywhere else." *Id.* 247–54. Indeed, revealed preferences are a key input for many Members' editorial decisions. Cleland ¶119. And yet the Act forces Members to speak in ways that promote "expressed preferences" over revealed preferences—a framing and message that Members disagree with and should not be forced to make.

Second, the Act thus forces Members to "take sides" in the "heated political controversy" about these issues—*see CTIA - The Wireless Ass'n* v. *City of Berkeley ("CTIA II")*, 928 F.3d 832, 848 (9th Cir. 2019)—and to "convey a message fundamentally at odds with [their] mission[s]" and "business[es]," *Wheat Growers*, 85 F.4th at 1277–78. Members seek to provide users with informative, engaging content that will interest them. *See* Cleland ¶28; Fernandez ¶70. But, as both the title of the Act (the "Prohibiting Social Media Manipulation Act") and the AG Reports on which it is based make clear, the disclosures force Members to speak publicly about controversial issues in ways that allow the State to frame the debate around what it erroneously suggests to be the Members' harmful or "manipulative" editorial judgments about what content to select for each user's social media feed. The State is trying to "tilt[] public debate" about social media and emerging technology in its "preferred direction," which the First Amendment prohibits. *Moody*, 603 U.S. at 741. *Zauderer* does not apply where, as here, compelled disclosures "cross the line into compelled advocacy regarding a controversial issue." *Jewell* v. *Herke*, 526 F. Supp. 3d 459, 468 (D. Minn. 2021).

Third, the Act's compelled disclosures do not merely *discuss* controversial topics; the *disclosures themselves* are designed to, and will, engender significant controversy and public scorn, to "pressure" Members into changing their product designs and practices. *See* 30(b)(6) Tr. 162–63; Fernandez ¶71. The Ninth Circuit's decision in *X Corp.*, 116 F.4th 888, is instructive. Under California AB 587's compelled disclosure regime, the court explained, a platform would inevitably "face backlash from its users and the public" because, *in any case*, some segment of the population would be unhappy with the platform's practices and disclosures. *Id.* at 899 n.8. The same is true here. The act of disclosing explanations about, e.g., how the Member's algorithm functions (§325M.33(2)), or whether and how it conducts product experiments (§325M.33(5)), is inherently controversial. Fernandez ¶¶58–67; Cleland ¶114. And this is by design, as the State concedes, as part of an effort to change Members' product designs and practices through the backdoor. *See* 30(b)(6) Tr. 162–63.

The Act's compelled disclosures are controversial, further precluding application of *Zauderer*.

iii. The Act Fails Any Level of Scrutiny

1. Strict and Intermediate (*Central Hudson*) Scrutiny

The Act's compelled disclosures fail both strict scrutiny and intermediate scrutiny. The Act fails strict scrutiny because it is not "narrowly tailored to serve compelling state interests," *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015), and "less restrictive alternative[s] would serve the Government's purpose," *U.S.* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

The Act also fails intermediate scrutiny under *Central Hudson*. The State has not proven, as was its burden, that the Act (i) "directly and materially advances" a "substantial" governmental interest and (ii) is "no more extensive than necessary to further" the interest. *Mo. Broads. Ass'n* v. *Schmitt*, 946 F.3d 453, 460–61 (8th Cir. 2020).

First, the State has failed to show that the Act directly and materially advances a substantial government interest. The State asserts that the Act serves the interests of (i) "informing consumers about how social media platforms operate" (Kurtzberg Ex. 2 at 2); (ii) "empowering the legislature to identify and monitor emerging issues and risks posed by social media platforms" (*id.* at 3); and (iii) "pressur[ing]" social media platforms to "change their product design practices" (*see* 30(b)(6) Tr. 162–63). Under intermediate scrutiny, the State must "show that the Statute '*significantly* reduces' the alleged harms." *Schmitt*, 946 F.3d at 460.

