

No. SJC-13747
Appeals Court No. 2024-J-0724

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

META PLATFORMS, INC. AND INSTAGRAM, LLC,

Defendants-Appellants.

On Direct Appellate Review from an Order of
the Superior Court for Suffolk County, No. 2384CV02397

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Defendant-Appellants Meta Platforms, Inc. and Instagram, LLC make the following disclosures:

Meta Platforms, Inc. is a publicly traded corporation incorporated in Delaware, with a principal place of business in Menlo Park, California. It has no parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

Instagram, LLC is a limited liability company formed in Delaware, with a principal place of business in Menlo Park, California. It is a subsidiary of Meta Platforms, Inc. Instagram, LLC does not issue stock. Its sole member is Meta Platforms, Inc.

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STATEMENT OF ISSUES

1. Whether the Court has jurisdiction under the doctrine of present execution, where Meta sought dismissal of the Commonwealth's claims by invoking its immunity from suit under the Communications Decency Act, 47 U.S.C. § 230.

2. Whether Section 230 of the Communications Decency Act bars the Commonwealth's claims, which seek to impose liability on Meta for whether and how it publishes third-party content on Instagram.

3. Whether the First Amendment to the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights bar the Commonwealth's claims because they would impose liability on Meta for how it publishes third-party content, and for making statements to Congress and statements of opinion concerning its social media services.

4. Whether the Complaint fails to state a claim for public nuisance or violations of the Massachusetts Consumer Protection Act, M. G. L. Chapter 93A.

STATEMENT OF THE CASE

In October 2023, the Commonwealth brought this suit in the Superior Court against Meta Platforms, Inc. and Instagram, LLC (collectively "Meta"). The Complaint seeks recovery under Massachusetts consumer-protection and tort laws for harms caused by certain alleged conduct by Meta, namely: that Meta designed its services to be "addictive" to young users; that Meta failed to disclose information

about the risks of engaging with its services; that Meta misrepresented the safety of its services; and that Meta failed to establish adequate age verification processes for users of its services. See RA1/109-RA1/121.

Meta moved to dismiss the Complaint, arguing, among other things, that the Commonwealth's claims are barred by the Communications Decency Act, 47 U.S.C. § 230, as well as the First Amendment to the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights. Meta also argued that the Commonwealth's claims under state consumer-protection law fail as a matter of law because Meta's alleged conduct does not occur in the course of "trade or commerce" and is neither "unfair" nor "deceptive" within the meaning of the statute. Finally, Meta argued that the Commonwealth's public-nuisance claim fails because it relies on a mistaken and overly broad understanding of the public-nuisance doctrine, does not involve a public right as the doctrine requires, and fails plausibly to allege that any of Meta's conduct proximately caused the alleged harm.

After briefing and oral argument, the Superior Court (Krupp, J.) denied Meta's motion to dismiss. See RA1/471-RA1/498. Relevant here, the court rejected Meta's threshold argument that Section 230 bars the Commonwealth's claims. RA1/476-RA1/488. The Superior Court also rejected Meta's arguments that the First Amendment bars the Commonwealth's claims, RA1/488-RA1/490, and that

the Commonwealth failed to state a claim under state consumer-protection law and the public-nuisance doctrine, RA1/490-RA1/498.¹

Meta timely filed a notice of appeal under the doctrine of present execution. The doctrine applies here because Section 230 confers immunity from suit that can be vindicated only through an immediate appeal as a matter of right. See *infra* Section I. After its appeal was docketed in the Appeals Court, Meta timely filed an application for direct appellate review, which this Court granted on March 12, 2025.²

STATEMENT OF FACTS

A. Meta's Social Media Services

Meta operates several social media services, including Facebook and Instagram. RA1/28-RA1/29 ¶¶ 17-18. Billions of individuals use Instagram to connect and interact with each other by posting videos, photos, captions, and other audiovisual material, or by responding to content posted by other users. RA1/29 ¶ 18; RA1/39 ¶ 57; RA1/41 ¶ 64. Every user's experience of Instagram is unique

¹ Meta's request that the Superior Court report its ruling was denied. RA2/511-RA2/514.

² Because neither this Court nor the Appeals Court had yet decided whether the present execution doctrine applies to the denial of a claim of Section 230 immunity, Meta also petitioned a single justice of the Appeals Court for leave to appeal from the Superior Court's ruling. RA2/517-RA2/521. See *McMenimen v. Passatempo*, 452 Mass. 178, 186-188 (2008). This Court transferred and denied without prejudice that petition when it granted Meta's direct appellate review application. RA3/574-RA3/576.

and reflects content from, among other sources, other users' accounts. RA1/41 ¶¶ 61, 63, 64. To use Instagram, a person must sign up for an account and login with that account. RA1/39 ¶ 58. Meta's Terms of Use and other policies prohibit individuals under 13 years old from using Instagram. RA1/92 ¶¶ 302-303.

B. The Commonwealth's Allegations

The Commonwealth alleges that, as a result of Meta's various "design features," its users, especially young users,³ spend excessive amounts of time on its services. The Commonwealth further alleges that certain features create an addiction that, in turn, causes mental and physical harm to users, including sleep irregularities and enhanced anxiety and depression symptoms. RA1/103-RA1/105 ¶¶ 360, 365. The Commonwealth asserts that Meta knew about the dangers inherent in these features when it created them. It also asserts that Meta deceptively represents that it prioritizes user well-being over profit and that it excludes underage users from accessing its services. RA1/114-RA1/116 ¶¶ 394, 402.

The Complaint asserts four causes of action: three alleged violations of the Massachusetts Consumer Protection Act, M.G.L. Chapter 93A ("c. 93A"), and one public-nuisance claim. The c. 93A claims allege that Meta unfairly designed its social media services to be addictive for young users (Count One); deceptively represented its services as safe and not addictive, and omitted or misrepresented

³ The Complaint defines "young users" as users under 18 years old. RA1/22 n.1.

information about risks associated with its services (Count Two); and unfairly failed to take adequate steps to ensure that its services are not available to users under 13 years old and deceptively represented that it does not allow such users to access its services (Count Three). The public-nuisance claim alleges that Meta’s social media services mentally and physically harm young users who spend excessive amounts of time using the services (Count Four).

SUMMARY OF ARGUMENT

The doctrine of present execution allows this Court to reach Meta’s appeal and to dismiss the Commonwealth’s Complaint in its entirety.

Section 230 gives providers of interactive computer services like Meta immunity from suit—not just immunity from liability—for traditional publishing activity. Because this right cannot be vindicated after final judgment, the present execution rule applies to Meta’s appeal. And here, this Court should dismiss each of the Commonwealth’s claims. Section 230 gives interactive computer services immunity when a claim is based on third-party content and would treat providers as a publisher or speaker of such content. Each of those elements is met here, where the Commonwealth’s claims either target so-called “design features” that Meta uses to decide whether and how to organize, display, and disseminate—i.e., publish—third-party content, or seek to hold Meta liable for third-party content itself. The

Superior Court failed to meaningfully engage with precedent that supports Meta's Section 230 defense on each of these points.

Beyond violating Section 230, the Commonwealth's claims are fatally flawed on other bases that this Court can and should reach. Foremost, the entire Complaint violates Meta's First Amendment rights. The Commonwealth's challenges to Instagram's "design features" target expressive publishing activity that the U.S. Supreme Court recognized as recently as a year ago as shielded by the First Amendment. See *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). The Commonwealth's claims that would impose liability on Meta for alleged misrepresentations about Instagram's safety and age-verification practices run afoul of precedent protecting statements of opinion and the petitioning of Congress. And the Commonwealth's related attempt to punish Meta for failures to warn consumers about its characterizations of Instagram amounts to compelled speech that is also barred under the First Amendment. For the same reasons, the Complaint also violates Meta's rights under Article 16 of the Massachusetts Declaration of Rights.

Moreover, the Commonwealth's claims, and the Superior Court's order allowing them to proceed, overextend the bounds of Massachusetts public-nuisance and consumer-protection law. The Superior Court's public-nuisance ruling permits the Commonwealth's claim to advance where no public right is involved, as is required by this Court's precedents and the traditional limits of public-nuisance

doctrine. The Superior Court also erred in permitting the Commonwealth's consumer-protection claims to proceed despite multiple missing elements, chiefly the requirement that challenged conduct implicate "trade or commerce." Instagram is free to download and use, and Meta's operation of it therefore does not involve trade or commerce. The Superior Court's reliance on Meta's advertising practices to satisfy that requirement is inappropriate in these circumstances. The Commonwealth does not allege any harms arising from Meta's interactions with third-party advertisers. And such bootstrapping would improperly broaden the reach of Massachusetts consumer-protection law, as evidenced by the fact that it would permit the Commonwealth to impose civil liability on non-commercial, protected statements of opinion and petitioning activity.

For all these reasons, this Court should reverse the Superior Court and dismiss the Commonwealth's Complaint.

ARGUMENT

I. THIS APPEAL IS PROPERLY BEFORE THE COURT UNDER THE PRESENT EXECUTION DOCTRINE.

This Court has recognized that "an order denying a motion to dismiss based on immunity from suit enjoys the benefit of the present execution rule because it is a final order that meets the criteria for immediate appeal." *Kent v. Commonwealth*, 437 Mass. 312, 316 (2002). That rule applies here because, as the Superior Court acknowledged, "Section 230 provides an immunity from suit rather than a mere

defense to liability.” RA1/479 (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-255 (4th Cir. 2009)).

The present execution doctrine “permits the immediate appeal from an interlocutory order if the order will interfere with rights in a way that cannot be remedied on appeal from a final judgment.” *Kent*, 437 Mass. at 315 n.6. Such circumstances exist where a defendant “asserts an entitlement” to “protection from the burden of litigation,” *Estate of Moulton v. Puopolo*, 467 Mass. 478, 485-486 (2014), including where, as here, a defendant asserts an immunity from suit that “would be ‘lost forever’ if an order denying it were not appealable until the close of litigation,” *Brum v. Town of Dartmouth*, 428 Mass. 684, 688 (1999).⁴ It does not matter “whether the ... defendants are correct in their assertion that they are ... immune.” *Moulton*, 467 Mass. at 485. Under the doctrine of present execution, “interlocutory appeal ... is permissible to challenge the denial of that contention.” *Id.*

Whether Section 230 provides an immunity from suit, and therefore whether the doctrine of present execution applies, is a question of law that this Court reviews

⁴ See also *Kent*, 437 Mass. at 316 (“[A]n order denying a motion to dismiss based on immunity from suit enjoys the benefit of the present execution rule because it is a final order that meets the criteria for immediate appeal.”); *CP 200 State, LLC v. CIEE, Inc.*, 488 Mass. 847, 850 (2022) (“[D]efenses based on ... statutory immunities are immediately appealable”).

de novo. *CP 200 State*, 488 Mass. at 848. The plain text of Section 230 establishes that it provides an immunity from suit.

Several provisions in Section 230 work together to shield websites from litigation based on users' speech. First, Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). A companion provision, Section 230(c)(2), then “shields [websites] from liability for good-faith efforts to restrict access to” objectionable material. *In re Facebook, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (cleaned up). These “dual protections are commonly understood to operate in tandem, ensuring that a website is not discouraged by tort law from policing its users' posts, while at the same time protecting it from liability if it does not.” *Id.* at 89.

Meanwhile a third provision in Section 230—subsection (e)(3)—expressly clarifies that the immunity provided by subsection (c) is an immunity from suit *and* liability. 47 U.S.C. § 230(e)(3). Subsection (e)(3) states: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* The phrase “[n]o cause of action may be brought” necessarily confers immunity from suit. A “cause of action [is] the injury” that provides “the basis of controversy in legal procedure.” *Shapiro v. McCarthy*, 279

Mass. 425, 431 (1932). If a “cause of action” cannot be brought, a suit cannot be maintained.

This reading is confirmed by the rest of subsection (e)(3), which separately provides immunity from liability by stating that “no liability may be imposed.” 47 U.S.C. § 230(e)(3). Interpreting the earlier phrase “[n]o cause of action may be brought” to provide only immunity from liability would render the latter phrase surplusage. See *Shapiro*, 279 Mass. at 431; see also *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004) (“A basic tenet of statutory construction requires that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.”) (cleaned up).

Consistent with the text of Section 230(e)(3), multiple federal courts of appeals have interpreted Section 230 as providing immunity from suit. See, e.g., *Nemet*, 591 F.3d at 254 (Section 230 is an “immunity from suit rather than a mere defense to liability” (cleaned up)); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (“Congress intended that service providers ... be afforded immunity from suit.”). Doing so ensures that Section 230 “protect[s] websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.” *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc).

Numerous state supreme courts have interpreted Section 230 the same way. The Supreme Court of New Hampshire, for example, has observed that Section 230’s “plain language confers immunity from suit.” *Banaian v. Bascom*, 175 N.H. 151, 158 (2022). The Supreme Court of Texas granted in part a writ of mandamus compelling dismissal of state tort claims because Section 230 confers an immunity from suit. See *In re Facebook, Inc.*, 625 S.W.3d at 84. As that court explained, Section 230(e)(3)’s command that “[n]o cause of action may be brought” creates “a substantive right to be free of litigation, not just a right to be free of liability at the end of litigation.” *Id.* at 87. The Supreme Court of Florida has also determined that “[S]ection 230 expressly bars ‘any actions’” and that the court was “compelled to give the language of this preemptive law its plain meaning.” *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1018 (Fla. 2001). The Supreme Court of California has done the same. See *Hassell v. Bird*, 5 Cal. 5th 522, 544 (2018) (Section 230 “confers immunity from suit”).⁵

⁵ The Tenth Circuit stands alone in its atextual interpretation of Section 230(e)(3) as providing only immunity from liability. See *General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1181 (10th Cir. 2016). Reading Section 230(e)(3) as nothing more than “a preemption provision,” as that court did, see *id.* at 1182, ignores the plain language of the statute that “[n]o cause of action may be brought,” 47 U.S.C. § 230(e)(3). The Tenth Circuit also failed to engage with prevailing authority, including from its own circuit, correctly describing Section 230 as an immunity from suit. See *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (“Defendant is immune from suit pursuant to § 230”).

As these courts have recognized, because Section 230 provides immunity from suit, not merely immunity from liability, it “is generally accorded effect at the first logical point in the litigation process”—here, at the motion-to-dismiss stage. *Nemet*, 591 F.3d at 254 (cleaned up). That is because the Section 230 defense “‘is effectively lost if a case is erroneously permitted to go to trial.’” *Id.*⁶ Under such circumstances, where Section 230 provides “protection from the burden of litigation,” the present execution doctrine applies. See *Moulton*, 467 Mass. at 485-486.

II. SECTION 230 BARS THE COMMONWEALTH’S CLAIMS BECAUSE THEY WOULD TREAT META AS THE PUBLISHER OF THIRD-PARTY CONTENT.

Congress enacted Section 230 “to promote the continued development of the Internet and other interactive computer services, as well as to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” *Massachusetts Port Auth. v. Turo Inc.*, 487 Mass. 235, 239-240 (2021) (cleaned up). Consistent with Congress’s intent, “courts have construed § 230 to establish broad federal immunity

⁶ Given the unique circumstances of this case—including the coordination of discovery here with discovery in federal multidistrict litigation—Meta has not sought a stay of discovery in the Superior Court while this appeal is pending. A holding from this Court that Section 230 bars the Commonwealth’s claims would nonetheless protect Meta from a “costly and protracted legal battle[.]” *Roommates.Com*, 521 F.3d at 1175.

to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Id.* at 239 (cleaned up).⁷

Section 230 provides immunity when: “the defendant (1) is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information.” *Id.* at 240 (cleaned up); see also 47 U.S.C. § 230(c)(1). The Superior Court held—and the Commonwealth did not dispute—that the first element is satisfied here. RA1/480. The court instead held that Meta failed to establish the second and third elements. The court was incorrect on both points.

A. The Commonwealth’s Claims Depend on Third-Party Content.

The second element of this Court’s Section 230 test asks whether “the claim is based on information provided by another information content provider.” *Turo*, 487 Mass. at 240. The Superior Court acknowledged that “features like ephemeral content, notifications, and autoplay are tied to the display of the platform’s third-

⁷ See also *In re Facebook, Inc.*, 625 S.W.3d at 90 (“Federal and state courts have uniformly held that section 230 ‘should be construed broadly in favor of immunity’” (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019)); *Stokinger v. Armslist, LLC*, No. 1884CV03236F, 2020 WL 2617168, at *4 (Mass. Super. Apr. 28, 2020) (“This broad construction has resulted in the recognition by courts across the country that many causes of action are premised on the publication or speaking of third-party content.”) (citing *National Ass’n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49, 65 (D. Mass. 2019)).

party content.” RA1/488. That acknowledgment should have been enough to establish that Section 230’s second element was satisfied.

Section 230 defines “information content provider” to include “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet.” 47 U.S.C. § 230(f)(3). The only possible reading of the Complaint reveals that the Commonwealth’s claims depend on content posted by users of Meta’s services, not by Meta. The Complaint acknowledges that Instagram allows users to engage with others’ “videos, photos, pictures, captions, and other audiovisual materials.” RA1/39 ¶ 57. It also highlights certain content that allegedly harms teens, RA1/24 ¶ 10, such as “harassment and/or unwanted advances, bullying, and hate speech, among multiple other categories,” RA1/88 ¶ 274; see also RA1/83 ¶ 254; RA1/86 ¶ 266; RA1/114 ¶ 393, and seeks to redress harms related to such content, RA1/73-RA1/74 ¶¶ 200-201 (e.g., “constant negative social comparison[s]”). But the Complaint *never* alleges that Meta itself generated any of that content.⁸

⁸ A defendant is responsible for developing user-generated content if it “directly and ‘materially’ contributed to what made the content itself ‘unlawful.’” *Force*, 934 F.3d at 68 (citation omitted). That rule is inapplicable here because, as the Superior Court acknowledged, the Commonwealth did not allege “harm to young users ... from design choices that contributed to the development or creation of that content.” RA1/483.

The Superior Court did not hold otherwise. Instead, it concluded that Meta had not satisfied the second element because “[t]he Commonwealth alleges physical and mental harm to young users from Instagram’s design features *themselves* ..., not from the viewing of any specific third-party content.” RA1/483. But the Complaint cannot be fairly read to allege that the challenged features would cause harm in the absence of third-party content. Those features dictate how Meta publishes content; they could not function without third-party content. For example, the Commonwealth challenges “autoplay,” a feature that causes videos to play immediately upon loading. RA1/51 ¶ 103. But if there were no videos to play, there would be no “autoplay.” Nor does the Complaint allege how users would be addicted to Instagram if there was no content on the service. Regardless of Meta’s publishing choices, if Instagram had no content, and instead displayed a blank screen upon loading, no one would use it, nor could possibly claim that they were addicted to the service.

The Superior Court’s reasoning thus appears to depend on an artificial distinction between harm allegedly resulting from “*specific* third-party content,” RA1/483 (emphasis added), and third-party content generally. But the statutory text forecloses this distinction. Section 230(c)(1) immunizes interactive computer services against claims challenging “*any information* provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added).

Accordingly, whether the challenged editorial decision relates to a specific piece of content, or to third-party content generally, is of no moment given the broad statutory language.

The Superior Court suggested that Meta relied only on precedent involving harm caused by particular third-party content, RA1/483, but that is incorrect. In *Force*, the Second Circuit held that Section 230 barred the plaintiffs' claims challenging Facebook's algorithmic "friend suggestions" even though such allegations did not depend on the content of any third-party posts, but rather the connection formed between two users. 934 F.3d at 65. The court expressly held that "tools such as algorithms designed to match [third-party] information with a consumer's interests" fall within Section 230's ambit. *Id.* (collecting cases).

The Ninth Circuit shares this approach. In *Dyroff v. Ultimate Software Group, Inc.*, that court considered whether Section 230 barred claims challenging recommendation algorithms that connected users, rather than simply claims challenging the content of user posts. 934 F.3d 1093, 1098 (9th Cir. 2019). Much like *Force*, *Dyroff* held that Section 230 barred claims challenging "recommendations" of "user groups" to join, even though such recommendations were "not content in and of themselves." *Id.* And in *Estate of Bride v. Yolo Technologies, Inc.*, the Ninth Circuit held that Section 230 barred a product-liability claim that was "based ... solely on the anonymity" feature of the defendant service's

messaging app. 112 F.4th 1168, 1174 (9th Cir. 2024). The court held that Section 230 barred such a claim because “the design feature of anonymity” was a choice about how content would be published, for which Section 230 provided immunity regardless of the underlying content. *Id.* at 1181.

In short, Section 230 bars claims that challenge a defendant’s publishing activity generally, even if those claims do not challenge specific third-party content. Indeed, any other approach would permit a plaintiff’s “‘creative’ pleading” to “circumvent” Section 230’s protections. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016). Section 230 cannot be evaded so easily.

B. The Commonwealth’s Claims Target Meta in Its Capacity as a Publisher.

The Superior Court also erred in holding that Section 230 did not apply because the Commonwealth’s claims would not treat Meta as a “publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1). The court determined that this element of the Section 230 test was not satisfied because the Commonwealth’s claims hold “Meta liable for its own business conduct.” RA1/480.

Section 230 is not rendered inapplicable merely because a plaintiff claims to be challenging a defendant’s “conduct.” To the contrary, in applying Section 230, a “court[] must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status *or conduct* as a ‘publisher or speaker.’” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-1102 (9th Cir. 2009) (emphasis added). Put

another way, Section 230 bars the Commonwealth's claims so long as they treat Meta as a publisher.

Consistent with the statutory text, courts have adopted “a capacious conception of what it means to treat a website operator as [a] publisher.” *Force*, 934 F.3d at 65. “‘Features ... [that] reflect choices about what content can appear on the website and in what form’ are ‘editorial choices that fall within the purview of traditional publisher functions.’” *Turo*, 487 Mass. at 242 (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)); see also *Backpage.com*, 817 F.3d at 18 (“[A] publisher’s traditional editorial functions” include “deciding whether to publish, withdraw, postpone or alter content”). For this reason, Section 230 protects “features that are part and parcel of the overall design and operation of the website,” *id.* at 21, and applies to “tools ... that are designed to match that [third-party] information with a consumer’s interests,” *Force*, 934 F.3d at 66.

Section 230 thus provides immunity not only from claims that target editorial decisions about whether and how to publish, remove, or alter third-party content, but also from claims attacking “features and functions” that are “meant to facilitate the communication and content of others.” *Dyroff*, 934 F.3d at 1098. Because the Commonwealth’s claims target Meta’s role as a publisher, they must be dismissed under Section 230.

1. The Commonwealth’s Challenge to the “Design” of Its Services Would Treat Meta as a Publisher.

Under Counts One and Four, the Commonwealth alleges that Meta has engaged in an unfair trade practice and created a public nuisance, respectively, because it “willfully” and “knowingly” designed its services to be “addictive.” RA1/110-RA1/112 ¶¶ 381-382, 385; RA11/118-RA1/119 ¶¶ 411, 413. The Commonwealth identifies three broad categories of “design features” that allegedly make its services addictive: (1) notifications and alerts, RA1/45-RA1/49 ¶¶ 84-96; RA1/55-RA1/57 ¶¶ 126-134; (2) infinite scroll, autoplay, and Reels, RA1/50-RA1/53 ¶¶ 97-114; and (3) ephemeral content, RA1/53-RA1/55 ¶¶ 115-125. The Commonwealth also alleges that Meta engaged in an unfair trade practice by “us[ing] an ineffective age verification process.” RA1/474.

Despite singling out certain “design” features, the Commonwealth’s claims challenge the overall design of “feeds”—in particular, whether and how “videos, photos, pictures, captions, and other audiovisual material” will be disseminated to which users. See, e.g., RA1/39 ¶ 57. But as the Supreme Court recently recognized, when Meta curates, organizes, and disseminates third-party content on a user’s Facebook Newsfeed—i.e., when Meta engages in precisely the activities the Commonwealth challenges here—it is performing the same publishing activities as “[t]raditional publishers and editors” have long performed. *Moody*, 603 U.S. at 717 (First Amendment protections for traditional publishing equally apply to social

media services). See also *M.P. by & through Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 525 (4th Cir. 2025) (dismissing under Section 230 plaintiff’s state claims challenging Facebook’s “own design” because they were “inextricably intertwined with Facebook’s role as a publisher of third-party content”).

Section 230 has long been interpreted to bar claims that would impose liability on an entity for performing a publisher’s “traditional editorial functions as well as for the provider’s website construction and operation.” *Turo*, 487 Mass. at 245 n.3 (collecting First Circuit cases). And as the Second Circuit has recognized, “arranging and distributing third-party information inherently forms ‘connections’ and ‘matches’ among speakers, content, and viewers of content That is an essential result of publishing.” *Force*, 934 F.3d at 66. Indeed, “it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized” under Section 230. *Id.* at 67. The Superior Court denied Meta’s motion to dismiss because the Commonwealth alleged that “physical and mental harm ... [stems] from Instagram’s design features themselves,” but that is precisely why the claim *should be* dismissed. RA1/483 (emphasis omitted).

In any event, even if the challenged features are analyzed individually, Section 230 would still bar the State’s challenge to the “design” of Meta’s services. The federal court overseeing multi-district litigation involving analogous claims

(“MDL”) has held that Section 230 bars challenges to most of these features, and it therefore has precluded more than 30 states from pursuing consumer-protection claims under their state laws based on them. *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.* (“*In re Social Media*”), 753 F. Supp. 3d 849, 881 (N.D. Cal. 2024), appeal docketed, No. 24-7312 (9th Cir.).⁹ Because each of these “features” reflects Meta’s editorial judgments about whether and how to disseminate and display user-generated content, Section 230 bars the Commonwealth’s claims.

Notifications and Alerts. The Commonwealth challenges several ways in which Meta notifies and alerts users about content, relevant announcements, and other users’ activities, among other things. RA1/45-RA1/49 ¶¶ 82-96. Notifications “are not content in and of themselves.” *Dyroff*, 934 F.3d at 1098. But when Meta sends “alerts or notifications” about third-party content, it is “acting as a publisher” because notifications “facilitate the communication and content of others.” *Id.* Thus, courts have refused to impose liability on websites for using notifications to alert their users to content or other communications. See, e.g., *id.* (Section 230 barred challenge to “notifications” used to alert users to new content); *In re Social*

⁹ Without elaborating, the Superior Court found that the MDL court’s analysis as to those features was not “persuasive.” RA1/484.

Media, 702 F. Supp. 3d 809, 833 (N.D. Cal. 2023) (same); *FTC v. Match Grp., Inc.*, No. 3:19-CV-2281-K, 2022 WL 877107, at *7-8 (N.D. Tex. Mar. 24, 2022) (same).

Section 230 likewise bars the Commonwealth’s challenge to the *frequency* of notifications and alerts. RA1/55-RA1/57 ¶¶ 126-133 (challenging the “intervals” in which users receive notifications of other users’ activity or likes). As the MDL court reasoned, the alleged “[t]iming and clustering of notification of third-party content in a way that promotes addiction” still “directly target[s] [Meta’s] role[] as [a] publisher[] of third-party content.” *In re Social Media*, 702 F. Supp. 3d at 830-831. Thus, this claim also must fail.

Infinite Scroll, Autoplay, and Reels. The Commonwealth challenges as unfair Meta’s “virtually endless” feeds. RA1/50-RA1/53 ¶¶ 97-114. The Complaint alleges that the “infinite scroll” feature, which “continuously and perpetually selects” new posts with “no natural end point,” encourages users to use Meta’s services for unlimited periods of time. RA1/50 ¶ 100. See also RA1/52 ¶ 107 (similar allegations for autoplay); RA1/53 ¶ 112 (similar allegations for Reels).

These challenges attack Meta’s editorial decisionmaking about whether and how to publish third-party content and are therefore barred by Section 230. Indeed, deciding to display content involves “making information more available,” which is “an essential part of traditional publishing.” *Force*, 934 F.3d at 70 (emphasis omitted). As a result, imposing liability on Meta for including infinite scroll or other

content-delivery features would “necessarily require [Meta] to publish less third-party content” and “inherently limit” what Meta publishes in violation of Section 230. *In re Social Media*, 702 F. Supp. 3d at 831 & n.16 (holding that Section 230 bars claims for “[n]ot providing a beginning and end to a user’s ‘Feed’”); see also *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016) (Section 230 bars challenges to the “structure and operation of a website,” including “choices about what content can appear on the website and in what form”), aff’d on other grounds, 881 F.3d 739 (9th Cir. 2018).

Ephemeral Content. The Commonwealth challenges Meta’s use of “ephemeral” content, which is “only viewable for a limited time before disappearing.” RA1/54 ¶ 118; RA1/53-RA1/55 ¶¶ 115-125. The Commonwealth alleges that such content trains users to regularly check Meta’s services and results in compulsive use. *Id.* But “determining the length of content published and how long to publish [it] are ‘traditional editorial functions’ immune under Section 230.” *In re Social Media*, 702 F. Supp. 3d at 832 (quoting *Barnes*, 570 F.3d at 1102); see also *Doe v. Snap, Inc.*, No. H-22-00590, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022), aff’d sub nom. *Doe Through Roe v. Snap, Inc.*, No. 22-20543, 2023 WL 4174061 (5th Cir. June 26, 2023). In sum, Section 230 bars the entirety of the Commonwealth’s unfairness claim based on Meta’s “design features.”

Age Verification. The Commonwealth challenges Meta’s age-verification measures as ineffective. But a federal district court recently held that Section 230 barred a similar claim against Meta. See *Doe (K.B.) v. Backpage.com, LLC*, No. 23-CV-02387-RFL, 2025 WL 719080, at *5 (N.D. Cal. Mar. 3, 2025) (Section 230 barred “theory of liability derive[d] from Meta’s alleged failure to include adequate age and identity verification measures”). That is because “[t]he duty” of deciding who can access Meta’s services “cuts to the core of Meta’s role as a publisher: that is, determining who can and cannot speak” by dictating who can and cannot create an account on Meta’s services. *Id.* Because “the duty to include these challenged features is ‘not independent’ of Meta’s role as the ‘facilitator and publisher of third-party content’,” Section 230 guards against the imposition of “verification requirements” that are “designed with the particular purpose of limiting who will create an ... account” where, as here, they are intended to limit access to “third-party content.” *Id.*¹⁰

¹⁰ Other courts have held that Section 230 bars similar claims. See, e.g., *Doe v. Snap*, 2022 WL 2528615, at *14 (Section 230 barred claim that Snapchat “is negligently designed because the application fails to prevent underage users from creating accounts using false birthdays”); *Fields*, 217 F. Supp. 3d at 1124 (Meta’s “decision to furnish an account ... is itself publishing activity.”); cf. *Backpage.com*, 817 F.3d at 20 (Section 230 bars claims “permitt[ing] users to register under multiple screen names”).

2. The Commonwealth’s Deception-Based Challenges Would Treat Meta As a Publisher.

Section 230 likewise bars the deception-based challenges insofar as they would impose liability on Meta for failing to warn users about the editorial judgments effectuated through its “design features,” as well as the allegedly harmful content on Meta’s services. See, e.g., RA1/91 ¶ 298 (alleging that Meta “failed to disclose ... the addiction-inducing nature of its platform design features” and “the frequency of exposure to types of content deem[ed] harmful”); RA1/111 ¶ 383 (alleging that Meta “failed to disclose the dangerous nature of [its] social media platforms); RA1/114-RA1/115 ¶ 394(a),(c) (seeking to hold Meta liable for failing to warn about the allegedly “addictive” “design” of its service and the “high frequency young users viewed content ... identified as harmful”).

Failure to Warn of Allegedly Addictive Nature of “Design Features.”

Section 230 bars the Commonwealth’s claim targeting Meta’s failure to warn users of the allegedly addictive nature of its services “design features,” as the Commonwealth’s challenges to the features themselves are barred. Were the rule otherwise, plaintiffs could plead around Section 230 by framing a challenge to publishing activity as a “failure to warn” of such activity. See *Kimzey*, 836 F.3d at 1265-1266. For that reason, until recently, “every published decision” had rejected efforts to evade Section 230 by recasting barred claims as claims instead based on a service’s failure to “warn” or “protect” users “from the dangers posed by” online

services. *In re Facebook, Inc.*, 625 S.W.3d at 93-95 (noting the then-“unanimous view of other courts” on this issue). See also, e.g., *Herrick v. Grindr LLC*, 765 F. App’x 586, 591 (2d Cir. 2019) (failure-to-warn claim was “inextricably linked” to barred claim about service’s design); *V.V. v. Meta Platforms, Inc.*, Doc No. X06-UWY-CV-23-5032685-S, 2024 WL 678248, at *10 (Conn. Super. Ct. Feb. 16, 2024) (“[A]llegations of failure to warn of an application’s potential danger do not remove the ‘publisher’ status.”).¹¹

A pair of recent Ninth Circuit decisions illustrate the point. In *Bride*, the Ninth Circuit held that Section 230 barred a claim alleging that an interactive computer service should have “warn[ed] of the known dangers” of its anonymous messaging service. 112 F.4th at 1179-1180. The court rejected the plaintiffs’ negligent-design claim and failure-to-warn claim for the same reason: The plaintiffs’ attempt to hold the defendant liable for creating an app with an “unreasonable” risk of harm *and* for failing to warn about such harm was just another way to impose liability for the harmful effects of the content on the app. *Id.* at 1180. The Ninth Circuit held that the plaintiffs could not “plead around [Section 230’s] strictures” by reframing a challenge to publishing activity as a failure to warn of said activity. *Id.* at 1176,

¹¹ Despite this near-uniform authority, the MDL court held otherwise. However, that decision was based on the plaintiff-states’ presentation of their failure-to-warn theories in such “broad strokes” that the alleged harms may not have resulted from “features” protected by Section 230. *In re Social Media*, 753 F. Supp. 3d at 888. That is not the case here.

1180. And just months ago in *Doe v. Grindr Inc.*, the Ninth Circuit reaffirmed this point: An interactive computer service’s “role as a publisher of third-party content does not give it a duty to warn users of ‘a general possibility of harm.’” 128 F.4th 1148, 1154 (9th Cir. 2025) (quoting *Bride*, 112 F.4th at 1181).

Here, the Commonwealth alleges that users have been harmed by Meta’s “omissions” regarding the risks associated with its “design features.” RA1/35 ¶ 42; RA1/114 ¶ 394(a). Because Section 230 bars the Commonwealth’s challenge to those “design features,” which constitute protected publishing activity, see *supra* pp. 30-35, it also bars the Commonwealth’s claims based on Meta’s alleged failure to warn about that activity.

Failure to Warn of Harmful Third-Party Content. The Commonwealth seeks to impose liability on Meta for failing to warn users about allegedly harmful third-party content or the risks associated with such content. RA1/56 ¶ 129 (alleging “‘Like’ counts on users’ posts caused harmful negative social comparison”); RA1/88 ¶¶ 274-275 (faulting Meta for not “disclos[ing]” survey data about users’ “negative or harmful” “interactions with content,” “including suicide and self-harm, harassment and/or unwanted advances, bullying, and hate speech, among multiple other categories”). Section 230 bars the Commonwealth’s omissions theory of liability because it relies on Meta’s “decision to publish” allegedly harmful content. See *Bride*, 112 F.4th at 1180.

Courts have repeatedly held that Section 230 prevents the prosecution of claims alleging a failure to warn about the existence of harmful third-party content. For example, *Bride* affirmed the dismissal of a failure-to-warn claim under Section 230 where the plaintiffs alleged that an online service should have warned that they could encounter allegedly harmful content. See 112 F.4th at 1180. As the court explained, “[t]his is essentially faulting [the defendant] for not moderating content in some way, whether through deletion, change, or suppression Thus, § 230 immunizes [the defendant] from liability[.]” *Id.* at 1180-1182.

Similarly, courts have also held that Section 230 bars failure-to-warn claims based on risks associated with allegedly harmful content—i.e., when “the harm animating [the] [p]laintiffs’ claims ‘is directly related to the posting of third-party content.’” *L.W. ex rel. Doe v. Snap Inc.*, 675 F. Supp. 3d 1087, 1097 (S.D. Cal. 2023). See also *Herrick*, 765 F. App’x at 591 (dismissing a plaintiff’s failure-to-warn claim because it was “inextricably linked to Grindr’s alleged failure to edit, monitor, or remove the offensive content provided by” another user); *Lama v. Meta Platforms, Inc.*, 732 F. Supp. 3d 214, 222 (N.D.N.Y. 2024) (similar); *Backpage.com*, 2025 WL 719080, at *7 (Section 230 barred failure-to-warn claim because “Doe is seeking to hold Meta liable as a publisher for its failure to warn of the generalized risk of . . . content”). This Court should do the same.

* * *

In short, the Commonwealth’s c. 93A and public-nuisance claims target Meta in its capacity as a publisher of third-party content. For that reason, each is barred by Section 230.

III. THE FIRST AMENDMENT BARS ALL CLAIMS.

The Commonwealth’s Complaint should be dismissed for a separate reason: Each claim infringes on Meta’s First Amendment rights.¹² The challenges related to the “addictive” design of Meta’s services variously seek to penalize Meta for selecting, prioritizing, and displaying user-generated speech—activity that was expressly recognized by the U.S. Supreme Court in *Moody* as protected expressive activity. Nor does the First Amendment allow the Commonwealth to hold Meta liable for its statements of opinion and petitioning of Congress, which are both protected. Meanwhile the Commonwealth’s challenges to Meta’s alleged failures to warn users about certain risks associated with its services would unconstitutionally compel such speech. On First Amendment grounds alone, this Court should dismiss the Complaint in its entirety.¹³

¹² Meta’s arguments under the First Amendment apply with equal force to Article 16 of the Massachusetts Declaration of Rights, which “provides analogous protections and, in some instances, provides more protection for expressive activity than the First Amendment.” *Massachusetts Coal. for the Homeless v. City of Fall River*, 486 Mass. 437, 440 (2020).

¹³ The Court may rule on the First Amendment and Rule 12(b)(6) arguments here because, “[w]hen all of the issues raised in an appeal of the denial of immunity present questions of law, judicial economy is served by reaching the nonimmunity issues as well as the immunity issues.” *Kent*, 437 Mass. at 320. See also *Brum*, 428

A. The Commonwealth’s Challenges to “Design Features” and Age-Verification Measures Are Barred by the First Amendment.

The Commonwealth’s unfairness-based challenges to Meta’s decisions about whether and how to display content as well as its age-verification measures cannot be reconciled with *Moody*. There, the U.S. Supreme Court used broad language to describe social media services’ organization and display of third-party content as expressive activity protected by the First Amendment. *Moody*, which specifically addressed and held protected Facebook’s content feeds, confirmed that the First Amendment “does not go on leave when social media are involved.” 603 U.S. at 719.

In *Moody*, the U.S. Supreme Court observed that under long-settled First Amendment principles, “the editorial function itself is an aspect of speech,” and “[a]n entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity.” *Id.* at 731 (cleaned up).¹⁴ Meanwhile, social

Mass. at 688-690 (declining to reach immunity issue in present execution appeal and instead reversing denial of defendant’s motion to dismiss on basis of nonimmunity issue). This principle is served especially well here, where Meta’s First Amendment defense would dispose of this litigation and should be addressed at the earliest juncture possible. See *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 800 (9th Cir. 2022) (“[T]he First Amendment’s protections extend ... to unnecessary litigation that chills speech.”).

