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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12

13
14 **NETCHOICE,**
15
Plaintiff,
16
v.
17
ROB BONTA, ATTORNEY GENERAL OF
18 **THE STATE OF CALIFORNIA, in his**
19 **official capacity,**
20 Defendant.
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5:25-cv-03178

**DEFENDANT'S REPLY IN SUPPORT
OF CROSS-MOTION FOR SUMMARY
JUDGMENT**

Date: October 22, 2026
Time: 9:00 a.m.
Dept: 1, 5th Floor
Judge: Hon. Beth Labson Freeman
Trial Date: N/A
Action Filed: April 9, 2025

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INTRODUCTION

Plaintiff fails to carry its burden of proving its challenges to Title 1.4D, which the Legislature enacted to combat the widespread problem of online resale of stolen goods. To start, Plaintiff’s threshold burden in this case is to show that it has standing. It has not done so. The record does not show that Plaintiff’s members face a genuine threat of imminent prosecution because Plaintiff has not put forth any evidence that its members have a concrete plan to violate Title 1.4D. Therefore, it does not have standing to bring its pre-enforcement challenge. It further lacks standing to bring its as-applied challenges, as the issues in those claims turn on how its members operate their feeds and require the participation of its individual members.

On the merits, Plaintiff asks the Court to broaden the preemptive effect of the INFORM Act, 15 U.S.C. § 45f, far beyond Congress’s intent, and to ignore settled Ninth Circuit law in the process. Under the conflict preemption principles that do apply, Cal. Civ. Code § 1749.8(b) does not stand as an obstacle to the full purposes of 15 U.S.C. § 45f.

Plaintiff’s claims under section 230 of the Communications Decency Act (“CDA”) likewise fall short. The Ninth Circuit has made clear that section 230 claims must be resolved by determining whether *each* individual section of a challenged statute—on its own terms—requires platforms to monitor third-party content. Because none of the challenged sections regulate based on the *content* of third-party users’ posts, they fall outside of section 230’s preemptive ambit.

Plaintiff’s First Amendment challenges also fail. Plaintiff contends that the First Amendment shields online marketplace users from providing basic identifying information to the platforms, only the most anodyne of which is disclosed publicly. But no First Amendment theory justifies this extreme position. The State’s significant interest in preventing the sale of stolen goods overshadows any minimal burden on Plaintiff’s members and users.

This Court should also reject Plaintiff’s vagueness challenge to Title 1.4D. The challenged provisions are clear—and certainly clear enough to avoid any due process violation. After all, Title 1.4D need only provide Plaintiff a reasonable opportunity to know what conduct is prohibited and be sufficiently definite to avoid arbitrary and discriminatory enforcement. Because Title 1.4D easily survives that standard, Plaintiff’s void-for-vagueness claim must fail.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING ITS PRE-ENFORCEMENT LAWSUIT OR AS-APPLIED CHALLENGES ON BEHALF OF ITS MEMBERS

A. Plaintiff Fails to Demonstrate that Its Members Face a Genuine Threat of Imminent Prosecution

Despite its efforts to argue otherwise, Plaintiff must demonstrate that its members face a “credible” or “genuine threat of imminent prosecution” to have standing for its pre-enforcement challenge. *Thomas v. Anchorage Equal Rts. Comm’n*, 220 F.3d 1134, 1139, 1140 (9th Cir. 2000) (en banc); accord *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). This requirement applies because Plaintiff’s members face no risk of imminent injury without showing that they are likely to face liability. *Compare Meland v. Weber*, 2 F.4th 838, 845 (9th Cir. 2021) (plaintiff had standing where plaintiff “*has* suffered a direct personal injury” under statute currently in effect) (emphasis added). This requirement also applies to pre-enforcement challenges generally—Plaintiff’s distinction between challenges to “proscriptive” statutes (which Plaintiff concedes are subject to this standard) versus “prescriptive” statutes (which Plaintiff contends are not), *see* Pl.’s Opp. 4, has no basis in its cited case law. *Thomas*, cited by Plaintiff, states that “the mere existence of a proscriptive statute” is insufficient to satisfy the “case or controversy” requirement but does not say anything about limiting its holding to proscriptive statutes. *Thomas*, 220 F.3d at 1139. And Plaintiff’s other cited case, *Stavrianoudakis v. U.S. Fish & Wildlife Serv.*, 108 F.4th 1128 (9th Cir. 2024), *applied* the “genuine threat of imminent prosecution” test in a pre-enforcement challenge to what Plaintiff characterizes as a prescriptive regulation. *Id.* at 1143 (“No violation of the laws is on the horizon and no enforcement action or prosecution is either threatened or imminent.” (quoting *Thomas*, 220 F.3d at 1137)).