As discussed above, interest (iii) is not a legitimate government interest at all, let alone a substantial one. And as to the other two, the State has come nowhere close to meeting its burden. There is simply no evidence—within the AG Reports or anywhere else—that the Act's specific compelled disclosures will do anything to inform consumers or empower the legislature with meaningful information. Nor does common sense suggest that they will do so. Rather, the record makes clear that the Act's disclosures will be (at best) meaningless and unhelpful and (at worst) affirmatively misleading. *See supra* at 11–14, 26–27. Similarly, the Act seeks information about rate limits to "prevent abuse" (*see* AG 2024 Report 33, AG 2025 Report 25), but the record shows that §325M.33(1)'s compelled disclosures will enable bad actors to "propagate spam and other harmful content" by giving them a road map of Members' efforts to prevent such conduct. Cleland ¶91.

Second, the Act's compelled disclosure requirements are more extensive than necessary to further any asserted State interest. For starters, the Act could seek information about Minnesota account holders only or information relevant to Minnesota account holders, rather than account holders worldwide. *See* §§325M.33(3)–(4). The Act's disclosure requirements are also more extensive than necessary because there are "less-burdensome alternatives" that would not interfere with First Amendment rights. *Schmitt*, 946 F.3d at 462.

For example, the State could provide or mandate "[e]ducation about the responsible use of social media and emerging technologies," as noted in the AG Reports. AG 2025 Report 36; AG 2024 Report 27; *see 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (the State fails to "satisfy the requirement that its restriction on speech be no more extensive than necessary" where "educational campaigns" might "prove to be more effective"). Despite the AG Reports' recommendation, the State did not try such educational campaigns before enacting the Act. The State has also failed to "demonstrate[] that an incentive-based program" would "be ineffective." *DoorDash, Inc.* v. *City of New York*, 789 F. Supp. 337, 359 (S.D.N.Y. 2024), *aff'd*, 185 F.4th 1 (2d Cir. 2026).

Finally, the Act does not directly and materially advance the State's purported interests because the compelled disclosure requirements are "so pierced by exemptions and inconsistencies" that they are "irrational and ineffective." *Schmitt*, 946 F.3d at 461. The Act is the brainchild of AG Reports that "examine[] the impact of technology companies and their products on the mental health and well-being of Minnesotans" (AG 2025 Report 4), but the Act inexplicably exempts thirteen different types of similarly situated actors (e.g., streaming services, online video games, *see* §325M.31(j)), regulation of which would promote the same statutory interests. *See* Cleland ¶¶45–46, 58.

Accordingly, the Act's compelled disclosure requirements do not withstand intermediate scrutiny.

2. *Zauderer*

Even if *Zauderer* applied—and it does not—the Act's compelled disclosure requirements would fail that level of scrutiny too, because they (i) are "unduly burdensome" and "unjustified"; (ii) are not "reasonably related to the State's interest in preventing deception of consumers," i.e., do not further a "substantial governmental interest" (*Zauderer*, 471 U.S. at 644, 651); and (iii) "extend [] broader than reasonably necessary" (*NIFLA*, 585 U.S. at 776).

First, The Act's compelled disclosure requirements are "unduly burdensome" and "unjustified" because they "chill[] protected speech." *Milavetz, Gallop & Milavetz, P.A.* v. *U.S.*, 559 U.S. 229, 250 (2010). Specifically, the Act—and the "broadly construed" investigatory and remedial powers that Defendant holds to enforce it (*see* Section 325M.34; 30(b)(6) Tr. 240–44)—are designed to and likely will pressure Members to change their First Amendment-protected practices. For instance, Members will be pressured to weigh expressed preferences more heavily than revealed preferences in their content algorithms and product experiments. Cleland ¶¶118–21; Fernandez ¶71. They will also be pressured to change their product experimentation in ways that will harm users, including by conducting fewer product experiments about the topics covered by the Act, fewer product experiments overall, and fewer product experiments about Minnesota users (since the product experiment disclosures are limited to experiments that involve 1,000 or more Minnesota "users," ¶325M.33(5)). *See* Cleland ¶¶179–80; Fernandez ¶73. The Act is also "unduly burdensome" because it "imposes potentially significant implementation costs." *NetChoice* v. *Att'y Gen., Fla.*, 34 F.4th 1196, 1230 (11th Cir. 2022), *vacated on other grounds*, *Moody*, 603 U.S. 707. For instance, Members must compile massive amounts of information for which they do not have pre-existing workflows, such as how often account holders worldwide are "posting" and "disseminating" Minnesota "user-generated content." Cleland ¶¶86, 128.