¹⁴ *Moody* followed a long line of precedent holding that “expressive activity includes presenting a curated compilation of speech originally created by others.” 603 U.S. at 728. See, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 16 (1986).

media services including Meta “mak[e] millions of ... decisions each day” about whether and how to “include and exclude, organize and prioritize” third-party content. *Id.* at 716. These “choices about what third-party speech to display and *how to display it*” result in “distinctive compilations of expression” that are protected by the First Amendment. *Id.* (emphasis added). See also *id.* at 731 (decisions about how third-party speech is “organiz[ed] and present[ed]” on social media services are “expressive activity”). Taken together, those choices “result[] in a distinctive expressive product,” and “[w]hen the government interferes with” that product, it “confronts the First Amendment.” *Id.* at 731-732.

The aspects of the Complaint targeting Meta’s design therefore directly infringe on Meta’s right to free expression. For instance, the Commonwealth’s challenges would force Meta to change how it displays posts, and to publish content for longer periods of time than it otherwise would. See, e.g., RA1/50 ¶ 99 (challenging how Meta “selects and shows more posts to the user”); RA1/53 ¶ 116 (challenging “ephemeral” content). Any court order that requires Meta to alter its decisions about whether and how it presents third-party content will necessarily impact “the curated compilation” of content that appears on Meta’s services—a compilation that reflects “a wealth of choices about whether [and how] to convey posts having a certain content or viewpoint.” *Moody*, 603 U.S. at 717, 738.

The Superior Court’s decision did not acknowledge, much less analyze, *Moody* despite its direct relevance to this case.¹⁵ Instead, the Superior Court summarily concluded that the Commonwealth’s claims are “principally based on conduct and product design, not on expressive content.” RA1/489. But the so-called “conduct” at issue is whether and how Meta organizes and displays content, i.e., the way Meta exercises its editorial discretion. See *Moody*, 603 U.S. at 731, 740. This is the precise activity that the U.S. Supreme Court held was protected by the First Amendment. *Id.* at 731. And because “organizing and presenting” third-party speech in a compilation “is expressive activity of [Meta’s] own,” *id.*, “government efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the First Amendment,” *id.* at 717.

The Superior Court further suggested, in a footnote, that the Commonwealth’s claims “may very well be permitted under [] intermediate scrutiny.” RA1/489 n.17. But the tiers of scrutiny are a poor fit for cases such as this one, where the Commonwealth seeks to use tort liability to suppress Meta’s expression. See *Snyder v. Phelps*, 562 U.S. 443, 458-459 (2011) (setting aside jury verdict imposing tort liability without applying tiers of scrutiny). And if tiers of scrutiny do apply here,

¹⁵ *Moody* was decided while Meta’s motion to dismiss was under advisement in the Superior Court. Meta brought *Moody* to the Superior Court’s attention in a notice of supplemental authority, RA1/364-RA1/365, but the court did not mention *Moody* in its decision.

the U.S. Supreme Court has held that claims that would compel speakers to “alter[] the content of their speech” are necessarily “content based” and thus subject to strict scrutiny. *National Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (cleaned up). The Commonwealth has made no attempt to argue that its claims could satisfy strict scrutiny, nor could it. See *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1119-1122 (9th Cir. 2024) (holding state law requiring social media companies to engage in risk reporting likely failed strict scrutiny). Moreover, the Commonwealth has not alleged any interest sufficient to survive even intermediate scrutiny. See *Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 799-803 (2011) (rejecting purported state interest of protecting minors from violent video games).

Other courts’ readings of *Moody* confirm its broad protections for social media services’ free expression. For instance, the Ninth Circuit recently relied on *Moody* to strike down a California law requiring online services to submit reports that “opine on potential harm to children” posed by their services, in part because “the Supreme Court recently affirmed ‘that laws curtailing editorial choices by online platforms must meet the First Amendment’s requirements.’” *Bonta*, 113 F.4th at 1117-1118 (cleaned up). Similarly, multiple federal district courts have relied on *Moody* to enjoin state laws that require social media services to restrict minor users’ access to third-party content, finding that such laws restrict companies’ “abilities to collage user-generated speech into their ‘own distinctive compilations

of expression.” *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1123 (D. Utah 2024) (cleaned up), appeal docketed, No. 24-4100 (10th Cir.); see also *Students Engaged in Advancing Tex. v. Paxton*, No. 1:24-CV-945-RP, ___ F. Supp. 3d ___, 2025 WL 455463, at *15 (W.D. Tex. Feb. 7, 2025) (law restricts digital services’ “editorial ‘choices about how to display’ speech in all of their applications” (cleaned up)), appeal docketed, No. 25-50096 (5th Cir.). These same defects bar the Commonwealth’s claim attempting to penalize Meta for how it has designed its services.

The First Amendment also precludes the Commonwealth’s claims based on ineffective age-verification measures. Indeed, courts have permanently enjoined states’ attempts to establish age-verification requirements because they “impose[] significant burdens on adult access to constitutionally protected speech and ‘discourage[] users from accessing’” websites requiring verification. *NetChoice, LLC v. Griffin*, No. 5:23-CV-5105, 2025 WL 978607, at *8 (W.D. Ark. Mar. 31, 2025) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 856 (1997)), appeal docketed, No. 25-1889 (8th Cir.). Such requirements “erect[] barriers to accessing entire social media platforms” and thus obstruct both adults’ and minors’ “ability to speak and receive protected speech online” and access “the vast democratic forums of the Internet.” *Id.* at *13; see also *NetChoice, LLC v. Yost*, No. 2:24-cv-00047, 2025 WL 1137485, at *15 (S.D. Ohio April 16, 2025)

(permanently enjoining law that “impedes minors’ ability to engage in and access speech by requiring covered websites to obtain parental consent” and thus results in “an impermissible curtailment of [minors’] First Amendment rights”), appeal filed (6th Cir.).¹⁶ In short, the First Amendment precludes the Commonwealth’s efforts to require Meta to implement its preferred age-verification measures. See also *Brown*, 564 U.S. at 794 (“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” (citations omitted)).

B. The Commonwealth’s Deception-Based Challenges Are Barred by the First Amendment.

The First Amendment also bars the Commonwealth’s deception-based claims, which are grounded in its theories that Meta made material “misrepresentations” and “omissions” about the “safety of [its] platforms,” and that Meta falsely claimed that it excludes users under 13 years old from its services. RA1/114 ¶ 394; RA1/116 ¶ 402. Because these claims would punish Meta for its protected statements or its right not to speak, they cannot advance.

¹⁶ See also *Reyes*, 748 F. Supp. 3d at 1129 n.169 (D. Utah 2024) (preliminarily enjoining age-verification requirement because it likely violates First Amendment), appeal docketed, No. 24-4100 (10th Cir.); *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2025 WL 807961, at *15 (N.D. Cal. Mar. 13, 2025) (same), appeal docketed, No. 25-2366 (9th Cir).

Misrepresentations. The Commonwealth first alleges that Meta made misrepresentations about the “safety of [its] platforms” and its “efforts in prioritizing well-being.” RA1/114 ¶ 394. But this theory runs headlong into the First Amendment’s protections for statements of opinions, i.e., statements where the speaker “express[es] a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.” *Cheng v. Neumann*, 51 F.4th 438, 444 (1st Cir. 2022) (citation omitted); accord *Friedman v. Boston Broads., Inc.*, 402 Mass. 376, 379 (1988) (“Statements of opinion are constitutionally protected and thus are not actionable.”). “The vaguer a term, or the more meanings it reasonably can convey, the less likely it is to be actionable.” *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129 (1st Cir. 1997).

The Commonwealth contends that Meta deceived consumers when making public statements, including in its Community Standards, about its “focus[] on the wellbeing of the community” and “[m]aking the community a safer place.” See RA1/66-RA1/68 ¶¶ 172-173, 176-177; RA1/86 ¶ 267. But general statements about broad concepts like “wellbeing” and “safety” are precisely the subjective opinions that are nonactionable under the First Amendment. See, e.g., *Costa v. FCA US LLC*, 542 F. Supp. 3d 83, 101 (D. Mass. 2021) (“[G]eneral statements about big-picture concepts such as trust, security, reputation, and safety are non-actionable puffery.”);

Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001) (representation that consumers “would be safely and adequately served” was “devoid of any meaningful specificity”); *In re Lyft Inc. Secs. Litig.*, 484 F. Supp. 3d 758, 770 (N.D. Cal. 2020) (dismissing claim based on “generalized assertions about Lyft’s commitment to safety, its safety measures, and the role safety plays in the rideshare market”).

The statements the Commonwealth identifies cannot give rise to liability. A factfinder lacks any objective criteria to determine whether Meta was “focused” on “wellbeing” and “safety” based on the Complaint’s allegations. Cf. *Compuware Corp. v. Moody’s Invs. Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (Moody’s credit rating is a “predictive opinion, dependent on a subjective and discretionary weighing of complex factors” leaving “no basis upon which [the court] could conclude that the credit rating itself communicates any provably false factual connotation”). This lack of objective criteria is why courts generally protect “statements involving expressions of personal judgment, especially as the judgments become more vague and subjective in character.” *Pan Am Sys., Inc. v. Atlantic Ne. Rails & Ports, Inc.*, 804 F.3d 59, 65 (1st Cir. 2015) (citation and internal quotation marks omitted). Moreover, the statements in Meta’s Community Standards serve as the basis for its “expressive choices” about “which third-party content [its] feeds will display, or how the display will be ordered and organized.” *Moody*, 603 U.S. at 740.

Nor can the Commonwealth impose liability for statements that Meta employees made to Congress, including about Meta’s prioritization of safety and wellbeing, and its policies regarding users under age 13. See RA1/62-RA1/65 ¶¶ 156-159, 164; RA1/67 ¶¶ 174-175; RA1/93 ¶¶ 304-306. The U.S. Supreme Court has repeatedly held that the First Amendment generally protects efforts to petition the government, which necessarily includes congressional testimony. See, e.g., *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (efforts to influence public officials are not illegal, “regardless of intent or purpose”); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961) (defendant could not be liable for “attempt[ing] to bring about the passage of laws” even if it “deliberately deceived the public and public officials”). The purpose of these protections is “to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014).

The Superior Court concluded that Meta’s alleged misrepresentations to the public “are not protected by the First Amendment.” RA1/489. But the Superior Court did not rely on any allegations showing that Meta’s congressional testimony included statements the speaker *knew* to be false. And without any such connection, the First Amendment broadly shields Meta’s statements to Congress as petitioning activity. See, e.g., *International Bhd. of Teamsters, Loc. 734 Health and Welfare*

Tr. Fund v. Philip Morris Inc., 196 F.3d 818, 826 (7th Cir. 1999) (statements that “were designed to influence Congress ... cannot be a source of liability directly under the *Noerr-Pennington* doctrine”).

Because the First Amendment protects Meta’s expressive choices about the design of its social media services, its opinions about the safety of its services, and its statements to Congress, those activities also cannot serve as the basis for the Commonwealth’s public-nuisance claim. RA1/118-RA1/119 ¶¶ 411-413. That claim, too, must be dismissed.

Omissions. The Commonwealth likewise cannot pursue its theory that Meta deceived its users and the public by failing to disclose information about the alleged “addictive nature of [its] product.” RA1/114-RA1/115 ¶¶ 394-395. According to the Commonwealth, Meta “fail[ed] to disclose” “the manipulative, addiction-inducing nature of its platform design features,” RA1/91 ¶ 298, and the Commonwealth seeks an injunction that would effectively force Meta to make the Commonwealth’s preferred warnings about the services’ alleged risks and harms, RA1/121-RA1/122 (Prayers for Relief).

The First Amendment does not tolerate such efforts to force private entities to communicate the government’s message. For example, in *Bonta*, the Ninth Circuit held that the California law’s reporting requirement “clearly compel[led] speech by requiring covered businesses to opine on potential harm to children.” 113 F.4th at

1117. Because “the First Amendment protects ‘the right to refrain from speaking at all,’” the “forced disclosure of information, even purely commercial information, triggers First Amendment scrutiny.” *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). And because the reporting requirement “compel[led] speech with a particular message about controversial issues” and required businesses to “censor[] speech based on its content,” the law was subject to (and likely failed) strict scrutiny. *Id.* at 1121-1122.¹⁷

The Commonwealth’s claims here resemble—and indeed, *extend beyond*—the compelled reports struck down in *Bonta*. The Commonwealth not only seeks to impose liability on Meta for exposing users to allegedly harmful content, but it also seeks a court order that would necessarily *require* Meta to make the Commonwealth’s preferred statements about the alleged risks of Meta’s services. The Commonwealth’s claim is the precise type that courts have already rejected.¹⁸ This Court should do the same.

¹⁷ See also, e.g., *Volokh v. James*, 656 F. Supp. 3d 431, 443 (S.D.N.Y. 2023) (preliminarily enjoining New York law requiring social media networks to develop hate speech policies because the law “compel[led] [them] to speak about the range of protected speech” they would “allow its users to engage (or not engage) in”), appeal docketed, No. 23-356 (2d Cir.).

¹⁸ See, e.g., *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822-823 & n.1 (W.D. Ky. 1989) (First Amendment barred claim against game developer for alleged failures to warn that game was addictive), *aff’d*, 904 F.2d 378 (6th Cir. 1990); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002) (similar); *O’Handley v. Padilla*, 579 F. Supp. 3d 1163, 1187-1188 (N.D. Cal. 2022) (dismissing tort claims because “Twitter has important First Amendment rights that would be jeopardized

IV. THE SUPERIOR COURT ADOPTED NOVEL AND UNWARRANTED EXPANSIONS OF MASSACHUSETTS LAW.

In holding that the Commonwealth had adequately pled its claims, the Superior Court adopted multiple novel and unwarranted expansions of Massachusetts law. The Superior Court improperly extended public-nuisance law, permitting the Commonwealth to punish alleged conduct implicating, at best, an amalgamation of individual private rights rather than a public right. Moreover, the Superior Court’s order failed to find multiple essential elements of a claim under c. 93A, including that the alleged conduct deals in “trade or commerce.” Both errors warrant correction by this Court.

A. The Superior Court Incorrectly Expanded Public-Nuisance Doctrine.

A public nuisance “is an unreasonable interference with a right common to the general public.” *Sullivan v. Chief Just. for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 34 (2006) (quoting Restatement (Second) Torts § 821B(1) (1979)). Historically, a public right has implicated “the interests of the community at large—interests that were recognized as rights of the general public entitled to protection.” Restatement (Second) Torts § 821B cmt. b. Thus, “traditional concepts” of rights covered by the doctrine involves rights held in common by the community as a

by a Court order telling Twitter what content-moderation policies to adopt and how to enforce those policies”), aff’d sub nom. *O’Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023).

whole, such as “rights of safe passage” on highways and navigable waters, or rights to be free from public-health conditions that “adversely affect[]” a community, like “the keeping of diseased animals or the maintenance of a pond breeding malarial mosquitoes.” *Leary v. City of Boston*, 20 Mass. App. Ct. 605, 610 (1985). See also *Jupin v. Kask*, 447 Mass. 141, 158-159 (2006) (approvingly citing discussion in *Leary*).

By contrast, conduct that affects a private right cannot support a public- nuisance claim. See Restatement (Second) Torts § 821B cmt. g (contrasting a public right with “the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured”). See also, e.g., *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 453 (R.I. 2008) (“The right of an individual child not to be poisoned by lead paint” is a “nonpublic right[.]”). That is true even where tortious conduct is alleged to have harmed a large number of people. See Restatement (Second) Torts § 821B cmt. g (“Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.”); see also *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 727 (O.K. 2021) (rejecting public-nuisance claims in part because “[t]he damages the State seeks are

not for a communal injury but are instead more in line with a private tort action for individual injuries ... to certain, though numerous, individuals”).¹⁹

The Commonwealth’s public-nuisance claim is premised on the theory that Meta’s allegedly addictive designs have harmed public health and safety in Massachusetts. But that alleged harm looks nothing like the harms traditional public-nuisance claims have aimed to address. See *supra* p. 52-53. Recognizing this, other courts have repeatedly declined to punish alleged product-related public health or safety harms through public-nuisance litigation. See, e.g., *Lead Indus. Ass’n*, 951 A.2d 428 (lead paint); *Association of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2001) (tobacco); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001) (handguns); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000) (tobacco); *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694 (1992) (asbestos).

Indeed, the Commonwealth’s claim would push the limits of public-nuisance law even further by seeking redress of alleged harms arising not from products, but from intangible information, content, and ideas shared by Instagram users. That cannot be squared with the First Amendment. See *supra* pp. 41-43. And even if Meta’s services could be considered “products” (they cannot), nuisance liability

¹⁹ For example, in the opioids context, courts have held that there is no “public right to be free from the threat that others may misuse or abuse prescription opioids,” even if opioids harm a large number of people. *Hunter*, 499 P.3d at 727.

should not lie under these circumstances. Permitting “nuisance liability for manufacturing, marketing, or selling products,” as the Commonwealth seeks here, would have widespread adverse consequences. *Hunter*, 499 P.3d at 731 (questioning the wisdom of permitting, for example, “a sugar manufacturer or the fast food industry [to] be liable for obesity”).

The Superior Court did not engage with these fundamental principles of public-nuisance doctrine. It reasoned only that the Commonwealth’s allegation “that Meta has contributed to a youth mental-health crisis by promoting the addictive use of its platform” was “sufficient” to support a claim. RA1/497. That was error. The Superior Court noted that in considering whether there has been an unreasonable interference with a public right, Massachusetts courts may consider “whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort[,] or the public convenience.” *Sullivan*, 448 Mass. at 715. But the court stopped short of *identifying* the public right within those spheres that is implicated by the Commonwealth’s case. RA1/497. The unreported decision that it relied upon, *Commonwealth v. Purdue Pharmaceuticals L.P.*, No. 1884CV01808BLS2, 2019 WL 5495866 (Mass. Super. Sept. 17, 2019), makes the same mistake. *Id.* at *4 (summarily concluding that state’s public-nuisance claim based on harms flowing from prescription drugs “interfered with public health and safety”). See also *supra* 54 n.19.

The Superior Court’s omission is telling, because there is *no* public right implicated here. The Commonwealth’s claim seeks to turn numerous individual claims of personal injury into a broader allegation of interference with a public right. But the doctrine is clear that individual injuries, even when cumulatively considered, cannot support a public-nuisance claim.

B. The Chapter 93A Claims Fail Because They Do Not Challenge Meta’s Conduct in “Trade or Commerce” or Satisfy Other Essential Elements.

Even if the Commonwealth’s three statutory claims could survive the bars imposed by Section 230 and the First Amendment, they still fail as a matter of law. In each instance, the Superior Court’s order failed to find essential elements of a claim under c. 93A, including that Meta was engaged in “trade or commerce,” that Meta’s conduct was unfair or deceptive, and that there was a causal connection between Meta’s conduct and the alleged injuries.

Chapter 93A “prohibits unfair or deceptive acts or practices ‘in the conduct of any trade or commerce.’” *Sullivan v. Five Acres Realty Tr.*, 487 Mass. 64, 69 (2021) (citing Mass. Gen. Laws Ch. 93A, § 2(a)). It therefore applies only to “interaction[s]” that are “‘commercial’ in nature.” *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 22-23 (1997). This, in turn, depends on the “nature of the transaction, the character of the parties, the activities engaged in by the parties,”

and “whether the transaction was motivated by business or personal reasons.” *Five Acres Realty*, 487 Mass. at 69.

Because Instagram allows users to sign up and post or interact with others’ content free of charge, the use of Instagram does not involve “trade or commerce.” Notwithstanding the fact that Instagram is a free service, the Superior Court held that “the provision of Instagram accounts serves a commercial end” because Meta “sell[s] targeted advertising opportunities to third parties.” RA1/496. But the Commonwealth does not allege any harms arising from Meta’s interactions with third-party advertisers, much less harms stemming from Meta’s own advertising activity. The focus of the claim is on a different transaction: the free initiation of a social media account. Chapter 93A does not apply because that interaction does not involve trade or commerce or any otherwise commercial “transaction.” *Five Acres Realty*, 487 Mass. at 69.

Moreover, the Superior Court’s determination that Instagram serves a “commercial” end—simply because Meta allows third parties to advertise on Instagram—overextends the reach of Massachusetts’s consumer-protection law. Under this Court’s precedents, Chapter 93A is limited to regulating deceptive *commercial* speech. See *id.* at 69-70. But the Superior Court’s ruling permits the Commonwealth to challenge alleged misrepresentations based on Meta’s congressional testimony, which is constitutionally shielded twice over for reasons

unrelated to commerciality. RA1/494. First, congressional testimony is protected petitioning activity. See *supra* pp. 49-50. Second, it is comprised of subjective, generalized statements of opinion regarding prioritizing “safety” and “well-being,” RA1/94 ¶ 310, that are not “specific and measurable” and therefore not actionable. See *supra* pp. 47-48. The Superior Court’s unbounded approach imposes civil liability on Meta even for protected petitioning activity, and even in the absence of a deliberately false statement of fact. It cannot stand.

CONCLUSION

For the foregoing reasons, the Commonwealth’s claims all fail as a matter of law. This Court should reverse Superior Court’s decision and dismiss the Complaint with prejudice.

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May 12, 2025

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NOTICE

43

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 23-2397-BLS1

COMMONWEALTH
Plaintiff

vs.

META PLATFORMS, INC., & another¹
Defendants

MEMORANDUM AND ORDER
ON MOTION TO DISMISS

The Commonwealth contends that Meta Platforms, Inc. and Instagram, LLC (together, “Meta”) violated G.L. c. 93A, § 2, and created a public nuisance, by designing and using addictive design features on Instagram to exploit children’s psychological vulnerabilities, and falsely represented to the public that its features were not addictive and that Meta prioritized youth health and safety. Meta has now moves to dismiss for failure to state a claim. For the reasons set out below, that motion is denied.

BACKGROUND

A. The Commonwealth’s Factual Allegations²

Meta owns, develops, designs, markets, and operates Instagram, a social media platform that enables users to post and share images and videos, and allows them to interact with other users. Instagram is accessible through web browsers or through a smart phone application (“app”). Most Instagram users access the platform through the app. More than 33 million young

¹ Instagram, LLC.

² This is a brief summary of the Complaint’s factual allegations, which span 88 pages.

people in the United States use Instagram, including over 300,000 daily active users in Massachusetts between ages 13 and 17. Almost all of Meta's revenue comes from advertising targeted based on data collected from its users.

1. Use of Addictive Platform Tools

To generate advertising revenue, Meta knowingly designs and employs the following four features or tools (the "Platform Tools") to interfere with or override young user's ability to regulate their time on Instagram, resulting in mental and physical harms from addictive use:

Incessant Notifications. When the Instagram app is installed on a smart phone, Instagram enables approximately 40 types of audio and visual push notifications by default. These notifications alert users to a variety of events and activities on Instagram. Many of these notifications appear on a user's phone screen even when the user is not on the app or using the phone.

Meta has purposefully designed these notifications, including the way they are "pushed" and displayed, to take advantage of well-understood neurological and psychological phenomena and to increase young users' time spent on Instagram. Among other things, Meta uses sounds and vibrations to trigger dopamine releases and prey on users' "fear of missing out" ("FOMO").

Meta's research has shown that because teens crave acceptance, notifications are highly effective in bringing them back to the app to receive positive validation. Meta's research also shows that the high volume of notifications causes young users to feel overloaded, overwhelmed, and compelled to revisit the app repeatedly during the day and night, causes inattention and hyperactivity, and reduces productivity and well-being.

Intermittent Variable Rewards. To prolong young users' time on Instagram or induce them to return to the platform, Meta uses intermittent variable rewards ("IVRs") associated with

“likes” of a user’s post. IVRs provide positive stimuli that induces a psychologically pleasing dopamine release at random, unpredictable intervals. The unpredictability of the rewarding stimuli creates a feedback loop in which the user keeps checking for more rewarding stimuli. Knowing that teen brains are particularly susceptible to the feel-good effects of dopamine, Meta has designed its notification delivery system to randomly supply young users with positive, dopamine-inducing notifications (i.e., that someone “liked” a user’s post), interspersed with dopamine gaps, to build anticipation and craving. This strengthens the desire to return to the platform with each dopamine release. Meta also sometimes withholds notifications of “likes” on a user’s post to deliver larger bursts of dopamine. Similarly, to create suspense, Meta employs a short delay after a user swipes to refresh their feed before new information is displayed.

Infinite Scroll and Autoplay. Meta uses features such as “infinite scroll” and “autoplay” to encourage young users to use Instagram for extended amounts of time. The infinite scroll feature loads new posts and advertisements for the user to view as the user scrolls down their page feed, removing the need to hit a next page button to view more posts. Because there is no natural end point for the user, the infinite scroll format makes it difficult for young users to leave the platform. The autoplay function in Instagram’s “Stories” and “Reels” automatically starts playing the next “Story” or “Reel” as the prior one ends without the user needing to take any further action. Both features exploit young users’ minds, which seek novelty. Meta is aware that these features harm young users by encouraging passive consumption.

Ephemeral Features. To capitalize on teens’ sensitivity to FOMO, Meta has added ephemeral aspects to its “Stories” and “Live” features. Stories are only available to view for 24 hours before disappearing from a user’s feed. A user can only interact with the Live feature

when the user broadcasts their livestream video to followers or the public. Meta knows these features cause problematic, habitual use and contribute to mental health harms to young users.

2. Ineffective Age Assurance Measures

Meta has publicly stated that children under 13 years of age should not use Instagram and that it is focused on keeping these users off the platform. Nonetheless, Meta uses an ineffective age verification process. Although Meta is aware that individuals under 13 lack the skill to safely use social media, it has recklessly and/or deliberately disregarded the existence of hundreds of thousands of such users on its platforms because removing them would impact Instagram's growth. Had young users and their families known about Meta's conduct, they would have taken their own measures to police inappropriate underage use.

3. Deceptive Public Statements About Platform Safety

On multiple occasions, Meta has represented that its platform features are safe, not addictive, and prioritize the safety and well-being of its young users over profits. Such statements were made during, among other events, media interviews in 2018 and 2019, a 2018 technology event, Congressional testimony in 2020 and 2021, an October 2021 Facebook post responding to Congressional testimony from a whistleblower, and an October 2021 public statement in response to a 60-Minutes segment on the harms caused by Meta's products.

Meta's statements are belied by its internal data showing that Instagram addicts and harms children. Meta has repeatedly deprioritized youth well-being to increase revenue. Contrary to its public assertions from 2018 to 2022, Meta repeatedly failed to invest meaningfully in well-being initiatives to address known harms to young users. Meta's top executives repeatedly rejected design changes that Meta's internal research indicated would improve well-being. For example, because it would impact revenue, Meta refused to hide "Like"

counts, which induces corrosive social comparisons, even after a pilot program indicated hiding “Like” counts would improve well-being. Meta also refused to remove cosmetic surgery filters used primarily by teen girls, which experts agreed were harmful. Had consumers known the truth about Meta’s failure to prioritize youth well-being, they would have altered their own conduct.

B. The Present Lawsuit

The Commonwealth filed this case in November 2023. It asserts three counts under G.L. c. 93A, § 2: that Meta engaged in unfair and deceptive acts and practices by deploying the Platform Tools with features to induce young users’ addictive use of Instagram (Count One); by misrepresenting that Instagram was safe, not addictive, and prioritized young users’ well-being over profits (Count Two); and by publicly claiming that it excludes users under age 13 from Instagram and inhibits such users, and failing to employ meaningful age enforcement efforts for profit-motivated reasons (Count Three). The Commonwealth also asserts a public nuisance claim, alleging that by purposefully employing features and tools to addict youth and induce their problematic use of Instagram, Meta has knowingly created, substantially contributed to, and/or substantially participated in maintaining a youth mental health crisis, the costs of which have been borne by the Commonwealth’s schools and public health system (Count Four).

DISCUSSION

Meta moves to dismiss on several grounds. It argues that the Commonwealth’s claims are barred by Section 230 of the Communications Decency Act (“the CDA”), 47 U.S.C. § 230 (“Section 230”), and/or the First Amendment. It also argues the factual allegations are

insufficient to support the claims. I review these arguments under the Mass. R. Civ. P. 12(b)(6) standard.³

I. The Communications Decency Act

Meta contends that the Commonwealth’s claims – whether grounded on Instagram’s design features or Meta’s public representations – are barred by Section 230. As explained below, I disagree.

A. Overview of Section 230 Immunity

Congress enacted Section 230 “when the internet was young and few of us understood how it would transform American society.” Lemmon v. Snap, Inc., 995 F.3d 1085, 1090 (9th Cir. 2021). Among other things, it sought “to promote the continued development of the Internet and other interactive computer services and other interactive media,” 47 U.S.C. § 230(b)(1), and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). See Massachusetts Port Auth. v. Turo Inc. (“Turo”), 487 Mass. 235, 239-240 (2021).⁴

³ Under Rule 12(b)(6), a court must accept as true the complaint’s factual allegations and draw “all reasonable inferences” from those allegations in plaintiff’s favor. Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021). The factual allegations must set forth the basis for plaintiff’s entitlement to relief with “more than labels and conclusions,” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); “rais[ing] a right to relief above the speculative level[,] . . . plausibly suggesting (not merely consistent with)’ an entitlement to relief.” Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp., 550 U.S. at 555.

⁴ “Child safety and well-being” are also “explicit goals of the CDA.” In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., 2023 WL 7524912 at * 7 (N.D. Cal. Nov. 14, 2023). See 47 U.S.C. § 230(b)(3) (“encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services”), § 230(b)(4) (“remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material”).

To achieve these aims, Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). See Turo, 487 Mass. at 240. Section 230 “shields website operators from being ‘treated as the publisher or speaker’ of material posted by users of the site, . . . which means that ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.’”⁵ Jane Doe No. 1 v. Backpage.com, LLC (“Backpage”), 817 F.3d 12, 18 (1st Cir. 2016) (internal quotations and citations omitted), cert. denied, 580 U.S. 1083 (2017).

“[C]ourts have construed § 230 ‘to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’” Turo, 487 Mass. at 240, quoting Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir.), cert. denied, 552 U.S. 1062 (2007). See Backpage, 817 F.3d at 18 (“near-universal agreement that section 230 should not be construed grudgingly”) (and cases cited). Immunity “does not depend on the form of the asserted cause of action; rather, it depends on whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another.” Id. at 19. See Federal Trade Comm’n v. Accusearch Inc., 570 F.3d 187, 1195 (10th Cir. 2009) (“The prototypical service qualifying for this [Section 230] immunity is an online messaging board . . . on which Internet subscribers post comments and respond to comments posted by others.”).

⁵ Section 230 alters “the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others.” Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014).

“Section 230(c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant’s role, broadly defined, in publishing or excluding third party [c]ommunications.” Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017), aff’d in part and dismissed in part sub nom, Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020). Accord Lemmon, 995 F.3d at 1094 (immunity applies to “claims [that], at bottom, depend[] on a third party’s content, without which no liability could have existed”).⁶

“[E]ven with the broad protections provided by the CDA,” the immunity available under Section 230(c)(1) is not absolute;⁷ “‘an interactive computer service provider remains liable for its own speech’ and for its own unlawful conduct.” Turo, 487 Mass. at 240, quoting Universal Communication Sys., Inc. v. Lycos, Inc. (“Lycos”), 478 F.3d 413, 419 (1st Cir. 2007). See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC (“Roommates”), 521 F.3d 1157, 1164 (9th Cir. 2008) (CDA “not meant to create a lawless no-man’s-land on the Internet”); Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016) (“Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet,

⁶ See Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1098 (9th Cir. 2019) (rejecting attempt to “plead around Section 230 immunity”), cert. denied, 140 S. Ct. 2761 (2020); Kimzey v. Yelp! Inc., 836 F.3d 1263, 1266 (9th Cir. 2016) (rejecting attempt “to plead around the CDA to advance the same basic argument that the statute plainly bars”); Backpage, 817 F.3d at 22 (“third-party content . . . appears as an essential component of each . . . of the appellants’ . . . claims.”); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (rejecting plaintiff’s attempt to plead around Section 230; plaintiff’s “allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace’s role as a publisher of online third-party-generated content”).

⁷ See 47 U.S.C. § 230(e)(3) (“Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”).

though any claims might have a marginal chilling effect on internet publishing businesses. . . . “[W]e must be careful not to exceed the scope of the immunity provided by Congress.”), quoting Roommates, 521 F.3d at 1164 n. 15.

Section 230(c)(1) immunity “applies when ‘the defendant (1) is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information.’” Turo, 487 Mass. at 240, quoting Backpage, 817 F.3d at 19.⁸ “Practically speaking, the second and third factor tend to overlap in significant ways. The question of whether a plaintiff seeks to treat an interactive computer service as a publisher or speaker of third-party information . . . interacts in obvious ways with the question of whether the information provided is the information of a third-party.” In re Apple Inc. App Store Simulated Casino-Style Games Litig., 625 F. Supp. 3d 971, 978 (N.D. Cal. 2022). See Turo, 487 Mass. at 241-242, quoting Backpage, 817 F.3d at 19 (“The ‘ultimate question’ in determining whether an interactive computer service provider . . . is entitled to § 230 immunity is whether ‘the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another.’”). “Where a defendant establishes these requirements based on the face of a complaint, a motion to dismiss may be granted.” Cohen, 252 F. Supp. 3d at 156. See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254-255 (4th Cir. 2009) (because Section 230 provides “immunity from suit rather than a mere defense to liability,” courts

⁸ The Ninth Circuit and other courts have articulated this test slightly differently and in a different order. Under their version of the test, the statute provides immunity to “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100-1101 (9th Cir. 2009) (footnote omitted). To avoid ambiguity, when referring to the prongs of the test, I refer to them in the order they are described in Turo, even when describing cases from the Ninth Circuit.

“resolve the question of § 230 immunity at the earliest possible stage”) (internal quotations, emphasis omitted); Backpage, 817 F.3d at 15 (affirming dismissal under Section 230).

B. Deceptive Statements

Section 230 does not apply to claims based on a defendant’s own speech. Thus, claims based on a publisher’s representations about its publishing conduct are not immunized under Section 230. See, e.g., Hiam v. HomeAway.com, Inc., 267 F. Supp. 3d 338, 346-347 (D. Mass. 2017) (Young, J.), aff’d, 887 F.3d 542 (1st Cir. 2018); Moving & Storage, Inc. v. Panayotov, 2014 WL 949830 at * 2 (D. Mass. Mar. 12, 2014) (O’Toole, J.).

The Commonwealth alleges that Meta misrepresented the safety of its platform, its efforts to protect the well-being of young users, and its age-verification efforts. To the extent the Commonwealth’s claims are based on these purportedly false statements, they are not subject to Section 230 immunity. See, e.g., State v. Meta Platforms, Inc., 2024 WL 3253106 at * 11 (Tenn. Ch. Ct. Mar. 13, 2024) (Section 230 does not bar deception claim against Meta).

C. Platform Tools and Age Verification

The Commonwealth’s claims are also based on the negative impacts of Instagram’s Platform Tools – i.e., incessant notifications, IVR, ephemeral posts, infinite scroll, and auto play – and its ineffective age verification efforts. Whether these claims are subject to immunity requires a careful application of Section 230’s three-part test. It is undisputed that Meta meets the first prong of the test. The parties, however, hotly contest whether Meta has satisfied the test’s second and third prongs. As explained below, I read the Complaint as principally seeking to hold Meta liable for its own business conduct. In other words, the claims are based, not on

Instagram’s third-party content, but its features regardless of content. Consequently, I conclude that Meta is not entitled to dismissal under Section 230.⁹

1. Prong 2

The second prong of the test to determine if Section 230 immunity applies looks at whether the claim is based on information provided by another information content provider. An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). See Lycos, 478 F.3d at 419 (“broad definition” covers “even those who are responsible for the development of content only ‘in part’”). “[I]nternet companies remain on the hook when they create or develop their own internet content” and “to the extent they are responsible . . . in part, for the creation or the development of the offending content on the internet.” Lemmon, 995 F.3d at 1093 (internal quotations omitted).

“[A] website helps to develop unlawful content . . . if it contributes materially to the alleged illegality of the conduct.” Roommates, 521 F.3d at 1168. “A material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed content allegedly unlawful.” Jones, 755 F.3d at 410. See Force v. Facebook, Inc., 934 F.3d 53, 68-69 (2d Cir. 2019) (defendant considered to have developed third-party content if “defendant directly and materially contributed to what made the content itself unlawful” and “may, in some circumstances, be a developer of its users’ content if it encourages or advises users to provide the specific actionable content that forms the basis for the claim”) (internal

⁹ In its briefing, Meta did not separately analyze Prongs 2 and 3, but conflated the analysis after noting that the two prongs tend to overlap. This overlap does not mean that the distinction between the prongs should necessarily be ignored. I analyze each prong separately.

quotations omitted); Social Media Cases, 2023 WL 6847378 at * 32 (Super. Ct. Cal. Oct. 13, 2023) (“Where a provider manipulates third party content in a manner that injures a user, Section 230 does not provide immunity.”). “Given the complexity with which online platforms function, it is not always clear . . . if the platform’s involvement or intervention in the posting or presentation of [another’s] content crosses the line into . . . ‘development.’” In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation (“In re Soc. Media”), 702 F. Supp. 3d 809, 827-828 (N.D. Cal. 2023). See Elliott v. Donegan, 469 F. Supp. 3d 40, 56-57 (E.D.N.Y. 2020) (“It is relatively easy to define what constitutes the creation of information. . . . Determining what constitutes the development of information is a stickier task.”).

Generally, “providing content-neutral tools does not render an internet company a ‘creator or developer’ of the downstream content that its users produce with those tools.” Lemmon, 995 F.3d at 1094. See Daniel v. Armslist, LLC, 386 Wis.2d 449, 472 (2019) (“A neutral tool in the CDA context is a feature provided by an interactive computer service provider that can be utilized for proper or improper purposes. . . . A defendant who provides a neutral tool that is subsequently used by a third party to create unlawful content will generally not be considered to have contributed to the content’s unlawfulness.”) (internal quotations and citation omitted).¹⁰ However, internet companies do not enjoy “absolute immunity from all claims related to their content-neutral tools;” liability may arise from such tools provided “plaintiffs’ claims do not blame them for the content that third parties generate with those tools.” Lemmon, 995 F.3d at 1094. See Social Media Cases, 2023 WL 6847378 at ** 30, 33 (“Section 230 does not bar a

¹⁰ “Examples of . . . neutral tools include a blank text box for users to describe what they are looking for in a roommate . . . , a rating system that allows consumers to award businesses between one and five stars and write reviews, . . . and a social media website that allows groups to create profile pages and invite members.” Daniel, 386 Wis.2d at 473 (internal citations omitted).

claim based on features of a social media site that have an adverse effect on users apart from the content of material published on the site” and “does not shield [d]efendants from liability for the way in which their platforms actually operate”).

The Commonwealth alleges physical and mental harm to young users from Instagram’s design features *themselves*, which purportedly cause addictive use, and not from the viewing of any specific third-party content or from design choices that contributed to the development or creation of that content. In other words, the alleged harm occurs regardless of the content that users see. As such, Prong 2 is not satisfied because the Commonwealth is seeking to hold Meta liable for its own injurious conduct (creating and employing tools to addict young users and engaging in ineffective age verification), not that of any other party.¹¹

In support of its position, Meta cites several decisions from around the country. However, in each, Prong 2 was conceded, undisputed, or satisfied because the action alleged harm caused by third party content.¹² Meta also relies on a recent decision by a federal district court in

¹¹ See, e.g., Lemmon, 995 F.3d at 1093-1094 (Prong 2 not satisfied where Snapchat designed reward system and Speed Filter; plaintiffs’ negligent design claim based on allegation these features worked together to encourage users to drive at dangerous speeds; claim “rest[ed] on nothing more than Snap’s ‘own acts’”); Moving & Storage, Inc., 2014 WL 949830 at * 2 (Prong 2 not satisfied where “plaintiffs’ claims do not arise from the content of [third-party customer] reviews . . . but instead, the defendants’ alleged ill-intentioned deletion of . . . reviews . . . , coupled with various representations;” “[t]he manner in which the information is presented, or withheld, is the conduct at issue, as well as the allegedly misleading ratings which result from such alleged manipulations”).