Because the “genuine threat of imminent prosecution” test applies, Plaintiff must show that (1) Plaintiff’s members “have articulated a concrete plan to violate the law in question,” (2) “the prosecuting authorities have communicated a specific warning or threat to initiate proceedings” against Plaintiff’s members, and (3) there is a “history of past prosecution or enforcement” of the challenged law. *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022). Plaintiff’s

case fails at the first prong, because Plaintiff has put forth *no* facts as to the “when, to whom, where, or under what circumstances” that would demonstrate a concrete plan to violate Title 1.4D. *Id.* at 1211. That Plaintiff “br[ought] the present lawsuit” means little. Pl.’s Opp. 4. If the “concrete plan” prong could be satisfied by the mere existence of the lawsuit challenging a statute, then that requirement would be meaningless, as the analysis necessarily applies when a party sues to challenge a statute. Nor does it matter that Plaintiff’s “members are *not* currently in compliance with SB 1144,” Pl.’s Opp. 4, as this Court preliminarily enjoined the law from taking effect, *see* PI Ord.—that Plaintiff’s members are not currently complying with a law that is not in effect does not show that they have a concrete plan to violate it if it was.

Plaintiff’s claim that that some of its members would incur “meaningful compliance costs,” Pl.’s Opp. 4, to comply with Title 1.4D is irrelevant to its concrete plan argument. *See Ass’n of Am. R.R. v. Cal. Off. of Spill Prevention and Response*, 113 F. Supp. 3d 1052, 1058-59 (E.D. Cal. 2015) (“Plaintiffs do not prove that they in fact have a concrete plan to violate [the statute], but rather argue that compliance will cost them a significant amount of money.”). Plaintiff only asserts that its members will attempt to comply with Title 1.4D but laments the alleged costs. *See* Pl.’s Mot., Ex. B ¶¶ 12-13; *id.*, Ex. C ¶¶ 42-49; *id.*, Ex. D ¶¶ 27-32. That is the opposite of a “concrete plan” to violate Title 1.4D.

B. Plaintiff Lacks Associational Standing for Its As-Applied Claims

Though Plaintiff repeatedly asserts that its members’ individual participation is unnecessary to resolve this case, it has submitted evidence for only two of its 31 members, and it concedes that Title 1.4D will affect these many members differently. *See* Pl.’s Opp. 6-7. Accordingly, there is not “complete identity between the interests of the [association] and those of its member[s],” *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 10 n.4 (1988) (citation omitted), and an “*ad hoc* factual inquiry” for each member is necessary, *Rent Stabilization Ass’n of City of N.Y. v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993).

That Plaintiff’s claims are legal constitutional challenges seeking declaratory and injunctive relief does not cure this problem. Courts have held that associations lack standing to bring as-applied constitutional challenges—regardless of the relief sought—where, as here, the as-applied

claims require individualized factual inquiries for each member of the association. *See Ass’n of Christian Schs. Int’l v. Stearns*, 678 F. Supp. 2d 980, 985-86 (C.D. Cal. 2008) (finding plaintiffs’ as-applied claims and the relief they sought, though equitable in nature, both required individualized proof); *Dinkins*, 5 F.3d at 592-93 (finding no associational standing for as-applied constitutional claims because the court would have had to “engage in an *ad hoc* factual inquiry for *each* [member] who allege[d] that he ha[d] suffered a taking” (emphasis in original)).

With respect to its First Amendment claim, Plaintiff fails to distinguish this case from *NetChoice v. Bonta*, 152 F.4th 1002 (9th Cir. 2025) (*NetChoice II*). Plaintiff is flatly wrong in asserting that there is no “genuine dispute” that Plaintiff’s members have a First Amendment interest in their supposed “curated compilation of speech.” *Contra* Pl.’s Opp. 7. In fact, Plaintiff has not demonstrated that its members’ feeds are expressive at all. *See* Def.’s Mot. 21 (citing *Meta Platforms Inc. v. Bonta*, No. 5:25-CV-09789-EJD, 2026 WL 2260373, at *5 (N.D. Cal. Aug. 5, 2026)); *see also infra* at 12. Accordingly, Plaintiff is mistaken in asserting that, unlike in *NetChoice II*, the Court can resolve its as-applied First Amendment challenge without the individual participation of its members because Title 1.4D “burdens protected activity regardless of the form that expression takes.” *See* Pl.’s Opp. 8. To establish the First Amendment is even implicated at all, Plaintiff must provide *evidence* regarding “*each* member’s [feed] and how it functions.” *NetChoice II*, 152 F.4th at 1014 (emphasis in original). It has not done so here.