Second, the Act's compelled disclosure requirements fail under *Zauderer* because they are not "reasonably related to the State's interest in preventing deception of consumers" and do not further a "substantial governmental interest." *Zauderer*, 471 U.S. at 644, 651. The Act will not prevent consumer deception and will, instead, *mislead* consumers, for all of the reasons discussed above. *See supra* at 11–14, 26–27.

"Transparency" is not a substantial interest in itself, unless it serves some other important goal, and to satisfy scrutiny under *Zauderer*, the "interest at stake must be more than the satisfaction of mere 'consumer curiosity.'" *CTIA II*, 928 F.3d at 844. Here, the Act does not further a sufficiently substantial governmental interest to satisfy *Zauderer*. Defendant has not met his burden of demonstrating that the Act's disclosure requirements will actually prevent consumer deception or further public health and safety. There is no evidence that consumers need or want the information compelled by the Act to make informed decisions about what services to use. Rather, the record shows that consumers will likely not understand the disclosures and will even be misled by them. *See* Srivastava ¶148; Cleland ¶¶74, 80, 86; Fernandez ¶¶19, 26, 31; *supra* at 11–14; 26–27.

While "transparency" may sound like a noble interest in the abstract, the State has provided no proof that the Act's compelled disclosures will provide anything meaningful to consumers. *See Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring). Perhaps that is why it is difficult to imagine any consumer in the real world being informed in any helpful way by the disclosures compelled by the Act. For example, it is unfathomable that the average consumer will know what to do with percentile statistics about various types of account interactions for account holders worldwide. §325M.33(3). That is even more true here, where the Act fails to make clear how these percentiles are to be calculated and does not require Members to disclose their methodology for making the calculations. Thus, even if the AG Reports include evidence about supposed harms of social media *generally,* they are entirely bereft of information about how the *Act's specific compelled disclosures* will be helpful in addressing those harms, rendering the State's arguments for the Act "little more than unsupported assertions[.]" *Zauderer*, 471 U.S. at 648.

Finally, for these reasons and those discussed above at 32–34, the Act's compelled disclosure requirements also flunk *Zauderer* review because they "extend [] broader than reasonably necessary[.]" *NIFLA*, 585 U.S. at 776.

B. The Act Violates The Takings Clause

In addition to the First Amendment problems outlined above, the Act's compelled disclosure requirements also violate the Takings Clause, which prohibits the State from taking "private property" for "public use," "without just compensation." U.S. Const. amend. V. The Act exacts a categorical (or "*per se*") taking of Members' property. *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 150–51 (2021); *Heights Apartments, LLC* v. *Walz*, 30 F.4th 720, 733 (8th Cir. 2022). Specifically, as discussed above in Section IV of the Statement of Facts, Sections 325M.33(1)(ii), 325M.33(2), 325M.33(4), and 325M.33(5) compel the disclosure of Members' proprietary trade secrets and confidential business information without providing Members with any compensation.

i. The Act Compels Disclosure of Members' Protected Property

When "data [is] cognizable as a trade-secret property right under [state] law, that property right is protected by the Takings Clause." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003–04 (1984). Under Minnesota law, to constitute a trade secret, the information must (i) not be "generally known or readily ascertainable"; (ii) have "value as a result of its secrecy"; and (iii) be the "subject of reasonable efforts to protect its secrecy." *Wyeth* v. *Nat. Biologics, Inc.*, 395 F.3d 897, 899 (8th Cir. 2005).

Here, each factor is met as to the information that Members must disclose about their content algorithms, safety and user-notification procedures, and product experimentation under §§325M.33(1)(ii), 325M.33(2), 325.33(4), and 325M.33(5). Thus, the Act compels the disclosure of Members' protected property.[6]

First, the information at issue here is not generally known or readily ascertainable. Information is readily ascertainable if, unlike here, it (i) is "available in trade journals, reference books, or published materials" or (ii) "can be ascertained by proper means," such as "discovery by independent invention," "observation of the item in public use or on public display," or "from published literature." *Surgidev Corp.* v. *Eye Tech., Inc.*, 648 F. Supp. 661, 688 (D. Minn. 1986), *aff'd*, 828 F.2d 452 (8th Cir. 1987). This requirement

[6] As noted, X's content algorithm is an exception.

is satisfied if the information is not "quickly" available through "[r]everse engineering[.]" *Electro-Craft Corp.* v. *Controlled Motion, Inc.*, 332 N.W.2d 890, 899 (Minn. 1983).