¹² See, e.g., Backpage, 817 F.3d at 19 (Prong 2 conceded); Lycos, 478 F.3d at 420 (Prong 2 satisfied where plaintiff’s allegations merely established defendant’s conduct made it easier for *others* to develop and disseminate misinformation); Dyroff, 934 F.3d at 1096, 1099 (Prong 2 satisfied where website’s notification and recommendation functions did not materially contribute to content that harmed plaintiff’s son); Barnes, 570 F.3d at 1101 (website allegedly failed to remove explicit profiles of plaintiff posted by ex-boyfriend, no dispute “‘information content’ . . . at issue . . . provided by another ‘information content provider’”); Force, 934 F.3d at 68-71 (Facebook’s algorithms did not develop terrorist organization’s content by directing such content to users most interested in the organization and terrorist activities). See also Social

California, which concluded that claims against Instagram and other platforms were barred insofar as they were based on notifications, infinite scroll, autoplay, and ephemeral postings. See In re Soc. Media, 2023 WL 7524912 at ** 13-16. However, that decision does not explicitly conduct a Prong 2 analysis,¹³ and I do not find it otherwise persuasive as it pertains to those features, particularly considering the cogent analysis provided by a California Superior Court decision that reaches the opposite conclusion. See Social Media Cases, 2023 WL 6847378 at ** 30-35.

2. **Prong 3**

Prong 3 “asks whether a cause of action seeks to treat a defendant as a ‘publisher or speaker’ of third-party content.” Lemmon, 995 F.3d at 1091. Stated differently, it “focus[es] on whether the duty the plaintiff alleges stems from the defendant’s status or conduct as a publisher or speaker.” Id. (internal quotations omitted). See Dyroff, 934 F.3d at 1098 (“what matters is whether the claims ‘inherently require[] the court to treat the defendant as the “publisher or speaker” of content provided by another,’” quoting Barnes, 570 F.3d at 1102); Henderson v. Sourcing for Public Data, L.P., 53 F.4th 110, 120-121 (4th Cir. 2022) (“A claim treats the defendant ‘as the publisher or speaker of any information’ when it (1) makes the defendant liable for publishing certain information to third parties, and (2) seeks to impose liability based on that information’s improper content.”). “In this particular context, publication generally involve[s] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party

Media Cases, 2023 WL 6847378 at * 34 (distinguishing Dyroff and explaining that “in Dyroff, liability was premised on the website’s publication and recommendation of third-party content and injury flowing from that content, not from the provider’s own actions”).

¹³ See In re Soc. Media, 2023 WL 7524912 at * 8 (“[P]laintiffs allege that defendants fail to meet the [third] prong. The Court thus directs the bulk of its analysis there.”)

content.” Lemmon, 995 F.3d at 1091 (internal quotations omitted). See Lycos, 478 F.3d at 422 (“If the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally.”); Turo, 487 Mass. at 242 (“[f]eatures . . . [that] reflect choices about what content can appear on the website and in what form are editorial choices that fall within the purview of traditional publisher functions. . . but more concentrated involvement in the transaction may fall outside that purview”) (internal quotations and citations omitted).¹⁴

“Section 230 does not create immunity simply because publication of third-party content is relevant to or a but-for cause of the plaintiff’s harm. The issue is whether the defendant’s alleged duty to the plaintiff could ‘have been satisfied without changes to the content posted by the website’s users and without conducting a detailed investigation.’” In re Soc. Media, 2023 WL 7524912 at * 9, quoting Doe v. Internet Brands, Inc., 824 F.3d 846, 851 (9th Cir. 2016). See HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 682 (9th Cir. 2019) (rejecting “test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content”; courts must “look instead to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content”); Social Media Cases, 2023 WL 6847378 at * 12 (“Even if third-party content is a ‘but-for’ cause of the harm suffered by a plaintiff, the action is not barred by Section 230 if the cause of action does not seek to hold the provider liable as a publisher.”); Henderson, 53 F.4th at 122-123 (“for [immunity] to apply, we require that liability

¹⁴ “A clear illustration of a cause of action that treats a website proprietor as a publisher is a defamation action founded on the hosting of defamatory third-party content.” Internet Brands, Inc., 824 F.3d at 851.

attach to the defendant on account of some improper content within their publication;” “we do not apply a but-for test”) (internal quotation marks omitted, emphasis removed).

Meta fails to satisfy Prong 3 for essentially the same reasons it cannot satisfy Prong 2. The Complaint does not seek to hold Meta liable for its conduct as a publisher or speaker, i.e., for its publication decisions. Rather, the Commonwealth seeks to hold Meta liable in “its distinct capacity as a product designer.” Lemmon, 995 F.3d at 1092. The Commonwealth alleges that Instagram’s features in and of themselves, regardless of their associated content, cause its young users to become addicted to the platform or to participate on the platform at an inappropriate age. If the Commonwealth were successful, Meta would not have to alter or monitor Instagram’s third-party content; the gravamen of the allegations have nothing to do with the type of content editing, monitoring, or removal that could trigger immunity under Section 230.¹⁵

In support of its position, Meta points to statements in Backpage, Lycos, Force, and other cases which perhaps could be broadly read to suggest that any efforts engaged in by a social media company related to the content of its platforms or the platform’s design and operation constitute an exercise of protected publishing functions. See, e.g., Backpage, 817 F.3d at 21

¹⁵ See Lemmon, 995 F.3d at 1092-1093 (Prong 3 not satisfied where claim derived from alleged dangerous Snapchat filter that showed the user’s speed, not content created using the feature; “though publishing content is ‘a but-for cause of just about everything’ Snap is involved in, that does not mean that the [plaintiffs’] claim, specifically, seeks to hold Snap responsible in its capacity as a ‘publisher or speaker’”); Social Media Cases, 2023 WL 6847378 at * 31 (claims against Meta and other platform owners based on interactive operational features, including IVR algorithms, continuous scrolling, auto play, not subject to Section 230 because they “do not seek to require that Defendants publish or de-publish third-party content that is posted on those platforms. The features themselves allegedly operate to addict and harm minor users of the platforms regardless of the particular third-party content viewed by the minor user”); State v. Meta Platforms, Inc., 2024 WL 3253106 at * 10 (no immunity where complaint alleged that Instagram’s features operated to addict and harm young users, regardless of the third-party content). Cf. MySpace, 528 F.3d at 420, 422 (immunity applied to claims regarding age-verification where plaintiff attempted to hold defendant liable for harm caused by objectionable content posted by third-party user).

(Prong 3 satisfied where plaintiffs' claims, which "address[ed] . . . decisions about how to treat postings," challenged "features that are part and parcel of the overall design and operation of the [defendant's] website (such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs)" that "reflect[ed] choices about what content can appear on the website and in what form"). As noted above, however, these decisions concerned cases that at their core focused on the defendants' display of third-party content and the analysis therein must be read in that light. In Force, for example, victims of terrorist attacks alleged that Facebook provided material support to terrorist organization through its display of terrorist content. See 934 F.3d at 57, 65, 68. Similarly, in Backpage, sex trafficking victims brought claims against the operator of online classified advertisements for the harm they suffered from its postings. See 817 F.3d at 16, 19–20. Because in those cases the plaintiffs' claims were closely tied to third-party content, their assertions regarding the platform's features were properly viewed as seeking "to treat [the] defendant as a 'publisher or speaker' of third-party content." Lemmon, 995 F.3d at 1091.

The same is not true here. As discussed with regard to Prong 2, the Commonwealth is seeking to hold Meta liable for its own conduct, not that of a third-party. As pled, third-party content is not an essential component of the Commonwealth's claims. See Lemmon, 995 F.3d at 1093, 1094 (Section 230 "cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties" and as such immunity only applies to "claims [that], at bottom, depend[] on a third party's content, without which no liability could . . . exist[]"); Social Media Cases, 2023 WL 6847378 at * 32 ("Where a provider manipulates third party content in a manner that injures a user, Section 230 does not provide immunity."); Airbnb, Inc. v. Boston, 386 F. Supp. 3d 113, 120 n.5, 121 n.7 (D. Mass. 2019) (Sorokin, J.) (rejecting assertion

that First Circuit interpreted Section 230 to “expansively protect[] all decisions a company makes that in any way implicate the overall design and operation of its online platform”; both Backpage and Lycos “focused on the basis for the plaintiffs’ assertions of liability, asking whether ‘third-party content is . . . an essential component of’ the plaintiffs’ claims”) (internal quotations omitted).

I recognize the distinction the Commonwealth makes is somewhat subtle given that features like ephemeral content, notifications, and autoplay are tied to the display of the platform’s third-party content. However, the distinction is consistent with the purposes and language of the CDA. See Social Media Cases, 2023 WL 6847378 at * 32 (“So long as providers are not punished for publishing third-party content, it is consistent with the purposes of Section 230 to recognize a common law duty that providers refrain from actions that injure minor users by inducing frequency and length of use of a social media platform to the point where a minor is addicted and can no longer control the information they receive from that platform.”). Discovery may reveal that the line the Commonwealth seeks to draw cannot be maintained in fact, but the Complaint’s allegations are sufficient to avoid a finding of Section 230 immunity at this stage.

II. First Amendment

Meta argues the Commonwealth’s claims are barred by the First Amendment because they seek to hold Meta liable for its content policies and other editorial functions associated with curating third-party content.¹⁶ Viewing the Complaint in the light most favorable to the Commonwealth, I find this argument is unavailing.

¹⁶ Meta also argues that the claims violate Article 16 of the Massachusetts Declaration of Rights. The parties agree that Article 16 is “generally coextensive with the federal constitution when it comes to the freedom of expression,” Flaherty v. Knapik, 999 F. Supp. 2d 323, 332 (D. Mass. 2014) (Ponsor, J.), and therefore focus their arguments on authority analyzing the First Amendment. See Defendants’ Memorandum in Support of Defendants’

Insofar as the Commonwealth's claims are based on the Platform Tools that allegedly induce addiction in young users and Meta's allegedly ineffective age verification efforts, I read such claims to be principally based on conduct and product design, not on expressive content. See Id. at * 37 ("Because the allegations . . . can be read to state that Defendants' liability grows from the way their platforms functioned, the Demurrer cannot be sustained pursuant to the protections of the First Amendment. . . . [T]he allegations can be read to state that Plaintiffs' harms were caused by their addiction to Defendants' platforms themselves, not simply to exposure to any particular content visible on those platforms.").¹⁷ As such, Meta has failed to establish that the claims are entirely based on protected speech or expression and that therefore dismissal is appropriate.

To the extent the Commonwealth's claims are based on Meta's alleged false statements to the public about its efforts to ensure the well-being of its young users and age verification efforts, such misrepresentations are not protected by the First Amendment. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); Fanning v. Federal Trade Comm'n, 821 F.3d 164, 174 (1st Cir. 2016) ("The First Amendment . . . does not protect misleading commercial speech."), cert. denied, 580 U.S. 1049 (2017); Meta Platforms, Inc. v. District of Columbia, 301 A.3d 740, 758 (D.C. 2023) ("the only speech that is

Motion to Dismiss (Docket # 23) at 10 n.4; Commonwealth's Opposition to Defendants' Motion to Dismiss (Docket # 24) at 23 n.23. I do the same.

¹⁷ Even if these features carry some expressive element, the claim may very well be permitted under the intermediate scrutiny test set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980), because the Complaint plausibly alleges that such elements are commercial in nature and that the Commonwealth has a substantial interest in protecting young users from their harmful impacts. This determination, however, is better left to a later stage of the litigation.

being targeted by the District’s investigation are Meta’s public statements regarding the company’s content moderation practices;” “even if content moderation is itself protected speech, fraudulent misrepresentations regarding a company’s moderation practices is not”).¹⁸

III. Sufficiency of Allegations

A. G.L. c. 93A

The Consumer Protection Act prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.” G.L. c. 93A, § 2(a). Generally, to state a claim under G.L. c. 93A, “a plaintiff must allege facts sufficient to establish four elements: first, that the defendant has committed an unfair or deceptive act or practice; second, that the unfair or deceptive act or practice occurred in the conduct of any trade or commerce; third, that the plaintiff suffered an injury; and fourth, that the defendant’s unfair or deceptive conduct was a cause of the injury.” Rafferty v. Merck & Co., 479 Mass. 141, 161 (2018) (internal quotations omitted). When the Commonwealth brings an enforcement action under the statute, however, it is not required to establish that any individual was harmed by the allegedly unfair or deceptive act or practice insofar as it seeks injunctive relief and civil penalties. See G.L. c. 93A, § 4;¹⁹ Commonwealth v.

¹⁸ Meta also suggests the deception claims concern alleged misrepresentations made to influence the legislative process and are therefore protected by the First Amendment under the Noerr-Pennington doctrine. See United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Evans v. Lorillard Tobacco Co., 465 Mass. 411, 456-457 (2013) (explaining doctrine). However, “[t]he protection [provided by the doctrine] does not cover activity that was not genuinely intended to influence government action . . . [and] does not protect deliberately false or misleading statements.” United States v. Philip Morris USA Inc., 566 F.3d 1095, 1123 (D.C. Cir. 2009) (citation omitted). I note that it appears from the Complaint that several statements relied upon by the Commonwealth were made in the press. The extent to which the doctrine applies is best resolved at a later stage of the litigation.

¹⁹ And compare G.L. c. 93A, §§ 9, 11.

Fall River Motor Sales, Inc., 409 Mass. 302, 312 (1991); Commonwealth v. Chatham Development Co., Inc., 49 Mass. App. Ct. 525, 528-529 (2000).

“[W]hether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact. . . . But whether conduct found to be unfair or deceptive rises to the level of a chapter 93A violation is a question of law[.]” H1 Lincoln, Inc. v. South Washington St., LLC, 489 Mass. 1, 13-14 (2022) (internal quotations and citation omitted).

Meta argues the Commonwealth fails to plausibly allege that its conduct was unfair and/or deceptive or that such conduct occurred in trade or commerce. These arguments are unpersuasive.²⁰

1. Unfair Conduct (Counts One and Three)

“To determine whether conduct rises to the level of an unfair act or practice, courts look to the following factors: ‘(1) whether the conduct is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers or other businesses.’” Columbia Plaza Assocs. v. Northeastern Univ., 493 Mass. 570, 587 (2024), quoting H1 Lincoln, 489 Mass. at 14. Meta argues that as to Counts One and Three, the Complaint fails to plausibly suggest that its conduct rises to the level of an unfair act or practice.

²⁰ Among other things, the Commonwealth prays for relief requiring defendants to “pay full and complete restitution to every person who has suffered any ascertainable loss by reason of Defendant’s unlawful conduct.” Complaint at 100. Meta argues that the request for restitution must be dismissed because the harms allegedly experienced by Instagram users relate to mental and physical health, Instagram is a free service, and the Commonwealth pleads no financial injury. The extent to which restitution or some other relief is appropriate is a factual issue that cannot be addressed at this stage. See Commonwealth v. DeCotis, 366 Mass. 234, 245 (1974) (“G.L. c. 93A granted full authority to the courts to use their traditional equity power to fashion decrees to remedy the wrong complained of and to make the decree effective”).

Meta first argues that the Commonwealth fails to allege conduct that falls within an established concept of unfairness. I disagree. Count One alleges that Meta designs and employs various Instagram features that it knows encourage addictive use by teenagers. Count Three alleges that Meta fails to meaningfully exclude children under 13, although it is aware of how harmful Instagram is for children. Such allegations are sufficient to avoid dismissal.

Meta also argues that Counts One and Three fail adequately to allege substantial injury. First, it asserts that the Complaint only alleges an attenuated causal chain between the alleged unfair conduct (the design features) and the alleged harm (mental and physical health issues). But the Complaint does adequately allege such a causal connection. To the extent Meta contends that the injuries to users alleged by the Commonwealth all stem from the content of third-party postings, this argument is unpersuasive for the reasons discussed above. See, supra, at 10-18.

Second, Meta argues that the Commonwealth fails to allege monetary harm or non-subjective harm. This argument fails because the type of mental and physical harm alleged by the Commonwealth is the proper subject of an unfair acts or practices claim. See In the Matter of Int'l Harvester Co., 104 F.T.C. 949, 1061 (1984) (with regard to substantial harm requirement, “[w]hile in most cases the harm involved is monetary, . . . ‘unwarranted health and safety risks may also support a finding of unfairness,’” quoting Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980)). See also Commonwealth v. Keches Law Group, 2021 WL 2226449 at * 4 (Mass. Super. May 17, 2021) (Salinger, J.) (Attorney General “may enforce c. 93A without having to allege, prove, or quantify any economic injury”).

Lastly, pointing to the three-part test used to analyze unfairness under the Federal Trade Commission Act, Meta argues that the Complaint fails to allege that the purported harms to young users are not outweighed by Instagram’s countervailing benefit or that those harms are not

reasonably avoidable by Instagram’s users. See Federal Trade Comm’n v. Direct Mktg. Concepts, Inc., 569 F. Supp. 2d 285, 299 (D. Mass. 2008) (O’Toole, J.), aff’d, 624 F.3d 1 (1st Cir. 2010) (“To justify a finding of unfairness[,] the injury . . . must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided,” quoting American Fin. Serv. Ass’n v. Federal Trade Comm’n, 767 F.2d 957, 971 (D.C. Cir. 1985)). In support of the latter contention, Meta points to the Complaint’s allegations regarding Meta’s “Take a Break,” “Daily Limit,” and age-verification tools.

Meta’s arguments miss the mark. The Commonwealth is not required to meet these two factors to prove unfairness and, in any event, the Complaint adequately alleges facts that satisfy them. The Commonwealth alleges that because Instagram’s features are designed to overcome users’ choice and autonomy to regulate their time on the platform, the elective tools referenced by Meta are an unreasonable option. See Complaint ¶¶ 82-83, 124, 134-136, 255-265, 383. The Complaint also alleges that Meta’s internal research and an expert advisor confirmed that the risks of the platform outweigh its benefits. Complaint ¶¶ 181, 349, 384. These allegations are sufficient to plausibly suggest that the harm alleged could be reasonably avoided and that such harm was not outweighed by Instagram’s countervailing benefits.

2. Deceptiveness (Counts Two and Three)

An act or practice is deceptive “if it could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted,” that is, “if it possesses a tendency to deceive.” Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 394 (2004) (internal quotations omitted). Liability for deceptive acts or practices “does not require proof that a plaintiff relied on the representation, . . . that the defendant intended to deceive the plaintiff, . . .

or even knowledge on the part of the defendant that the representation was false.” *Id.* (internal citations omitted). “In determining whether an act or practice is deceptive, regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public.” *Leardi v. Brown*, 394 Mass. 151, 156 (1985) (internal quotations omitted). See *Aspinall*, 442 Mass. at 394. A statement “need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A.” *Id.* A statement that is half-true or even “true as a literal matter” may be actionable if it “create[s] an over-all misleading impression through failure to disclose material information.” *Id.* at 394-395.

Meta alleges Counts Two and Three fail to allege that it engaged in deceptive practices for three reasons. None have merit. First, Meta contends alleged statements about prioritizing safety and well-being are non-actionable, non-specific statements of opinion. But the Complaint alleges that Meta’s statements about Instagram’s safety and its concern for the well-being of its young users were inconsistent with its actions, which included deprioritizing youth well-being and ignoring its own internal evidence about the harm the platform caused. Given this context, the Complaint plausibly suggests that the statements are at the very least misleading half-truths. Even if the relevant statements are considered opinions, the allegations plausibly suggest that the statements created an over-all misleading impression through failure to disclose material information. See *Aspinall*, 442 Mass. at 394-395; *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995) (“opinion may constitute a statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it. . . . This is particularly true where the maker is understood to have special knowledge of facts unknown to the recipient.”) (internal citations omitted). The extent to which these statements are actionable are best addressed at a later stage.

Second, Meta argues the Commonwealth fails to allege that many of its purported statements are false. It specifically points to the allegations supporting Count Three. See Complaint ¶¶ 324, 327, 335-336, 402. However, even if these statements are literally true, the Complaint plausibly suggests that the statements created an over-all misleading impression through the failure to disclose material information.

Lastly, Meta contends the Complaint fails plausibly to allege that users would have acted differently if they were aware of the purported deception. Whether consumers would have acted differently is “ill-suited for resolution on a motion to dismiss.” Commonwealth v. Exxon Mobil Corp., 2021 WL 3493456 at * 12 (Mass. Super. June 22, 2021) (Green, J.). In any event, the Commonwealth alleges that had users and families been aware of the harmful nature of Instagram’s design features they may have decided not to use the platform or restricted its use. Complaint ¶¶ 55, 298, 299, 344.²¹

3. Trade or Commerce

As noted above, a plaintiff must allege that the unfair or deceptive act or practice occurred “in the conduct of any trade or commerce,” which the statute defines to include:

the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security . . . and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

G.L. c. 93A, § 1(b) (emphasis added). “The use of the words ‘distribution of any services’ in conjunction with words such as ‘sale’ and ‘lease’ indicates an intent that the services be

²¹ Meta also argues that the Commonwealth’s allegations fail to show a causal connection between the deceptive act and the alleged injury. I disagree.

distributed in exchange for some consideration or that there must be other strong indications that the services are distributed in a business context.” Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc., 398 Mass. 480, 493 (1986) (emphasis added). See Sullivan v. Five Acres Realty Tr., 487 Mass. 64, 69 (2021) (c. 93A “intended to apply to individuals acting in a business context”). To determine whether a defendant acted in a business context, the court examines “the nature of the transaction, the character of the parties, the activities engaged in by the parties, whether the transaction was motivated by business or personal reasons, whether similar transactions have been undertaken in the past, and whether the participant played an active role in the transaction.” Sullivan, 487 Mass. at 69. Whether a defendant was acting in the business context “is determined by the facts of each case” and as such, “[t]his determination is typically for the trier of fact and is preferably decided on a fuller record rather than on a motion to dismiss.” Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 849-850 (2017) (internal quotations omitted).

Meta argues that using Instagram does not involve trade or commerce because Instagram is a free service. While the Commonwealth concedes Instagram is free to users, the Complaint alleges that Meta offers and distributes its social media services to millions of Massachusetts users, including over 300,000 teens, in exchange for the collection of personal data, which it then uses to sell targeted advertising opportunities to third parties, Complaint ¶¶ 39, 50, 51, 54; and that Meta derives revenue from selling this advertising. Id. at ¶¶ 36, 52, 143. These allegations plausibly suggest that, although free to users, the provision of Instagram accounts serves a commercial end and that therefore, Meta undertook its purportedly unfair and deceptive actions while engaged in trade or commerce. Cf. Planned Parenthood Fed’n of Am., Inc., 398 Mass. at 493-494 (defendant was not engaged in trade or commerce where it did not charge for its

services and “[t]here [was] little question that [its] employees ... [were] motivated in their work to advocate the pro-life position,” rather than profit).

B. Public Nuisance

Citing the Restatement (Third) of Torts and cases from outside Massachusetts, Meta argues that the Commonwealth’s public nuisance claim should be dismissed because it seeks an unwarranted expansion of the public nuisance doctrine beyond its traditional bounds to include a product and its impact. It also contends that the claim fails because Meta’s alleged conduct does not involve a public right. I disagree.

A public nuisance is one that “interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury.” Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 448 Mass. 15, 34 (2006), quoting Connerty v. Metropolitan Dist. Comm’n, 398 Mass. 140, 148 (1986). “In determining whether there has been an unreasonable interference with a public right, a court may consider, inter alia, “[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience[.]” Id., quoting Restatement (Second) of Torts § 821B. “Massachusetts courts have allowed public nuisance claims concerning dangerous products.” Commonwealth v. Purdue Pharma, L.P., 2019 WL 5495866 at * 5 (Mass. Super. Sept. 17, 2019) (Sanders, J) (and cases cited). Here, the Commonwealth alleges that Meta has contributed to a youth mental health crisis by promoting the addictive use of its platform. This is sufficient to support a public nuisance claim.

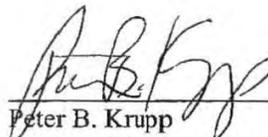
Meta also argues that the public nuisance claim fails because the Complaint does not plausibly suggest that Meta proximately caused the alleged harms. See Alholm v. Town of Wareham, 371 Mass. 621, 626 (1976) (“plaintiffs ha[ve] the burden of proving that the alleged

nuisance . . . was the proximate cause of their injuries”). Meta asserts that those harms are associated with third parties who provide the alleged content and who act independently from Meta. Again, I disagree. As noted above, the Complaint is primarily based on Meta’s own conduct, not third-party content. Moreover, because Meta was purportedly aware of the harms occurring to young users from overuse of Instagram, the alleged mental and physical harms suffered by Massachusetts youth and the associated burdens to the Massachusetts school and health care systems were foreseeable.

ORDER

Defendants’ Motion to Dismiss (Docket # 22) is **DENIED**.

Dated: October 17, 2024



Peter B. Krupp
Justice of the Superior Court

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom
of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S. SUPREME COURT OCTOBER TERM 2024

<U.S. Supreme Court, Oct. Term 2024, Oral Argument - Questions Presented:>

<Whether the court of appeals erred as a matter of law in applying rational-basis review to a law burdening adults' access to protected speech, instead of strict scrutiny as this Court and other circuits have consistently done. [Free Speech Coal., Inc. v. Paxton](#), 95 F.4th 263 (5th Cir.), cert. granted, 144 S. Ct. 2714 (2024); [Free Speech Coalition, Inc., et al., v. Paxton](#), 2025 WL 218776 (U.S.) (U.S.Oral.Arg.,2025).>

<Do public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out? [Mahmoud v. McKnight](#), 102 F.4th 191 (4th Cir. 2024), cert. granted sub nom. [Mahmoud v. Taylor](#), No. 24-297, 2025 WL 226842 (U.S. Jan. 17, 2025).>

<1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students. >

<2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter-school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires >

<Drummond ex rel. State v. Oklahoma Statewide Virtual Charter Sch. Bd., 2024 OK 53, 558 P.3d 1, cert. granted sub nom. OK Charter Sch. Bd. v. Drummond, No. 24-394, 2025 WL 288306 (U.S. Jan. 24, 2025), and cert. granted sub nom. St. Isidore of Seville Sch. v. Drummond, No. 24-396, 2025 WL 288308 (U.S. Jan. 24, 2025).>

<Does a state violate the First Amendment's Religion Clauses by denying a religious organization an otherwise-available tax exemption because the organization does not meet the state's criteria for religious behavior? Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n, 2024 WI 13, 411 Wis. 2d 1, 3 N.W.3d 666, cert. granted sub nom. Cath. Charities Bureau, Inc. v. WI Lab. Rev. Comm'n, 220 L. Ed. 2d 288 (Dec. 13, 2024), amended, No. 24-154, 2024 WL 5112872 (U.S. Dec. 16, 2024), and cert. granted in part sub nom. Cath. Charities Bureau, Inc. v. WI Lab. Rev. Comm'n, No. 24-154, 2024 WL 5112872 (U.S. Dec. 16, 2024).>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I

Current through P.L. 119-5. Some statute sections may be more current, see credits for details.

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Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 16

Art. XVI. Liberty of the press; free speech

[Currentness](#)

ART. XVI. The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

[Notes of Decisions \(766\)](#)

M.G.L.A. Const. Pt. 1, Art. 16, MA CONST Pt. 1, Art. 16
Current through amendments approved February 1, 2024.

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 KeyCite Yellow Flag
Proposed Legislation

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

[Currentness](#)

(a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of [section 223](#) or [231](#) of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under [section 1595 of Title 18](#), if the conduct underlying the claim constitutes a violation of [section 1591](#) of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 1591 of Title 18](#); or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 2421A of Title 18](#), and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added [Pub.L. 104-104, Title V, § 509](#), Feb. 8, 1996, 110 Stat. 137; amended [Pub.L. 105-277](#), Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739; [Pub.L. 115-164](#), § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

EXECUTIVE ORDERS

[EXECUTIVE ORDER NO. 13925](#)

[Ex. Ord. No. 13925](#), May 28, 2020, 85 F.R. 34079, which related to moderation of content posted on social media platforms, was revoked by [Ex. Ord. No. 14029](#), § 1, May 14, 2021, 86 F.R. 27025.

[Notes of Decisions \(294\)](#)

Footnotes

1 So in original. Probably should be “subparagraph (A)”.

47 U.S.C.A. § 230, 47 USCA § 230

Current through P.L. 119-5. Some statute sections may be more current, see credits for details.

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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 1

§ 1. Definitions

Currentness

The following words, as used in this chapter unless the text otherwise requires or a different meaning is specifically required, shall mean--

(a) “Person” shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) “Trade” and “commerce” shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in [subparagraph \(k\) of section four hundred and one of chapter one hundred and ten A](#) and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

(c) “Documentary material” shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) “Examination of documentary material”, the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

Credits

Added by St.1967, c. 813, § 1. Amended by St.1969, c. 814, § 1; St.1972, c. 123; [St.1987, c. 664, § 1](#).

[Notes of Decisions \(405\)](#)

M.G.L.A. 93A § 1, MA ST 93A § 1

Current through the 2024 2nd Annual Session. Some sections may be more current, see credits for details.with the emergency legislation Chapter 34 of the 2025 First Regular and First Special Sessions of the 132nd Legislature of Maine. The First Regular

§ 1. Definitions, MA ST 93A § 1

Session convened December 4, 2024 and adjourned sine die March 21, 2025. The general effective date for nonemergency laws passed in the First Regular Session of the 131st Legislature is June 20, 2025. The First Special Session convened March 25, 2025.

End of Document

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KeyCite Red Flag

Unconstitutional or Preempted Preempted by [In re Federal National Mortg. Ass'n Securities, Derivative, and "ERISA" Litigation](#), D.D.C., July 31, 2007



KeyCite Yellow Flag

Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XV. Regulation of Trade (Ch. 93-110h)

Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 2

§ 2. Unfair practices; legislative intent; rules and regulations

Currentness

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under [sections four, nine and eleven](#), the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act ([15 U.S.C. 45\(a\)\(1\)](#)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of [15 U.S.C. 45\(a\)\(1\)](#) (The Federal Trade Commission Act), as from time to time amended.

Credits

Added by St.1967, c. 813, § 1. Amended by St.1978, c. 459, § 2.

[Notes of Decisions \(1983\)](#)

M.G.L.A. 93A § 2, MA ST 93A § 2

Current through the 2024 2nd Annual Session. Some sections may be more current, see credits for details.with the emergency legislation Chapter 34 of the 2025 First Regular and First Special Sessions of the 132nd Legislature of Maine. The First Regular Session convened December 4, 2024 and adjourned sine die March 21, 2025. The general effective date for nonemergency laws passed in the First Regular Session of the 131st Legislature is June 20, 2025. The First Special Session convened March 25, 2025.

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36 Mass.L.Rptr. 56
Superior Court of Massachusetts,
Suffolk County..

COMMONWEALTH of Massachusetts

v.

PURDUE PHARMA, L.P. et al. ¹

¹ Purdue Pharma, Inc., Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, and Russell J. Gasdia.

1884CV01808BLS2

|

September 17, 2019

MEMORANDUM OF DECISION AND ORDER ON
THE DEFENDANT PURDUE'S MOTION TO DISMISS

Janet L. Sanders, Justice of the Superior Court

***1** The Commonwealth commenced this action against Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively, Purdue) seeking redress for harms that it claims were caused by Purdue's deceptive marketing and sale of its opioid products in Massachusetts. The First Amended Complaint (the Complaint) also names as defendants current and former Purdue directors, CEOs, and a vice president of sales. All defendants have moved to dismiss the claims against them pursuant to [Mass.R.Civ.P. 12\(b\)\(6\)](#). This Memorandum concerns only the Motion to Dismiss by Purdue. ² For the following reasons, this Court concludes that it must be *DENIED*.

² The Court expects to issue decisions on the motions made by the individual defendants within the next few weeks.

BACKGROUND

The Complaint is notable both in its length (274 pages) and its level of detail, including its citation to and quotations

from Purdue's own internal communications. This Court only briefly summarizes those allegations, which are taken as true for purposes of this Motion.

Purdue manufactures prescription opioid medications used for the treatment of chronic pain. The Complaint largely focuses on Purdue's [OxyContin](#), which is a tablet patients take orally, and which is sold in different dosing strengths. Butrans and Hysingla are Purdue's other opioid products. ³ Purdue's opioid formulations include "extended release" or "long acting" doses because they release the active ingredient into a person's system over time. Other opioids on the market are "immediate release" formulations. Opioids, including Purdue's products, carry several risks to the user, including physical dependence, addiction, and related withdrawal symptoms. Opioids can also cause [respiratory depression](#), which is life-threatening.

³ Butrans releases opioids into the body from a skin patch; the Complaint does not describe Hysingla's dosing route.

Purdue released OxyContin in 1996. In the years thereafter, opioid-related deaths rose across the nation and in Massachusetts in particular. In 2007, after multiple state and federal investigations, a predecessor corporation and three executives pleaded guilty to illegal misbranding. An agreed statement of facts submitted in connection with that plea stated that Purdue supervisors and employees intentionally deceived doctors about OxyContin's addictive properties in the previous six years. Also in 2007, Purdue reached a consent judgment with several states, including Massachusetts (the 2007 Judgment). The 2007 Judgment prohibited Purdue from making "any written or oral claim that is false, misleading, or deceptive" in the promotion or marketing of OxyContin. It also required Purdue to establish and follow an abuse and diversion detection program to identify high-prescribing doctors who show signs of inappropriate prescribing, to stop promoting drugs to them, and to report them to authorities.

In the years following the 2007 Judgment, Purdue, despite its promises, did not substantively alter its deceptive and illegal marketing practices. Rather, it continued to downplay its opioids' propensities for addiction and abuse in its messaging to doctors so as to persuade them to prescribe the opioids at greater frequency, at ever-higher (and more expensive) doses, and for longer treatment durations. Purdue also influenced prescribing to inappropriate patient populations. For example, it promoted opioids for use by geriatric [osteoarthritis](#) patients,

even though opioids were more dangerous for elderly individuals and studies had not shown opioids to be a more effective treatment for them. According to the Complaint, Purdue knew that its marketing tactics caused more patients to become addicted and substantially increased the likelihood that they would overdose and die. Despite this knowledge, Purdue continued to minimize the dangers associated with the use of its drugs and to make false representations regarding their safety. It did so in order to maximize its profits.

*2 The Complaint goes into extensive detail about Purdue's marketing tactics. For example, Purdue deployed its sales staff to make frequent in-person visits to doctors' offices in Massachusetts, targeting doctors who were already suspected of overprescribing. It dispensed money, meals, or other gifts to prescribers, and paid doctors to act as spokespersons for its opioids. Purdue funded programs at Tufts University and Massachusetts General Hospital in order to influence physicians associated with those institutions. Its sales representatives dispensed savings cards, knowing that their use would encourage patients to stay on opioids longer.

The Complaint alleges that, because of Purdue's unfair and deceptive conduct, the Commonwealth has sustained substantial damage. In particular, the Commonwealth asserts that Purdue's actions significantly contributed to the opioid epidemic in Massachusetts, which has been the cause of thousands of deaths and non-fatal overdoses. Included within the thousands who have died are 671 people who filled prescriptions for Purdue opioids. Those that have survived their addictions have imposed a heavy burden on the Commonwealth: many cannot work, and they require lengthy and expensive care and treatment, for both themselves and their dependents. The Commonwealth is seeking damages from the defendants to offset the costs of the opioid epidemic, which has been declared a public health emergency in Massachusetts.

DISCUSSION

The standard that this Court applies to the instant motion is well established. Although the complaint must contain more than “labels and conclusions,” [Iannacchino v. Ford Motor Co.](#), 451 Mass. 623, 636 (2008), the ultimately inquiry is whether the plaintiff has alleged facts that are “adequately detailed so as to plausibly suggest an entitlement to relief.” [Greenleaf Arms Realty Trust, LLC v. New Boston Fund, Inc.](#), 81 Mass.App.Ct. 282, 288 (2012) (reversing lower court's

allowance of [Rule 12\(b\)\(6\)](#) motion). In ruling on the motion, the Court accepts the factual allegations as true and draws all reasonable inferences in the plaintiff's favor. [Sisson v. Howe](#), 460 Mass. 705, 707 (2011). Its review is also confined to the four corners of the complaint, with consideration of other materials appropriate only where the complaint attaches them or where they are of the type of which this Court can take judicial notice. [Schaer v. Brandeis Univ.](#), 432 Mass. 474, 477 (2000).

Many of Purdue's arguments in support of its Motion disregard this standard. A good portion of Purdue's memoranda and a large part of its oral argument dispute the factual basis for the Commonwealth's allegations. For example, it argues that addiction is complex and multifaceted, and that the Commonwealth has itself contributed to the problem. It argues that OxyContin makes up only a small fraction of the opioids prescribed nationally and that Purdue is being unfairly scapegoated for a problem not of its making. Such arguments are better made to the fact finder at trial. They cannot be resolved under [Rule 12\(b\)\(6\)](#). Purdue also asks this Court to take into account matters beyond the four corners of the Complaint that it says contradict the Complaint's allegations, citing to findings by the Massachusetts Department of Public Health, for example. This too ignores the standard this Court applies at this early stage of the case. The Court therefore declines to address these arguments, and turns instead to the legal arguments Purdue offers in support of the Motion.

The Complaint asserts two causes of action: violations of G.L.c. 93A (Count I) and public nuisance (Count II). In support of its Motion, Purdue argues that the Complaint fails to state a claim because its allegations conflict with federal law—namely, FDA approval of the opioids at issue. In a related vein, it contends that the challenged conduct is exempt from Chapter 93A because it is a “permitted practice.” As to the nuisance claim, Purdue asserts that it fails as a matter of law because there is no allegation that Purdue has infringed on any “public right.” More generally, Purdue contends that it cannot be legally liable for harms flowing from prescriptions written by doctors because the “learned intermediary” doctrine breaks the chain of causation between its conduct and the harms alleged. Similar arguments have been raised and rejected in litigation against Purdue proceeding in other states. See, e.g., [Alaska v. Purdue Pharma, L.P.](#), 2018 WL 4468439 (Alaska Super.Ct. 2018); [State of Arkansas v. Purdue Pharma, L.P.](#), No. 60CV-18-2018

(Ark.Cir.Ct. Apr. 5, 2019); *Minnesota v. Purdue Pharma, L.P.*, No. 27-CV-18-10788 (Minn.Dist.Ct. Jan. 4, 2019); *New Hampshire v. Purdue Pharma, Inc.*, 2018 WL 4566129 (N.H.Super.Ct. 2018); *Ohio v. Purdue Pharma, L.P.*, 2018 WL 4080052 (Ohio C.P. 2018); *Oklahoma v. Purdue Pharma, L.P.*, 2017 WL 10152334 (Okla.Dist.Ct. 2017); *Tennessee v. Purdue Pharma L.P.*, No. 1-173-18 (Tenn.Cir.Ct. Feb. 22, 2019); *Vermont v. Purdue Pharma L.P.*, No. 757-9-18 (Ver.Super.Ct. March 19, 2019). In line with these other states, this Court concludes that Purdue's arguments do not support dismissal and offers the following by way of explanation.