II. 15 U.S.C. § 45f DOES NOT PREEMPT CAL. CIV. CODE § 1749.8(b)

In its opposition brief, Plaintiff again suggests that Congress intended for 15 U.S.C. § 45f to preempt *any* state law that regulates how online marketplaces prevent online sales of stolen goods, regardless of whether it conflicts with federal law. Pl.’s Opp. 10 (arguing that 15 U.S.C. § 45f preempts entire “patchwork of state laws” that existed in 2022). This does more than stretch “conflict” beyond its ordinary meaning—it reads “conflict” out of 15 U.S.C. § 45f. Based on the ordinary meaning of “conflict” in the context of preemption—a term well-defined by decades of case law interpreting conflict preemption principles—this Court should hold that 15 U.S.C. § 45f preempts state laws only where there is a true conflict, rather than all state laws where there happens to be some “differ[ence]” from federal law. Pl.’s Mot. 10.

1 Plaintiff's argument to the contrary rejects settled Ninth Circuit case law. As already
2 discussed in Defendant's cross-motion, *Jones v. Google* considered this same issue, and found
3 that an express preemption provision preempting "inconsistent" state laws incorporated conflict
4 preemption standards. 73 F.4th 636, 642 (9th Cir. 2023) (citing cases). That *Jones* considered a
5 law that used the word "inconsistent" instead of "conflict" only undermines Plaintiff's argument.
6 If the word "inconsistent" incorporates "conflict" preemption principles, *id.*, the word "*conflict*"
7 sends that signal even more clearly.

8 Plaintiff is also incorrect that 15 U.S.C. § 45f(g) is rendered superfluous if it only preempts
9 State laws that conflict with its requirements. By explicitly incorporating implied preemption
10 principles into 15 U.S.C. § 45f(g), Congress did not merely replicate those principles—it
11 communicated that it did not intend for 15 U.S.C. § 45f to occupy the entire field of online
12 marketplace regulation, leaving "no room for supplementary state legislation." *Murphy v. Nat'l*
13 *Collegiate Athletic Ass'n*, 584 U.S. 453, 479 (2018). And even if 15 U.S.C. § 45f(g) merely
14 repeats implied conflict preemption principles, that raises no issue here. The canon against
15 surplusage is not a constitutional rule—it is a statutory construction tool that is not necessary
16 when the statutory language is clear, as here. *See U.S. Postal Serv. v. Konan*, 607 U.S. 391, 406
17 (2026). Nor does 15 U.S.C. § 45f stand alone in incorporating implied preemption standards. As
18 evidenced by *Jones* and the cases it discusses, Congress often uses express preemption provisions
19 to incorporate implied preemption principles. *See Jones*, 73 F.4th at 642 (discussing 15 U.S.C.
20 § 6502(d) and cases cited therein).

21 Under the correct conflict preemption principles, Plaintiff must establish either that it would
22 be impossible for its members to comply with both state and federal requirements, or that the state
23 law "stands as an obstacle to the accomplishment and execution of the full purposes and
24 objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Plaintiff concedes
25 that there is no impossibility preemption issue here. *See Pl.'s Opp.* 11-12. And because section
26 1749.8(b) does not obstruct the "full purposes and objectives" of 15 U.S.C. § 45f, *English*, 496
27 U.S. at 79, it is not preempted.

1 Title 1.4D yields to 15 U.S.C. § 45f only “[i]f the purpose of [15 U.S.C. § 45f] cannot
 2 otherwise be accomplished—if its operation within its chosen field else must be frustrated and its
 3 provisions be refused their natural effect.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363,
 4 373 (2000). State laws that “*supplement*” federal law “do not stand as an obstacle to Congress’s
 5 objectives.” *Jones*, 73 F.4th at 642 (emphasis added). Section 1749.8(b)’s inclusion of offline
 6 transactions in the definition of “high-volume third-party seller” supplements 15 U.S.C. § 45f’s
 7 definition and does not obstruct that definition from having its intended effect. Section 45f clearly
 8 provides that online marketplaces need only count transactions made through and processed by
 9 the online marketplace “[f]or purposes of calculating the number of discrete sales or transactions
 10 or the aggregate gross revenues *under subparagraph (A)*.” 15 U.S.C. § 45f(f)(3) (emphasis
 11 added). That is, 15 U.S.C. § 45f explicitly provides that the counting limitation for the definition
 12 of “high-volume third party seller” applies only for purposes of complying with federal, not state,
 13 law. Title 1.4D’s definition of “high-volume third-party seller” clearly does not interfere with
 14 complying with 15 U.S.C. § 45f because transactions “utilizing” the online marketplace
 15 inevitably include transactions made “through” the online marketplace, meaning compliance with
 16 Title 1.4D will necessarily result in compliance with 15 U.S.C. § 45f. *See* Def.’s Mot. 11.