Here, the information compelled by the Act cannot be reverse-engineered, quickly or otherwise, and is not available in published materials or anywhere else in the public domain. Cleland ¶¶156–82; Srivastava ¶¶130–35. Of course, if the information *were* generally known or readily ascertainable, the State would not have needed to pass a law compelling its disclosure. The AG Reports themselves posit that the "designs of user interfaces and algorithms" are often "imperceptible" to "users"; there is "little visibility of [algorithmic] training data"; and the "decisions that companies make and that algorithms will make" are "indecipherable." AG 2025 Report 15, 29–30; AG 2024 Report 13, 22, 28.

Second, the trade secret information compelled by the Act derives independent economic value from its secrecy—that is, it "provides a competitive advantage." *Surgidev Corp.*, 648 F. Supp. at 692. Here, the trade-secret information compelled by the Act is "core to each Member's competitive advantage in the social media industry" and is "valuable *because* it is kept secret." Cleland ¶159 (emphasis in original). If Members are forced to publish their trade secrets, competing social media platforms, particularly nascent platforms, would recreate and utilize the information for themselves. *See id.* ¶¶95, 103, 144, 164, 168, 179; Srivastava ¶¶133–35, 149. And Members have developed these trade secrets at their great expense. *See* Cleland ¶¶144, 174, 178–79; Srivastava ¶¶133–35, 149; *Surgidev Corp.*, 648 F. Supp. at 692 (information "developed at great expense" is "most eligible for favorable judicial trade secret recognition"). Indeed, the State's own witness even conceded that social media content algorithms are the "unique engine that typically drives [Members'] product's profitability" and that it is "self-evident" that Members consider both their content algorithms and product experimentation data to be "trade secrets." 30(b)(6) Tr. 197–99. Moreover, the State's "intention to use this information" is further "proof of its value." *Surgidev Corp.*, 648 F. Supp. at 692.

Third, Members make significant efforts to maintain the secrecy of the information. *See* Cleland ¶¶160, 170, 180; Srivastava ¶¶136–46. "[R]easonable" efforts to maintain secrecy are sufficient—such efforts include requiring employees to "sign secrecy or non-disclosure agreements" that put them "on notice of the trade secret status" of the relevant information and require that they "surrender" the information when they "depart[] the company"; and restricting access to the information by segregating it "from the central facility" and "keeping [it] in locked files" accessible only to "high-level company executives" on "strictly a 'need-to-know' basis." *Surgidev Corp.*, 648 F. Supp. at 693–94.

Members make sufficiently reasonable efforts to protect their trade secret information. Members do one or more of the following:

- Require their employees to sign non-disclosure agreements that define the protected information, confirm the company's ownership of it, and mandate that the employee destroys or returns it before departing the company;

- Restrict access to the information on a "need-to-know" basis, granting employees only the minimum access necessary to perform their duties;
- Maintain the information in segregated, password-protected repositories accessible only to a select number of high-level employees; and
- Deploy software tools that monitor for and block unauthorized attempts to transfer confidential data outside company systems. *See* Cleland ¶¶160, 170, 180; Srivastava ¶¶15, 136–46.

Finally, even if the information compelled under the Act was not formally considered a trade secret under Minnesota law, it at least qualifies as "[c]onfidential business information," which "has long been recognized as property" for Takings purposes when, as here, it is "acquired or compiled by a corporation in the course of conduct of its business." *Carpenter* v. *U.S.*, 484 U.S. 19, 26 (1987).

ii. The Act Effectuates a Taking of Members' Protected Property

The Act effects a categorical, *per se* taking because the Act "deprive[s]" Members of their "right to exclude" others from using their trade-secret information "without compensation." *Walz*, 30 F.4th at 733.