1. Conflict with Federal Law

*3 Purdue argues that the Commonwealth's claims conflict with FDA decisions approving the sale of the opioids at issue in this litigation and the labeling that accompanied them. In particular, Purdue maintains that, because the representations and conduct that the Commonwealth claims to be deceptive conform to determinations the FDA made in the exercise of its regulatory authority, then it necessarily follows that those statements are not actionable as a matter of law. Although Purdue does not use the term "preemption," that appears to be the doctrine upon which it is relying. Neither the law nor the facts as alleged in the Complaint support Purdue's position, however.

"In all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the court starts] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (alterations removed; internal quotations and citations omitted).  *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Conflict preemption (which Purdue appears to assert) is a type of implied preemption that "occurs where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotations and citations omitted).  *Reckis v. Johnson & Johnson*, 471 Mass. 272, 283 (2015). A party's contention that state law claims are preempted because it is impossible to comply both with state and federal law has been described as a "demanding defense."  *Wyeth*, 555 U.S. at 573. Purdue falls well short of demonstrating what the case law requires for this type of preemption to apply. In particular, there is nothing

about this lawsuit which seeks to impose restraints on Purdue that would put it at odds with the FDA, or which would make it impossible for Purdue to comply both with federal and state regulations.

This becomes particularly apparent upon a fair reading of the Complaint itself. It does not challenge the contents of the relevant opioid labels, nor does it seek to remove Purdue's opioids from the marketplace. Instead, the Complaint contains numerous allegations that Purdue's marketing activities were *inconsistent* with label warnings. For example, despite prominent warnings in the label concerning the risk of abuse and addiction, Purdue put out publications which sought to minimize those risks in a false and deceptive manner.⁴ Its sales force also actively and forcefully marketed opioids for elderly *arthritis* patients, even though the FDA approved label clearly warned against use in that population.⁵

4 One Purdue publication cited in the Complaint stated: "addiction is rare in patients who become physiologically dependent on opioids while using them for pain control." Another stated that only "a small minority of people may not be reliable or trustworthy" and therefore not suitable for opioids. A third stated that addiction "is not caused by drugs."

5 The *OxyContin* label provides: "Life-threatening respiratory depression is more likely to occur in elderly ... patients because they may have altered pharmacokinetics or altered clearance compared to younger, healthier patients ... Monitor such patients closely, particularly when initiating and titrating OXYCONTIN and when OXYCONTIN is given concomitantly with other drugs that depress respiration ... Alternatively, consider the use of non-opioid analgesics in these patients."

The Commonwealth points out that courts in other states have rejected similar arguments made by Purdue. See, e.g.,  *Delaware v. Purdue Pharma, L.P.*, 2019 WL 446382 (Del.Super. 2019); *Grewal, Attorney General of New Jersey v. Purdue Pharma, L.P.*, 2018 WL 4829660 (N.J.Super.Ct. 2018), and state decisions cited at page 5, *supra*. Those courts reasoned that there was no conflict between the state and federal law, given the allegations leveled against Purdue that it promoted use of opioids far beyond that which was consistent with the FDA-approved labeling. Purdue makes no effort to

explain why the reasoning of these other courts is flawed except to direct this Court to a single decision handed down by a North Dakota court which concluded that federal law did preempt that state's claims against Purdue. See *North Dakota v. Purdue Pharma L.P.*, Case No. 08-2018-CV-01300 (May 10, 2019), attached to Purdue's Reply Brief as Exhibit A. This holding appears to be an outlier and is of questionable value, however, particularly given a decision handed down by the United States Supreme Court that same day which clarified the showing a drug manufacturer must make on a claim of “impossibility preemption.”  *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S.Ct. 1668 (May 20, 2019).

2. Permitted Practice Under c. 93A

*4 Purdue argues that even if federal law does not preempt the state law claims, it cannot be held liable on a c. 93A claim because the conduct that the Commonwealth challenges is actually permitted by federal law and, as such, is a “permitted practice” exempt from c. 93A liability. In support, it relies on G.L.c. 93A, § 3, which expressly exempts from the reach of the statute “transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States.” Purdue argues that, because the FDA approved high-dose opioids, the conduct at issue here falls within that § 3 exemption. This Court disagrees, for much the same reasons that it concludes there is no federal preemption.

Section 3 precludes the assertion of a 93A claim “when a regulator authorized to review the defendant's actions has determined that those actions, in particular, were not unfair or deceptive.”  *O'Hara v. Diageo-Guinness, USA, Inc.*, 306 F.Supp.3d 441, 454 (D.Mass. 2018), and cases cited therein. A defendant who seeks protection from c. 93A liability under this section bears a “heavy” burden of proving that the exemption applies. *Aspinall v. Philip Morris, Inc.*, 453 Mass. 431, 434 (2009). In particular, the defendant “must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction.”  *Bierig v. Everett Sq. Plaza Assocs.*, 34 Mass.App.Ct. 354, 367 n.14 (1993). Rather, the defendant must demonstrate that the regulatory scheme “affirmatively *permits* the practice which is alleged to be unfair or deceptive.” *Id.* (italics in original).

The Complaint in the instant case does not describe conduct that has been affirmatively approved by the FDA. Instead, it describes marketing practices that minimized addiction risks, promoted misuse of the drugs, and targeted inappropriate patient populations—conduct which no state or federal regulatory authority has condoned. Citing a September 10, 2013, letter from the FDA in response to a citizen's petition, Purdue argues that the FDA rejected proposed labeling restrictions on the dose and duration for opioid use. It does not follow, however, that this action authorized Purdue to make the false claims the Complaint alleges that it did regarding addiction and abuse. In any event, the exemption enunciated in § 3 is an affirmative defense that is rarely decided on a Rule 12(b)(6) motion. Compare  *Fleming v. Nat'l Union Fire Ins. Co.*, 445 Mass. 381, 389-91 (2005).

3. Public Nuisance

Purdue attacks Count II of the Complaint both on factual and legal grounds. As already, explained, factual disputes cannot be resolved on a motion to dismiss. As to the legal basis, Purdue contends that the Complaint fails to state a claim for public nuisance because it does not allege an interference with a public right. Rather, the Commonwealth's nuisance claim is (according to Purdue), “exactly the sort of poorly disguised, repackaged products liability claim courts have rejected.” Purdue cites decisions by courts in Delaware and Connecticut dismissing similar public nuisance claims against it. See  *Delaware*, 2019 WL 446382 at *12-*13;  *New Haven v. Purdue Pharma, L.P.*, 67 Conn. L. Rptr. 644, 2019 WL 423990 (January 8, 2019). Applying Massachusetts law, this Court reaches a different conclusion.

A public nuisance, as opposed to a private nuisance, is one that “interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury.”  *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 448 Mass. 15, 34 (2006), quoting  *Connerty v. Metropolitan Dist. Comm'n*, 398 Mass. 140, 148 (1986), and citing Restatement (Second) of Torts § 821B (1979) (“A public nuisance is an unreasonable interference with a right common to the general public”). “In determining whether there has been an unreasonable interference with a public right, a court may consider, *inter alia*, [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the

public convenience.’ ” [Sullivan](#), 448 Mass. at 15, quoting [Restatement \(Second\) of Torts § 821B](#). Applying these legal principles, this Court concludes that the Complaint's allegations are sufficient to support a claim that Purdue's conduct has interfered with public health and safety.

*5 This Court also disagrees with Purdue that this is simply a repackaged product liability claim that cannot as a matter of law be brought as a public nuisance claim. In fact, Massachusetts courts have allowed public nuisance claims concerning dangerous products. See, e.g., [Evans v. Lorillard Tobacco Co.](#), 2007 WL 796175 at *18-*19 (Mass.Super.Ct. 2007) [[22 Mass. L. Rptr. 91](#)] (denying motion to dismiss public nuisance action against cigarette manufacturer); [Boston v. Smith & Wesson Corp.](#), 2000 WL 1473568 at *14 (Mass.Super. 2000) [[12 Mass. L. Rptr. 225](#)] (denying motion to dismiss public nuisance action against gun manufacturer). In support of its position that the claims here fall outside the traditional scope of public nuisance law, Purdue relies on [Jupin v. Kask](#), 447 Mass. 141 (2006). In that case, however, the SJC concluded only that the storage of a lawfully obtained unloaded weapon in one's home could not support a claim for public nuisance. The allegations in the Complaint against Purdue are far different.

4. Causation

Purdue argues that the Complaint does not contain sufficient factual allegations to show causation. In opposing the Motion, the Commonwealth points out (quite correctly) that questions of causation generally should not be decided on a motion to dismiss, given their fact-intensive nature. The Commonwealth also contends that, at least with respect to the c. 93A claim, it need not prove that any consumer actually was harmed. See [Commonwealth v. Equifax, Inc.](#), 35 Mass. L. Rptr. 106, 2018 WL 3013918 at *5 (Mass.Super. 2018) (the Attorney General, unlike a private litigant, need only prove that the unfair and deceptive acts took place in trade or commerce, not that they caused any quantifiable economic injury). That is because, in actions by the Attorney General under c. 93A, the court may impose civil penalties and require the defendant to pay the costs of abatement in lieu of damages.

See [G.L.c. 93A, § 4](#). For purposes of this Motion, however, this Court assumes that some causation between the conduct at issue and some quantifiable harm must be established.

The Court concludes that the Complaint contains sufficient allegations to meet the standard applicable to a 12(b)(6) motion.

In order to show causation, the Commonwealth must plead and prove both “cause in fact” and proximate cause. Cause in fact means injury or harm that would not have occurred but for the defendant's conduct. Proximate cause is an injury to a plaintiff that was a “foreseeable result” of the defendant's actions. [Kent v. Commonwealth](#), 437 Mass. 312, 320 (2002). Purdue contends that this case raises several causation issues. Many of these arguments are fact-based, which this Court sees no need to discuss, given the standard applicable to a [Rule 12\(b\)\(6\)](#) motion. There is one legal issue that does merit some comment, however. Purdue argues that, because doctors prescribed the drugs alleged to have caused the harm here, they are an intervening cause that shields Purdue from liability. This argument appears to rely in large part on the learned intermediary doctrine.

The learned intermediary doctrine is based on the proposition that a drug manufacturer's duty to warn may be discharged if the manufacturer provides the physician with an adequate warning about any risks associated with its prescription drug. [Niedner v. Ortho-McNiel Pharm., Inc.](#), 90 Mass.App.Ct. 306, 309 (2016). If an adequate warning is provided, then the chain of causation between the defendant drug maker and the consumer plaintiff is broken, since the physician is presumed to make an independent and educated prescribing decision. [Liu v. Boehringer Ingelheim Pharm., Inc.](#), 230 F.Supp.3d 3, 9 (D.Mass. 2017). That causation chain is not broken, however, where the prescribing decision is affected by deceptive and misleading conduct on the part of the drug manufacturer.

See, e.g., [In re Neurontin Mktg. & Sales Practices Litig.](#), 712 F.3d 21, 39 (1st Cir. 2013) (physician held not to be an independent intervening cause in case involving fraudulent marketing of prescription drug). In other words, because of the defendant's wrongful conduct, the physician is no longer acting independently and the learned intermediary doctrine is not applicable. That is precisely what the Complaint alleges here: by actively undermining the warnings on its products through its deceptive conduct, Purdue is alleged to have caused physicians to write prescriptions they otherwise would not have written. That is sufficient.

5. Miscellaneous Arguments

*6 Purdue's remaining arguments require little discussion. It asserts that the 2007 Judgment estops the Commonwealth from bringing the present action because its terms require Purdue to market its products consistently with approved uses and labeling, which it has done. This is not what the Complaint alleges, however: it accuses Purdue of engaging in marketing practices that were inconsistent with the relevant approved product labels, and, thus, in violation of the 2007 judgment. Purdue next argues that the statute of limitations bars any claim that relies on allegations predating 2012.⁶ The statute of limitations begins to run, however, only when the plaintiff knew or should have known of the defendant's harmful conduct.  *Koe v. Mercer*, 450 Mass. 97, 101 (2007); see also  *Szymanski v. Boston Mut. Life Ins. Co.*, 56 Mass.App.Ct. 367, 370 (2002) (discovery rule applies to G.L.c. 93A actions). That is ordinarily a question of fact.  *Doe v. Creighton*, 439 Mass. 281, 283-84 (2003). The Complaint contains sufficient factual allegations with regard to the pre-2012 conduct to raise at least a factual issue. Finally, Purdue argues that certain of the damages the

Commonwealth seeks are unavailable, and, for that reason, those portions of the Complaint must be dismissed. A motion to dismiss, however, tests the plaintiff's entitlement to *any* relief under the causes of action pleaded, not the scope of that relief following a determination of liability. [Mass.R.Civ.P. 12\(b\)\(6\)](#);  *Iannacchino*, 451 Mass. at 635-36. Purdue may pursue these arguments at later stages of litigation, where appropriate.

6 The Complaint was filed on June 12, 2018. Claims under G.L.c. 93A have a four-year statute of limitations, [G.L.c. 260, § 5A](#). Moreover, the parties entered into a consent agreement to toll the statute of limitations during the period from August 2, 2016, through May 18, 2018.

All Citations

Not Reported in N.E. Rptr., 36 Mass.L.Rptr. 56, 2019 WL 5495866

2025 WL 719080

Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Jane DOE (K.B.), Plaintiff,
v.
BACKPAGE.COM, LLC, et al., Defendants.

Case No. 23-cv-02387-RFL

Signed March 3, 2025

Synopsis

Background: Alleged sex trafficking victim brought action against owner of social media platform for violations of federal civil sex trafficking statute, on grounds owner facilitated and financially benefited from victim's sex trafficking, and state products liability law. Owner moved to dismiss for failure to state a claim.

Holdings: The District Court, [Rita F. Lin, J.](#), held that:

Communications Decency Act (CDA) barred victim's claim for violation of sex trafficking statute, on grounds owner operated platform as a "breeding ground" for trafficking;

CDA barred victim's claim for violation of sex trafficking statute, on grounds owner's algorithms created connections between traffickers and victims;

CDA barred victim's products liability claim for design defect, on grounds owner failed to include adequate age and identity verification procedures;

CDA barred victim's products liability claim for design defect, on grounds owner failed to provide reasonable tool to report sex trafficking;

CDA barred victim's products liability claim for design defect, on grounds owner failed to warn users of risk of sex trafficking and fake accounts; and

leave to amend products liability claims was not warranted.

Motion granted.

See also [724 F. Supp. 3d 882](#).

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

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[Benjamin David Betner](#), [Collin Joe Cox](#), Johanna Esther Smith, Gibson, Dunn & Crutcher LLP, Houston, TX, [Kristin A. Linsley](#), Gibson, Dunn & Crutcher LLP, San Francisco, CA, for Defendant Meta Platforms Inc.

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 105

[RITA F. LIN](#), United States District Judge

*1 Plaintiff Jane Doe alleges that she was a victim of horrific sex trafficking crimes on Instagram, a social media platform owned by Defendant Meta Platforms, Inc. ("Meta"), where she was repeatedly sold for unlawful sex acts over the course of a year. Her trafficker was later convicted in a criminal trial and sentenced to 40 years in prison. Doe now sues Meta, alleging that it facilitated and financially benefited from her sex trafficking, in violation of the federal civil sex trafficking statute,  [18 U.S.C. § 1595](#). Doe also asserts products liability claims for design defect and failure to warn, alleging

that Meta defectively designed Instagram because it lacked identity verification procedures and adequate mechanisms to report sex trafficking, as well as failed to provide adequate warnings about the known danger of trafficking on Instagram. Meta argues that § 230 of the Communications Decency Act bars liability. For the reasons explained below, under Ninth Circuit precedent, § 230 immunizes Meta from Doe's claims because Doe ultimately seeks to hold Meta responsible based on its role as a publisher of others' sex trafficking content. The motion to dismiss for failure to state a claim is therefore **GRANTED** without leave to amend.

I. FACTUAL BACKGROUND

The Third Amended Complaint ("Complaint" or "TAC") reasserts two theories for why Meta is liable under the federal civil sex trafficking statute, 18 U.S.C. § 1595. First, Doe alleges that Meta—through its social media platform, Instagram—has "created a breeding ground for human trafficking, and has knowingly benefited from facilitating a trafficking hub." (TAC ¶ 1.) Second, Doe alleges that Meta uses its algorithms to create "connections" between traffickers and victims "at all costs, even when they know those connections are harmful." (*Id.* ¶ 3.)

The Complaint also asserts new products liability claims for design defect and failure to warn. With respect to Doe's design defect claims, Doe alleges that Meta designed an unreasonably dangerous product by (1) failing to incorporate identity and age verification requirements into its account setup process and (2) failing to establish a reporting mechanism whereby users could report sex trafficking. According to Doe, Meta "intentionally designed its social media products to not include common sense precautions such as age and identity verification or a meaningful mechanism to prevent traffickers from operating [through] fake accounts." (*Id.* ¶ 41.) Thus, Meta's "design choice enables traffickers, including Jane Doe's trafficker, to adopt false identities, allowing them to pose as peers to their intended victims and to disguise their true identity from law enforcement." (*Id.*)

Additionally, Doe alleges that Meta "designed its Instagram product to not include an adequate mechanism to report sex trafficking on the product that would have enabled [it] to report traffickers to appropriate law enforcement authorities." (*Id.* ¶ 42.) Even where Meta does "allow[] a user to report inappropriate content ... there is no immediate response mechanism through which" Meta takes timely

action. (*Id.*) As a result, any report that is made is "almost always ineffectual." (*Id.* ¶ 43.) Thus, Meta's product is allegedly "defective in design" because it poses a "substantial likelihood of harm to its users." (*Id.* ¶ 124.)

*2 Finally, with respect to Doe's failure to warn claims, Doe alleges that Meta "sold and distributed its Instagram product in a defective and unreasonably dangerous condition by failing to adequately warn about the risk of sex trafficking" on the platform, which "rendered the product unsafe for its intended or reasonably foreseeable uses." (*Id.* ¶ 159.) According to Doe, Meta was obligated to warn users that "sex trafficking is rampant" on the platform, or at the least, that "foreseeable product use included interactions with traffickers who could seek to groom, recruit, and sell an unsuspecting user into sex trafficking" or that "a victim may be approached by sex traffickers operating under fake accounts and false identities." (*Id.* ¶ 162.) Thus, because Meta's Instagram product does not contain such warnings, Doe alleges that it is unreasonably dangerous.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). See Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court "accept[s] all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009) (citation omitted). "Dismissal is appropriate when the complaint lacks a cognizable legal theory or sufficient factual allegations to support a cognizable legal theory." *Saloojas, Inc. v. Aetna Health of Cal., Inc.*, 80 F.4th 1011, 1014 (9th Cir. 2023) (quoting *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 604 (9th Cir. 2019)). Rule 12(b)(6) also "authorizes a court to dismiss a claim on the basis of a dispositive issue of law."

[Seismic Reservoir 2020, Inc. v. Paulsson](#), 785 F.3d 330, 335 (9th Cir. 2015) (quoting [Neitzke v. Williams](#), 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)).

III. DISCUSSION

Section 230(c) provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” [47 U.S.C. § 230\(c\)\(1\)](#). That section has been interpreted to “protect[] apps and websites which receive content posted by third-party users (i.e., Facebook, Instagram, ... etc.) from liability for any of the content posted on their services, even if they take it upon themselves to establish a moderation or filtering system, however imperfect it proves to be.” [Est. of Bride by & through Bride v. Yolo Techs., Inc.](#), 112 F.4th 1168, 1175–76 (9th Cir. 2024). [Section 230](#)’s immunity applies to the decision of “whether to publish ... third-party content” and whether “to withdraw from publication” such content. [Sikhs for Just. “SFJ”, Inc. v. Facebook, Inc.](#), 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015), *aff’d*, 697 F. App’x 526 (9th Cir. 2017) (quoting [Barnes v. Yahoo!, Inc.](#), 570 F.3d 1096, 1102 (9th Cir. 2009)). This grant of immunity persists unless the service is itself “responsible, in whole or in part, for the creation or development of” the offending content.” [Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC](#), 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (quoting [47 U.S.C. § 230\(f\)\(3\)](#)).

The Ninth Circuit has articulated a three-part test governing [Section 230](#) immunity. [Section 230](#) bars any claim where: “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” [Barnes](#), 570 F.3d at 1100–01. Moreover, [Section 230](#) confers immunity if “the duty” the plaintiff seeks to enforce “would necessarily require an internet company to monitor third-party content.” [HomeAway.com, Inc. v. City of Santa Monica](#), 918 F.3d 676, 682 (9th Cir. 2019). As detailed below, each of the duties at issue in Doe’s Complaint ultimately seeks to hold Meta responsible based

on its role as a publisher of third-party content that it failed to moderate or otherwise remove.

A. Civil sex trafficking claim

*3 Doe alleges that Meta facilitated and financially benefited from her sex trafficking, in violation of the federal civil sex trafficking statute, [18 U.S.C. § 1595](#). The Court previously granted Meta’s motion to dismiss this claim on [§ 230](#) immunity grounds. See [Doe \(K.B.\) v. Backpage.com, LLC](#), 724 F. Supp. 3d 882 (N.D. Cal. 2024). As explained in the order, the Second Amended Complaint asserted two theories of liability: that Meta operates Instagram as a “breeding ground” for sex trafficking, and that Meta creates connections between traffickers and their victims through the use of algorithms. *Id.* at 884. Both theories of liability were held to be precluded by [§ 230](#) because they “inherently require[d] the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Id.* (quoting [Dyroff v. Ultimate Software Grp., Inc.](#), 934 F.3d 1093, 1098 (9th Cir. 2019)). The Third Amended Complaint reasserts those theories, adding no new allegations relevant to them. They therefore fail for the same reasons previously explained.

First, Doe’s breeding ground theory is foreclosed by [§ 230](#) because it “essentially seeks to hold Meta liable for failing to remove traffickers’ grooming messages and posts advertising their victims for sex.” *Id.* As in the Second Amended Complaint, the Third Amended Complaint does not allege “that Meta, rather than third parties, created and developed such content.” *See id.*

Second, as explained in the Court’s prior order, Doe’s connection theory is foreclosed by [Dyroff v. Ultimate Software Group, Inc.](#), 934 F.3d 1093, 1094–95 (9th Cir. 2019). In that case, a social networking website was immunized from suit by [Section 230](#) after a user died from heroin purchased through a connection made on the website. [Id.](#) To avoid [Section 230](#) immunity, the plaintiff there argued that the website did not simply “publish[] information created or developed by third parties,” but instead, created and developed content by using “features and functions, including algorithms, to analyze user posts ... and recommend other user groups,” which “include[d] the heroin-related discussion group to which [the user] posted and (through its

emails and push notifications) to the drug dealer who sold him the fentanyl-laced heroin.” [Id.](#) at 1098. The Ninth Circuit rejected that argument, holding that “[t]hese functions—recommendations and notifications—are tools meant to facilitate the communication and content of others,” and “not content in and of themselves” created by the website. [Id.](#)

In the Third Amended Complaint, Doe again claims that Meta’s algorithms facilitated her sex trafficking by “[c]reating, suggesting, and encouraging connections between sex traffickers and vulnerable persons on Instagram” and “[r]ecommending that vulnerable persons become Instagram ‘friends’ with sex traffickers.” (TAC ¶ 109); see also [Doe \(K.B.\)](#), 724 F. Supp. 3d at 885 (previously dismissing claim based on identical language in the SAC). Although Doe does not argue that Meta’s algorithms are themselves Meta’s content—as the plaintiff in [Dyroff](#) did—Doe articulates a theory that is essentially analogous: that because her claims are based on Meta connecting her to a certain person, not directing her to certain content, [Section 230](#) does not apply. (Dkt. No. 107 at 11 (“[E]mploying algorithms to connect traffickers and victims is still not ‘publisher’ conduct under [Section 230](#)”).¹ But Doe “cannot plead around [Section 230](#) immunity by framing” her claim as one involving Meta’s connection algorithms rather than the consequence of what the algorithm facilitates: promotion of third-party user-generated sex trafficking content. [Dyroff](#), 934 F.3d at 1098. And as the Court explained in its prior order, where Doe’s theory of liability is based on the “content of the subsequent interaction,” the claim is barred. [Doe \(K.B.\)](#), 724 F. Supp. 3d at 885.

¹ Citations to page numbers refer to the ECF pagination.

^{*4} Relying on a recent out-of-circuit decision, Doe now advances an argument that [Dyroff](#) was overruled by the Supreme Court’s recent decision in [Moody v. NetChoice LLC](#), 603 U.S. 707, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024). See [Anderson v. TikTok, Inc.](#), 116 F.4th 180, 184 (3d Cir. 2024) (holding that TikTok’s algorithm—which curated content on users’ For You Page—was TikTok’s own “‘expressive activity,’ and thus its first party speech,” outside the protections of [Section 230](#),

based on [NetChoice](#)). However, the Court does not read [NetChoice](#) as overruling [Dyroff](#). [NetChoice](#) does not address [Section 230](#) liability. Instead, [NetChoice](#) holds only that a platform’s “editorial judgments” about “compiling the third-party speech it wants in the way it wants” reflects the platform’s “own views and priorities”—and therefore warrants First Amendment protection. [NetChoice](#), 603 U.S. at 718, 144 S.Ct. 2383. Doe’s argument therefore appears to presuppose that editorial decisions cannot be both an expression of a publisher’s point of view (protected under the First Amendment) and a publication of a third-party’s content (protected under [Section 230](#)). However, Doe provides no basis on which the Court should conclude that [Section 230](#) immunity is mutually exclusive with First Amendment protection. Indeed, the undisputed core of [Section 230](#) immunity protects a website’s moderation decisions, in its role as a “publisher,” about which third-party content to remove and which to permit. That those moderation decisions are also protected by the First Amendment does not strip them of their [Section 230](#) immunity. To hold otherwise would effectively render the core of [Section 230](#) a nullity, contrary to Congress’s intent and the plain language of the statute. In sum, [NetChoice](#) does not provide a basis for revisiting the prior ruling on Doe’s civil sex trafficking claims.²

² The Allow States and Victims to Fight Online Sex Trafficking Act provides an exception for particular sex trafficking claims. See [Doe v. Reddit, Inc.](#), 51 F.4th 1137, 1140–41 (9th Cir. 2022). Although

Doe argues that “[Reddit](#) was wrongly decided,” she concedes that under current Ninth Circuit precedent, the exception does not apply. (Dkt. No. 107 at 11.)

B. Products liability claims

Doe also brings products liability claims against Meta for design defect (Counts 2 and 4) and failure to warn (Counts 3 and 5). As previously explained, [Section 230](#) precludes liability where “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information by another information content provider.”

[Barnes](#), 570 at 1100–01. There is no dispute that Meta is an interactive computer service provider, so the parties’ dispute focuses on the second and third prongs with respect to each claim.

“The second and third prongs of [Barnes](#) require [the Court] to consider each cause of action alleged ‘to determine whether a plaintiff’s theory of liability would treat a defendant as a publisher or speaker of third-party content.’” [Doe v. Grindr Inc.](#), 128 F.4th 1148, 1151 (9th Cir. 2025) (quoting [Calise v. Meta Platforms, Inc.](#), 103 F.4th 732, 740 (9th Cir. 2024) (internal quotation omitted)). Thus, the Court must ask “whether the duty the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’” [Calise](#), 103 F.4th at 740 (quoting [Barnes](#), 570 F.3d at 1102); see also [Barnes](#), 570 F.3d at 1101–02 (“[W]hat matters is not the name of the cause of action ... [but] whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.”). Therefore, the Court must separately analyze each duty that Doe alleges was required by Meta in order to determine whether the claim itself is barred by [Section 230](#). For the reasons described below, [Section 230](#) precludes all of Doe’s products liability claims.

1. Design defect theory

Doe alleges strict products liability (Count 2) and negligence (Count 4) for design defect. Both counts assert that Meta designed an unreasonably dangerous product by failing to include identity and age verification requirements as part of the account setup process and by failing to create a reporting process whereby users could report sex trafficking. These “duties” are analyzed in turn.

a. Identity and age verification requirements

First, Doe alleges that Meta should have incorporated identity and age verification procedures into its account setup process. (TAC ¶ 130 (Meta “designed, manufactured, marketed, and sold its Instagram product in an unreasonably dangerous condition because it did not include adequate identity verification or mechanisms to prevent users from creating fake accounts.”).) It is Doe’s view that imposing these

duties would not require Meta to “monitor third-party content on Instagram or otherwise perform ‘publisher’ activities” because these duties relate to the “account creation process—a step that occurs before the third-party user can post content and therefore before any published third-party content exists.” (Dkt. No. 107 at 12.) Therefore, Doe argues, these claims are not precluded by [Section 230](#).

*5 Doe’s arguments are foreclosed by Ninth Circuit precedent. In [Doe v. Grindr Inc.](#), the Ninth Circuit recently held that a plaintiff’s design defect claims were barred by [Section 230](#) because they sought to hold the defendant liable for its conduct as a publisher. In that case, a minor plaintiff created an account on Grindr’s App, representing that he was over 18 years old. Grindr’s App matched the plaintiff with four men, all of whom allegedly raped the plaintiff. With respect to his design defect claim, the plaintiff’s “theory of liability [was] that Grindr breached its duty not to design ... defective products by failing to prevent a minor from being matched with predators, by matching users based on geographic data it extracted from them, and by allowing [the plaintiff] to communicate with abusive adults,” even when safer alternative designs were feasible. [Doe](#), 128 F.4th at 1153. The Ninth Circuit concluded that the claim was barred by [Section 230](#) because the “challenged features of the App”—which “were meant to facilitate the communication and content of others”—were “not independent of Grindr’s role as a facilitator and publisher of third-party content.” *Id.* (internal quotations omitted).

That reasoning applies with equal force to the facts of this case. Here, Doe’s theory of liability derives from Meta’s alleged failure to include adequate age and identity verification measures that would prevent the creation of fake accounts facilitating sex trafficking communications. The duty to include these challenged features is “not independent” of Meta’s role as the “facilitator and publisher of third-party content” published on the platform. To the contrary, the duty cuts to the core of Meta’s role as a publisher: that is, determining who can and cannot speak on its platform. Doe’s proposed verification requirements are designed with the particular purpose of limiting who will create an Instagram account, and more specifically, limiting the types of content likely to be posted from those accounts (i.e., sex trafficking content). A platform’s decision as to whether to allow anonymous speech, and the consequent effects on the content of the speech that proliferates on the platform, is a classic publication decision. It is a determination of who may speak,

and thus, whose content may be barred on the platform. See [F. Barnes, 570 F.3d at 1102](#) (the act of “publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content”); [F. Est. of Bride, 112 F.4th at 1179–80](#) (finding [Section 230](#) barred design defect claims based on the theory that a platform’s “anonymity” facilitated cyberbullying and thus was “unreasonably dangerous,” because that theory attempts “to hold [the platform] responsible for users’ speech or [the platform’s] decision to publish it”).

The outcome might be different if Doe sought to impose verification requirements for reasons independent of the third-party content produced by anonymous accounts. Here, though, Doe’s allegations are clear that the source of the duty is the danger that unverified accounts allow traffickers “to adopt false identities, allowing them to pose as peers to their intended victims and to disguise their true identity from law enforcement.” (TAC ¶ 41.) As such, Doe’s claims are squarely foreclosed under [Doe v. Grindr](#):

Doe relies heavily on [Lemmon v. Snap, Inc.](#), to support her argument. [995 F.3d 1085 \(9th Cir. 2021\)](#). But for the same reasons as articulated by the Ninth Circuit in [Doe v. Grindr](#), that case is inapposite. In [Lemmon](#), Plaintiffs sued Snap on a design defect theory for their creation of a “Speed Filter,” which allowed users to record and superimpose their speed on top of their recorded photos or videos through Snapchat. The Ninth Circuit held that [Section 230](#) did not bar the claim because the plaintiffs “[did] not fault Snap in the least for publishing” third-party messages generated using the Speed Filter. [Id. at 1093](#). The claim did not depend on “what messages, if any, a Snapchat user employing the Speed Filter actually sen[t].” [Id. at 1094](#). Instead, the plaintiffs sought to hold Snap liable for creating the Speed Filter as a product in the first place. The court therefore found that the theory of liability stemmed from Snap’s “distinct capacity as a product designer,” and not from Snap’s role as the publisher of any message. [Id. at 1092](#). That was evidenced by the fact that “Snap could have satisfied its ‘alleged obligation’—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat’s users generate.” [Id.](#); see also [Doe, 128 F.4th at 1153](#) (“[Snap’s] duty to avoid designing a product that encouraged dangerous driving was ‘fully independent

of defendant’s role in monitoring or publishing third-party content,’ and it did not ‘seek to hold the defendant responsible as a publisher of speaking’” (quoting [Lemmon, 995 F.3d at 1093](#))). Here, by contrast, Doe is seeking to hold Meta liable for its determination of who can and cannot access its platform to speak in the first place, which cuts to the core of Meta’s role as a publisher. Thus, this claim is barred by [Section 230](#).

b. Reporting requirement

*6 Additionally, Doe argues that Meta created a defectively designed product because it did not “provide a reasonable tool by which to report sex trafficking” and instead “largely just directs users to call law enforcement or contact anti-trafficking organizations.” (TAC ¶¶ 42, 133.) Furthermore, Doe states that “even where Instagram allows a user to report inappropriate content ... such that a user could theoretically report trafficking, there is no immediate response mechanism” through which Meta “takes timely action.” (*Id.* ¶ 42.) In other words, the asserted duty is not only to create a mechanism by which third-party content may be reported, but to monitor and act on those reports as well. Accordingly, the justification for why Meta may be held liable springs from its failure to monitor, and moderate, the third-party content enabled by Instagram.

This duty is again directed at Meta’s role as a publisher. The right from which “the duty springs” is Meta’s role as the alleged publisher of the sex trafficking posts. [Calise, 103 F.4th at 742](#). Doe does not contend, for example, that the manufacturer of the phone she used to access Instagram is required to provide her with a notification mechanism, like a button, that would allow her to report sex trafficking. Instead, Doe alleges that Meta is the one who owes her that duty because Meta “knew or should have known” that Instagram “attracts, enables, and facilitates sex traffickers, and sex traffickers use its Instagram product to recruit and sexually exploit other Instagram users like Jane Doe.” (TAC ¶ 57.) In other words, Meta owes the duty because of the third-party content that Meta allows to be published on its platform, and because Meta has failed to effectively monitor and remove it. As such, Doe is seeking to impose liability against Meta based on its publication of the third-party content, which is precisely the type of claim precluded by [Section 230](#).

2. Failure to warn theory

Doe also argues that Meta's Instagram product is unreasonably dangerous under a failure to warn theory (Counts 3 and 5) because it “lacks any warnings that sex trafficking is rampant” on the platform, or that “foreseeable product use included interaction with traffickers.” (*Id.* ¶ 162.) Relatedly, Doe argues that Meta's products do not include warnings that users are allowed to make fake accounts, which facilitates a sex trafficker's ability to obscure their identity when engaging victims.

Here, again, Doe's theory of liability springs from Meta's role as a publisher. According to Doe, Meta had a duty to warn users about the risks of sex trafficking on its platform because Meta's platform is the vehicle through which the third-party sex trafficking content is published. The Ninth Circuit's opinion in *Estate of Bride by and through Bride v. Yolo Technologies, Inc.* is directly on point as to this issue. *Id.* 112 F.4th 1168 (9th Cir. 2024). There, the plaintiff alleged that the app developed by YOLO encouraged cyberbullying due to its anonymity. The Ninth Circuit found that *Section 230* precluded the plaintiff's product liability claim based on failure to warn because “the failure to warn claim faults YOLO for not mitigating, in some way, the harmful effects of harassing and bullying content.” *Id.* at 1180. “This is essentially faulting YOLO for not moderating content in some way, whether through deletion, change, or suppression.” *Id.* The same logic applies to Doe's claim here.

Doe contends that her case is more like *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). That case, though, did not involve an allegation that the defendant's liability sprang from its publication of objectionable content. There, the Ninth Circuit held that *Section 230* did not bar a plaintiff's failure to warn claim where her theory of liability focused on a defendant's actual knowledge of a rape scheme. Specifically, a modeling website learned from outside sources that a pair of men were contacting women whose ads were posted on the website, luring them to fake auditions, and drugging and raping them. As the Ninth Circuit explained, the plaintiff's theory “ha[d] nothing to do with [the defendant's] efforts, or lack thereof, to edit, monitor, or remove user generated content”—but instead was based on defendant's “actual knowledge ... from an outside source of information

about criminal activity.” *Id.* at 852–53; see also *Est. of Bride*, 112 F.4th at 1181 (“In short, the defendant in *Internet Brands* failed to warn of a known conspiracy operating independent of the site's publishing function.”). And, in fact, the Ninth Circuit emphasized that the two men were not alleged to ever have posted on the modeling website, and the plaintiff did not “claim to have been lured by any posting” on the website. *Internet Brands*, 824 F.3d at 851. Therefore, the plaintiff's “failure-to-warn claim was not based on the defendant's failure to remove any user content or on the defendant's publishing or monitoring of third party content.” *Doe*, 128 F.4th at 1154 (citing *Internet Brands*, 824 F.3d at 851). As a result, *Section 230* did not preclude the claim.

*7 By contrast, here, Doe is seeking to hold Meta liable as a publisher for its failure to warn of the generalized risk of sex trafficking content on its platform, and the use of fake accounts that might facilitate that content. See *id.* (similarly distinguishing *Internet Brands* because the plaintiff did “not allege that Grindr had independent knowledge of a conspiracy, and Grindr's role as a publisher of third-party content does not give it a duty to warn users of a general possibility of harm resulting from the App” (internal quotations omitted)). Accordingly, *Section 230* precludes this claim.

In sum, *Section 230* bars all of Doe's claims as pled. “When a plaintiff cannot allege enough facts to overcome *Section 230* immunity, a plaintiff's claims should be dismissed.” *Dyroff*, 934 F.3d at 1097. Because the claims are dismissed based on *Section 230*, the Court does not reach Meta's other arguments for dismissal.

C. Leave to amend

Doe does not request leave to amend, but amendment would be futile in any event. Doe was previously afforded multiple opportunities to amend her Complaint. Although the Third Amended Complaint is the first in which Doe also pleaded products liability claims, Doe does not identify any additional facts she could allege to allow her claims to overcome *Section 230*. Accordingly, all of Doe's claims are dismissed without leave to amend.

IV. CONCLUSION

Based on the foregoing, Meta's motion to dismiss the Third Amended Complaint is **GRANTED WITH PREJUDICE WITHOUT LEAVE TO AMEND.**

IT IS SO ORDERED.

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United States District Court, S.D. Texas, Houston Division.

John DOE, THROUGH NEXT
FRIEND Jane ROE, Plaintiff,

v.

SNAP, INC., Bonnie Guess-Mazock, and
Conroe Independent School District, Defendants.

Civil Action No. H-22-00590

|
Signed 07/07/2022

MEMORANDUM AND OPINION

Lee H. Rosenthal, Chief United States District Judge

*1 John Doe alleges that when he was a 15-year-old sophomore at Oak Ridge High School, in Conroe, Texas, his science teacher, a woman in her thirties, engaged him in a sexual relationship. This teacher, Bonnie Guess-Mazock, allegedly lured Doe into the relationship by using the social-media platform, Snapchat, to send Doe inappropriate messages and photographs, and then by encouraging him to take prescription and over-the-counter drugs during sex. The sexual assaults continued repeatedly over several months. They were discovered when Doe overdosed on the prescription drugs Guess-Mazock provided him. After a long hospital stay, Doe recovered, at least from the drug overdose. Doe's legal guardian sues Guess-Mazock, the Conroe Independent School District, and Snap, Inc., the company that owns and maintains Snapchat. All defendants moved to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (Docket Entries Nos. 11, 10, 24).