17 To argue otherwise, Plaintiff relies primarily on *NetChoice v. Carr*, a Northern District of
 18 Georgia case concerning the interpretation of a Georgia state law (“Act 564”) with substantively
 19 identical language to Cal. Civ. Code § 1749.8(b). *See* No. 1:24-cv-02485-SDG, 2024 WL
 20 3262633 (N.D. Ga. June 30, 2024), *appeal pending*, No. 24-12273 (11th Cir.). But the court’s
 21 obstacle preemption analysis in *Carr* is unconvincing in at least two respects.

22 First, although the court in *Carr* acknowledged the presumption that Congress did not
 23 intend to preempt “the historic police powers of the States,” *see* 2024 WL 3262633, at *3
 24 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)), it did not discuss whether Act 564 was
 25 within Georgia’s historic police powers. But that law, like Title 1.4D, is plainly a law
 26 enforcement tool designed to protect consumers—“an area that is traditionally within [a] state’s
 27 police powers to protect its own citizens.” *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir.
 28 2011); *see also Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004). The

1 Carr court’s preemption conclusion was therefore erroneous, because it failed to find the requisite
 2 “compelling” evidence of an intent to preempt Act 564’s definition of “high-volume third-party
 3 seller” before granting NetChoice relief. *See Ass’n des Eleveurs de Canards et d’Oies du Quebec*
 4 *v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017).

5 This Court should reject the Carr court’s conclusion for a second reason, as well. There, the
 6 court relied on *Crosby* to conclude that Congress intended to preempt Act 564. But that case is
 7 clearly distinguishable. In *Crosby*, the Supreme Court considered a Massachusetts law imposing
 8 sanctions on the government of Burma. But foreign affairs—unlike consumer protection—is a
 9 subject outside the traditional police powers of the States. *See Movsesian v. Victoria*
 10 *Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012). Further, the federal statute in *Crosby*
 11 made clear that Congress intended for the President to exercise discretion in leading the United
 12 States’ strategic response to Burma. *See* 530 U.S. at 374. The Massachusetts law at issue directly
 13 undermined the federal law by damaging the “economic and diplomatic leverage” the President
 14 could levy. *Id.* at 376-77. By contrast, no one here contends that Title 1.4D or Act 564 would
 15 similarly render 15 U.S.C. § 45f so ineffective. Further, extensive legislative history showed that
 16 Congress considered and rejected the broader approach taken by Massachusetts. *Id.* at 378 n.13.
 17 Nothing in 15 U.S.C. § 45f’s legislative history shows that Congress considered, and rejected, the
 18 approach taken by Title 1.4D and Act 564, as was the case in *Crosby*. Finally, and perhaps most
 19 important, 15 U.S.C. § 45f contains a self-limiting provision, *see* Def.’s Mot. 12 (discussing 15
 20 U.S.C. § 45f(f)(3)(B)), that the federal statute in *Crosby* did not have.

21 Finally, Plaintiff’s position that section 1749.8(b) obstructs the purposes of 15 U.S.C. § 45f
 22 runs contrary to the plain language of 15 U.S.C. § 45f’s preemption provision, which provides
 23 that a State may not enact a law that “conflicts with the *requirements of this section.*” 15 U.S.C.
 24 § 45f(g) (emphasis added). If accepted by the Court, Plaintiff’s argument would read this wording
 25 out of the statute. Congress could have, but did not, draft 15 U.S.C. § 45f to preempt laws that
 26 conflict with “any provision” of the statute—something it has done numerous times. *See, e.g.,* 15
 27 U.S.C. § 1692n (preempting State laws “to the extent that those laws are inconsistent with *any*
 28 *provision of this subchapter*” (emphasis added)). Instead, Congress made clear that it intended to

preempt only those State laws that conflict with 15 U.S.C. § 45f’s affirmative, substantive “requirements.” Plaintiff does not show that Title 1.4D’s definition of “high-volume third-party seller” obstructs any substantive requirement of 15 U.S.C. § 45f.

III. CDA SECTION 230 DOES NOT PREEMPT TITLE 1.4D

Section 230 immunity applies only to laws that “necessarily require an internet company to monitor third-party content.” *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 741 (9th Cir. 2024) (quoting *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019)). Under the “exacting analysis” required for section 230, *Est. of Bride v. Yolo Techs.*, 112 F.4th 1168, 1176 (9th Cir. 2024), none of the challenged provisions of section 1749.8.9 are preempted.