The term "property" in the Takings Clause is not a reference to a "physical thing," but rather "denote[s] the group of rights" a citizen has. *Ruckelshaus*, 467 U.S. at 1003. Among the "fundamental" property rights the Taking Clause protects is the "right to exclude" others from accessing or using property. *Cedar Point*, 594 U.S. at 148–52. When a statute "appropriates for the enjoyment of third parties the owners' right to exclude," as the Act does here, it "constitutes a *per se*" taking, and the Constitution requires the government to provide just compensation. *Id.*

It is "immaterial" whether the "physical invasion is 'permanent or temporary,' 'intermittent as opposed to continuous,' or whether the government is directly invading the [property] or allowing a third party to do so." *Walz*, 30 F.4th at 733 (quoting *id.* at 153). In the context of "trade secret[s], the right to exclude others is *central* to the very definition of the property interest." *Ruckelshaus*, 467 U.S. at 1011. Once the information is "disclosed to others," the "holder of the trade secret has lost [a] property interest in the data," even if "the data retain usefulness" in other ways. *Id.* at 1011–12. The Act, in direct conflict with that principle, destroys the rights of Members to exclude others from accessing their trade secrets.

Once Members publish the information about their content algorithms, safety and user-notification procedures, and product experimentation, competitors will be able to replicate and utilize that information. *See* Cleland ¶¶144, 164, 168–71; Srivastava ¶¶133, 149. The rights of Members to exclude the public and competitors from accessing this information will be extinguished forever. To impose such an obligation, the State must provide just compensation. It is undisputed that the State has not done so and will not.

C. The Act Is Unconstitutionally Vague

The Act's expansive reach and vague terms—coupled with Defendant's broad authority to enforce the Act and investigate (what he considers to be) potential violations of it—make the Act unconstitutionally vague. The "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

Here, the Act's compelled disclosure requirements are so unintelligible that they "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited" and are "so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement." *Fantasysrus 2, L.L.C.* v. *City of E. Grand Forks, Minn.*, 881 F. Supp. 2d 1024, 1032 (D. Minn. 2012). Defendant—who is charged with enforcing the Act—(i) has openly expressed his animus toward social media (or, in his view, "ruthless corporations") (Fernandez Ex. 41); (ii) has vowed to use "all the tools at [his] disposal" to regulate them (*id.*); (iii) wields broad and comprehensive authority to investigate, conduct discovery, and sue under Minnesota Statutes Section 8.31 in connection with conduct *he believes* to be unfair, discriminatory, or otherwise unlawful (*see, e.g.*, 30(b)(6) Tr. 240–44); and (iv) has, in fact, already used those powers to sue Members TikTok and Meta (Fernandez Ex. 39 at ¶¶4, 7, 9, 19, 24, 295, Ex. 40 at ¶¶2, 19 n.4, 53).

First, Section 325M.33(1)'s requirement for Members to disclose "an explanation" of how they "limit[] *excessive account interactions*" is unconstitutionally vague. "[E]xcessive" is undefined, and the term is not used by social media companies at all or in any consistent manner (*see* Cleland ¶¶97–101; Fernandez ¶¶54–57), so Members cannot comply without knowing what the *State* considers excessive. In addition, Section 325M.31(d)'s definition of "account interactions" is vague because, while the Act provides illustrative examples of "account interactions," the term "include[s] but [is] not limited to" those examples, *see* §325M.31(d), leaving Members guessing at which interactions are covered.

Second, Section 325M.33(2)'s requirement to disclose an explanation of how the Member "*assesses the quality of content*" is unconstitutionally vague. The phrase "assesses the quality of content" is undefined and it has no universally accepted definition in the industry (*see* Cleland ¶¶103–10; Fernandez ¶¶48–51), so Members cannot understand how to make disclosures about it to any reasonable degree of certainty. In addition, Members do not "assess" content quality through explicit, rule-based systems that can be distilled into a public-facing disclosure. *See* Srivastava ¶121. Thus, they cannot know whether their disclosures would satisfy Section 325M.33(2) or expose them to enforcement for noncompliance.