Based on the motions, the responses, the replies, and the applicable case law, the court grants in part and dismisses in part Guess-Mazock's motion to dismiss, (Docket Entry No. 24); grants the school district's motion to dismiss, (Docket Entry No. 11); and grants Snap, Inc.'s motion to dismiss, (Docket Entry No. 20). Doe's claims against the school district and Doe's intentional-infliction-of-emotional-distress claim against Guess-Mazock are dismissed without prejudice and with leave to amend. Doe may amend his complaint against the school district by **August 22, 2022**. Doe's claims against Guess-Mazock are abated until 90 days after Doe

serves Guess-Mazock with notice as required under the [Texas Education Code § 22.0513](#). Doe's claims against Snap, Inc. are dismissed with prejudice.

The reasons are set out below.

I. Background

The summary of the factual background is based on the allegations in Doe's complaint, which the court accepts as true in considering this motion to dismiss. The allegations describe a troubled adolescent who survived a difficult childhood. Doe's father abandoned him as a child, and his mother was murdered. Doe has been raised by Jane Roe, his guardian, who brings this lawsuit on his behalf. (Docket Entry No. 1, at 2).

In October 2021, during his sophomore year at Oak Ridge High School, Doe's science teacher, Guess-Mazock, a woman in her thirties, "preyed" on the fifteen-year-old Doe, knowing that he was young and otherwise vulnerable. Guess-Mazock asked Doe to "stay with her in the classroom after the rest of the classroom was dismissed" and "met with Doe alone with the door to the classroom closed." (*Id.*, at 3). "At this closed-door meeting, [Guess-Mazock] began to groom Doe for a sexual relationship and, in furtherance of that goal, asked Doe for his Snapchat username." (*Id.*). "Guess-Mazock then began to seduce Doe via Snapchat by sending seductive photos of herself appended with solicitous messages." (*Id.*).

Throughout the fall and winter of 2021, Guess-Mazock and Doe "had repeated sexual contact ... at different locations," including Guess-Mazock's car and Doe's home. (*Id.*, at 3–4). Guess-Mazock also purchased, or gave money to Doe to purchase, prescription and over-the-counter drugs, "and encouraged Doe to abuse those substances prior to their having sex." (*Id.*, at 4). On January 12, 2022, Doe overdosed on prescription drugs that Guess-Mazock gave Doe or paid him to get. Doe survived after a long hospital stay. (*Id.*, at 13).

*2 Doe's legal guardian filed this civil action, asserting claims under federal law against the Conroe Independent School District, and asserting claims under federal and state law against Guess-Mazock. As to the school district, Doe first alleges that it violated § 1983 by failing to adequately train its teachers and staff to identify illegal and inappropriate student-teacher relationships. (*Id.*, at 7). Doe alleges that even though "the illicit relationship between Guess-Mazock and Doe ... was an open secret that students frequently discussed," school staff and administrators were not trained "to recognize and report inappropriate sexual relationships

between students and teachers.” (*Id.*, at 4–5). Second, Doe alleges that the school district failed to properly screen teachers and other employees, even though the district “had at least five instances of sexual assault of a student by employees in the last 20 years.” (*Id.*, at 8). Doe alleges that “[u]pon information and belief, an adequate background check would have revealed Guess-Mazock’s pedophilic tendencies.” (*Id.*, at 9). Third, Doe alleges that the school district failed to adequately supervise Guess-Mazock, who not only assaulted Doe, but also “attempted to seduce other students.” Doe alleges that the school district should not have allowed “opposite-sex, student-teacher private meetings on school grounds,” and that by “explicitly permitting” these meetings, “the School District promulgated a [] policy and procedure that demonstrates a conscience indifference to the Fourteenth Amendment rights of students of the District and Doe in particular.” (*Id.*, at 10).

As to Guess-Mazock, Doe alleges that she violated Doe’s due process rights under the Fourteenth Amendment “to be free of illegal sexual advances by his teacher at school.” (*Id.*, at 6). Doe alleges that Guess-Mazock assaulted, battered, and raped him, because “Doe had not reached the age of consent at the time of Guess-Mazock’s seduction.” (*Id.*, at 6–7).

Finally, Doe asserts three state-law negligence claims against Snap, Inc., the owner of Snapchat. Doe alleges that Snap is liable for “negligent undertaking” because it “claims to have undertaken to protect its young users” by “report[ing] all instances of child sexual exploitation to authorities,” a duty that it breached “by failing to exercise reasonable care in performing its data-mining services and failing to intervene when [Guess-Mazock] started sending sexually explicit messages and images to [Doe].” (*Id.*, at 11). Doe also alleges that Snapchat is “negligently designed” because the application “allow[s] for the widespread practice of using false birth dates,” so that “users younger than 13 years old are using the application.” Doe alleges that “[b]y creating an environment where adults can interact with underage users with assurances that there will be no long-lasting evidence of those interactions, Snap has fostered an environment that draws in sexual predators and allows them to act with impunity.” And Doe alleges a claim of gross negligence, stating that when “viewed objectively ... Snap presented an extreme risk of grievous harm in marketing an application to minors that, by design, allows pedophiles to prey on them with apparent impunity.” (*Id.*, at 12).

II. The Standard for a Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), a federal court dismisses a complaint if it fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6); *see also* Fed. R. Civ. P. 8(a)(2) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”). In reviewing a Rule 12(b)(6) motion, the court “accept[s] all well-pleaded facts as true and view[s] all facts in the light most favorable to the plaintiff.”

 *Thompson v. City of Waco*, 764 F.3d 500, 502 (5th Cir. 2014). “A court reviewing a motion to dismiss under Rule 12(b)(6) may consider ‘(1) the facts set forth in the complaint, (2) the documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201.’ ” *DZ Jewelry, LLC v. Certain Underwriters of Lloyds London*, No. H-20-3606, 2021 WL 1232778 (S.D. Tex. Mar. 21, 2021) (quoting  *Inclusive Cmty. Proj., Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019)).

To withstand a Rule 12(b)(6) motion, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”  *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint must include “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017) (quoting  *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ”  *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (alteration in original) (quoting  *Twombly*, 550 U.S. at 557). “A complaint ‘does not need detailed factual allegations,’ but the facts alleged ‘must be enough to raise a right to relief above the speculative level.’ ”  *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (quoting  *Twombly*, 550 U.S. at 555).

III. Analysis

*3 The motions to dismiss the federal and state law claims by each of the three defendants, the Conroe Independent School District, Guess-Mazock, and Snap, Inc., are addressed in turn.

A. The Conroe Independent School District

Doe asserts a § 1983 claim against the Conroe Independent School District. Doe alleges that “Anthony Livecchi, while acting under the color of state law as principal of Oak Ridge High School, and the Conroe Independent School District

deprived Doe of [his Due Process] rights.” (Docket Entry No. 1, at 7). Doe does not name Livechi as a defendant in this lawsuit. Doe alleges that the school district violated § 1983 by failing to properly train its teachers and staff to identify warning signs indicating inappropriate student-teacher relationships; that the school district was “deliberately indifferent ... in failing to adequately train Defendant Guess-Mazock”; that the school district failed to properly screen employees before “placing them into the classroom with vulnerable students”; and that the school district failed to “adequately supervise” its teachers by “ha[ving] a policy that allow[ed] teachers and students of the opposite sex to hold closed door meetings private in classrooms and other rooms within the high school.”

The school district argues that Doe’s complaint must be dismissed because Doe has not alleged that an official policymaker “approved, adopted, or ratified any actions Doe claims caused him injuries.” (Docket Entry No. 11, at 9). The school district also argues that Doe has not alleged that an official policymaker’s actions or inactions amounted to deliberate indifference of Doe’s constitutional rights. (*Id.*, at 13).

The court agrees with both arguments. Liability cannot be imposed on school districts under a theory of vicarious liability or *respondeat superior*: [Piotrowski v. City of Harker Heights](#), 503 U.S. 115, 120 (1992). A plaintiff must plausibly allege that a policy or custom attributable to the school district was the “moving force” behind the deprivation of the plaintiff’s constitutional rights. [Monell v. Dep’t of Social Servs.](#), 436 U.S. 658, 694 (1978). That policy or custom must have been tolerated or approved by a person or entity with final policymaking authority for the school district.

[Gonzalez v. Ysleta Indep. Sch. Dist.](#), 996 F.2d 745, 753–54 (5th Cir. 1993). In Texas, the school district’s Board of Trustees is the sole entity with final policymaking authority for the school district. See [Piotrowski v. City of Houston](#), 237 F.3d 567, 578 (5th Cir. 2001) (quoting [TEX. EDUC. CODE ANN. § 11.151\(b\)](#)).

To survive a motion to dismiss, Doe must plausibly allege that Conroe Independent School District’s Board of Trustees adopted an unconstitutional policy or otherwise knew about and acquiesced “in a permanent and deeply embedded abusive and unconstitutional practice.” [Penny v. New Caney Indep. Sch. Dist.](#), No. H-12-3007, 2013 WL 2295428, at

*4 (S.D. Tex. May 23, 2013) (citing [Piotrowski](#), 237 F.3d at 578–79). “Isolated violations of law by [the school district’s] employees cannot constitute a custom or policy by [the district’s] Board of Trustees.” *Id.*

Doe’s complaint does not once mention the Board of Trustees. The complaint alleges that “[t]he School” had “inadequate” training policies, and that “the School was deliberately indifferent to Doe’s constitutional rights.” (Docket Entry No. 1, at 7–8). These allegations are insufficient to allege that the Board of Trustees adopted an unconstitutional policy or acquiesced to an unconstitutional custom.

*4 Doe has also not alleged that an official policymaker’s actions or inactions amounted to deliberate indifference of his constitutional rights. “When a plaintiff bases [his] claim on a failure to implement or enforce a policy or custom, the facts alleged must support an inference of deliberate indifference to the plaintiff’s constitutional rights.” [Gonzalez](#), 996 F.2d at 753–54, 755–56. Doe appears to base at least three of his claims against the school district on the district’s failure—not the Board’s—to implement policies or customs that would have protected him from harm by Guess-Mazock. Doe alleges that the school district did not enact adequate training policies to teach teachers and staff “warning signs that indicate inappropriate student-teacher relationships”, that the school district did not enact social media policies prohibiting teachers from communicating with students; and that the school district “fail[ed] to adequately supervise its teachers,” because the school “allows teachers and students of the opposite sex to hold closed door meetings privately in classrooms and other rooms within the high school.”

To plead that an official policymaker acted with deliberate indifference, Doe would need to plead facts showing that “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [school district could] reasonably be said to have been deliberately indifferent to the need.” [Gonzalez](#), 996 F.2d at 757 (citation omitted). Doe has not alleged a pattern of sexual assault by teachers, or inappropriate contact between teachers and students through social media, that has “occurred for so long or so frequently,” that the need for more or different training is obvious. [Peterson v. City of Fort Worth](#), 588 F.3d 838, 850 (5th Cir. 2009). Doe alleges that the school district had “at least five instances of sexual assault of a student by employees in the last 20 years.” This allegation

does not suggest a pattern of sexual assault so obvious that the school board acted with deliberate indifference to Doe's constitutional rights by failing to enact different training or social media policies. Five instances over twenty years suggests, at most, isolated instances of condemnable conduct, but not a pattern of behavior among teachers requiring different training protocols.

“To act with deliberate indifference,” the school board “must also know of and disregard an excessive risk to the victim's health or safety.”   *McLendon v. City of Columbia*, 305 F.3d 314, 326 n.8 (5th Cir. 2002) (internal quotations omitted). The allegation that Guess-Mazock preyed on Doe in a classroom with the door closed does not plausibly allege that the Board knew or should have known, from one instance of abusive conduct, that allowing teachers to communicate with opposite-sex students in closed-door rooms would pose an excessive risk to students' safety. It is not “so obvious” that a teacher who is alone with a student of the opposite gender will sexually assault that student, so as to require the enactment of an open-door policy.

Doe also alleges that the school district “has a persistent and widespread practice of failing to properly screen their potential employees prior to hiring them and placing them into the classroom with vulnerable students.” (Docket Entry No. 1, at 8). But even assuming that this adequately alleges a policy or practice, Doe has not alleged facts that could support “a direct causal link between the alleged policy and the claimed constitutional injury.” *Penny*, 2013 WL 2295428, at * 4 (citing  *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998)). Doe alleges, in conclusory fashion, that “an adequate background check would have revealed Guess-Mazock's pedophilic tendencies.” (Docket Entry No. 1, at 9). Doe does not explain what a background check might have revealed or how the background check “would have revealed Guess-Mazock's pedophilic tendencies.” Doe does not allege, for example, that Guess-Mazock had a criminal record or a record from prior employment that would have raised any red flags about Guess-Mazock, which might lend support to his allegations.

*5 Doe has not alleged that the Board of Trustees enacted or failed to enact policies or customs with deliberate indifference to Doe's constitutional rights. The school district's motion to dismiss is granted, without prejudice and with leave to amend by no later than August 22, 2022.

B. Bonnie Guess-Mazock

Doe asserts a federal claim under  42 U.S.C. § 1983 and state-law claims of assault, battery, statutory rape, and intentional infliction of emotional distress against Guess-Mazock. In her motion to dismiss, Guess-Mazock does not deny that she sexually assaulted, battered, and raped Doe. Instead, she argues that because she did not assault Doe on school property or during school events, the  § 1983 claim must be dismissed because she did not commit the assaults under color of state law.

Guess-Mazock argues that Doe's state-law claims must be dismissed because Doe did not comply with certain procedural prerequisites to filing the state-law claim against her as a school district employee, and because she has “professional immunity” under Texas state law. (Docket Entry No. 24, at 9 (citation omitted), 11). The Texas law she relies on provides that:

A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

 TEX. EDUC. CODE ANN. § 22.0511(a).

Guess-Mazock argues that she is immune from Doe's state-law claims because she “is a professional employee under the statute,” and “her actions [were] within the scope of her duties.” (Docket Entry No. 24, at 11). Guess-Mazock argues, however, that she is also immune from Doe's federal-law claim because she was *not* acting “under the color of state law.” (*Id.*, at 9).

Doe asserts that Guess-Mazock's arguments for dismissing the claims are irreconcilable. Doe argues that if Guess-Mazock acted under the scope of her employment in sexually

assaulting Doe, then she necessarily acted under color of state law, regardless of whether the assaults occurred on school property or during a school event. “Under color of state law,” however, “does not necessarily equate to ‘scope of employment.’” [McLaren v. Imperial Cas. and Indem. Co.](#), 767 F. Supp. 1364, 1371 n.4 (N.D. Tex. 1991) (citing [Brown v. Miller](#), 631 F.2d 408, 411 (5th Cir. 1980)); cf. [Robnett v. City of Indianapolis](#), 894 F.3d 876, 881 (7th Cir. 2018) (“[T]he plaintiff argues that there is no effective difference between [under color of state law] and scope of employment. That is incorrect. While the two concepts are ‘closely related,’ they are ‘not identical.’” (citation omitted)). While it is Doe’s burden to plead that Guess-Mazock acted under the color of state law, “[i]mmunity under [§ 22.0511](#) is an affirmative defense,” and so Guess-Mazock bears the burden of establishing that she acted within the scope of her employment. [Moreno v. Northside Indep. Sch. Dist.](#), No. SA-11-CA-0746-XR, 2012 WL 13029076, at *9 (W.D. Tex. Jan. 23, 2012).

This case demonstrates, at least on the pleadings, that it is plausible that Guess-Mazock acted “under the color of state law” for the purpose of Doe’s [§ 1983](#) claim, but did not act “under the scope of employment” for the purpose of Doe’s state-law tort claim, so that both survive dismissal. The reasons are explained below.

1. [§ 42 U.S.C. § 1983](#)

*6 Doe has plausibly alleged a claim under [§ 1983](#). To state a claim under [§ 1983](#), Doe must allege that he was deprived of a constitutional right “by a person acting under color of state law.”¹ [West v. Atkins](#), 487 U.S. 42, 48 (1988); [James v. Tex. Collin Cnty.](#), 535 F.3d 365, 373 (5th Cir. 2008). Doe alleges that Guess-Mazock violated his Due Process right to bodily integrity. Guess-Mazock does not contest that Doe, a minor who is legally incapable of consent to sex, has a constitutionally protected right to be free from sexual abuse by his teacher. See [Doe v. Taylor Indep. Sch. Dist.](#), 15 F.3d 443, 445 (5th Cir. 1994) (*en banc*) (“We hold ... that schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right.”).

1 As a public official, Guess-Mazock can be sued in her official or her personal capacity. See [Hafner v. Melo](#), 502 U.S. 21 (1991). Doe alleges that he has sued Guess-Mazock in her personal capacity.

“Although the law is clear that physical sexual abuse of a student by a school teacher can give rise to [§ 1983](#) liability, a separate and essential element of such a claim is that the abuse occur under color of state law.” [Becerra v. Asher](#), 105 F.3d 1042, 1045 (5th Cir. 1997). Guess-Mazock argues that Doe’s [§ 1983](#) claim should be dismissed, because he has not alleged that she was acting under color of law when the sexual abuse occurred, as no alleged assault occurred on school premises or at school functions. This argument is unpersuasive based on Doe’s allegations and Fifth Circuit precedent.

[Becerra v. Asher](#) is instructive. Asher, a music teacher in the Houston Independent School District, sexually molested an eleven-year-old student, identified as Juan Doe. [Id.](#) at 1044. Juan’s mother sued Asher, the school district, and three school administrators, alleging a federal-law claim under [§ 1983](#) and state-law claims. The Fifth Circuit, sitting en banc, held that the mother failed to state a claim under [§ 1983](#) against Asher, because the “physical sexual abuse of Juan did not occur under color of state law.” [Id.](#) at 1047.

In that case, Asher “first befriended and show[ed] a special interest in Juan at school,” but the assaults did not start until after Juan “withdrew from the school where [the teacher] taught.” [Id.](#) at 1047. Juan and Asher separately “continued a friendship,” “includ[ing] home music lessons, trips to the zoo and theme parks, and church activities,” after Juan had left school. [Id.](#) at 1044, 1047. Asher then twice assaulted Juan in Juan’s home. [Id.](#)

The Fifth Circuit held that “[a]s egregious and cruel as Asher’s acts were,” “Asher’s physical sexual abuse of Juan did not occur under color of state law.” [Id.](#) at 1047. The court noted that “[t]he assaults occurred at Juan’s home,” and that “Asher first molested Juan more than five months after Juan withdrew from the school where Asher taught. Asher’s contacts with Juan thereafter were in no way part of his duties as a state employee, were not school-sponsored, and were not reported to any school official.” [Id.](#) The court emphasized that “Asher

was not Juan's teacher 'before, during, and after' the sexual abuse, nor was this wrongful conduct 'on and off school grounds.' ” *Id.* (quoting [Doe v. Taylor](#), 15 F.3d 443, 452 n.4 (5th Cir. 1994)).

Juan had “offered expert affidavits to the effect that the seduction of Juan began at school, and the later sexual abuse would not have occurred if Asher had not first won Juan's trust and affection while serving as his teacher.” *Id.* But, the Fifth Circuit stated, “the constitutional violation [under the Due Process Clause] did not extend to the development of trust and affection.” *Id.* “On this evidence,” the court concluded, “there was no ‘real nexus ... between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher.’ ” *Id.* (citation omitted).

*7 The *Becerra* court reached its conclusion by distinguishing an earlier Fifth Circuit decision, [Doe v. Taylor Indep. Sch. Dist.](#), 15 F.3d 443 (5th Cir. 1994), and by comparing the case to a Tenth Circuit decision, [D.T. by M.T. v. Indep. Sch. Dist. No. 16 of Pawnee Cnty., Okl.](#), 894 F.2d 1176 (10th Cir. 1990). These cases help define the parameters of a [§ 1983](#) claim when a student alleges that he or she was sexually assaulted by a teacher.

In [Doe v. Taylor](#), a female student was sexually molested by her high school teacher. 15 F.3d at 445. The Fifth Circuit held that the teacher's actions *were* taken under color of state law. [Id.](#) at 452 n.4. The court wrote:

In this case, ... [the teacher] took full advantage of his position as Doe's teacher and coach to seduce her. He required Doe to do little or no work in the classroom and still gave her A's. He also spoke to one of Doe's other teachers about raising her grade in that class. [The teacher] was also Doe's basketball coach and he exploited that position as well. The first physical contact [the teacher] had with Doe was after a basketball game in November 1986 when he grabbed her and kissed her. [The teacher's] physical contact with Doe escalated thereafter. During the next several months [the teacher]

took Doe from his classroom to an adjoining lab room where he kissed and petted her. During that same period of time [the teacher] also met Doe in the school's fieldhouse where similar activity took place.

Id.

The court concluded that because “a ‘real nexus’ exist[ed] between the activity out of which the [Constitutional] violation occur[red] and the teacher's duties and obligations as the teacher,” the teacher's conduct was “taken under color of state law.” *Id.*

The Tenth Circuit reached the opposite conclusion in a case involving allegations of sexual assault of a student by a teacher. In *D.T. by M.T.*, a teacher molested a student over summer vacation, at the teacher's home, following a fundraising activity for a basketball camp that was not affiliated with the school. [894 F.2d at 1177](#). “It [was] uncontested in [the] case” that the teacher “was on summer ‘vacation’ ” and “had no duties or obligations owing to or functions to perform for the School District.” *Id.* at 1186. “His contract required only that he teach fifth grade and coach boys' basketball ... commencing late August and continuing to the end of May of each year.” *Id.* The school principal had “made it plain [to the teacher] that any and all activities associated with [the] summer basketball camps were not school related.” *Id.* As a result, the court concluded, the “events were the product of a private individual acting in his private capacity.” *Id.* (citation omitted). The student had failed to state a claim under [§ 1983](#).

This case is between *Doe v. Taylor* and *D.T.* and *Becerra*. Unlike the plaintiff in *Doe v. Taylor*, the Doe in this case does not allege that a sexual assault occurred on the school campus or at school functions, or that Doe received any favoritism on grades in the classroom. Unlike the plaintiffs in *D.T.* and *Becerra*, Doe was a student of the teacher who allegedly committed the assault. Doe has alleged that Guess-Mazock used her authority as Doe's assigned teacher to have Doe stay with her in the classroom after the rest of the class was dismissed. Doe alleges that Guess-Mazock “began to seduce Doe via Snapchat by sending seductive photos of herself appended with solicitous messages.” Although Doe does not allege whether these messages were sent while

Guess-Mazock and Doe were on or off school property, it is plausible that messages were sent during school hours. Doe similarly does not allege that Guess-Mazock and Doe had sex on school property, but does allege that “[s]ex occurred at different locations,” and provides only a few examples. Doe alleges that Guess-Mazock “exhibited explicit interest in him beyond what was appropriate for a teacher-student relationship,” so that “it was an open secret” among students on campus, suggesting that there plausibly was illicit contact on campus.

*8 When a teacher sends inappropriate messages to a student in her class, it is more than plausible to believe that that student would fear repercussion if he did not answer those messages, or attempted to cut off ties, compared to if “a total stranger [had] been contacting [him].” [Chivers v. Cent. Noble Cmty. Sch.](#), 423 F. Supp. 2d 835, 854 (N.D. Ind. 2006). Guess-Mazock’s “official interactions with [Doe] and [her] sexual pursuit [of Doe] constituted an ‘indivisible, ongoing relationship’ even though a significant amount of the sexual misconduct [allegedly] occurred after hours and off school grounds[.]” [Id.](#) at 854 (quoting [Doe v. Taylor](#), 15 F.3d at 461 (Higginbotham, J., concurring)). There was a sufficiently alleged nexus between Guess-Mazock’s position of trust and authority as Doe’s teacher, and Guess-Mazock’s violation of Doe’s bodily integrity to state a claim. Guess-Mazock’s motion to dismiss Doe’s [§ 1983](#) claim is denied.

2. State-Law Claims

Doe also asserts four state-law claims against Guess-Mazock of assault, battery, statutory rape, and intentional infliction of emotional distress. (Docket Entry No. 1, at 7). Guess-Mazock moves to dismiss these claims on both immunity and procedural grounds. Guess-Mazock argues that she is immune from suit under the Texas Education Code, because

[a] professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee’s position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive

force in the discipline of students or negligence resulting in bodily injury to students.

[TEX. EDUC. CODE ANN. § 22.0511\(a\)](#). Guess-Mazock argues that Doe’s alleged tort claims were “incident to or within the scope of [her] duties.”

Guess-Mazock also argues that dismissal is required on procedural grounds because, under Texas law, “before a person may sue a professional employee of a school district, such as a teacher, the claimant must first give written notice to the employee of the claim, reasonably describing the incident from which the claim rose.... [Doe] makes no such allegation that he provided notice to Guess-Mazock.” (Docket Entry No. 24, at 11) (citing [TEX. EDUC. CODE ANN. § 22.0513\(a\)](#)). Guess-Mazock also argues that Doe “made an irrevocable election of remedies when he filed suit on these claims and named [the school district] as a co-defendant,” because Texas law “immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit” if the plaintiff also sues the “governmental unit regarding the same subject matter.” (*Id.*, at 12 (citing [TEX. CIV. PRAC. & REM. CODE § 101.106](#))).

Finally, Guess-Mazock argues that Doe has failed to plausibly allege a claim of intentional infliction of emotional distress. Guess-Mazock does not challenge Doe’s claims of assault, battery, and rape. The court addresses Guess-Mazock’s immunity claim, before turning to her other arguments.

i. Immunity Under the Texas Education Code

“Whether [a teacher] is acting within the scope of [her] employment depends upon whether the general act from which [the] injury arose was in furtherance of the employer’s business and the accomplishment of the object for which the employee was employed.” [Gonzalez v. Johnson](#), No. 04-20-00516-CV, 2021 WL 4976562, at *2 (Tex. App. Oct. 27, 2021) (quoting [Chesshir v. Sharp](#), 19 S.W.3d 502, 505 (Tex. App. 2000)). The burden is on Guess-Mazock to establish that she was (1) “a professional employee of a school district”; (2) that the “challenged conduct was within or incident to the scope of [her] duties”; (3) that her “duties involved the exercise of discretion or judgment”; and (4) that

her “acts did not cause the plaintiff injury as a result of the use of excessive force in disciplining the plaintiff or negligence in disciplining the plaintiff.” *Doe v. S & S Consol. I.S.D.*, 149 F. Supp. 2d 274, 297 (E.D. Tex. 2001). The following cases demonstrate that Guess-Mazock was not acting within the scope of her employment when she purchased drugs for Doe and sexually assaulted him.

*9 In *Ashley G. v. Copperas Cove Indep. Sch. Dist.*, Case No. 19-cv-420, 2020 WL 7240392 (W.D. Tex. Dec. 9, 2020), parents of a fourteen-year-old son with autism sued three school administrators after the administrators allegedly assaulted their son. The assault occurred when M.G., the student, was called to the assistant principal's office after he was accused of stealing a snack from another student. *Id.* at *1. M.G. denied the allegation and tried to leave the office. “Upon being told to sit down repeatedly by [the assistant principal] while she blocked the door, M.G. pushed [the principal] out of the way and into a wall.” *Id.* at *2. “At this point, the first of two restraints on M.G. was initiated.” *Id.* Another assistant principal, Robert Turner, wrapped his arms around M.G. and “attempted to place M.G. in a standing restraint.” *Id.* Later, after M.G. started to kick Turner, Turner “guided M.G. to the ground by placing one knee on the ground while in the hug containment.” *Id.*

The parents brought a common-law assault claim against the assistant principals. The court held, however, that the assault claims were barred “by the statutory immunity under  [Tex. Educ. Code § 22.0511](#),” because “[i]t [was] within the scope of educators, especially principals and counselors, to address discipline and behavioral incidents of students,” and “[t]he restraint performed was an act of discretion under their duties.” *Id.*

In *Anderson v. Bessman*, 365 S.W.3d 119 (Tex. App. 2011), a group of faculty members of the University of Texas Medical Branch at Galveston sued the provost and several department chairs for wrongly firing them, asserting various tort claims. *Id.* at 121. The faculty members alleged that the administrators violated school procedures and “terminated faculty positions based on financial incentives and personal animosities, and had acted in bad faith in recommending their termination.” *Id.* at 123. The school administrators moved to dismiss the lawsuit, alleging that their decisions to terminate the faculty was well within their discretion.

The court agreed that the school administrators were immune from suit because they were acting in the scope of

employment when they fired the faculty members, even if the firing was alleged to be based on their own financial incentives and personal animosities. The alleged conduct underlying the tort claims—the school administrators firing faculty members—fell within the administrators' job duties, and was therefore within the scope of their employment.

Finally, in *Jackson v. Texas Southern University*, 31 F. Supp. 3d 884 (S.D. Tex. 2014), a Texas Southern University faculty member, Dr. Jackson, sued another faculty member, Dr. Adobo, for assault.² Dr. Jackson alleged that he was proctoring an exam with Dr. Adobo when Dr. Adobo physically assaulted him without provocation. Dr. Adobo argued that because the assault was within the scope of his employment, he was immune from suit. The court agreed. The court “[f]ound from the facts alleged ... that Dr. Adobo was acting in the scope of his employment in proctoring an exam as lawfully assigned by [Texas Southern University], substantially within the authorized time and space limits of the university's scheduling, even if he was motivated in part by personal animosity toward Dr. Jackson.” *Id.* at 888.

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The issue in *Anderson* and *Jackson* was whether the school administrators were immune under the Texas Tort Claims Act, which similarly provides that a government employee is immune if the lawsuit is “based on conduct within the general scope of that employee's employment,” among other criteria.  [Tex. Civ. Prac & Rem. Code Ann. § 101.106\(f\)](#).

These cases suggest that an employee is acting in the scope of his or her employment if he or she commits a tort while completing a job duty. In *Ashley G.*, the assistant principals allegedly assaulted a student while they were disciplining him. In *Anderson*, school administrators allegedly committed various torts when they fired faculty members. In *Jackson*, a faculty member allegedly assaulted another faculty member while he was proctoring an exam.

*10 The question is whether Doe has alleged that Guess-Mazock was performing her duties as a teacher when she allegedly assaulted, battered, and raped Doe. The court cannot conclude, based on the allegations, that Doe's injuries occurred “within” or “incident to” Guess-Mazock's duties as a teacher. There is no allegation that, for example, Guess-Mazock was communicating with Doe about school assignments when Guess-Mazock assaulted Doe. There is no allegation that Guess-Mazock was teaching Doe at the

time of the assault. There is no allegation that Guess-Mazock was working to advance the school's interests when Guess-Mazock sexually assaulted Doe off-campus.

“Because this is a 12(b)(6) motion, the [c]ourt cannot go beyond the pleadings in deciding” whether Guess-Mazock was acting within the scope of her employment, “[a]nd, as noted, immunity under § 21.0511 is an affirmative defense.” *Moreno*, 2012 WL 13029076, at *10. “Dismissal under Rule 12(b)(6) based on affirmative defense is appropriate only if the application of the defense is apparent on the face of the complaint.” *Id.* Doe's allegations thread a thin needle. The court finds that Doe has sufficiently alleged a nexus between Guess-Mazock's authority as a teacher and her sexual assault of Doe to plausibly support that Guess-Mazock was acting under color of state law for purposes of Doe's § 1983 claim. But the court also finds that Doe has also not alleged facts showing that the tort occurred incident to the scope of Guess-Mazock's duties as a teacher, as required for her to be entitled to immunity on Doe's state-law claims. Further discovery may reveal that one, or both, of these conclusions is inaccurate. But dismissal of Doe's state-tort claims on immunity grounds is improper under Rule 12(b)(6).

ii. Election-of-Remedies

In addition to her immunity argument, Guess-Mazock argues that Doe's state-law claims must be dismissed under the Texas Tort Claims Act because Doe “made an irrevocable election of remedies when he filed suit on these claims and named [the school district] as a co-defendant.” Guess-Mazock argues that the Texas Tort Claims Act “immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit” if the plaintiff also sues the “governmental unit regarding the same subject matter.”

The Texas Tort Claims Act's election-of-remedies requirement is irrelevant to this dispute, because the Texas Tort Claims Act does not apply to Doe's claims. The Act provides that “[a] government unit in the state is liable for:

- (1) Property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of employment if:

- (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

- (B) the employee would be personally liable to the claimant according to Texas law; and

- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. AND REM. CODE § 101.021.

Doe has not complained of personal injury proximately caused by the condition or use of tangible, personal, or real property, or the operation or use of a motor-vehicle. The Tort Claims Act's election-of-remedies does not apply to Doe's claims. See *Dallas Cnty. Mental Health v. Bossley*, 968 S.W.2d 339, 343 (1998).

iii. Intentional Infliction of Emotional Distress

Guess-Mazock also argues that Doe has not alleged the necessary elements of an intentional infliction of emotional distress claim. Guess-Mazock does not raise any similar argument about Doe's assault, battery, or rape claims. Guess-Mazock argues that Doe has not plausibly alleged an intentional infliction of emotional distress claim because he has not “pled any facts that establish any degree of severity of his alleged emotional distress suffered as a result of Guess-Mazock's actions,” because Doe “acknowledg[es] that his childhood and homelife were ‘turbulent and chaotic.’” (Docket Entry No. 24, at 13). Guess-Mazock appears to suggest that Doe could not suffer from severe emotional distress from her conduct, because he already experienced emotional distress at home. While the court finds that this particular argument is meritless, the court agrees that Doe's claim for infliction of emotional distress must be dismissed.

*11 The Texas Supreme Court has stated that a claim for intentional infliction of emotional distress is “first and foremost, a ‘gap-filler’ tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.” *Hoffman-La Roche, Inc. v. Zeltwanger*,

144 S.W.3d 438, 447 (Tex. 2004) (citing [Standard Fruit and Vegetable Co. v. Johnson](#), 985 S.W.2d 68 (Tex. 1998)).³ “Where the gravamen of a plaintiff’s complaint is really another tort, intentional infliction of emotional distress should not be available.” *Id.* (citing cases). Additionally, “when the substance of the complaint is covered by another tort, ‘a plaintiff cannot maintain an intentional infliction claim regardless of whether he or she succeeds on, or even makes, [an alternate] claim.’ ” *Miller v. Target Corp.*, 854 F. App’x 567, 569 (5th Cir. 2021) (quoting [Hoffman-La Roche, Inc.](#), 144 S.W.3d at 448).

³ The case on which Doe relies to argue that he has properly asserted an intentional infliction of emotional distress claim, [Doe v. Beaumont I.S.D.](#), 8 F. Supp. 2d 596 (E.D. Tex. 1998), predates *Standard Fruit*—the Texas Supreme Court case which held that a plaintiff must allege facts independent of another tort claim to support an intentional infliction of emotional distress claim.

Doe alleges that Guess-Mazock intentionally “subject[ed] Doe to sexual assault and abuse” which “constitute[d] ... intentional infliction of emotional distress.” (Docket Entry No. 1, at 7). As alleged, Doe’s intentional-infliction claim is not based on conduct separate from the conduct giving rise to his assault or statutory rape claims. See [Hoffman-La Roche](#), 144 S.W.3d at 450 (denying the plaintiff’s intentional-infliction claim because it was not “independent of her sexual harassment claim”); *Draker v. Schreiber*, 271 S.W.3d 318, 323 (Tex. App. 2008) (“[T]o maintain a claim for intentional infliction of emotional distress, [the plaintiff] was required to allege facts independent of her defamation claim.”). Doe’s intentional-infliction claim is dismissed, without prejudice, so that Doe may, if he can, amend his claim to allege facts sufficient to support an independent claim for intentional infliction of emotional distress.

iv. Required Notice Under the Texas Education Code

Finally, Guess-Mazock argues that the court should dismiss Doe’s state-law claim on procedural grounds because Doe did not provide her with required notice of his claims under [§ 22.0513 of the Texas Education Code](#). At the court’s June 28, 2022, hearing, and in his motion to dismiss response, Doe conceded that he did not provide Guess-Mazock with

adequate notice. The remedy is not dismissal, but abatement. See *Gray v. Fort Worth Indep. Sch. Dist.*, Case No. 4:09-cv-00225-Y (N.D. Tex. June 4, 2009) (Docket Entry No. 10) (“[S]ection 22.0513 requires such a notice, but provides that a court shall abate the suit if notice was not provided.”). The Texas Education Code provides that “[n]ot later than the 90th day before the date a person files a suit against a professional employee of a school district, the person must give written notice to the employee of the claim, reasonably describing the incident from which the claim arose.” [TEX. EDUC. CODE § 22.0513](#). The Code also provides that if “[a] professional employee of a school district against whom a suit is pending ... does not receive written notice,” that employee “may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending.” *Id.* The court, in turn, “shall abate the suit if the court, after a hearing, finds that the person is entitled to an abatement because notice was not provided as required by this section,” and that abatement will “continue[] until the 90th day after the date that written notice is given to the professional employee of a school district.” *Id.* [§ 22.0513\(c\)](#), (3).

*12 It is unclear whether Guess-Mazock is entitled to this notice, because she was no longer a school district employee when Doe filed suit. No “Texas state or federal case [has] analyz[ed] whether a Plaintiff must give pre-suit notice to a former employee under [TEX. EDUC. CODE § 22.0513](#).” (Docket Entry No. 41, at 1). Guess-Mazock argues that “the answer is clear” that notice is still required, because “the analysis is whether the challenged acts were by a professional employee, and not whether a defendant in a lawsuit is currently employed.” (*Id.*). She argues that as long as she committed the alleged acts while she was still a teacher in the Conroe School District, she is entitled to the protections, including procedural protections, afforded by the Texas Education Code.

The conservative approach is to give Guess-Mazock the notice and abatement she seeks, despite the resulting delay, and despite the facts that Guess-Mazock has already received the complaint, hired counsel, and timely filed a motion to dismiss. Still, the court, out of an abundance of caution, finds that abatement is required. Doe and Guess-Mazock must file a joint letter informing the court when Doe has provided Guess-Mazock with notice required under [§ 22.0513](#). Doe may move to reopen the case 90 days after he has provided Guess-Mazock written notice of his claims, and file an amended complaint at that time. See [TEX. EDUC. CODE § 22.0513\(d\)](#).

Because of the abatement, the court vacates its previous scheduling order deadlines only as they apply to Guess-Mazock. (Docket Entry No. 40). The deadlines remain in place as to the claims against the school district, except that Doe may have until August 22, 2022, to amend his complaint against the school district.

C. Snap, Inc.

Finally, Doe asserts three claims against Snap, Inc. First, Doe asserts a claim of “negligent undertaking.” (Docket Entry No. 1, at 10). Doe alleges that “Snapchat represents that it reports all instances of child sexual exploitation to authorities,” and as a result has undertaken a “duty ... to protect its young users.” (*Id.*). Doe alleges that Snap has represented “to advertisers that it undertakes to monitor content to prohibit bullying and explicit content,” and has created a host of anti-abuse measures designed to monitor the content shared on its platform, including “dedicated Safety and Support teams” and an “Abuse Engineering Team.” (*Id.*, at 11). Doe alleges that Snap breached its duty “to exercise reasonable care in performing its data-mining services and failing to intervene when an adult started sending sexually explicit messages and images to a minor.” (*Id.*). Doe alleges that Snap should be able to “extract[] sufficient data from the user to accurately determine, and target, a user’s age,” to identify when “minor users ... send and receive messages from adults on their Snapchat application.” (*Id.* at 11–12).

Second, Doe asserts that Snap “negligently designed” Snapchat “by allow[ing] users as young as 13 years old to create accounts” using false birthdates, “[b]y creating an environment where adults can interact with underage users with assurances that there will be no long-lasting evidence of those interactions,” and by creating a platform that deletes messages and images shortly after they are sent. Doe alleges that that Snap owes a duty to “use ordinary care in designing, maintaining, and distributing its products and services,” and that through these alleged design flaws, has “fostered an environment that draws in sexual predators and allows them to act with impunity.” (*Id.*, at 12).