Plaintiff errs in urging this Court to treat the three challenged subsections of section 1749.8.9 as a “unified scheme” that treats online marketplaces as speakers of third-party content. Pl.’s Opp. 13-14. Such an approach is directly contrary to Ninth Circuit precedent requiring a “claim-specific” analysis. *Calise*, 103 F.4th at 738. Accordingly, the Court must closely evaluate each of the challenged provisions to determine whether they “necessarily require [Plaintiff’s members] to monitor third-party content” in violation of section 230. *Id.* at 741. None do.

First, section 1749.8.9(a) requires an online marketplace to “alert local, regional, or state law enforcement agencies in California if it knows or should know that a third-party seller is selling or attempting to sell stolen goods to a California resident.” Plaintiff offers no response to Defendant’s argument that, under *Doe I v. Twitter, Inc.*, 148 F.4th 635, 647-48 (9th Cir. 2025), a statute that requires notification to the government when a platform has actual knowledge of illegal activity is not preempted. Def.’s Mot. 15. Accordingly, there is no dispute that section 1749.8.9(a) is not preempted to the extent that it applies to cases of actual knowledge.

Plaintiff’s arguments regarding section 1749.8.9(a)’s phrase “should know” also fail. Plaintiff objects that “should know” incorporates the constructive knowledge standard but does not explain why that standard *necessarily* requires content monitoring. Such a standard does not, as Plaintiff asserts, require open-ended monitoring of all third-party content. Instead, constructive knowledge merely requires a reasonable investigation in situations of “conspicuousness or notoriety.” *See* Def. Mot. 16. Such situations could arise, for example, when a platform receives a

1 tip that a user is reselling stolen goods. Plaintiff's contrary argument merely points to section
2 (b)(1)(D), which is a separate provision that must be interpreted independently. Pl.'s Opp. 15.

3 In any event, "should know" could be severed if there were any section 230 problem.
4 "Severability is a matter of state law." *Nat'l Ass'n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102,
5 1122 (9th Cir. 2019) (citation omitted). Under California law, "courts have traditionally applied a
6 presumption in favor of severability." *In re D.L.*, 93 Cal. App. 5th 144, 162 (2023). Absent
7 "express language confirming or prohibiting severability," three factors govern: "whether the
8 provision is (1) grammatically, (2) functionally, and (3) volitionally separable." *Id.* at 163.

9 Plaintiff does not (and cannot) dispute grammatical and functional severability. Volitional
10 severability turns on "whether the remainder would have been adopted by the legislative body
11 had [it] foreseen the partial invalidation of the statute." *In re D.L.*, 93 Cal. App. 5th at 163. Given
12 its focus on stopping theft, SB 1144 § 1, the Legislature clearly would have preferred to enact
13 subpart (a)(1) without the words "should know" over not enacting that provision at all. Plaintiff is
14 wrong that such a provision would do "virtually nothing" to stop theft. *See* Pl.'s Opp. 16. Reports
15 to law enforcement based on actual knowledge allow for investigation and potential arrest of
16 those selling stolen goods online. It makes little sense that the Legislature would instead not enact
17 subpart (a)(1) at all, which would be far less effective. And this is not a case, as in *Abbott Labs. v.*
18 *Franchise Tax Bd.*, 175 Cal. App. 4th 1346 (2009), where the question whether to sever
19 implicated difficult decisions between two divergent "policy choices." *Id.* at 1359. Here, subpart
20 (a)(1) without "should know" still advances the policy goals of SB 1144.

21 This severance argument is not waived, *see* Pl.'s Opp. 15, but instead preserved by citation
22 to relevant "case authority." *Cf. United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010)
23 (argument waived because it was made "without citation to law or to the record"). In any case,
24 Plaintiff briefed the issue, foreclosing any prejudice. *See Chavez v. Robinson*, 817 F.3d 1162,
25 1166 n.3 (9th Cir. 2016).

26 Second, section 1749.8.9(b)(1)(A) requires online marketplaces to "[e]stablish and
27 maintain a policy prohibiting the sale of stolen goods on the online marketplace, which shall
28 include consequences for knowingly selling stolen goods on the online marketplace, including,

1 but not limited to, suspension or termination of the seller’s account.” Plaintiff argues that this
 2 subsection “plainly contemplates that *the marketplace* will review the content of specific posts
 3 and assess whether to remove them.” Pl.’s Opp. 16 (emphasis in original). But drafting policies
 4 regarding the knowing sale of stolen goods clearly does not require content moderation, and
 5 Plaintiff does not argue otherwise. And Plaintiff does not explain how applying those policies
 6 “necessarily” requires such moderation given that Plaintiff can respond to tips from users and law
 7 enforcement or adopt other non-content-based methods. *Calise*, 103 F.4th at 741. Plaintiff points
 8 to “other provisions” of section 1749.8.9 it contends require such monitoring. Pl.’s Opp. 16. But
 9 again, subsection (b)(1)(A) must be evaluated on its own terms. *See supra* at 8.