Third, Members cannot understand the Act's requirement to disclose descriptions of "*product experiments*" and "*experimental conditions*," §325M.33(5), each of which are undefined. Moreover, Section 325M.33(5) requires disclosures about "experiments" that concern users "viewing or engaging with content" that "users consider to be *high or low quality*." §325M.33(5)(i). But the Act does not define "high quality" or "low quality," and those terms do not have a universally understood definition in the industry. *See* Cleland ¶¶151–53; Fernandez ¶¶52–53. Thus, Members must undertake the inherently subjective exercise—in the face of costly and significant enforcement—of determining what content the *State* would consider high- or low-quality content.

Fourth, nor can Members understand what is required under Section 325M.33(4)(i)'s mandate to publish notification percentile statistics for "all platform account holders *in a given day*." The term "given day" is undefined, and the quantity and timing of notifications can vary significantly depending on the "day." *See* Cleland ¶¶139–42; Fernandez ¶¶22–30.

Accordingly, the Act is unconstitutionally vague because it is "susceptible of sweeping and improper application," *Button*, 371 U.S. at 433, fails to provide "a reasonable opportunity to know what" the statute "prohibit[s]," and thus carries "the attendant dangers of arbitrary and discriminatory application." *D.C.* v. *City of St. Louis, Mo.*, 795 F.2d 652, 653 (8th Cir. 1986).

The Act has all of the hallmarks of a law that is void for vagueness under the First and Fourteenth Amendments.

D. The Act Violates the U.S. Constitution's Ban on Extraterritorial Economic Regulation

The Act violates the Constitution's ban on extraterritorial economic regulation under the Dormant Commerce and Due Process Clauses because its disclosure requirements "appl[y] Minnesota law to commerce wholly outside of Minnesota." *Styczinski* v. *Arnold*, 46 F.4th 907, 913 (8th Cir. 2022).

The Act impermissibly regulates wholly extraterritorial conduct in at least three ways. *First*, because Minnesota account holders comprise a very small percentage of the Members' overall account holders (*see* Cleland ¶¶79, 137; Fernandez ¶39), §§325M.33(3) and 325M.33(4)—which seek various information about "all platform account holders" worldwide—require Members to collect and disclose significant amounts of information about non-Minnesotans. *Second*, the editorial changes that the Act will pressure Members to make—e.g., weighing expressed preferences more heavily than revealed preferences in their content algorithms and product experiments, and conducting fewer product experiments, both overall and specifically about the topics covered by the Act (*see* Cleland ¶121; Fernandez ¶73)—are changes that would affect users nationwide, not only those in Minnesota. *Third*, the Act requires Members to make each of the compelled disclosures their "website[s]" *universally*, to every single account holder in the world, and not just to Minnesotan account holders. *See* §§325M.33(1)–(5).

Accordingly, the Act impermissibly seizes nationwide and extraterritorial authority, which violates the Dormant Commerce Clause and, for the same reasons, the Due Process Clause. *See Fuld* v. *Palestine Liberation Org.*, 606 U.S. 1, 15–17 (2025) ("[t]he Constitution confers upon the Federal Government—and it alone—both nationwide and extraterritorial authority" and "due process protects the individual's right to be subject only to lawful power").

II. NetChoice Satisfies the Remaining Preliminary Injunction Factors

For the reasons discussed above, NetChoice is likely to succeed on the merits. In addition, NetChoice will "suffer irreparable harm" absent preliminary relief; the "balance of equities" tips in NetChoice's favor; and an injunction is "in the public interest." *Jones*, 947 F.3d at 1104–05.

First, Members will suffer irreparable harm absent a preliminary injunction because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 19 (2020). Moreover, the forced disclosure of trade secrets independently causes "irreparable harm." *FMC Corp.* v. *Taiwan Tainan Giant Indus.*, 730 F.2d 61, 63 (2d Cir. 1984). *Second*, the balance of equities tips in NetChoice's favor and the public interest favors an injunction, as it is "always in the public interest" to "prevent the violation of a party's constitutional rights." *Bao Xiong ex rel. D.M.* v. *Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019).[7]

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[7] NetChoice requests a waiver of Rule 65(c)'s requirement for a "security," which Defendant does not oppose.

CONCLUSION

This Court should preliminarily enjoin enforcement of the Act.

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By: /s/ Joel Kurtzberg

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