Finally, Doe asserts a claim of “gross negligence,” alleging that Snap was “conscious[ly] indifferen[t] to ... the use of its product to foster the exploitation of a minor by an adult” by “marketing an application to minors that, by design, allows pedophiles to prey on them with apparent impunity.” (*Id.*, at 12–13).

*13 Snap argues that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, bars Doe’s three negligence claims, because “Section 230 immunizes interactive computer service providers like Snap from liability for its users’ content and any alleged failure to adequately monitor such content.” (Docket Entry No. 20, at 9). Snap also alleges that “even setting aside the dispositive issue of Section 230 immunity,” Doe “fails to plausibly allege any claim against Snap,” because Doe “does not, and cannot, allege that Snap was a proximate cause of [Doe’s] harm—i.e., that ‘but for’ the use of Snapchat, Mazock would not have abused him.” (*Id.*).

The court agrees that Doe’s claims against Snap are barred by the Communications Decency Act. Section 230 of the Communications Decency Act “provide[s] broad immunity ... to Web-based service providers for all claims stemming from their publication of information created by third parties.” *Doe v. Myspace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); see 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). “No cause of action may be brought and no liability may be imposed under any State or local law,” 47 U.S.C. § 230(e)(3), if the cause of action would “make internet service providers liable for information originating with a third-party user of the service,” *Diez v. Google, Inc.*, 831 F. App’x 723, 724 (5th Cir. 2020).

Neither party disputes that Snap is an “interactive computer service” provider protected by Section 230. The Communications Decency Act defines “interactive computer service” broadly to include “any information, service, system, or access software provider that provides or enables computer access by multiple users to a computer server ...” 47 U.S.C. § 230(f)(2). Multiple courts have held that Snap is an “interactive computer service” provider, because “[t]he Snapchat application permits its users to share photos and videos through Snap’s servers and the internet. Snapchat thus necessarily ‘enables computer access by multiple users to a computer server,’ and Snap, as the creator, owner, and operator of Snapchat, is therefore a ‘provider’ of an interactive computer service.” *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021); see also *Grossman v. Rockaway Tp.*, No. MRS-L-1173-18, 2019 WL 2649153, at *14 (N.J. Super. Ct. June 10, 2019); *Palmer v. Savoy*, No.

20-CV-94, 2021 WL 3559047, at *5 (N.C. Super. July 18, 2021).

The disputed issue is whether Doe's claims attempt to hold Snap liable for "[the] publication of information created by third parties." *Myspace, Inc.*, 528 F.3d at 418. If so, Doe's claims are barred by [Section 230](#). See *In re Facebook, Inc.*, 625 S.W.3d 80, 83 (Tex. 2021) ("[T]he uniform view of federal courts interpreting [Section 230](#) requires dismissal of claims alleging that interactive websites ... should do more to protect their users from the malicious or objectionable activity of other users.").

The Fifth Circuit considered allegations similar to Doe's in *Doe v. Myspace, Inc.*, 528 F.3d 413 (5th Cir. 2008). In that case, a parent alleged that Myspace had failed to take sufficient steps to prevent her 13-year-old daughter from lying about her age to create a personal profile on Myspace, which resulted in her being contacted and ultimately assaulted by a sexual predator. The Fifth Circuit held that the plaintiff's claim was barred by [Section 230](#), because the claim sought "to hold Myspace liable for its failure to implement measures that would have prevented [the child] from communicating with [a sexual predator]." *Id.* at 420. These allegations, the court explained, were "merely another way of claiming that Myspace was liable for publishing the communications." *Id.*

*14 The Third Circuit considered similar allegations in *Green v. Am. Online, Inc. (AOL)*, 318 F.3d 465 (3d Cir. 2003), and held that AOL was immune from the plaintiff's claims under [Section 230](#). In that case, the plaintiff sued AOL after he received a computer virus from a third-party and received derogatory comments from users in an online "chat room." *Id.* at 469. The plaintiff alleged that AOL had negligently failed "to properly police its network for content transmitted by its users." *Id.* at 470. The Third Circuit held that [Section 230](#) barred the plaintiff's claims because the plaintiff "attempt[ed] to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Id.* at 471.

The Ninth Circuit, however, recently held that Snap was not entitled to immunity on a negligent design allegation.

In *Lemmon v. Snap*, 995 F.3d 1085 (9th Cir. 2021), parents of two boys sued Snap after their sons were killed in a car crash. The crash occurred because the boys were driving at high speeds while attempting to take a picturing using a Snapchat filter that shows users the speed at which they are traveling. The parents alleged that Snap negligently designed Snapchat by creating "[t]he Speed Filter," among other alleged design flaws. *Id.* at 1091–92. Snap moved to dismiss on immunity grounds under [Section 230](#). The Ninth Circuit denied the motion, alleging that the parents' complaint did "not seek to hold Snap liable for its conduct as a publisher or speaker," but instead "treat[ed] Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect." Put differently, the parents' claim was not about the publication of content, it was about Snap's alleged negligence "as a product designer." *Id.* at 1092.

Doe's negligent undertaking, negligent design, and gross negligence claims all seek to hold Snap liable for messages and photos sent by Guess-Mazock. Doe's allegations are similar to those *Myspace* and *AOL*, and distinguishable from those in *Lemmon*. Doe's negligent undertaking claim alleges that Snapchat has failed to monitor content and messages sent between parties on its platform. Doe's gross negligence claim alleges that Snap is indifferent to sexual predators' use of the platform to message minors "with apparent impunity." Each of these claims seek to "fault[] [Snap] for information provided by [a] third part[y]"—messages and photos sent by Guess-Mazock to Doe. *Lemmon*, 995 F.3d at 1093. [Section 230](#) provides Snap with immunity from these claims.

Doe's negligent design claim is similar barred by the Communications Decency Act. Doe alleges that Snapchat is negligently designed because the application fails to prevent underage users from creating accounts using false birthdays, and because Snapchat allows messages to automatically delete after a short period of time. Doe alleges that these designs cause harm because they allow adults to inappropriately message children. While Doe's negligent design claim "may be couched as [a] complaint[] about" Snapchat's "design and operation ... rather than ... its role as a publisher of third-party content," Snapchat's "alleged lack of safety features is only relevant to [Doe's] injuries to the extent that such features would have averted wrongful communication via [Snap's] platforms by third parties."

 *In re Facebook, Inc.*, 625 S.W.3d at 93–94 (internal quotation marks and citations omitted). The crux of Doe's negligent design claim, like his negligent undertaking and gross negligent claims, is that Snapchat designed its product with features that allegedly created the opportunity for Guess-Mazock to send illicit messages to Doe. Doe's negligent design claim similarly aims to hold Snap liable for communications exchanged between Doe and Guess-Mazock. This claim is also barred by  Section 230.

*15 Doe concedes that “[i]f this Court follows the prevailing precedent” on  Section 230 immunity, then “the court must dismiss this case.” (Docket Entry No. 30, at 17–18). The court agrees. Because Snap is immune from Doe's claims, and because amendment would be futile, Snap's motion to dismiss is granted, with prejudice.⁴

⁴ Because the court finds that Doe's claims against Snap are barred by the Communications Decency Act, the court does not address Snap's arguments that Doe has failed to plausibly allege that Snap owed, and breached, a duty to Doe, or that Snap's conduct proximately caused Doe's harm.

IV. Conclusion

Guess-Mazock's motion to dismiss, Docket Entry No. 24, is granted in part and denied in part; the school district's motion

to dismiss, Docket Entry No. 11, is granted; and Snap's motion to dismiss, Docket Entry No. 20, is granted. Doe's claims against the school district and Doe's intentional infliction of emotional distress claim against Guess-Mazock are dismissed without prejudice, and with leave to amend. Doe's claims against Snap, Inc., are dismissed with prejudice, because amendment would be futile given Snap, Inc.'s broad immunity under  Section 230.

This case will proceed on two tracks. Doe may amend his complaint against the school district by **August 22, 2022**. The court's scheduling order, Docket Entry No. 40, remains in place for resolving Doe's claims against the school district. The court abates Doe's claims against Guess-Mazock until 90 days after Doe gives Guess-Mazock written notice of his claim, as required under the Texas Education Code. Doe and Guess-Mazock must file a joint letter indicating that Doe has provided Guess-Mazock with this required notice. Doe may file an amended complaint as to Guess-Mazock after the abatement period ends. The court will set a new scheduling order for resolving Doe's claims against Guess-Mazock after Doe files his amended complaint.

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2023 WL 4174061

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United States Court of Appeals, Fifth Circuit.

John DOE, THROUGH Next Friend
Jane ROE, Plaintiff—Appellant,
v.
SNAP, INCORPORATED, doing business
as Snapchat, L.L.C., doing business as
Snap, L.L.C., Defendant—Appellee.

No. 22-20543

FILED June 26, 2023

Appeal from the United States District Court for the Southern
District of Texas, USDC No. 4:22-CV-590

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Before Higginbotham, Graves, and Douglas, Circuit Judges.

Opinion

Per Curiam: *

* This opinion is not designated for publication. See
5th Cir. R. 47.5.

*1 John Doe, through his legal guardian, appeals the
district court's dismissal of his claims against Snap Inc.
("Snap"). He argues that in light of the allegations made
against Snap, it cannot claim immunity under § 230 of the
Communications Decency Act ("CDA"). See [47 U.S.C.
§ 230\(c\)\(2\)](#). However, for the reasons stated below, we
AFFIRM.

For nearly a year and a half, John Doe ("Doe"), a minor
child, was sexually assaulted by his high school science
teacher, Bonnie Guess-Mazock ("Mazock"). Mazock utilized

the social media platform Snapchat, which is owned by Snap,
to groom Doe by sending him sexually explicit content.
Eventually, Mazock began to meet with Doe outside of the
classroom to encourage and engage in sexual conduct. The
abuse was not uncovered until Doe overdosed on prescription
drugs that were either provided or financed by Mazock.

Doe eventually sued Mazock, the school district, and
Snap. Against Snap, Doe brought claims under Texas
law for negligent undertaking, negligent design, and gross
negligence. In response, Snap moved to dismiss the suit under
[Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), arguing
that *inter alia*, Doe's claims were precluded by the CDA.

Relying on this court's precedent, the district court granted
Snap's motion. It explained that this court and others have
held that § 230 of the CDA provides "immunity ... to Web-
based service providers for all claims stemming from their
publication of information created by third parties." [Doe
v. MySpace, Inc.](#), 528 F.3d 413, 418 (5th Cir. 2008). As Doe's
claims against Snap were based on Mazock's messages, the
district court found Snap immune from liability.

On appeal, Doe asks us to revisit this issue. He cites
several authorities in support of his contention that the
broad immunity provided by the CDA goes against its
plain text and public policy. However, as Doe himself
acknowledges, this argument is contrary to the law of our
circuit: "Parties complaining that they were harmed by a
Web site's publication of user-generated content ... may sue
the third-party user who generated the content, but not the
interactive computer service that enabled them to publish
the content online." [MySpace, Inc.](#), 528 F.3d at 419; *see
also* [Diez v. Google, Inc.](#), 831 F. App'x 723, 724 (5th Cir.
2020) (unpublished) (per curiam) ("By its plain text, [§
230](#) creates federal immunity to any cause of action that
would make internet service providers liable for information
originating with a third-party user of the service."). Because
we are bound by the decisions of prior panels until such time
as they are overruled either by an *en banc* panel of our court or
by the Supreme Court, *see* [Jacobs v. Nat'l Drug Intel. Ctr.](#),
548 F.3d 375, 378 (5th Cir. 2008), we AFFIRM the judgment
of the district court.

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2022 WL 877107

United States District Court, N.D. Texas, Dallas Division.

FEDERAL TRADE COMMISSION, Plaintiff,

v.

MATCH GROUP, INC., Defendant.

Civil Action No. 3:19-CV-2281-K

|

Signed 03/24/2022

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MEMORANDUM OPINION AND ORDER

[ED KINKEADE](#), UNITED STATES DISTRICT JUDGE

*1 Before the Court are: (1) Defendant Match Group, Inc.'s Motion to Dismiss ("Motion to Dismiss") (Doc. No. 20); (2) Plaintiff Federal Trade Commission's Motion to Exclude Matters Outside the Pleadings Pursuant to [Fed. R. Civ. P. 12\(d\)](#) ("Motion to Exclude") (Doc. No. 26); and (3) Plaintiff Federal Trade Commission's Motion for Leave to File Sur-Reply ("Motion for Leave") (Doc. No. 32). The Court has carefully considered each of the motions, the responses, the replies, the supporting appendices, the applicable law, and the relevant portions of the record.

For the reasons set forth in Section II, the Court **GRANTS in part and DENIES in part** Match Group, Inc.'s Motion to Dismiss. For the reasons set forth in Sections III and IV, the Court **DENIES** Plaintiff Federal Trade Commission's Motion to Exclude and Motion for Leave, respectively.

I. Factual and Procedural Background

Defendant Match Group, Inc. ("Match") is "the dominant online dating service provider in the United States" and it owns, operates, and controls Match.com. Compl. (Doc. No. 1) at 3, ¶¶10-11. Match "primarily generates revenue

on Match.com by selling subscriptions to consumers in 25 countries, including the United States." *Id.* Consumers of online dating services, such as Match.com, are given access to the service's database of other users to find a romantic partner. *Id.* at 4, ¶13. Consumers create profiles containing certain information about themselves, and it is these profiles which other users are able to view. *Id.* at ¶14. Consumers are able to communicate with one another through various means; on Match.com this includes "likes", "winks" (until May 2018), and personalized "emails". *Id.* at ¶13; 6, ¶20. The types of communications a consumer can send and also read depend upon whether they are a subscriber or not. *Id.* at ¶¶20-21.

Plaintiff Federal Trade Commission (the "FTC") alleges that online dating services such as those Match owns, operates, and controls, are "often misused to facilitate fraud or to promote dubious or unlawful products or services to consumers." *Id.* at ¶15. This includes romance scams such as gifting or loaning the culprit money, stealing the consumer's personal information, and obtaining through extortion compromising videos or pictures of the consumer. *Id.* at ¶15; 5, ¶19. These schemes have allegedly resulted in substantial injury to consumers of online dating services. *Id.* at ¶16. The FTC alleges that, between 2015 and 2017, consumers reported to the FTC and the Federal Bureau of Investigation losses totaling an estimated \$884 million. *Id.*

Match.com offers subscriptions in 1-, 3-, 6-, or 12-month packages, and all packages automatically renew. *Id.* at 5, ¶17. Consumers can also create a free "nonsubscriber" profile which gives them limited access to services. *Id.* Consumers using Match.com's services are not able to identify whether another user is a subscriber or nonsubscriber. *Id.* at ¶18. The FTC alleges that, from 2013 to mid-2018, nonsubscribers were unaware that "as many as 25-30 percent of Match.com members who registered each day were using Match.com to perpetrate scams." *Id.* at ¶19. The FTC alleges that Match knew, or suspected, certain users were engaging in fraud. *Id.* at 10, ¶36. Knowing that, Match allegedly used communications from these fraudulent accounts to induce nonsubscribers to purchase a subscription, touting the communications as romantic interest from a legitimate user, which then exposed these consumers to a "risk of falling victim to a romantic scam or other form of fraud" when accessing these fraudulent communications. *Id.* at 6-7, ¶¶22-26; 10, ¶34-37.

*2 The FTC also alleges that, until mid-2019, Match marketed a deceptive "match GUARANTEE" to users purchasing a six-month Match.com subscription service. *Id.*

at 11, ¶38. The “match GUARANTEE” promised these subscribers a free six-month subscription if they did not “meet someone special” during the paid six-month subscription. *Id.* at ¶39. Match “did not disclose that the guarantee is subject to any additional terms or conditions” even though several requirements set forth in “a lengthy ‘Program Rules’ section” must be satisfied in order to receive the guarantee. *Id.* at ¶¶40-43. The FTC alleges that few subscribers actually received a free six-month subscription because Match did not clearly state the requirements of the “match GUARANTEE” or the required process by which to claim it. *Id.* at 15-17, ¶¶46, 48, 51-52.

The FTC also alleges that Match has a confusing and complicated subscription cancellation process. Match.com subscriptions have a “negative option renewal”, meaning the subscription automatically renews and the subscriber is charged unless he affirmatively cancels the subscription. *Id.* at 17, ¶¶53-54. The cancellation process allegedly has “several steps”, including two pages of “survey questions”, consumers must complete before reaching the actual confirmation cancellation page. *Id.* at ¶¶55-56. The FTC alleges this practice has resulted in Match billing “thousands of consumers” for subscription auto-renewals “after they believed they effectively canceled their Match.com subscriptions.” *Id.* at 19, ¶58. The FTC also alleges Match has deceptive billing practices, in particular those related to Match.com billing disputes and access to paid-for subscription services or accounts. *Id.* at ¶¶61-63.

The FTC initiated action against Match directly in federal court. In filing this suit, the FTC alleges, generally, that Match violated [15 U.S.C. § 45\(a\)](#) by: (1) misleading users that “dating communications” were sent from legitimate user accounts when Match knew the account was fraudulent or flagged for review as set up by a third-party for illegitimate purposes; (2) exposing legitimate customers to fraud because Match failed to investigate these fake accounts before sending notification of those communications; (3) offering a “money back guarantee” that was deceptive; and (4) unfairly denying customers access to paid-for accounts in relation to billing disputes. The FTC also alleges that Match violated the Restore Online Shoppers’ Confidence Act (“ROSCA”) in (5) failing to provide a simple way for customers to cancel recurring charges. In its Complaint, the FTC seeks injunctive relief, disgorgement, restitution, monetary civil penalties, costs, and any other relief to which it is entitled. Match filed the instant Motion to Dismiss in response to the Complaint.

The FTC then filed its Motion to Exclude and Motion for Leave to file Sur-reply.

Before the Court ruled on those motions, Match filed a motion to stay the case pending the Supreme Court’s resolution of a key issue before the Court in this case—whether the Federal Trade Commission Act (the “Act”) permits the FTC to seek equitable monetary relief directly in federal court. *See generally* Mot. to Stay (Doc. No. 51). This Court granted the stay. *See* Order Staying Case (Doc. No. 54). The Supreme Court issued its decision in [AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n](#), — U.S. —, 141 S. Ct. 1341 (2021), on April 22, 2021. The Supreme Court held that Section 13(b) of the Act explicitly authorizes the FTC to seek injunctive relief in federal court, including, “in proper cases”, a “permanent injunction”, but this authorization does not extend to equitable monetary relief. [Id.](#) at 1344. The Act, as its currently written, does not authorize the FTC to obtain, or the courts to award, equitable monetary relief, including disgorgement and restitution. [Id.](#) at 1352.

*3 The Court turns now to the pending motions.

II. Match’s Motion to Dismiss Under Rule 12(b)(6)

A. Applicable Law

1. Rule 12(b)(6) Standard

In considering a Rule 12(b)(6) motion, a court must determine whether the plaintiff has sufficiently stated a claim upon which relief may be granted. [FED. R. CIV. P. 12\(b\)\(6\)](#). A well-pleaded complaint must allege facts upon which the claims are based and not merely recite the elements of a cause of action. [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555 (2007). The facts must be sufficiently alleged such that the “claim has facial plausibility” and is not merely “possible”. [Aschcroft v. Iqbal](#), 556 U.S. 662, 678 (2009). A plaintiff pleads a claim with facial plausibility when the “factual content ... allows the court to draw the reasonable inference that the defendant is liable.” *Id.* In other words, the alleged facts must nudge the plaintiff’s claims “across the line from conceivable to plausible.” [Twombly](#), 550 U.S. at 570. The Court “accept[s] all well-pleaded facts as true and view[s] those facts in the light most favorable to the plaintiff.” [Stokes v. Gann](#), 498 F.3d 483, 484 (5th Cir.

2007) (per curiam). The Court does not, however, “accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.” *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007) (quoting *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)).

The Court must generally determine a motion to dismiss for failure to state a claim based solely on the pleadings, including any attachments thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The Fifth Circuit also allows the district court to consider documents attached to the motion to dismiss when those documents “are referred to in the plaintiff’s complaint and are central to [the plaintiff’s] claim.” *Id.* at 498–99 (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

“Although dismissal under Rule 12(b)(6) is ordinarily determined by whether the facts alleged in the complaint, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings.” *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986); see also *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 470 (5th Cir. 2006) (“Although dismissal under rule 12(b)(6) may be appropriate on a successful affirmative defense, that defense must appear on the face of the complaint.”).

2. Section 13(b) of the Federal Trade Commission Act

Section 45(a) of the Act prohibits “[u]nfair methods of competition ... and unfair or deceptive acts or practices in or affecting commerce[.]” 15 U.S.C. § 45(a)(1). This section also empowers the FTC to take action against such prohibited conduct. *Id.* § 45(a)(2). The FTC is authorized to enforce the Act through the FTC’s own administrative proceedings and in court actions. *AMG Cap.*, 141 S. Ct. at 1346-47. Relevant to this case, the Act permits the FTC “in proper cases” to file an action directly in court seeking a permanent injunction. 15 U.S.C. § 53(b) (the “Section 13(b)”). When the FTC reasonably believes:

*4 (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC], and (2) that the enjoining thereof

pending the issuance of a complaint by the [FTC] and until such complaint is dismissed by the [FTC] or set aside by the court on review, or until the order of the [FTC] made thereon has become final, would be in the interest of the public—

The [FTC] by any of its attorneys designated by it for such purpose may bring suit in a district court of the United State to enjoin any such act or practice.... *Provided further*, That in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction.

Id.

3. Section 4 of the Restore Online Shoppers’ Confidence Act

Recognizing the importance of consumer confidence to online commerce, Congress enacted the Restore Online Shoppers’ Confidence Act (“ROSCA”) in response to finding “that the aggressive sales tactics many companies use against their online customers have undermined consumer confidence in the Internet and thereby harmed the American economy.” 15 U.S.C. § 8401. Section 4 of ROSCA makes it unlawful to charge a consumer for goods or services sold online using a “negative option feature” unless the seller: (1) provides clear and conspicuous disclosure of all material terms of the transaction before obtaining the consumer’s billing information; (2) obtains the consumer’s express informed consent before charging the consumer; and (3) provides a simple method for the consumer to stop recurring charges. *Id.* § 8403. “Negative option feature” is defined as, “in an offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.” 16 C.F.R. § 310.2(w).

B. Analysis

In its Motion to Dismiss, Match argues all five of the FTC’s claims must be dismissed. Match first contends the Court must dismiss Counts I-IV because the FTC cannot bring them in federal court under Section 13(b) which is premised on the FTC’s reasonable belief Match “is violating, or is about to violate” the law. Match asserts the FTC admits in its Complaint that the complained-of conduct has ceased and fails to allege specific facts that Match “is imminently resuming” the unlawful conduct. Next, Match contends

equitable monetary relief is not authorized under Section 13(b) because that provision authorizes only injunctive relief. Third, Match submits it is entitled to immunity for Counts I and II under the Communications Decency Act (“CDA”) which provides web-based service providers, like Match, immunity from liability for publishing third-party generated content. Finally, Match asserts the ROSCA claim fails as a matter of law because the FTC alleges only that Match's online method for cancelling a subscription is not simple. Because the FTC fails to allege Match's other five cancellation methods are also not simple, the Court must dismiss the ROSCA claim.

The FTC responds first that it does plausibly allege a claim against Match under Section 13(b) based on the “likelihood to recur” standard used by the Fifth Circuit, which the Court must apply rather than the Third Circuit standard Match submits. Next, the FTC contends it is entitled to seek equitable monetary relief under Fifth Circuit precedent and this Court should not apply the conflicting Seventh Circuit law on which Match relies. On the third point, the FTC argues the CDA does not bar Counts I and II because the FTC seeks to hold Match liable only for Match's own conduct and the resulting harm, not that of any third-party, and for its actions taken in “bad faith”. Finally, the FTC asserts it properly pled the ROSCA claim because it alleges conduct sufficient to find Match liable for a ROSCA violation. The FTC also contends that Match's argument and evidence regarding other available cancellation methods are not relevant at this stage. In its reply, Match maintains its arguments the FTC has not sufficiently pled any of its five claims and each must be dismissed.

*5 The Court has taken the well-pleaded facts as true and has viewed those in the light most favorable to the FTC as the plaintiff. The Court **denies** the Motion to Dismiss as to Counts I-IV on Match's argument that the FTC fails to allege plausible facts that Match “is violating” or “is about to violate” the law as required under Section 13(b).  *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 723 (5th Cir. 1982); *see FTC v. Neora LLC*, 552 F. Supp. 3d 628, *6 (N.D. Tex. 2021) (Lynn, CJ.) (“Regarding the FTC's pleading burden, to plead that a defendant ‘is violating, or is about to violate’ under § 13(b), the FTC need only allege practices ‘giving rise to a “fair inference of a reasonable expectation of continued violations” absent restraint.’”) (quoting  *Sw. Sunsites*, 665 F.2d at 723); *see also Neora*, 552 F. Supp. 3d at *7 (“Accordingly, simply because the Complaint contains allegations of past violations does not mean that the FTC has not sufficiently alleged that

similar violations are likely to reoccur. Instead, allegations of past violations must be assessed in [the] context of the FTC's other allegations, including the *Cornerstone Wealth* factors[.]”); *cf.*  *United States v. Cornerstone Wealth Corp., Inc.*, 549 F. Supp. 2d 811, 816-17 (N.D. Tex. 2008) (Fitzwater, CJ.) (listing non-exclusive factors the court should consider in whether to issue a § 13(b) permanent injunction based on past violations of the law).

The Court also **denies** the Motion to Dismiss as to Count V of the FTC's Complaint based on Match's alleged violation of ROSCA. The Court looks only to the allegations contained in the Complaint; argument or evidence of other cancellation methods Match might offer but which are not alleged in the Complaint are not properly considered by the Court on the Motion to Dismiss. The FTC sufficiently pled Count V with facial plausibility as the “factual content ... allows the court to draw the reasonable inference that the defendant is liable.”

 *Iqbal*, 556 U.S. at 678; *see also* 15 U.S.C. § 8403.

The Court turns now to the claims on which the Motion to Dismiss is **granted**.

1. Equitable Monetary Relief

In its Motion to Dismiss, Match asks the Court to find the FTC is not entitled to equitable monetary relief under § 13(b). The FTC argues in its Response such relief is permitted under Fifth Circuit caselaw and asks the Court deny Match's Motion to Dismiss this relief. Before the Court issued a ruling on the Motion to Dismiss, the Supreme Court granted certiorari to consider this exact issue and held that Section 13(b) does not authorize the FTC to seek, or a federal court to award, equitable monetary relief in an action filed directly in court.

 *AMG Capital*, 141 S. Ct. at 1344, 1352.

After issuance of the Supreme Court's decision, the parties filed a Joint Report with the Court explaining each party's position of the effect on this case. *See generally* Joint Report (Doc. No. 62). In that Joint Report, the FTC concedes the Supreme Court's *AMG Capital* decision “precludes this Court from awarding equitable monetary relief under Section 13(b)” which the FTC seeks in relation to Counts I-IV. Joint Report at 3. In light of the Supreme Court's holding in *AMG Capital*, the Court **grants** the Motion to Dismiss the FTC's claim for equitable monetary relief under Section 13(b) for Counts I-IV—the FTC has no authority to seek, and this Court is

not empowered to award, any equitable monetary relief. The Court, therefore, **dismisses with prejudice** the FTC's claim for monetary relief.

2. Counts I and II—Immunity under Section 230 of the Communications Decency Act

A defendant is entitled to immunity under the Communications Decency Act (the “CDA”) where: (1) the defendant is “a provider or user of an interactive computer service”; (2) the plaintiff's claims treat the defendant as a “publisher” of the allegedly damaging information; and (3) that information was “provided by another information content provider”. 47 U.S.C. § 230(c)(1). The CDA further provides that no liability attaches for any voluntary action taken in good faith by an interactive computer service provider “to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” *Id.* § 230(c)(2).

*6 In its Motion to Dismiss, Match contends it is entitled to immunity under § 230. Case law in the Fifth Circuit is well-established that dismissal under Rule 12(b)(6) may be appropriate where an affirmative defense appears clearly on the face of the complaint. *Clark*, 794 F.2d at 970 (“[A] claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings.”); *EPCO*, 467 F.3d at 470 (“Although dismissal under rule 12(b)(6) may be appropriate on a successful affirmative defense, that defense must appear on the face of the complaint.”). Courts in the Fifth Circuit have determined the affirmative defense at issue here, § 230 immunity, is an appropriate basis for dismissal under Rule 12(b)(6). *See, e.g., La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017) (court found defendant was entitled to § 230 immunity and dismissed plaintiff's claims with prejudice under Rule 12(b)(6)); *Hinton v. Amazon.com, dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014) (court found eBay was entitled to § 230 immunity and dismissed plaintiff's claims with prejudice under Rule 12(b)(6)); *Wells v. YouTube, LLC*, Civ. Action No. 3:20-CV-2849-BH, 2021 WL 2652966 (N.D. Tex. May 17, 2021), *adopting rec.*, 2021

WL 2652514 (June 28, 2021)(Scholer, J.) (court dismissed *pro se* plaintiff's claims with prejudice under Rule 12(b)(6) as barred by § 230 immunity); *Inge v. Walker*, Civ. Action No. 3:16-CV-0042-B, 2017 WL 4838981 (N.D. Tex. Oct. 26, 2017)(Boyle, J.) (on Rule 12(b)(6) motion, court dismissed with prejudice defamation claim against one defendant because defendant was immune under § 230 from any liability); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 8440858 (E.D. Tex. Jan. 18, 2006), *adopting rec.*, 2006 WL 3813758 (Dec. 27, 2006) (court dismissed plaintiff's claims against defendant with prejudice on Rule 12(b)(6) motion having found requirements for § 230 immunity appeared on face of complaint); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, Civ. Action No. 3:02-CV-2727-G, 2004 WL 833595 (Apr. 19, 2004)(Fish, CJ.) (court considered § 230 immunity on defendants' Rule 12(b)(6) motion but found defendants did not meet requirements for immunity on face of complaint); *cf. Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (“*MySpace II*”) (affirming district court's dismissal of plaintiff's claims, having construed defendant's Rule 12(b)(6) motion as Rule 12(c) motion, because defendant was entitled to § 230 immunity).

For the following reasons, the Court agrees with Match and finds Match is entitled to § 230 immunity for both Count I and Count II as that affirmative defense appears clearly on the face of the FTC's Complaint.

a. Count I—“Misrepresentation Regarding Users of Defendant's Service”

Match argues § 230 bars Count I because the FTC seeks to hold Match liable for content provided by third-parties and for acting as the publisher of third-party information. 47 U.S.C. § 230(c)(1). Match also contends it is immune from any liability arising from its efforts to conduct fraud review as asserted in Count I.

1) Immunity Under Section 230(c)(1)

a) *Provider of Interactive Computer Service*

For § 230(c) to apply, Match must be a provider of an “interactive computer service”. An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet....” *Id.* § 230(f)(2). Based on the briefing, it appears undisputed that Match is an “interactive computer service” provider for purposes of the CDA. Moreover, it is apparent from the Complaint that Match is an “interactive computer service” provider under the CDA. Compl. at 3, ¶10; 4, ¶12; *see also* [Beckman v. Match.com](#), No. 2:13-CV-97JCM-NJK, 2013 WL 2355512, at *3-4 (D. Nev. May 29, 2013) (finding Match to be an “interactive computer service” provider), *rev'd on other grounds*, 668 F. App'x 759 (9th Cir. 2016).

b) *Information from Another Information Content Provider*

An interactive computer service provider has immunity under the CDA as long as it is not also the provider for the content in question. [GW Equity LLC v. Xcentric Ventures LLC](#), Civ. Action No. 3:07-CV-0976-O, 2009 WL 62173, at *3 (N.D. Tex. Jan. 9, 2009)(O'Connor, J.) (citing [Carafano v. Metrosplash.com, Inc.](#), 339 F.3d 1119, 1123 (9th Cir. 2003)); *see also* [Google, Inc. v. Hood](#), 822 F.3d 212, 220 (5th Cir. 2016) (affirming “Congress’s grant of ‘broad immunity’ [under § 230] to internet service providers ‘for all claims stemming from their publication of information created by third parties,’ which we and other circuits have consistently given wide scope.”). The CDA defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3).

*7 In its Complaint, the FTC affirmatively alleges the advertisements Match sent were automatically generated when a communication was sent by one user to another. *See, e.g.*, Compl. at 6, ¶21; 7, ¶24; 9, ¶33. In support of Count I, the FTC alleges Match, “in numerous instances in connection with the advertising, marketing, promotion, offering for sale,

or sale of its online dating service, ... represented, directly or indirectly, expressly or by implication, that communications received by consumers using Match.com are from people interested in establishing a dating relationship with those consumers.” Compl. at 20-21, ¶68. But, “[i]n truth and in fact, in numerous instances,” these communications allegedly “are not from people interested in establishing a dating relationship with those consumers but are instead from fake accounts created by fraudsters to deceive consumers.” *Id.* at ¶69; *see id.* at 4, ¶¶15-16 (alleging user profiles are set up by “perpetrators” to carry out “romance scams”). Match allegedly “used these fraudulent communications to induce consumers to subscribe to Match.com” to view them and also to communicate with sender, a supposedly legitimate user. *Id.* at 6, ¶23; 8, ¶27. Instead of genuine romantic interest, new subscribers sometimes either found a profile that was unavailable (with no indication it was fraudulent) or accessed a fraudulent communication. *Id.* at ¶28. In its advertisements, Match allegedly did not disclose that the communication or user account was flagged or identified as fraudulent. *Id.* at ¶29. The FTC alleges “hundreds of thousands of consumers” purchased a Match.com subscription “after receiving a fraudulent communication.” *Id.* at 9, ¶32.

“[T]he immunity analysis turns on who was responsible for the specific harmful material at issue, not on whether the service provider was responsible for the general features and mechanisms of the service or content (such as advertisements) that might also have appeared on the service.” [Bates](#), 2006 WL 8440858, at *10. For Match to be the provider of the content at issue, the FTC must plausibly allege that Match “itself authored or created the content.” [LaTiejira](#), 272 F. Supp. 3d at 994. No matter how artfully pled, it is clear from the Complaint that the underlying communication created by a third-party, a Match.com user, is truly “the specific harmful material at issue,” not the automatically generated advertisement sent by Match.

The FTC alleges the advertisements themselves are deceptive because they incorrectly lead a consumer to believe a fraudulent communication was sent by a legitimate user seeking a romantic relationship and this misrepresentation induces the consumer to purchase a subscription. *See*, Compl. at 7, ¶24; 8, ¶26. The FTC does not allege that every advertisement was deceptive or that only fraudulent communications triggered an advertisement representing a user's romantic interest or including a subscription discount. In fact, the Complaint affirmatively (and repeatedly) asserts that these advertisements were *automatically* generated when

a communication was sent from one user (without reference to legitimacy of the account) to another user. *See, e.g.*, Compl. at 6, ¶21; 7, ¶24; 9, ¶33 (emphasis added). By the FTC's own allegations, the advertisement could be deceptive only in the instance that a fraudulent or flagged account sent the communication and not every advertisement was triggered solely by those communications.

Without those fraudulent communications, there could be no harm to these consumers. *cf. Jane Doe No. 1 v. Backpack.com, LLC*, 817 F.3d 12, 19-20 (1st Cir. 2016) (allegations treated defendant Backpack as publisher or speaker of third-party content where “there would be no harm to [plaintiffs] but for the content of the postings.”). But the FTC does not allege Match “created or developed” the fraudulent or flagged communication that triggered the automatic advertisement. *see LaTiejira*, 272 F. Supp. 3d at 994. Nor could the FTC make such allegations based on its other allegations that these fake accounts are created by “persons seeking to perpetrate scams.” *See, e.g.*, Compl. at 6, ¶22. It is the fraudulent or flagged communication that caused an advertisement to be deceptive based on these allegations and Match is not alleged to have had any hand in the creation of that content. *see Carafano*, 339 F.3d at 1124-25 (affirming that defendant Matchmaker.com could not be liable for fraudulent profile created by third party because it was that user, not Matchmaker.com, who supplied the information); *cf. Dryoff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (defendant did not “create or develop the posts that lead to Greer’s death”, it merely published the third-party content that injured Greer, and its recommendations and notifications are just tools, “not content in and of themselves.”).

*8 Website features such as recommendations and email notifications are “the type of content-neutral tools” that are used “to facilitate the communication and content of others.... [and] are not content in and of themselves.” *See, e.g., id.* at 1096-98. Again, the FTC affirmatively alleges the advertisements Match sent were generated automatically when one user sent a communication to another user. Compl. at 6, ¶23; 7, ¶24-25; 9, ¶33. The Court is not persuaded by the FTC’s attempt to distinguish *Dryoff* in arguing that these advertisements are not “content-neutral tools”. Just as in *Dryoff*, these automatically generated advertisements, as alleged by the FTC, are a tool used by Match to assist users in communicating with each other. *See id.* That the

advertisements allegedly include a message “touting” the communication was sent by a user having romantic interest and also a discount offer to “induce” a nonsubscriber to purchase a subscription package does not alter the analysis. The FTC “cannot plead around Section 230 immunity by framing these website features as content.” *Dryoff*, 934 F.3d at 1098. These automatically generated advertisements are not themselves content.

The FTC argues that the advertisements “deliberately withheld” the third-party content apparently inferring that because Match did not include or copy the communication into the advertisement, it is content created solely by Match which takes the advertisement outside the scope of § 230(c)(1) immunity. Although creative, this argument is not persuasive. It is without merit and legal support. *Cf. id.* (holding that Ultimate Software acted as a publisher through its recommendations of user groups and notifications of communications sent by users). The FTC cannot get around its own allegations which undoubtedly place third-party content at the core of Count I; without the communication from a fraudulent or flagged account, there can be no harm to any consumer. *cf. Backpack.com*, 817 F.3d at 19-20 (allegations treat Backpack as publisher or speaker of third-party content where “there would be no harm to [plaintiffs] but for the content of the postings.”).

As alleged in the Complaint, these advertisements are not content in and of themselves. Match used the advertisement to “help[] facilitate this user-to-user communication, but it did not materially contribute ... to the alleged unlawfulness of the content.” *Dryoff*, 934 F.3d at 1099.

*c) Publisher of Information from
Another Information Content Provider*

An interactive computer service provider is entitled to § 230 immunity if the plaintiff seeks to hold it liable as a publisher or speaker of information created by another information content provider, in other words a third-party. § 230(c)(1). Screening, blocking, monitoring, or editing allegedly harmful third-party content falls within “a ‘publisher’s traditional editorial functions,’ ” and a defendant is entitled to § 230 immunity for claims grounded in allegations of such conduct. *Bates*, 2006 WL 8440858, at *12

(quoting [Zeran v. Am. Online, Inc.](#), 129 F.3d 327, 330 (4th Cir. 1997)); accord [MySpace II](#), 528 F.3d at 420; [Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC](#), 521 F.3d 1157, 1170-71 (9th Cir. 2008) (“[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under [Section 230](#).”). The Fifth Circuit continues to affirm “Congress’s grant of ‘broad immunity’ [under [§ 230](#)] to internet service providers ‘for all claims stemming from their publication of information created by third parties,’ which we and other circuits have consistently given wide scope.” [Google](#), 822 F.3d at 220; see [MySpace II](#), 528 F.3d at 418 (“Courts have construed the immunity provisions in [§ 230](#) broadly in all cases arising from the publication of [third-party] user-generated content.”) (collecting cases); [Diez v. Google, Inc.](#), 831 F. App’x 723, 724-25 (5th Cir. 2020).