10 Moreover, contrary to Plaintiff’s argument, section 230 does not preempt any statute that
 11 imposes liability for “fail[ing] to remove content.” Pl.’s Opp. 16 (quoting *Est. of Bride*, 112 F.4th
 12 at 1177). *Estate of Bride* made that statement in discussing a legal obligation to remove a user’s
 13 posts based on the *content* of those posts. *See* 112 F.4th at 1177 (describing claim as “simply a
 14 defamation claim recast as negligence”). More to the point, a law challenged under section 230 is
 15 not preempted even if, “in operation and effect,” it “forces [platforms] to *remove* third-party
 16 content,” so long as it “does not proscribe, mandate, or even discuss the *content* of the listings.”
 17 *HomeAway.com*, 918 F.3d at 683 (first emphasis in original, second added). Under
 18 *HomeAway.com*, a law impermissibly requires “monitor[ing] third-party content” only if it forces
 19 the removal of postings based on the *content* of those postings. Subsection (a)(1)(A) does no such
 20 thing because it contemplates removal of a posting based on the offline *conduct* of its users
 21 (namely, the sale of stolen goods, which is unlikely to be evident in the *content* of the posting).

22 Third, section 1749.8.9(b)(1)(D) requires online platforms to “maintain internal written
 23 policies, systems, and staff to monitor listings in order to affirmatively prevent and detect
 24 organized retail crime.” Here too, Plaintiff fails to distinguish *HomeAway.com*, which preserves
 25 state laws that—like section 1749.8.9(b)(1)(D)—do not impose liability based on the *content* of
 26 third-party posts. Any duty to monitor and remove depends not on the *content* of others’ posts but
 27 on the *conduct* of organized retail crime, which may be suppressed without content moderation.
 28

IV. PLAINTIFF HAS NOT DEMONSTRATED ANY VAGUENESS CONCERNS IN TITLE 1.4D

Plaintiff's arguments in support of its vagueness challenges do not hold up to scrutiny. As an initial matter, Plaintiff does not have standing to bring any vagueness challenge on behalf of its members. Title 1.4D is a civil regulation of business activity, not a statute that burdens protected speech. SB 1144 did not amend any provisions of Title 1.4D that control what information sellers must disclose. *See infra* at 12. Further, the challenged portions of sections 1749.8.9(a) and (b)(1)(D) do not infringe upon speech and do not require online marketplaces to engage in content moderation. *See infra* at 12-15; *supra* at 8-10. Plaintiff is accordingly unable to stand in the shoes of its members' users for this vagueness challenge. The case it cites to argue the contrary, *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989), does not support its point. *Ripplinger* holds that plaintiffs have standing to raise the rights of third parties to bring vagueness challenges under the First Amendment. *Id.* at 1047-48. But because Title 1.4D does not implicate constitutionally protected speech, Plaintiff's vagueness challenge is one rooted in due process. For such a claim, Plaintiff asserts only its own rights. *See Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158, 1168 (C.D. Cal. 2009).

Beyond its inaccurate position that Title 1.4D implicates First Amendment vagueness concerns, Plaintiff's primary approach to defending its vagueness challenges is to demand that Defendant commit to answering various hypothetical questions. But the standard in a vagueness challenge is not whether Defendant answers speculative questions to Plaintiff's satisfaction, and Plaintiff cites no authority suggesting that is the case. Instead, Plaintiff bears a significant burden to show how the challenged provisions "specif[y]" "no standard of conduct . . . at all." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (internal quotation marks and citation omitted). The Supreme Court and the Ninth Circuit have recognized that "[m]any statutes will have some inherent vagueness" and that a certain quantum of vagueness is permissible—and even necessary. *See Rose v. Locke*, 423 U.S. 48, 49-50 (1975); *McSherry v. Block*, 880 F.2d 1049, 1054 (9th Cir. 1989) (quoting same). Consistent with that recognition, "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Parker v. Levy*, 417 U.S. 733, 757 (1974).

Plaintiff's remaining arguments are equally unavailing. With respect to the scienter requirement in section 1749.8.9(a), Plaintiff ignores that courts find that the presence of a scienter requirement *reduces* a statute's vagueness. *See United States v. Lee*, 937 F.2d 1388, 1394 (9th Cir. 1991) (citing *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982)). Nor is Plaintiff's inchoate fear of arbitrary enforcement a basis to uphold a vagueness challenge. To raise constitutional concerns, Plaintiff must show that there is a "*significant risk*" of arbitrary enforcement. *Or. Ass'n of Hosps. and Health Sys. v. State of Oregon*, 734 F. Supp. 3d 1139, 1166 (emphasis in original) (quoting *Skilling v. United States*, 561 U.S. 358, 412 (2010)). A mere "*possibility* that a law will be enforced arbitrarily is of no due process significance unless the possibility ripens into a prosecution." *Id.* (emphasis in original) (internal quotation marks, citations, and alterations omitted).