In Count I, the FTC seeks to hold Match liable for its advertisements that allegedly misrepresent the communication sent from a user “interested in establishing a dating relationship” with the consumer, but, “in numerous instances,” it was sent from an account set up by someone with nefarious motives. Compl. at 20-21, ¶¶68-69. Despite the FTC’s creative arguments to the contrary, the allegations ultimately rest on Match’s efforts, or conversely failures, to screen these fraudulent accounts and their communications, particularly with respect to automatically generated advertisements sent to nonsubscribers. and Match’s failure to disclose or warn of a fraudulent or flagged account to consumers. cf. [Herrick](#), 306 F. Supp. 3d at 590-91.

*9 “It would be impossible for service providers to screen each of their millions of postings for possible problems.” [Zeran](#), 129 F.3d at 331. The Court has already concluded the content at issue is created by third-parties, not Match. In truth, liability for Count I is predicated on alleged actions that Match took as a publisher performing traditional editorial functions, such as editing, screening, and removing content. See *id.*; [Dryoff](#), 934 F.3d at 1098 (“By recommending user groups and sending email notifications, [defendant] ... was acting as a publisher of other’s content.”); see also [MySpace II](#), 528 F.3d at 420 (claim based on MySpace’s alleged failure to implement measures to prevent minor user from communicating with adult user who sexually assaulted

her was simply “another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace’s role as a publisher of online third-party-generated content.”).

In its Response, the FTC cites [Anthony v. Yahoo! Inc.](#), 421 F. Supp. 2d 1257 (N.D. Cal. 2006) in support of its argument that [§ 230](#) does not apply to these “deceptive” advertisements. Resp. at 27 fn. 19. The FTC submits that the *Anthony* court “held that where an online dating service’s ‘manner of presenting the profiles—not the underlying profiles themselves—constitute fraud, the CDA does not apply.’” *Id.* (quoting [Anthony](#), 421 F. Supp. 2d at 1263). That court’s actual determination is not as broad as the FTC implies. The plaintiff in *Anthony* alleged defendant “Yahoo! sent ‘profiles of actual, legitimate former subscribers whose subscriptions had expired and who were no longer members of the service, to current members of the service.’” [Anthony](#), 421 F. Supp. 2d at 1263. The plaintiff specifically “allege[d] that Yahoo! *creates* false profiles, not merely fails to delete them[]” and that Yahoo! sent “users false profiles for the purpose of luring them into renewing their subscriptions.” [Id.](#) at 1262 (emphasis added). Based on those allegations, Yahoo! was not “‘the publisher or speaker’ of the profiles” even though they were created by third parties because the plaintiff alleged Yahoo! manufactured false profiles and also misrepresented profiles that it knew to be false or no longer active. [Id.](#) at 1262-63.

Although the FTC attempts to characterize Match’s conduct as akin to Yahoo! in *Anthony*, the FTC’s allegations are in no way similar. The FTC does not allege Match created or manufactured fraudulent accounts. *But see, e.g.*, Compl. at 5, ¶19; 6, ¶22. Furthermore, the FTC simply does not allege Match deliberately generated advertisements upon communications sent *only* from fraudulent or flagged user accounts for the purpose of selling advertisements. Here, the FTC challenges *automatically generated* advertisements sent by Match which, by the FTC’s own allegations, were triggered by any communication sent from one Match.com user to another. See, *e.g.*, Compl. at 6. The FTC does not allege that *every* advertisement was deceptive or that *every* communication which triggered an advertisement was deceptive. *But see, e.g.*, Compl. at 6 (alleges communications are sent from an illegitimate user “in many instances” and, between 2013 and 2016, more than half of certain communications were identified as

fraudulent.). The FTC also does not allege the advertisement's representation of romantic interest was included only when a flagged or fraudulent account was involved. In fact, the Complaint affirmatively (and repeatedly) asserts that these advertisements were *automatically* generated when a communication was sent from one third-party user (without reference to legitimacy of the account) to another user. *See, e.g.*, Compl. at 6, ¶21; 7, ¶24; 9, ¶33 (emphasis added). As alleged by the FTC, the advertisement could be deceptive only in the instance that a fraudulent or flagged account sent the communication and not every advertisement was triggered solely by those communications.

*10 The FTC also argues the advertisement “deliberately withheld” the third-party content. The FTC appears to infer that because Match did not include or copy the communication into the advertisement, it is then truly content created solely by Match which takes the advertisement outside the scope of § 230(c)(1). This argument is without merit and legal support. *cf. Dryoff*, 934 F.3d at 1098 (holding that Ultimate Software acted as a publisher through its recommendations of user groups and notifications of communications sent by users). As alleged in the Complaint, third-party content is most certainly at the heart of Count I because without it, there could be no harm to any consumer. *see Backpage.com*, 817 F.3d at 19-20 (allegations treat Backpage as publisher or speaker of third-party content where “there would be no harm to [plaintiffs] but for the content of the postings.”).

d) Conclusion

As alleged in the Complaint, the true basis for the FTC's claim is third-party content. *see La'Tiejira*, 272 F. Supp. 3d at 994; *Bates*, 2006 WL 8440858, at *11 (“In sum, because the [first amended complaint] affirmatively asserts that someone other than Defendant created and developed the particular unlawful and injurious photographs at issue in this case, those photographs as a matter of law constitute ‘information provided by another information content provider.’ ”); *GW Equity LLC*, 2009 WL 62173, at *3 (an interactive computer service provider has immunity under the CDA as long as it is not also the provider for the content in question). The automatically generated advertisements, as alleged by the FTC, are not content created by Match such that it is the information content provider. The FTC does not plausibly

allege Match materially contributed to the communications (or the user accounts sending them) which triggered the advertisements. At the end of the day, the FTC is seeking to hold Match liable for acting as a publisher of third-party content. *see Google*, 822 F.3d at 220 (affirming “Congress's grant of ‘broad immunity’ [under § 230] to internet service providers ‘for all claims stemming from their publication of information created by third parties,’ which we and other circuits have consistently given wide scope.”); *MySpace II*, 528 F.3d at 418; *see also Dryoff*, 934 F.3d at 1098 (“Section 230 immunity applies if the claims ‘inherently require[] the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.”) (quotations omitted). It is apparent from the face of the FTC's Complaint that Match is entitled to immunity under § 230(c)(1) for Count I.

2) Immunity Under Section 230(c)(2)

Section 230(c)(2) provides, in relevant part, that no interactive computer service provider may be liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene ... or otherwise objectionable[.]” § 230(c)(2). Because immunity under § 230(c)(1) applies, the Court need not reach the question of whether § 230(c)(2) also bars Count I. However, if the Court were to consider whether § 230(c)(2) immunity applies, Match is immune to the extent the FTC seeks to impose liability on Match for actions related to its fraud review process. *Id.*; *see also Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007) (“*MySpace I*”), *aff'd*, *MySpace II*, 528 F.3d 413 (“[T]he CDA also immunizes [interactive computer] services from liability based on efforts to self-regulate material.”).

b. Count II—Exposing Consumers to Risk of Fraud

In Count II, the FTC alleges Match “exposed consumers to the risk of fraud by providing recent subscribers access to communications that [Match] knew were likely to have been sent by persons engaging in fraud.” Compl. at 21,

¶71. The FTC alleges that Match's "actions cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition." *Id.* at ¶72. In support of this claim, the FTC alleges that Match "screens users that send communications through Match.com to identify users that are likely to be perpetrating romance scams or other frauds." *Id.* at 9, ¶33. The FTC alleges that, from 2013 through mid-2018, Match exposed nonsubscribers to a fraud risk through its automatically emailed advertisements of "communications from fraud-flagged users" allowing them access to fraudulent or flagged communications upon subscribing "while withholding [fraud-flagged communications] from subscribers until [Match] had completed its fraud review." *Id.* at 10, ¶34. The FTC alleges "[w]ithout this practice, the vast majority of these fraud-flagged Match.com users would never have been able to contact their intended recipients." *Id.* at ¶35. Because of this "practice", the FTC alleges Match "delivered millions of advertisements to consumers touting communications that [Match] knew to be sent by users likely engaging in fraud and that those consumers would not have received had they already been subscribers to Match.com." *Id.* at ¶37. The FTC alleges that consumers who subscribed to Match.com in order to view these communications "were placed at risk of falling victim to a romance scam or other form of fraud." *Id.*

*11 An interactive service provider has immunity under the (c)(2) exemption for voluntary actions taken in good faith to block or screen offensive material. § 230(c)(2).

Section 230(c)(2) "reflects Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all." *MySpace I*, 474 F. Supp. 2d at 850. It is apparent from the Complaint that the FTC seeks to hold Match liable for exposing nonsubscribers to potential fraud because they received notification of communications from fraud-flagged accounts before Match completed its fraud review process; in other words, the FTC challenges the fraud review process Match conducted for its subscribers as compared to nonsubscribers. Match is clearly entitled to immunity on this claim under § 230(c)(2). *See id.* ("[T]he CDA also immunizes such services from liability based on efforts to self-regulate material."); *cf. Herrick*, 306 F. Supp. 3d at 590 ("Herrick's claim that Grindr is liable because it failed

to incorporate adequate protections against impersonating or fake accounts is just another way of asserting that Grindr is liable because it fails to police and remove impersonating [or fake] content.").

The FTC tries to argue around the § 230(c)(2) exemption in asserting that liability arises from Match's "own bad faith conduct" which is "precisely the opposite of the 'good faith' the CDA protects." Resp. at 29. The FTC also argues that Match designed "its platform to funnel fraud-flagged communications towards its nonpaying members to generate subscriptions." *Id.* By its allegations in its Complaint, the FTC takes aim at the fraud review process Match performed with respect to communications sent to subscribers but that Match did not likewise perform or complete for those sent to nonsubscribers. *See, e.g., Compl.* at 10, ¶¶34-37. The FTC alleges Match withheld fraud-flagged communications from subscribers until a fraud review was completed, whereas Match's automatically generated advertisements notified nonsubscribers of the communication before the fraud review was done. *See, e.g., Compl.* at 10, ¶34. The FTC raises allegations of bad faith and a system "to funnel potentially fraudulent messages to Match.com users" for the first time in its Response. Resp. at 31. Nowhere in the Complaint does the FTC allege Match "developed a system" or "designed its platform to systematically peddle false advertisements." *Id.* at 29 & 31. The FTC cannot amend its Complaint in the Response to the Motion to Dismiss. *see Cody v. Allstate Fire & Cas. Ins. Co., Civ. Action No. 3:19-CV-1935-K*, 2021 WL 389768, at *7 (N.D. Tex. Feb. 3, 2021) (Kinkeade, J.) (citing *Skidmore Energy, Inc. v. KPMG LLP*, Civ. Action No. 3:03-CV-2138-B, 2004 WL 3019097, at *5 (N.D. Tex. Dec. 28, 2004)), *aff'd*, 19 F.4th 712 (5th Cir. 2021); *see Diamond Beach Owners Assoc. v. Stuart Dean Co., Inc., Civ. Action No. 3:18-CV-0173*, 2018 WL 7291722, at *4 (S.D. Tex. Dec. 21, 2018) ("[I]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time."). Also, allowing the FTC leave to amend its allegations on this point would be futile because Match is nevertheless entitled to immunity on Count II based on § 230(c)(1) as discussed *infra*. Moreover, as discussed at length in the analysis on Count I, the FTC has alleged the advertisements were automatically generated by a communication sent from one user to another, not just those sent from fraud-flagged user accounts. The FTC has pled its best case on this claim. *see Wells*, 2021 WL 2652966, at *6.

Even so, the FTC's argument that Match acted in "bad faith" is merely semantics. Based on its own allegations, the FTC challenges Match's conduct related to its internal efforts to review user accounts for being fake. The FTC seeks to impose liability on Match for failing to conduct or complete its "fraud review" process before sending nonsubscribers advertisements of fraud-flagged communications thereby allowing them access to those communications. "It would be impossible for service providers to screen each of their millions of postings for possible problems." [Zeran](#), 129 F.3d at 331. Congress chose to provide immunity for multiple reasons, including to avoid the "chilling effect" of service providers choosing to "severely restrict the number and types of messages" and "to encourage service providers to self-regulate the distribution of offensive material over their service." *Id.*; see [MySpace I](#), 474 F. Supp. 2d at 850 ("[S]ection [230(c)(2)] reflects Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all."). Match is entitled to immunity for liability stemming from its actions (or inaction) in reviewing user accounts sending communications. see [Herrick](#), 306 F. Supp. 3d at 590 ("Herrick's claim that Grindr is liable because it failed to incorporate adequate protections against impersonating or fake accounts is just another way of asserting that Grindr is liable because it fails to police and remove impersonating [or fake] content."). Count II is barred by [§ 230\(c\)\(2\)](#).

*12 Even if the Court agreed with the FTC that immunity under [§ 230\(c\)\(2\)](#) does not apply, which it does not, Match would still be entitled to immunity for this claim under [§ 230\(c\)\(1\)](#). In Count II, the FTC seeks to impose liability on Match for allegedly "expos[ing] consumers to the risk of fraud" in providing access to communications from third-party user accounts that were potentially fake. See Compl. at 21, ¶71. Such conduct goes to the heart of Match's "role as a publisher of online third-party-generated content."

[MySpace II](#), 528 F.3d at 420; see also [Bates](#), 2006 WL 8440858, at *10 ("The case law confirms that the immunity analysis turns on who was responsible for the specific harmful material at issue, not on whether the service provider was responsible for the general features and mechanisms of the service or other content (*such as advertisements*) that might have also appeared on the service.") (emphasis added). The Court's detailed analysis on [§ 230\(c\)\(1\)](#) immunity for

Count I, *supra*, applies equally here. Accordingly, Match is entitled to immunity on Count I under [§ 230\(c\)\(1\)](#).

c. Conclusion

"Courts have construed the immunity provisions in [§ 230](#) broadly in all cases arising from the publication of [third-party] user-generated content." [MySpace II](#), 528 F.3d at 418. No matter how artfully pleaded, the FTC is attempting to impose liability on Match for content created and developed by third-party users of Match.com in both Counts I and II. Based on the allegations in the Complaint, Match is acting as a publisher of third-party generated content and is entitled to immunity under [§ 230\(c\)\(1\)](#) on both Counts I and II. see [GW Equity](#), 2009 WL 62173, at *3 (an interactive computer service provider has immunity under the CDA as long as it is not also the provider for the content in question).

Furthermore, Match is entitled to immunity under [§ 230\(c\)\(2\)](#) on both Counts I and II for any actions related to its fraud review process of user accounts. [MySpace I](#), 474 F. Supp. 2d at 850 ("[T]he CDA also immunizes [interactive computer] services from liability based on efforts to self-regulate material."); see [Herrick](#), 306 F. Supp. 3d at 590 (defendant is entitled to immunity under [§ 230\(c\)\(2\)](#) for claims arising from alleged failure to protect plaintiff against fake accounts because it goes to efforts to police and remove fake content).

It is apparent from the face of the Complaint that Match is entitled to [§ 230\(c\)](#) immunity on both Counts I and II. Therefore, the Court **grants** the Motion to Dismiss and Counts I and II are **dismissed with prejudice**. see [La'Tiejira](#), 272 F. Supp. 3d at 981.

3. Leave to Amend

In a single sentence of its conclusory paragraph, the FTC ask the Court to "provide the FTC leave to amend any deficiencies the Court may find." It is well established that a party seeking to amend a pleading under Rule 15(a) need not always file a formal motion but the party must "give the court some notice of the nature of his or her proposed amendments" and support the request for leave to amend with "some specificity"

which is required. [Thomas v. Chevron U.S.A., Inc.](#), 832 F.3d 586, 590 (5th Cir. 2016). A plaintiff that simply “tack[s] on a general curative amendment request” in response to a motion to dismiss does not provide a sufficient basis for why the court should grant leave. [Goldstein v. MCI WorldCom](#), 340 F.3d 238, 254 (5th Cir. 2003). “[A] bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which the amendment is sought, *cf.* FED. R. CIV. P. 7(b)—does not constitute a motion within the contemplation of Rule 15(a).” [U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.](#), 336 F.3d 375, 387 (5th Cir. 2003) (quotation omitted).

The Fifth Circuit has “not provided strict guidelines as to what constitutes a sufficient request for leave to amend,” but that court has stated that “it is clear that *some* specificity is required.” *see* [Thomas](#), 832 F.3d at 590. A district court does not abuse its discretion in denying a plaintiff leave to amend where, as here, the plaintiff: (1) did not amend its complaint as a matter of right, (2) submitted a general curative request to amend its complaint in its response to the motion to dismiss, (3) did not submit a proposed amended complaint to the court, and (4) failed to provide “some specificity” to the court and defendant of the substance of its proposed amendment. [McKinney v. Irving Indep. Sch. Dist.](#), 309 F.3d 308, 315 (5th Cir. 2002). For those same reasons, the Court denies the FTC’s curative request to amend its Complaint. *See id.*; *see also* [Goldstein](#), 340 F.3d at 254-55 (affirming denial of motion for leave to amend where plaintiffs stated only that “Should this Court find that the Complaint is insufficient in any way, however, plaintiffs respectfully request leave to amend.”).

III. The FTC’s Motion to Exclude

*13 The FTC filed a Motion to Exclude (Doc. No. 26) arguing that Match improperly included matters outside the pleadings with its Motion to Dismiss. The FTC submits five categories of improper representations: (1) “Match claims the wrong entity was sued”; (2) “Match claims to have ‘permanently ceased’ its unlawful conduct”; (3) “Match claims to offer alternative simple cancellation methods”; (4) “Match’s claims about the FTC investigation”; and (5) “Match’s generic praising of its own business and business practices”. Mot. to Exclude at 3-8. In its response, Match agrees the Court should not rely on matters outside of the pleadings in deciding the Motion to Dismiss, and the FTC’s

Motion to Exclude should be denied because none of these matters must be considered by the Court in deciding the Motion to Dismiss. Resp. (Doc. No. 31) at 1.

The Court agrees with Match and **denies** this Motion to Exclude. Match does not ask the Court to take judicial notice of any matter, including within those five categories defined by the FTC. Furthermore, the Court did not take into consideration any of these “matters” identified by the FTC in deciding the Motion to Dismiss. *see* [Collins](#), 224 F.3d at 498 (court determines a motion to dismiss for failure to state a claim based solely on the pleadings, including any attachments thereto). For these reasons, the Court **DENIES** the Motion to Exclude.

IV. The FTC’s Motion for Leave to File Sur-Reply

The FTC seeks leave to file a sur-reply to Match’s Motion to Dismiss. *See* (Doc. No. 32). In this motion, the FTC contends that a sur-reply is necessary to: (1) address “a significant Fifth Circuit opinion” which raises “three issues critical to the Court’s decision in this case”; and (2) Match raised a new argument in its reply “regarding the pleading standard for Section 13(b)”. Mot. for Leave at 1. Match responds that the FTC is simply trying to get the “last word” on Match’s Motion to Dismiss because there is no new relevant legal authority and Match did not raise a new argument in its reply. Resp. (Doc. No. 35) at 1.

Sur-replies are highly disfavored and permitted only in very limited circumstances. *Campanor v. Cengage Learning, Inc.*, 3:09-CV-0921-M, 2010 WL 11618843, at *1 (N.D. Tex. June 10, 2010)(Lynn, J.); *see also* L.R. 7.1 (motion practice limited to response filed by nonmovant and reply filed by movant). A sur-reply may be permitted in the district court’s discretion where the movant asserts new legal theories or evidence in its reply. *Williams v. Aviall Servs. Inc.*, 76 F. App’x 534, 535 (5th Cir. 2003); *Zurich Am. Ins. Co. v. Centex Corp.*, 373 F. Supp. 3d 692, 695 (N.D. Tex. 2016)(Godbey, J.); *cf.* *Domain Vault LLC v. Rightside Grp., Ltd.*, 3:17-CV-0789-B, 2017 WL 4298133, at *1 (Sept. 28, 2017)(Boyle, J.) (sur-reply standard applies to motions other than just summary judgment). However, leave to file a sur-reply is not justified if the proposed sur-reply is simply a restatement of the arguments made in the party’s response. *see Williams*, 76 F. App’x at 535. Moreover, arguments in a reply are not “newly asserted” if they were raised in the motion or are within the scope of the arguments contained in the response. *Campanor*, 2010 WL 11618843, at *1; *accord Austin v.*

Kroger Tex. L.P., 3:11-CV-1169-B, 2016 WL 1322248, at *2 (Apr. 5, 2016)(Boyle, J.); cf. *Murray v. TXU Corp.*, 3:03-CV-0888-P, 2005 WL 1313412, at *4 (May 27, 2005)(Solis, J.) (“Assuming no new arguments were raised, the Court finds it nonsensical to believe a party must limit its research to previous briefings.”).

The Court has carefully considered the Motion for Leave with the attached proposed sur-reply, the response, and the reply. The Court is not persuaded by either of the FTC's proffered reasons that a sur-reply is warranted. Rather, the Court agrees with Match and concludes that the proposed sur-reply is nothing more than the FTC's attempt to get the “last word.” see *Murray*, 2005 WL 1313412, at *4 (“Plaintiff simply wants an opportunity to continue the argument.”). The Court **denies** the FTC's Motion for Leave

V. Conclusion

*14 The Court **grants** Defendant Match Group, Inc.'s Motion to Dismiss as to the claim for equitable monetary

relief in Counts I-IV. The Court also **grants** Defendant Match Group, Inc.'s Motion to Dismiss Counts I and II because Match is entitled to immunity under  47 U.S.C. § 230 of the Communications Decency Act, thus those claims are barred and **dismissed with prejudice**. Defendant Match Group, Inc.'s Motion to Dismiss is **denied** in all other respects. The Court **denies** Plaintiff Federal Trade Commission's Motion to Exclude. The Court also **denies** Plaintiff Federal Trade Commission's Motion for Leave to File a Sur-reply.

The Court hereby **lifts the stay** in this case.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 877107, 2022-1 Trade Cases P 82,047



Distinguished by [Doe #1 v. MG Freesites, LTD](#), N.D.Ala., February 9, 2022

765 Fed.Appx. 586

This case was not selected for publication in West's Federal Reporter.

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals, Second Circuit.

Matthew HERRICK, Plaintiff-Appellant,

v.

GRINDR LLC, KL Grindr Holdings Inc., [Grindr Holding Company](#), Defendants-Appellees.

18-396

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March 27, 2019.

Synopsis

Background: Harassment victim brought action against manufacturer of Internet-based dating application, alleging claims including negligence and products liability after victim's ex-boyfriend created profile on application to impersonate victim. The United States District Court for the [Southern District of New York](#), Caproni, J., dismissed action. Victim appealed.

Holdings: The Court of Appeals held that:

manufacturer was an "interactive computer services" that could be subject to immunity provision of Communications Decency Act (CDA);

products liability claims fell within scope of CDA immunity;

tort claims fell within scope of CDA immunity;

manufacturer's alleged failure to warn that its software could be used to impersonate and harass others was not cause of victim's damages;

under New York law, there was no material misrepresentation in manufacturer's terms of service; and

there was no evidence that a reasonable consumer would be misled by terms of service, as would be required to support deceptive business practices and false advertising claims under New York statute.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Amend the Complaint; Motion to Dismiss.

*588 Appeal from a judgment of the United States District Court for the Southern District of New York (Caproni, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court entered on February 14, 2018 is **AFFIRMED**.

Attorneys and Law Firms

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FOR APPELLEE GRINDR HOLDING COMPANY: [Moez M. Kaba](#) ([Allison Libeu](#), [Jonathan D. Guynn](#), on the brief), Hueston Hennigan LLP, Los Angeles, CA.

PRESENT: [DENNIS JACOBS](#), [REENA RAGGI](#), [RAYMOND J. LOHIER, JR.](#), Circuit Judges.

SUMMARY ORDER

Matthew Herrick appeals from a judgment of the United States District Court for the Southern District of New York

(Caproni, J.) dismissing his claims against Grindr LLC, KL Grindr Holdings, Inc., and Grindr Holding Company (collectively, “Grindr”). We assume the parties’ familiarity with the underlying facts, the procedural history, and the issues presented for review.

Grindr is a web-based “hook-up” application (“app”) that matches users based on their interests and location. Herrick was the victim of a campaign of harassment by his ex-boyfriend, who created Grindr profiles to impersonate Herrick and communicate with other users in his name, directing the other users to Herrick’s home and workplace. Herrick alleges that Grindr is defectively designed and manufactured because it lacks safety features to prevent impersonating profiles and other dangerous conduct, and that Grindr wrongfully failed to remove the impersonating profiles created by his ex-boyfriend.

Herrick filed suit against Grindr in New York state court in January 2017, asserting causes of action for negligence, deceptive business practices and false advertising, intentional and negligent infliction of emotional distress, failure to warn, and negligent misrepresentation. On the same day the complaint was filed, the state court *589 entered an *ex parte* temporary restraining order (“TRO”) requiring Grindr to disable all accounts impersonating Herrick. In February 2017, Grindr removed the case to the Southern District of New York. The district court subsequently denied Herrick’s motion to extend the state court’s TRO, concluding that each of his claims was either barred by Section 230 of the Communications Decency Act of 1996 (the “CDA”), 47 U.S.C. § 230, or failed on the merits.

Herrick filed an amended complaint in March 2017, adding causes of action for products liability, negligent design, promissory estoppel, fraud, and copyright infringement.¹ Grindr moved to dismiss on the grounds that all the claims other than copyright infringement are barred by CDA § 230, and that the misrepresentation-based claims fail on the merits. KL Grindr Holdings, Inc. (“KL Grindr”) and Grindr Holding Company (“Grindr Holding”) additionally moved to dismiss for lack of personal jurisdiction.

¹ Herrick does not appeal the dismissal of the copyright infringement claim.

On January 25, 2018, the district court granted the motions to dismiss. Herrick argues on appeal that the district court erred

in dismissing the majority of his claims as barred by the CDA; that he sufficiently pleaded the claims that were dismissed on the merits; and that the district court abused its discretion in denying leave to amend the complaint.

We review *de novo* a district court’s grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). [ACLU v. Clapper](#), 785 F.3d 787, 800 (2d Cir. 2015). We review the district court’s denial of leave to amend for abuse of discretion. [United States ex rel. Ladas v. Exelis, Inc.](#), 824 F.3d 16, 28 (2d Cir. 2016).

1. Under CDA § 230(c), “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). “In applying the statute, courts have broken it down into three component parts, finding that it shields conduct if the defendant [A] is a provider or user of an interactive computer service, [B] the claim is based on information provided by another information content provider and [C] the claim would treat the defendant as the publisher or speaker of that information.” [FTC v. LeadClick Media, LLC](#), 838 F.3d 158, 173 (2d Cir. 2016) (internal quotation marks and alterations omitted). “The majority of federal circuits have interpreted [§ 230(c)] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” [Almeida v. Amazon.com, Inc.](#), 456 F.3d 1316, 1321 (11th Cir. 2006) (internal quotation marks omitted).

A. Grindr is a provider of an interactive computer service.

Herrick suggests that the Grindr app is not an interactive computer service (“ICS”). The CDA defines an ICS as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server...” 47 U.S.C. § 230(f)(2). This definition “has been construed broadly to effectuate the statute’s speech-protective purpose.” [Ricci v. Teamsters Union Local 456](#), 781 F.3d 25, 28 (2d Cir. 2015).

As the district court observed, courts have repeatedly concluded that the definition of an ICS includes “social networking sites like Facebook.com, and online matching

services like Roommates.com and *590 Matchmaker.com,” which, like Grindr, provide subscribers with access to a common server. App. 198 (collecting cases). Indeed, the Amended Complaint expressly states that Grindr is an ICS, and Herrick conceded as much at a TRO hearing in the district court. Accordingly, we see no error in the district court’s conclusion that Grindr is an ICS.

B. Herrick’s claims are based on information provided by another information content provider.

Herrick argues that his claims are not based on information provided by another information content provider. He argues that while the information in a user’s Grindr profile may be “content,” his claims arise from Grindr’s management of its users, not user content.

Herrick’s products liability claims arise from the impersonating content that Herrick’s ex-boyfriend incorporated into profiles he created and direct messages with other users. Although Herrick argues that his claims “do[] not arise from any form of speech,” Appellant’s Br. at 33, his ex-boyfriend’s online speech is precisely the basis of his claims that Grindr is defective and dangerous. Those claims are based on information provided by another information content provider and therefore satisfy the second element of § 230 immunity. See Ricci, 781 F.3d at 27-28.

The claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress relate, in part, to the app’s geolocation function. These claims are likewise based on information provided by another information content provider. Herrick contends Grindr created its own content by way of the app’s “automated geolocation of users,” but that argument is undermined by his admission that the geolocation function is “based on real-time streaming of [a user’s] mobile phone’s longitude and latitude.” Appellant’s Br. at 32. It is uncontested that Herrick was no longer a user of the app at the time the harassment began; accordingly, any location information was necessarily provided by Herrick’s ex-boyfriend.

C. Herrick’s claims treat Grindr as the publisher or speaker of the offensive content.

As we have observed, “[a]t its core, § 230 bars ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content.’ ” LeadClick Media, LLC, 838 F.3d at 174 (quoting Jones v. Dirty World Entm’t Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014)). Therefore, allegations based on an ICS’s “refus[al] to remove” offensive content authored by another are barred by § 230. Ricci, 781 F.3d at 28.

Herrick argues that his claims are premised on Grindr’s design and operation of the app rather than on its role as a publisher of third-party content. However, as the district court observed, Grindr’s alleged lack of safety features “is only relevant to Herrick’s injury to the extent that such features would make it more difficult for his former boyfriend to post impersonating profiles or make it easier for Grindr to remove them.” App. 202. It follows that the manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and are barred by § 230. See, e.g., Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016) (claims based on the “structure and operation” of a defendant ICS were barred by § 230 because the lack of safety features reflects “choices about what content *591 can appear on the website and in what form,” which are “editorial choices that fall within the purview of traditional publisher functions”); Universal Comm’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007) (the defendant’s “decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting”).

Herrick argues that the failure to warn claim is not barred by § 230, relying on Doe v. Internet Brands, 824 F.3d 846 (9th Cir. 2016). But in Internet Brands, there was no allegation that the defendant’s website transmitted potentially harmful content; the defendant was therefore not an “intermediary” shielded from liability under § 230. Id. at 852. Herrick’s failure to warn claim is inextricably linked to Grindr’s alleged failure to edit, monitor, or remove the offensive content provided by his ex-boyfriend; accordingly, it is barred by § 230. See LeadClick Media, LLC, 838 F.3d at 174.

In any event, insofar as Herrick faults Grindr for failing to generate its own warning that its software could be used to impersonate and harass others, the claim fails for lack of causation. See [Estrada v. Berkel, Inc.](#), 14 A.D.3d 529, 530, 789 N.Y.S.2d 172 (2005) (observing that causation is element of failure to warn claim). Since, as the Amended Complaint admits, Herrick deactivated his Grindr account in 2015 (over one year before any impersonation or harassment), any purported failure to warn Herrick when he first downloaded Grindr in 2011 is unrelated to his ex-boyfriend's subsequent use of the app. In sum, there is no basis to infer from the Amended Complaint that Grindr's failure to warn caused Herrick's injury. The district court therefore did not err in dismissing the failure to warn claim.

To the extent that the claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress are premised on Grindr's allegedly inadequate response to Herrick's complaints, they are barred because they seek to hold Grindr liable for its exercise of a publisher's traditional editorial functions. See [LeadClick Media, LLC](#), 838 F.3d at 174. To the extent that they are premised on Grindr's matching and geolocation features, they are likewise barred, because under [§ 230](#) an ICS “will not be held responsible unless it assisted in the development of what made the content unlawful” and cannot be held liable for providing “neutral assistance” in the form of tools and functionality available equally to bad actors and the app's intended users. See [id.](#) at 174, 176 (citing [Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC](#), 521 F.3d 1157, 1168 (9th Cir. 2008) (in banc)).

* * *

For the foregoing reasons, Herrick's products liability claims and claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress are barred by CDA [§ 230](#), and dismissal on that ground was appropriate because “the statute's barrier to suit is evident from the face of the complaint.” [Ricci](#), 781 F.3d at 28.

2. Herrick argues that the district court erred in ruling that his claims for fraud, negligent misrepresentation, promissory estoppel, deceptive business practices, and false advertising fail to state a claim on the merits.

A. Fraud

“Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant *592 knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff.” [Wynn v. AC Rochester](#), 273 F.3d 153, 156 (2d Cir. 2001) (citing [Lama Holding Co. v. Smith Barney Inc.](#), 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 (1996)).

The district court determined that there was no material misrepresentation by Grindr because the allegedly misleading statements identified in the Amended Complaint--Grindr's Terms of Service and its “community values page”--do not represent that Grindr will remove illicit content or take action against users who provide such content, and the Terms of Service specifically disclaim any obligation or responsibility to monitor user content. On appeal, Herrick contends that the district court erred by considering language from Grindr's Terms of Service that was not incorporated into the Amended Complaint and reaffirms his contention that the community values page “fraudulently conveys that Grindr has the capacity to help.” Appellant's Br. at 41 (emphasis omitted).

Even if we were to assume that there were material misrepresentations in Grindr's Terms of Service and community values page and that Herrick reasonably relied upon them when he created a Grindr account in 2011, his claim would nevertheless fail for lack of causation. As the district court observed, Herrick deactivated his Grindr account in 2015 when he met his (now) ex-boyfriend, before any harassment began. Herrick therefore could have suffered the exact same harassment if he had never seen the Terms of Service or created a Grindr account; so his injury is not a “direct and proximate result of his reliance on [the alleged] misrepresentations,” [Lehman v. Dow Jones & Co.](#), 783 F.2d 285, 296 (2d Cir. 1986), and the district court therefore did not err in dismissing the fraud claim.

B. Negligent Misrepresentation

Herrick's negligent misrepresentation claim was dismissed on the same grounds as his fraud claim, and on the

additional ground that the Amended Complaint fails to allege a “special relationship” sufficient to sustain a claimed negligent misrepresentation. See [Anschutz Corp. v. Merrill Lynch & Co.](#), 690 F.3d 98, 114 (2d Cir. 2012). Since (for reasons adduced above) the Amended Complaint fails to plausibly allege that Grindr’s alleged misrepresentations are a proximate cause of Herrick’s injury, the district court did not err in dismissing the negligent misrepresentation claim. See [Laub v. Faessel](#), 297 A.D.2d 28, 30, 745 N.Y.S.2d 534 (2002).

C. Promissory Estoppel

The district court determined that Herrick’s promissory estoppel claim must be dismissed because it fails to allege a sufficiently unambiguous promise and fails to plausibly allege reasonable reliance. Herrick takes issue with these rulings, but even if we assume that the Amended Complaint plausibly alleges a promise and reasonable reliance, Herrick has failed to explain how his injury was “sustained ... by reason of his reliance” on the alleged promise. See [Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.](#), 804 F.2d 787, 793 (2d Cir. 1986). His promissory estoppel claim (like the claims for fraud and negligent misrepresentation) was appropriately dismissed for failure to plausibly allege causation.

D. Deceptive Business Practices and False Advertising

The district court determined that the claims for deceptive business practices and false advertising under [§ 593 New York General Business Law](#) (“GBL”) §§ 349 and [§ 350](#) fail because the Amended Complaint does not plausibly allege that a reasonable consumer would be misled by Grindr’s statements, and with respect to the false advertising claim, for the additional reason that it fails to allege reasonable reliance. On appeal, Herrick cites allegations regarding Grindr’s “promotional statements made on its website and its [Terms of Service] assuring potential users it would moderate abusive content and act to prevent harassment of its users.” Appellant’s Br. at 47.

As the district court observed, Grindr’s Terms of Service specify, *inter alia*, that “Grindr assumes no responsibility for

actively monitoring User Content for inappropriate content,” and that “Grindr does not endorse and has no control over the content of User Content submitted by other Users.” App. 210 (internal quotation marks omitted). Those disclaimers were properly considered by the district court in its ruling on the motion to dismiss. [Chambers v. Time Warner, Inc.](#), 282 F.3d 147, 152-53 (2d Cir. 2002) (“[T]he complaint is deemed to include ... any statements or documents incorporated in it by reference,” and “[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.” (internal quotation marks omitted)). In view of the disclaimers in the Terms of Service, Herrick has failed to plausibly allege that a reasonable consumer would be misled by Grindr’s statements, and the district court therefore did not err in dismissing the claims under [GBL §§ 349 and § 350](#). See [Stutman v. Chem. Bank](#), 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000).

3. The district court denied leave to amend the complaint for a second time on the ground that Herrick failed to attach a proposed amended complaint to his request for leave. In view of the fatal deficiencies in Herrick’s claims described above, we see no abuse of discretion in the district court’s denial of leave to amend. See [Credit Chequers Info. Servs., Inc. v. CBA, Inc.](#), 205 F.3d 1322 (2d Cir. 2000) (summary order) (denying motion to amend where “appellant has given no indication of what amendment is proposed that would state a valid claim for relief,” and therefore “failed to meet its burden of setting forth with particularity the grounds for supporting its motion”).

We have considered Herrick’s remaining arguments and conclude they are without merit.² The judgment of the district court is therefore **AFFIRMED**.

² Because the complaint must be dismissed in its entirety on the grounds of CDA immunity and failure to state claims, we need not address Grindr Holding’s and KL Grindr’s personal jurisdiction arguments.

All Citations

765 Fed.Appx. 586

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Appeal Filed by [NetChoice, LLC v. Bonta](#), 9th Cir., April 14, 2025

2025 WL 807961

Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.

NETCHOICE, LLC, doing
business as [NetChoice](#), Plaintiff,

v.

Rob BONTA, Attorney General of
the State of California, Defendant.

Case No. 22-cv-08861-BLF

|

Signed March 13, 2025

Synopsis

Background: Trade association of online businesses sued California Attorney General for declaratory and injunctive relief, seeking to invalidate the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, as facially violating the free-speech protections of the First Amendment and the California Constitution, as facially violating the Fourth Amendment, as facially void for vagueness under the First Amendment and the Due Process Clauses of the United States and California Constitutions, as facially violating the dormant Commerce Clause, and as facially preempted by the federal Children's Online Privacy Protection Act (COPPA) and Communications Decency Act (CDA). The United States District Court for the Northern District of California,

[Beth Labson Freeman, J.](#), [692 F. Supp. 3d 924](#), granted association's preliminary-injunction motion, holding that challenged provisions likely violated the First Amendment and were not severable. On Attorney General's appeal, the Court of Appeals, [113 F.4th 1101](#), affirmed in part, vacated in part, and remanded. On remand, trade association amended its complaint to assert both facial and as-applied challenges and to assert a new First Amendment theory, and association again moved for a preliminary injunction.