V. PLAINTIFF CANNOT PREVAIL ON ANY OF ITS FIRST AMENDMENT CLAIMS

A. Sections 1749.8(b) and (c) Do Not Violate the First Amendment

Plaintiff's challenges to sections 1749.8(b) and (c) founder at the threshold, as Plaintiff does not establish any First Amendment injury at all. Plaintiff relies principally on its claim that these provisions burden Plaintiff's members' "disseminat[ion of] curated compilations" of others' posts. Pl.'s Opp. 19. But the record contains no evidence whatsoever to establish that this activity is expressive. *See Meta Platforms Inc.*, 2026 WL 2260373, at *5 (concluding that social media companies do not "convey an expressive message through their personalized feeds"). Plaintiff reads *Moody v. NetChoice*, 603 U.S. 707 (2024), to categorically hold that "curating third-party content" is "expressive activity," Pl.'s Opp. 19, but the Ninth Circuit has rejected that argument. *See NetChoice II*, 152 F.4th at 1021 (under *Moody*, "some personalized recommendation algorithms may be expressive, while others are not, and that inquiry is fact intensive"). Plaintiff therefore must offer *evidence* that its members' feeds are expressive, and its bare assertion that its members have, and apply, content moderation policies is insufficient. *See* Pl. Opp. 19.

Plaintiff's compelled speech theory fares no better. Sections 1749.8(b) and (c) merely extend the data collection and disclosure regime in sections 1749.8.1 and 1749.8.2 to additional transactions. Plaintiff asserts a First Amendment injury on the theory that section 1749.8.1

1 requires third-party sellers to disclose basic identifying information “to *private* companies” (i.e.
 2 the online marketplaces). Pl.’s Opp. 20 (emphasis in original). Such a theory would draw into
 3 First Amendment scrutiny employment authorization and other forms that businesses must collect
 4 from their workers and customers. Unsurprisingly, Plaintiff does not cite a single decision where
 5 a mandate to collect information from customers or users triggered First Amendment protection.
 6 All of Plaintiff’s cases address mandates to *publicly* disclose certain information. *See* Pl.’s Opp.
 7 21. Thus, section 1749.8.1 does not implicate the First Amendment at all.

8 With respect to the public disclosure requirements of section 1749.8.2, any First
 9 Amendment burden is justified by the State’s interest in providing consumers with important and
 10 uncontroversial information. *See CTIA - The Wireless Ass’n v. City of Berkeley, California*, 928
 11 F.3d 832, 842 (9th Cir. 2019) (*CTIA*) (government “may compel truthful disclosure in
 12 commercial speech as long as the compelled disclosure is ‘reasonably related’ to a substantial
 13 governmental interest, and involves ‘purely factual and uncontroversial information’ that relates
 14 to the service or product provided”) (quoting *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*
 15 *of Ohio*, 471 U.S. 626, 651 (1985)). Plaintiff argues that *Zauderer* does not apply because the
 16 disclosures required in section 1749.8.2 do not “correct[] misleading advertising.” Pl.’s Opp. 21.
 17 Again, Ninth Circuit precedent forecloses the argument. *See CTIA*, 928 F.3d at 843 (“[T]he
 18 *Zauderer* exception for compelled speech applies even in circumstances where the disclosure
 19 does not protect against deceptive speech.”).

20 Plaintiff argues that sections 1749.8.1 and 1749.8.2 do not mandate disclosure of merely
 21 “uncontroversial information” because certain users must disclose a bank account and social
 22 security number. Pl.’s Opp. 21. But “a compelled statement is controversial when it takes sides in
 23 a heated political controversy, and forces the speaker to convey a message fundamentally at odds
 24 with its mission.” *Foothills Christian Ministries v. Johnson*, 148 F.4th 1040, 1054 (9th Cir. 2025)
 25 (internal quotation marks and citation omitted). By contrast, “‘uncontroversial’ in this context
 26 refers to the factual accuracy of the compelled disclosure.” *Nationwide Biweekly Admin., Inc. v.*
 27 *Owen*, 873 F.3d 716, 732 (9th Cir. 2017) (citation omitted). Bank account and social security
 28 numbers, if correctly disclosed as required under Title 1.4D, are factually accurate and therefore

1 uncontroversial. Regardless, no online marketplace user is required to publicly disclose that
 2 information—section 1749.8.1 requires only that online marketplaces *collect* such information.
 3 *See* Cal. Civ. Code § 1749.8.1(a). Accordingly, furnishing such information does not implicate
 4 First Amendment interests, let alone fall outside of the *Zauderer* standard. *See supra* at 13. The
 5 only information Title 1.4D requires to be *disclosed* are, for certain very high-volume sellers, the
 6 seller’s name, contact information (only to the extent the seller has means of being contacted),
 7 and “[w]hether or not another party is responsible for supplying the product to the consumer upon
 8 purchase.” Cal. Civ. Code § 1749.8.2(a).

9 Finally, the challenged provisions easily satisfy *Zauderer*’s standard. Def.’s Mot. 23.
 10 Plaintiff argues that disclosing the basic factual information required under section 1749.8.2 is
 11 “unduly burdensome” because online marketplaces must “collect and disseminate information
 12 about other speakers” even in instances where the online marketplace is not engaged in “sales or
 13 payment-processing activity.” Pl.’s Opp. 22. But that is not what “unduly burdensome” means in
 14 the *Zauderer* context, as Plaintiff’s own authority demonstrates. *See Nat’l Inst. of Fam. & Life*
 15 *Advocs. v. Becerra*, 585 U.S. 755, 778 (2018) (holding law unduly burdensome under *Zauderer*
 16 because it “drowns out” speaker’s own message by surrounding it “with a 29-word statement
 17 from the government, in as many as 13 different languages”). There is no potential to drown out
 18 any online marketplace’s or third-party seller’s speech here. *Wash. Post v. McManus*, 944 F.3d
 19 506 (4th Cir. 2019), is not to the contrary. *See* Pl.’s Opp. 22. There, the challenged law was a
 20 “presumptively unconstitutional” “content-based regulation on speech” that burdened only
 21 political advertisements. *Wash. Post*, 944 F.3d at 513 (internal quotation marks and citation
 22 omitted). That is a situation far afield from Title 1.4D.

23 **B. Sections 1749.8.9(a), (b)(1)(A), and (b)(1)(D) Are Constitutional**

24 Plaintiff’s challenge to subsections 1749.8.9(a), (b)(1)(A), and (b)(1)(D) also fails because
 25 Plaintiff cannot establish any impingement on First Amendment interests. Plaintiff appears to
 26 have abandoned its theory that these provisions burden the “expressive activity” of running an
 27 online platform. *Compare* Pl.’s Mot. 22, *with* Pl.’s Opp. 22-23. And for good reason, given
 28 Plaintiff’s failure to submit evidence establishing that its members’ platforms are in fact

1 expressive. *See supra* at 12. Plaintiff now instead relies only on its theory that the sections require
2 it to “censor” others’ speech. Pl.’s Opp. 22-23 (quoting *NetChoice, LLC v. Bonta*, 113 F.4th 1101,
3 1118 (9th Cir. 2024) (*NetChoice I*)). But the challenged sections do not impose an impermissible
4 duty to “censor” within the meaning of *NetChoice I*. There, the challenged law required online
5 platforms to make myriad editorial judgments about whether or not content was “harmful or
6 potentially harmful.” *NetChoice I*, 113 F.4th at 1118. Whether content is harmful depends on
7 context, and such a category plainly has the potential to cover political and other forms of highly
8 protected speech. *See id.* Here, by contrast, the challenged provisions apply only to the
9 straightforward category of commercial posts that advertise stolen goods.

10 Any burden on First Amendment interests is justified under the applicable standard of
11 review. Plaintiff argues that these provisions are subject to strict scrutiny but made no such
12 argument in its opening brief, instead citing an intermediate scrutiny case. *Compare* Pl.’s Mot. 20
13 (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948
14 (9th Cir. 2011)), *with* Pl.’s Opp. 23. In any case, contrary to Plaintiff’s argument, subsection
15 (a)(1) does not impose on platforms a widespread duty to “monitor” others’ posts, *see* Pl.’s Opp.
16 23, but instead a duty to report to law enforcement when the platform knows or should know
17 about stolen goods being sold on the platform. That is a governmental reporting requirement that
18 survives rational basis scrutiny. *See Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101, 1109
19 (D.C. Cir. 2011). With regard to subsections (b)(1)(A) and (b)(1)(D), Plaintiff concedes that
20 platforms “voluntarily” engage in much of the activity required under these sections and does not
21 explain why these provisions nonetheless impose a burden. Pl.’s Opp. 23 (emphasis in original).

22 CONCLUSION

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

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Respectfully submitted,

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