Holdings: The District Court, [Beth Labson Freeman, J.](#), held that:

association was likely to show that CAADCA, which was content-based in every application, could not survive strict scrutiny, and thus was facially invalid under the First Amendment;

association was likely to show that provision requiring content providers to enforce “published terms, policies, and community standards” was facially invalid, on its own, under the First Amendment;

association was not likely to show that provisions related to the use of a child's personal information were facially invalid, on their own, under the First Amendment;

association was not likely to show that provision barring a content provider's use of “dark patterns” or otherwise acting against children's interests was facially invalid, on its own, under the First Amendment;

association was likely to show that provision requiring content providers to enforce “published terms, policies, and community standards” was facially invalid and impermissibly vague, on its own, under the First Amendment;

association was likely to show that provisions related to use of a child's personal information were impermissibly vague under the First Amendment;

association was likely to show that provision barring a content provider's use of “dark patterns” or otherwise acting against children's interests was impermissibly vague under the First Amendment;

association was not likely to show that provision requiring content providers to estimate the age of a child user was impermissibly vague under the First Amendment;

association did not show that it was likely to prevail on its as-applied First Amendment challenge;

provisions related to the creation of a Data Protection Impact Assessment (DPIA) with respect to features likely to be accessed by children were functionally severable, but not volitionally severable, from other provisions under California law;

association did not show that it was likely to prevail on its Commerce Clause, COPPA, and CDA arguments; and

in addition to showing a likelihood of success on the merits of its First Amendment facial challenge, association showed that it would suffer irreparable harm absent an injunction, that the balance of hardships favored association, and that an injunction was in the public interest.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

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Validity Called into Doubt

 Cal. Civ. Code §§ 1798.99.28,  1798.99.29,  1798.99.30,  1798.99.31,  1798.99.32,  1798.99.33,  1798.99.35,  1798.99.40

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ORDER GRANTING PLAINTIFF'S SECOND MOTION FOR PRELIMINARY INJUNCTION

[Re: ECF 101]

[BETH LABSON FREEMAN](#), United States District Judge

*1 Committed to protecting children from harmful online products and services, the California State Legislature

enacted the California Age-Appropriate Design Code Act (“CAADCA” or “Act”), [Cal. Civ. Code §§ 1798.99.28 et seq.](#), for the stated purpose of protecting the “privacy, safety, and well-being” of children when they are online, *id.* § 1798.99.29. The Act was intended to take effect on July 1, 2024. *See id.* § 1798.99.30(d). Before that date, this suit was filed by Plaintiff NetChoice, LLC (“NetChoice”), a trade association comprised of internet companies such as Amazon, Google, Meta, and Netflix, challenging the CAADCA on constitutional and federal preemption grounds. *See* Compl., ECF 1. NetChoice also filed a motion for a preliminary injunction to enjoin enforcement of the CAADCA. *See* Pl.’s Mot. for Prelim. Inj., ECF 29. This Court granted the motion based on its determination that NetChoice was likely to succeed on its facial challenge to the Act under the First Amendment. *See* [NetChoice, LLC v. Bonta \(“NetChoice I”\)](#), 692 F. Supp. 3d 924 (N.D. Cal. 2023), *aff’d in part, vacated in part*, [113 F.4th 1101 \(9th Cir. 2024\)](#). The State appealed.

While the appeal was pending, the Supreme Court decided [Moody v. NetChoice, LLC](#), 603 U.S. 707, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024), which clarified the standard for analyzing a facial challenge to a statute under the First Amendment. Applying [Moody](#), the United States Court of Appeals for the Ninth Circuit concluded that this Court’s preliminary injunction order did not conduct the analysis required for a First Amendment facial challenge. *See* [NetChoice, LLC v. Bonta \(“NetChoice II”\)](#), 113 F.4th 1101, 1108 (9th Cir. 2024). The Ninth Circuit nonetheless affirmed the preliminary injunction as to one aspect of the CAADCA, the requirement that each covered business create a Data Protection Impact Assessment (“DPIA”) identifying, for each offered online service, product, or feature likely to be accessed by children, any risk of material detriment to children arising from the business’s data management practices. *See* [id.](#) at 1108-09. The Ninth Circuit also affirmed the injunction as to provisions of the CAADCA that are not grammatically severable from the DPIA requirement. *See* [id.](#) at 1108. The preliminary injunction was vacated in all other respects, and the case was remanded for further proceedings. *See* [id.](#)

On remand, NetChoice filed a first amended complaint (“FAC”), and a second motion for a preliminary injunction.

See FAC, ECF 100; Pl.’s Second Mot. for Prelim. Inj., ECF 101. The motion is opposed by the State. *See* Def.’s Opp’n., ECF 112. The Court has considered the motion, the State’s opposition, NetChoice’s reply, the parties’ supplemental briefs, the briefs filed by five sets of *amici curiae*, and the record evidence. The Court heard oral argument on January 23, 2025, and the State agreed to defer enforcement of the non-enjoined portions of the CAADCA until April 5, 2025, to allow the Court time to issue a reasoned decision.

NetChoice’s second motion for a preliminary injunction is GRANTED for the reasons discussed below.

I. BACKGROUND

*2 In recent years, “[s]ocial-media platforms, as well as other websites, have gone from unheard-of to inescapable.” [Moody](#), 603 U.S. at 716, 144 S.Ct. 2383. “They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments.” *Id.* “The questions of whether, when, and how to regulate online entities, and in particular the social-media giants, are understandably on the front-burner of many legislatures and agencies.” *Id.*

In general, government actors are better positioned than courts to address public policy issues relating to online platforms. *See* [Moody](#), 603 U.S. at 716, 144 S.Ct. 2383. However, “courts still have a necessary role in protecting those entities’ rights of speech, as courts have historically protected traditional media’s rights.” *Id.* The tension between legislative interests in regulating online entities and those entities’ First Amendment rights has generated lawsuits throughout the United States, many – like this one – brought by NetChoice. *See, e.g.*, [Moody](#), 603 U.S. 707, 144 S.Ct. 2383; [NetChoice v. Bonta](#), No. 5:24-CV-07885-EJD, — F.Supp.3d —, 2024 WL 5264045 (N.D. Cal. Dec. 31, 2024); [NetChoice, LLC v. Reyes](#), 748 F.Supp.3d 1105 (D. Utah 2024); [Computer & Comm’n’s Indus. Ass’n v. Paxton](#),¹ [747 F. Supp. 3d 1011 \(W.D. Tex. 2024\)](#); [NetChoice, LLC v. Fitch](#), 738 F. Supp. 3d 753 (S.D. Miss. 2024); [NetChoice, LLC v. Yost](#), 716 F. Supp. 3d 539 (S.D. Ohio 2024).

¹ NetChoice, LLC was the second named plaintiff in this suit.

The CAADCA was enacted for the purpose of regulating “business[es] that provide[] an online service, product, or feature likely to be accessed by children” (“coverage definition”). [Cal. Civ. Code §§ 1798.99.31\(a\)](#), [\(b\)](#). “Children” are “consumers who are under 18 years of age.” *Id.* § 1798.99.30(b)(1). The Act covers online businesses that meet certain criteria, including earning more than \$25 million in gross annual revenue or sharing at least 100,000 consumers’ information annually. *See id.* § 1798.140(d).² NetChoice alleges that the Act would apply to the vast majority of companies operating online, including major news outlets (New York Times, Wall Street Journal, ABC, CBS, Fox News, etc.), sports leagues, magazines, podcasts, social media services, online video games, and online self-help and suicide prevention services treating adults and children. *See* FAC ¶ 26. As used in the coverage definition, “online service, product, or feature” does not include telecommunications services, delivery or use of a physical product, or healthcare services. *See* [Cal. Civ. Code §§ 1798.99.30\(b\)\(5\)](#), [1798.99.40](#). The Act does not apply to government agencies or nonprofits. *See id.* § 1798.140(d).

² The definitions section of the California Consumer Privacy Act, [Cal. Civ. Code § 1798.140](#), is incorporated into the CAADCA unless otherwise specified, *id.* [§ 1798.99.30\(a\)](#).

The CAADCA imposes numerous affirmative requirements and prohibitions on covered businesses (collectively, “Regulatory Provisions”). *See* [Cal. Civ. Code §§ 1798.99.31\(a\)](#), [\(b\)](#). The Act’s affirmative requirements are set forth in [California Civil Code § 1798.99.31\(a\)](#), while its prohibitions are set forth in [California Civil Code § 1798.99.31\(b\)](#).

DPIA Requirement and Notice and Cure Provision

The cornerstone of the Act’s affirmative requirements “is the provision requiring online businesses to create a Data Protection Impact Assessment (DPIA) report identifying, for each offered online service, product, or feature likely to be accessed by children, any risk of ‘material detriment to children that arise from the data management practices of

the business.’” [NetChoice II](#), 113 F.4th at 1109 (quoting [Cal. Civ. Code §§ 1798.99.31\(a\)\(1\)](#)). Related provisions require covered businesses to create a plan to mitigate or eliminate the risks identified in the DPIA, *see* [Cal. Civ. Code § 1798.99.31\(a\)\(2\)](#), and to provide a list of all completed DPIAs (or the DPIAs themselves) to the California Attorney General upon request, *see* [id.](#) §§ 1798.99.31(a)(3)-(4).

*³ A covered business that is in substantial compliance with the DPIA requirement is entitled to written notice and a 90-day cure period before civil penalties may be assessed for violation of the Act. *See* [Cal. Civ. Code § 1798.99.35\(c\)](#). The CAADCA provides for civil penalties of up to \$2,500 per child for each negligent violation and up to \$7,500 per child for each intentional violation. *See* [Cal. Civ. Code § 1798.99.35\(a\)](#). Such penalties may be assessed and recovered in a civil action brought by the California Attorney General. *See id.*

The DPIA requirement is currently enjoined, as are other provisions of the CAADCA that the Ninth Circuit found to be not grammatically severable from the DPIA requirement, including the notice and cure provision. *See* [NetChoice, LLC v. Bonta](#), 113 F.4th at 1108. The enjoined provisions are [California Civil Code §§ 1798.99.31\(a\)\(1\)-\(4\)](#), [\(c\)](#), [1798.99.33](#), and [1798.99.35\(c\)](#) (collectively, “DPIA provisions”). *See* [id.](#)

Other Affirmative Requirements

In addition to complying with the DPIA requirement and related provisions, covered businesses must take the following actions enumerated in [California Civil Code §§ 1798.99.31\(a\)\(5\)-\(10\)](#):

- (5) Estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers.
- (6) Configure all default privacy settings provided to children by the online service, product, or feature to settings that offer a high level of privacy, unless the business can demonstrate a compelling reason that a different setting is in the best interests of children.

(7) Provide any privacy information, terms of service, policies, and community standards concisely, prominently, and using clear language suited to the age of children likely to access that online service, product, or feature.

(8) If the online service, product, or feature allows the child's parent, guardian, or any other consumer to monitor the child's online activity or track the child's location, provide an obvious signal to the child when the child is being monitored or tracked.

(9) Enforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children.

(10) Provide prominent, accessible, and responsive tools to help children, or if applicable their parents or guardians, exercise their privacy rights and report concerns.

 Cal. Civ. Code §§ 1798.99.31(a)(5)-(10).

Prohibitions

Covered businesses are prohibited from taking the following actions enumerated in  California Civil Code §§ 1798.99.31(b)(1)-(8):

(1) Use the personal information of any child in a way that the business knows, or has reason to know, is materially detrimental to the physical health, mental health, or well-being of a child.

(2) Profile a child by default unless both of the following criteria are met:

(A) The business can demonstrate it has appropriate safeguards in place to protect children.

(B) Either of the following is true:

(i) Profiling is necessary to provide the online service, product, or feature requested and only with respect to the aspects of the online service, product, or feature with which the child is actively and knowingly engaged.

(ii) The business can demonstrate a compelling reason that profiling is in the best interests of children.

(3) Collect, sell, share, or retain any personal information that is not necessary to provide an online service, product,

or feature ... unless the business can demonstrate a compelling reason that [doing so] is in the best interests of children likely to access the online service, product, or feature.

*4 (4) If the end user is a child, use personal information for any reason other than a reason for which that personal information was collected, unless the business can demonstrate a compelling reason that use of the personal information is in the best interests of children.

(5) Collect, sell, or share any precise geolocation information of children by default unless the collection of that precise geolocation information is strictly necessary for the business to provide the service, product, or feature requested....

(6) Collect any precise geolocation information of a child without providing an obvious sign to the child for the duration of that collection that precise geolocation information is being collected.

(7) Use dark patterns to lead or encourage children to provide personal information beyond what is reasonably expected to provide that online service, product, or feature to forego privacy protections, or to take any action that the business knows, or has reason to know, is materially detrimental to the child's physical health, mental health, or well-being.

(8) Use any personal information collected to estimate age or age range for any other purpose or retain that personal information longer than necessary to estimate age. Age assurance shall be proportionate to the risks and data practice of an online service, product, or feature.

 Cal. Civ. Code §§ 1798.99.31(b)(1)-(8).

Taking these provisions directly from a law enacted in the United Kingdom, the California Legislature left it to the courts to pass the CAADCA through the filter of our First Amendment. *See* 2022 Cal. Stat. ch. 320 (A.B. 2273), §§ (1)(d)-(e).

NetChoice's Complaint and First Motion for Preliminary Injunction

Before the CAADCA's original effective date of July 1, 2024, NetChoice filed this suit alleging six claims – four facial challenges to the Act on constitutional grounds and two challenges to the Act on federal preemption grounds.

See Compl. ¶¶ 76-122. NetChoice also filed a motion for a preliminary injunction to enjoin the Act's enforcement. See Pl.'s Mot. for Prelim. Inj. This Court granted the motion for a preliminary injunction on September 18, 2023, concluding that that NetChoice had shown it was likely to succeed on its facial challenge to the CAADCA under the First Amendment. See *NetChoice I*, 629 F. Supp. 3d at 961. The Court did not reach NetChoice's additional constitutional challenges to the Act or its challenges based on federal preemption. See *id.* at 962-63.

The Ninth Circuit affirmed the preliminary injunction only as to the DPIA provisions. See [NetChoice II](#), 113 F.4th at 1108. The Ninth Circuit found that the DPIA requirement triggers review under the First Amendment because it “compels speech by requiring covered businesses to opine on potential harm to children,” and because “it deputizes covered businesses into serving as censors for the State.” See [id.](#) at 1117-18. The Ninth Circuit found a facial challenge to the DPIA requirement appropriate, because “[i]n every application of the DPIA report requirement to a covered business, the DPIA report requirement raises the same First Amendment issues.” [Id.](#) at 1123. When determining what level of scrutiny applies to the DPIA requirement, the Ninth Circuit held that “[s]trict scrutiny is warranted because the DPIA report requirement (1) compels speech with a particular message about controversial issues; and (2) deputizes private actors into censoring speech based on its content.” [Id.](#) at 1118 (internal quotation marks and citations omitted). The Ninth Circuit concluded that the DPIA requirement is likely to fail strict scrutiny, because (among other reasons) “a disclosure regime that requires the forced creation and disclosure of highly subjective opinions about content-related harms to children is unnecessary for fostering a proactive environment in which companies, the State, and the general public work to protect children's safety online.” [Id.](#) at 1122.

*5 The Ninth Circuit vacated the preliminary injunction in all other respects. See [NetChoice II](#), 113 F.4th at 1108. Stating that most of the CAADCA's other provisions “by their plain language, do not necessarily impact protected speech in all or even most applications,” the Ninth Circuit determined that the record needed further development before a First Amendment facial challenge could be evaluated under the standard clarified in [Moody](#). [Id.](#) at 1122-23.

The Ninth Circuit found that this Court's order “not only failed to properly consider the facial nature of NetChoice's First Amendment challenges to other provisions of the CAADCA, *id.* §§ 1798.99.31(a)(5)-(7), (9), (b)(1)-(4), (7), but also erroneously overstated the likelihood that NetChoice would ultimately succeed in showing that the unconstitutional portions of the CAADCA are not severable from its valid remainder.” [Id.](#) at 1108. The case was remanded to this Court for further proceedings consistent with the Ninth Circuit's opinion. See [id.](#)

NetChoice's FAC and Second Motion for Preliminary Injunction

On remand, NetChoice filed the operative FAC, asserting the same six claims pled in the original complaint. See FAC ¶¶ 77-126. However, whereas the original complaint raised only facial challenges to the CAADCA, each of the claims of the FAC is asserted both facially and as applied to NetChoice's members. See *id.*

The FAC asserts claims for: (1) violation of the First and Fourteenth Amendments to the U.S. Constitution, and [Article I, Section 2\(a\) of the California Constitution](#) (facial and as applied); (2) violation of the Fourth Amendment to the U.S. Constitution (facial and as applied); (3) void for vagueness under the First Amendment and Due Process Clause of the U.S. Constitution, and [Article I, Section 7\(a\) of the California Constitution](#) (facial and as applied); (4) violation of the dormant Commerce Clause of the U.S. Constitution (facial and as applied); (5) preemption under the Children's Online Privacy Protection Act (“COPPA”), [15 U.S.C. §§ 6501 et seq.](#) (facial and as applied); and (6) preemption under Section 230 of the Communications Decency Act, [47 U.S.C. § 230](#) (“[Section 230](#)”) (facial and as applied).

NetChoice adds a new First Amendment theory challenging the Regulatory Provisions, [Cal. Civ. Code §§ 1798.99.31\(a\), \(b\)](#), on the basis that the Act's coverage definition is content-based and fails strict scrutiny, thus infecting all of the Regulatory Provisions and rendering them unconstitutional in every application. See FAC ¶ 25, Prayer ¶ 2.

NetChoice also filed a second motion for a preliminary injunction, which is the subject of this order.

II. LEGAL STANDARD

“The Supreme Court has explained that plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm absent preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest.” [Where Do We Go Berkeley v. California Dep’t of Transportation](#), 32 F.4th 852, 859 (9th Cir. 2022) (citing [Winter v. Nat. Res. Def. Council, Inc.](#), 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The Ninth Circuit employs a sliding scale approach to the four [Winter](#) factors, under which a strong showing on the balance of hardships may compensate for a lesser showing of likelihood of success. See [Where Do We Go Berkeley](#), 32 F.4th at 859.

In cases arising under the First Amendment, showing a likelihood of success on the merits generally results in a finding that the remaining [Winter](#) factors are satisfied as well. See [Am. Beverage Ass’n v. City & Cnty. of San Francisco](#), 916 F.3d 749, 757-58 (9th Cir. 2019). Where the plaintiffs “have a colorable First Amendment claim, they have demonstrated that they likely will suffer irreparable harm if the [law] takes effect.” [Id.](#) at 758. Next, a finding that the plaintiffs have raised serious First Amendment questions compels a finding that the balance of hardships tips sharply in their favor. See [id.](#) Finally, there is a “significant public interest in upholding First Amendment principles,” and “it is always in the public interest to prevent the violation of a party’s constitutional rights.” [Id.](#) (internal quotation marks and citations omitted).

III. DISCUSSION

*6 The parties devote the bulk of their arguments to the first [Winter](#) factor, likelihood of success on the merits. As NetChoice points out in its reply, the State effectively concedes the other three [Winter](#) factors. See Pl.’s Reply at 17, ECF 121; Def.’s Opp’n. at 7.

NetChoice contends that it is likely to succeed on the merits of its First Amendment claims; that it is entitled to injunctive relief on the ground that the previously enjoined DPIA provisions are not severable from the remainder of the CAADCA; and that it is likely to succeed on the merits of its

claims that the CAADCA is preempted by [Section 230](#) and COPPA and is invalid under the dormant Commerce Clause. The State disputes those contentions. The Court addresses them in turn.

A. First Amendment Claims (Claims 1 and 3)

In Claim 1 of the FAC, NetChoice asserts that the CAADCA violates the expressive rights of NetChoice and its members under the First Amendment, and in Claim 3, NetChoice asserts that the CAADCA is void for vagueness under the First Amendment.³ NetChoice argues that it is likely to succeed on the merits of those claims for four reasons. First, NetChoice contends that the CAADCA as a whole, through its coverage definition, is content-based on its face and fails strict scrutiny. Because the coverage definition necessarily applies in every application of the Act, NetChoice asserts that it is likely to succeed on its First Amendment facial challenge to the Act as a whole. Second, NetChoice contends that seven Regulatory Provisions are facially invalid, specifically those addressing: content policy enforcement, [Cal. Civ. Code § 1798.99.31\(a\)\(9\)](#); information use restrictions, [id.](#) §§ 1798.99.31(b)(1)-(4); dark patterns, [id.](#) § 1798.99.31(b)(7); and age estimation, [id.](#) § 1798.99.31(a)(5) (collectively, the “Individual Provisions”). Third, NetChoice asserts that the Individual Provisions are impermissibly vague in violation of the First Amendment. Fourth, NetChoice asserts that “[f]or the same reasons the challenged provisions are facially invalid, they are also invalid as applied to NetChoice’s members.” Pl.’s Second Mot. for Prelim. Inj. at 23. The State argues that NetChoice’s arguments are without merit and that NetChoice cannot demonstrate it is likely to succeed on the merits of its First Amendment claims.

³ Claim 1 also is brought under [Article I, Section 2\(a\) of the California Constitution](#), and Claim 3 also is brought under the Due Process Clause of the United States Constitution and under [Article I, Section 7\(a\) of the California Constitution](#). Those additional aspects of Claims 1 and 3 are not bases for NetChoice’s second motion for preliminary injunction, however, and so are not discussed here.

The Court begins by discussing First Amendment principles generally, as well as the standard for First Amendment facial challenges clarified in [Moody](#). The Court then takes up

NetChoice's four asserted bases for likely success on the merits of its First Amendment claims.

1. General Principles

“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws ‘abridging the freedom of speech.’ ” [Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 \(2015\)](#) (quoting U.S. Const., Amdt. 1). “Under that Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” [Id.](#) (quotation marks and citation omitted). Content-based restrictions on speech are presumptively unconstitutional and may be justified only if the government proves that they survive strict scrutiny, that is, that they are narrowly tailored to serve compelling state interests. See [Id.](#) at 163, 171, 135 S.Ct. 2218. Content-neutral laws are subject to intermediate scrutiny. See [City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 67, 142 S.Ct. 1464, 212 L.Ed.2d 418 \(2022\)](#). “[T]o survive intermediate scrutiny, a restriction on speech or expression must be narrowly tailored to serve a significant governmental interest.” [Id.](#) at 76, 142 S.Ct. 1464.

2. Standard for Evaluating First Amendment Facial Challenges

*7 In general, “a plaintiff cannot succeed on a facial challenge unless he establishes that no set of circumstances exists under which the law would be valid, or he shows that the law lacks a plainly legitimate sweep.” [Moody, 603 U.S. at 723, 144 S.Ct. 2383](#) (internal quotation marks, citation, and brackets omitted). “In First Amendment cases, however, [the Supreme Court] has lowered that very high bar,” substituting “a less demanding though still rigorous standard.” [Id.](#) “The question is whether a substantial number of the law’s applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” [Id.](#) (internal quotation marks, citation, and brackets omitted).

“[A] First Amendment facial challenge has two parts[.]” [NetChoice II, 113 F.4th at 1115](#). “The first step in the proper facial analysis is to assess the state laws’ scope.” [Moody, 603 U.S. at 724, 144 S.Ct. 2383](#). “What activities, by what actors, do the laws prohibit or otherwise regulate?” [Id.](#) The second step “is to decide which of the laws’ applications violate the First Amendment, and to measure them against the rest.” [Id.](#) at 725, 144 S.Ct. 2383.

The party bringing the First Amendment facial challenge has the burden to show the full scope of the law’s coverage; to identify which of the law’s applications are constitutionally permissible and which are not; and, ultimately, to show that the law “prohibits a substantial amount of protected speech relative to its plainly legitimate sweep.” [Moody, 603 U.S. at 744, 144 S.Ct. 2383](#) (internal quotation marks and citation omitted).

3. Facial Challenge to CAADCA based on Coverage Definition

NetChoice contends that the CAADCA’s coverage definition, limiting the Act’s application to “business[es] that provide[] an online service, product, or feature likely to be accessed by children,” is facially content-based, triggering strict scrutiny of the Act as a whole. Because this gateway coverage definition controls whether the Act applies in the first instance, and is facially content-based, NetChoice argues that the State must show that the burdens imposed by the Act’s Regulatory Provisions are the least restrictive means to achieve a compelling state interest. NetChoice asserts that the State cannot make that showing, and that as a result NetChoice is likely to succeed in demonstrating that the Act as a whole is facially invalid.

In opposition, the State argues that the coverage definition is content-neutral. The State also argues that NetChoice’s facial challenge to the Act as a whole does not comport with the Ninth Circuit’s opinion in this case or with the Supreme Court’s opinion in [Moody](#), because in the State’s view both of those opinions require evaluation of a First Amendment facial challenge to a statute on a provision by provision basis.

NetChoice did not raise this argument, that the gateway coverage definition is content-based, in its first motion for a preliminary injunction. Consequently, neither this Court

nor the Ninth Circuit had occasion to consider whether the coverage definition causes the CAADCA's Regulatory Provisions to be subject to strict scrutiny in every application. This Court takes up that analysis here.

a. CAADCA Regulates Protected Speech

NetChoice must demonstrate as an initial matter that the CAADCA, through its coverage definition, regulates protected speech and thereby implicates the First Amendment. See [NetChoice II](#), 113 F.4th at 1116-17 (determining as an initial matter whether “the DPIA report requirement regulates the speech of covered businesses and thus triggers review under the First Amendment.”). A court considering a First Amendment facial challenge “may assume without deciding that the statute ‘reaches some protected speech.’” [Arizona Attorneys for Crim. Just. v. Mayes](#), 127 F.4th 105, 110 (9th Cir. 2025) (quoting [United States v. Hansen](#), 599 U.S. 762, 784, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023)). The Court need not rely on an assumption in this case, however, because NetChoice has demonstrated that the Act regulates protected speech through its coverage definition.

*8 As noted, the CAADCA regulates “business[es] that provide[] an online service, product, or feature likely to be accessed by children.” [Cal. Civ. Code §§ 1798.99.31\(a\)](#), [\(b\)](#). NetChoice argues that the vast majority (if not all) of such online services, products, and features will involve expressive content, pointing to examples including articles and original videos regarding the entertainment industry published by IMDB, see Ciarella Decl. ¶¶ 2, 10, ECF 29-22; recommendations for and information about books offered by Goodreads, see Roin Decl. ¶¶ 2, 18, ECF 29-25; articles, user comments, and podcasts about technology and policy published by Techdirt.com, see Masnick Decl. ¶¶ 2, 8, ECF 29-29, Masnick Suppl. Decl. ¶ 6, ECF 101-5; and content on social media platforms, see Paolucci Decl. ¶¶ 2, 11, ECF 29-28, Paolucci Suppl. Dec. ¶ 5, ECF 101-6. In addition to its own evidence, NetChoice directs the Court to the declaration of the State's expert, Jenny Radesky, M.D., who discusses children's online access to video games, video streaming services, social media, and educational content. See Radesky Decl. ¶ 25-29, ECF 51-5. Those types of products and services traditionally have enjoyed First Amendment protections. See [Davis v. Elec. Arts Inc.](#), 775 F.3d 1172, 1176 (9th Cir.

2015) (recognizing that video games are entitled to protection under the First Amendment because they communicate ideas and social messages like protected books, plays, and movies).

In opposition, the State does not dispute that the Act's coverage definition implicates protected speech. Nor does the State identify any non-speech application of the CAADCA. Instead, the State contends that the coverage definition is content-neutral, and designed only to identify businesses that target children so that those businesses may be regulated. The Court addresses the latter contention below in the context of its discussion regarding the appropriate level of scrutiny.

b. The CAADCA is Content-Based on its Face

Having concluded that the CAADCA regulates protected speech, the Court must determine what level of scrutiny applies. The “crucial first step” in evaluating a First Amendment challenge to a law regulating expression is “determining whether the law is content neutral on its face.” [Reed](#), 576 U.S. at 165, 135 S.Ct. 2218. “A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained’ in the regulated speech.” [Id.](#) (quotation marks and citation omitted). A law is content-based on its face if it “applies to particular speech because of the topic discussed or the idea or message expressed.” [Id.](#) at 163, 135 S.Ct. 2218. A law that is facially content-neutral nonetheless will be considered a content-based regulation of speech if the law “cannot be justified without reference to the content of the regulated speech[.]” [Id.](#) at 164, 135 S.Ct. 2218. “Those laws, like those that are content based on their face, must also satisfy strict scrutiny.” [Id.](#)

In [Reed](#), the Supreme Court addressed a First Amendment challenge to a town's code regulating display of outdoor signs. See [Reed](#), 576 U.S. at 159, 135 S.Ct. 2218. The code treated signs differently based on their message. See [id.](#) For example, signs bearing ideological messages were given more favorable treatment than signs concerning a political candidate, which were themselves given more favorable treatment than signs announcing an assembly of individuals. See [id.](#) at 169, 135 S.Ct. 2218. The Supreme Court found

the disparate treatment to be “a paradigmatic example of content-based discrimination.” *Id.* Rejecting the town’s argument that the code was content-neutral because it did not endorse or discriminate against any particular ideas within each category of sign, the Supreme Court held that “a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 169, 135 S.Ct. 2218.

Applying *Reed* to the present case, this Court finds that the CAADCA’s coverage definition makes the Act content-based in every application. *See Cal. Civ. Code* §§ 1798.99.31(a),

(b). Businesses that provide online services, products, or features “likely to be accessed by children” are subject to heightened regulation, while other businesses are not. “Likely to be accessed by children,” means it is reasonable to expect, based on the following indicators, that the online service, product, or feature would be accessed by children:

*9 (A) The online service, product, or feature is directed to children as defined by the Children’s Online Privacy Protection Act (*15 U.S.C. Sec. 6501 et seq.*).

(B) The online service, product, or feature is determined, based on competent and reliable evidence regarding audience composition, to be routinely accessed by a significant number of children.

(C) An online service, product, or feature with advertisements marketed to children.

(D) An online service, product, or feature that is substantially similar or the same as an online service, product, or feature subject to subparagraph (B).

(E) An online service, product, or feature that has design elements that are known to be of interest to children, including, but not limited to, games, cartoons, music, and celebrities who appeal to children.

(F) A significant amount of the audience of the online service, product, or feature is determined, based on internal company research, to be children.

Cal. Civ. Code § 1798.99.30(b)(4). Application of these criteria to determine whether a particular business’s online offerings are likely to be accessed by children unavoidably requires an evaluation of content.

The State argues that the Act’s coverage definition is content-neutral even though its application requires examination of the content published by a particular business, relying mainly on *City of Austin*. *City of Austin* involved a city code that distinguished between on-premises and off-premises signs and imposed additional regulations on the latter. *See City of Austin*, 596 U.S. at 66, 142 S.Ct. 1464. The code defined an off-premises sign to be one “advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.” *Id.* The Supreme Court acknowledged that application of the code required an examination of the particular sign’s content, but found that such examination was required “only in service of drawing neutral, location-based lines.” *Id.* at 69, 142 S.Ct. 1464. Under those circumstances, the Supreme Court concluded that the code was content-neutral, observing that “[t]his Court’s First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.” *Id.* at 72, 142 S.Ct. 1464.

Seizing on that language, the State argues “[t]hat determining whether a business’s users are children may involve looking at the content of a product, service, or feature does not make the Act content based.” Def.’s Opp’n at 12, ECF 112. The State’s argument ignores the differences between the present case and *City of Austin*. The code addressed in *City of Austin* did “not single out any topic or subject matter,” because a sign’s substantive message itself was irrelevant to the code’s application. *City of Austin*, 596 U.S. at 71, 142 S.Ct. 1464. A sign was treated differently under the code based solely on whether it was located on the same premises as the thing being discussed, and the sign message mattered “only to the extent that it inform[ed] the sign’s relative location.” *Id.* In contrast, the CAADCA does single out particular subject matter, specifically, online content that is likely to be accessed by children. A business will be treated differently under the CAADCA if it provides online services, products, or features with design elements that are known to be of interest to children, such as games, cartoons, music, or other content that appeals to children, or the business knows that a significant portion of its audience is children. Thus, the present case is not like *City of Austin*, in which evaluation of speech

was necessary only to determine whether the sign was an on-premises sign or an off-premises sign.

*10 The State cites the Ninth Circuit's recent decision in [Project Veritas v. Schmidt](#), 125 F.4th 929 (9th Cir. 2025), in support of its position that the necessity to examine online content to apply the CAADCA does not make it content-based. [Project Veritas](#) involved a nonprofit media organization's challenge to an Oregon law prohibiting the recording of oral conversations without the knowledge of all participants. *See* [id.](#) at 937. The plaintiff frequently recorded individuals without their knowledge when engaged in undercover journalism; in the plaintiff's experience, an announcement that a conversation is being recorded may cause individuals to refuse to talk or to distort their story. *See* [id.](#) The plaintiff challenged the Oregon law under the First Amendment, both facially and as-applied. *See* [id.](#) at 939.

The Ninth Circuit determined that the Oregon statute regulates speech protected by the First Amendment. *See* [Project Veritas](#), 125 F.4th at 942. In deciding whether the statute is content-based or content-neutral, the Ninth Circuit summarized the holdings of [Reed](#) and [City of Austin](#) as follows: “a regulation of speech is facially content based ... if it targets speech based on its communicative content – that is, if it applies to particular speech because of the topic discussed or the idea or message expressed.” [Id.](#) at 950 (internal quotation marks, citations, and brackets omitted). Applying those standards, the Ninth Circuit found that the Oregon statute is facially neutral, as it merely limits the circumstances under which a conversation may be recorded, but does not draw distinctions based on the speaker's message. *See* [id.](#) at 950-51. Here, the CAADCA does draw distinctions based on the speaker's message, namely, whether it is content likely to be accessed by children, in which case the content is regulated to protect children's “best interests.” Given that critical difference between the two statutes, this Court finds the State's arguments based on [Project Veritas](#) to be unpersuasive.

The Court likewise finds the State's reliance on [Porter v. Martinez](#), 68 F.4th 429 (9th Cir. 2023), to be misplaced. In [Porter](#), the plaintiff brought a First Amendment challenge to a state law prohibiting the honking of a vehicle's horn

except when reasonably necessary to warn of a safety hazard.

See [id.](#) at 434. Even accepting the plaintiffs' “questionable assertion that honking to give a warning is a form of expression,” the Ninth Circuit found that the law did not distinguish “between honks intended to convey warnings and honks intended to convey other messages.” [Id.](#) at 441. The Ninth Circuit rejected the plaintiff's argument that the law was content-based on its face “because an officer must examine the content of the message that is conveyed to determine whether a violation has occurred.” [Id.](#) The Ninth Circuit held that an officer did not need to examine the “content” of a honk to determine whether the law had been violated; the officer only needed to “observe the traffic circumstances and determine if a safety risk is present.” [Id.](#) at 442. The facts of [Porter](#) are so different from those of the present case that the Court finds it to have little relevance.

The State suggests that the CAADCA is not content-based if its sole purpose is to regulate businesses that serve children. *See* Def.'s Opp'n at 12. As NetChoice points out, however, the Act does not regulate all businesses that provide services to children, only those that provide online content to children. Businesses that provide online content featuring “advertisements marketed to children,” “games,” “cartoons,” “music,” or “celebrities who appeal to children” fall within the Act's coverage definition. [Cal. Civ. Code](#) § 1798.99.30(b)(4). Businesses that provide other types of online services to children fall outside the Act's coverage definition. *See* [Cal. Civ. Code](#) §§ 1798.99.30(b)(5), [1798.99.40](#). The cornerstone of the Act, the DPIA requirement, directs businesses to determine whether children are exposed “to harmful, or potentially harmful, content on the online product, service, or feature.” *See* Cal. Civ. Code § 1798.99.3(a)(1)(B)(i) (emphasis added). The Supreme Court has held that where “[t]he overriding justification for the regulation is concern for the effect of the subject matter on young viewers,” the law “is not justified without reference to the content of the regulated speech.” [Playboy Ent. Grp., Inc.](#), 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (internal quotation marks and citation omitted). A law that “focuses only on the content of the speech and the direct impact that speech has on its listeners,” is “the essence of content-based regulation.” [Id.](#) (internal quotation marks and citation omitted). The Court therefore finds entirely

unpersuasive the State's suggestion that the Act is not content-based.

*11 NetChoice points to three recent cases in which statutes were held to be content-based on their face, and thus subject to strict scrutiny, because of their coverage definitions. See [Reyes](#), 748 F.Supp.3d at 1123; [Fitch](#), 738 F. Supp. 3d at 771; [Yost](#), 716 F. Supp. 3d at 558. In [Reyes](#), the district court held that because “the Central Coverage Definition facially distinguishes between ‘social’ speech and other forms of speech, it is substantially likely the Definition is content based[.]” [Reyes](#), 748 F.Supp.3d at 1123. The [Reyes](#) court went on to conclude that, “Accepting that the entire Act, through the Central Coverage Definition, is facially content based, strict scrutiny applies.” [Id.](#) In [Fitch](#), the district court found that a statute was content-based, and thus subject to strict scrutiny, because the coverage definition distinguished between digital service provider (“DSPs”) of “social interaction” (covered) and DSPs of “news, sports, commerce, [or] online video games” (not covered). [Fitch](#), 738 F. Supp. 3d at 771.

[Yost](#) addressed a statute with a coverage definition that limited the statute's application to websites “targeted at children, or reasonably anticipated to be accessed by children.” [Yost](#), 716 F. Supp. 3d at 554. The [Yost](#) court found the distinction between websites on the basis of whether they target children was not sufficient, standing alone, to make the statute content-based. See [id.](#) at 556.

The [Yost](#) court reasoned that “[t]here is no indication that the State disfavors the sort of content designed to appeal to children – cartoons and the like.” [Id.](#) However, the [Yost](#) court determined that the statute's exclusion from the coverage definition of two categories of websites – product review websites and “widely recognized” media outlets – were “easy to categorize as content based.” [Id.](#) at 557-58. By crafting the coverage definition to exclude product review websites and widely recognized media outlets, the State was “favoring engagement with certain topics, to the exclusion of others,” which was “plainly a content-based exception deserving of strict scrutiny.” [Id.](#) at 558. Thus, while the [Yost](#) court declined to find the statute's coverage definition to be content-based solely because it was limited to

websites targeting children, the [Yost](#) court ultimately did find the coverage definition to be content-based because of its exclusions of certain categories of websites. See [id.](#) Based on that content-based coverage definition, the [Yost](#) court went on to apply strict scrutiny to the statute as a whole. See [id.](#)

After the hearing in the present case, NetChoice filed a statement of recent decision advising the Court of another decision finding a statute to be content-based on its face because of its coverage definition. See [Students Engaged in Advancing Texas v. Paxton \(“SEAT”\)](#), No. 1:24-CV-945-RP, --- F.Supp.3d ---, 2025 WL 455463 (W.D. Tex. Feb. 7, 2025). [SEAT](#) involved a statute that distinguished between DSPs based on whether they allowed users to interact with each other socially. A DSP that did so but “primarily function[ed] to provide” access to news or commerce was unregulated, while an identical DSP that “primarily function[ed] to provide” updates on what a user's friends and family were doing was regulated. [Id.](#) at ---, 2025 WL 455463 at *10. Relying on [Fitch](#) and [Yost](#), the [SEAT](#) court concluded that strict scrutiny applied “because the law regulate[d] DSPs based on the content of their speech and the identity of the speaker.” [Id.](#) Addressing the same statute in a companion case, the [SEAT](#) court found in [Computer & Commc'ns Indus. Ass'n](#) that the content-based coverage definition required strict scrutiny of all substantive provisions. See [Computer & Commc'ns Indus. Ass'n](#), 747 F. Supp. 3d at 1034-35.

In [Reyes](#), [Fitch](#), [Yost](#), [SEAT](#), and [Computer & Commc'ns Indus. Ass'n](#), the district courts found the statutes they addressed to be content-based on their face in light of distinctions drawn by their coverage definitions.

The State argues that [Reyes](#), [Fitch](#), and [Yost](#) are distinguishable from the present case, because they addressed statutes that specifically regulated social media companies, and the courts' decisions were largely based on differential treatment between “social” speech and other speech. The State argues that the CAADCA does not distinguish between social speech and other speech, but rather applies to all types of companies that produce all kinds of content likely to be

accessed by children. Nothing in [Reyes](#), [Fitch](#), and [Yost](#) suggests that their holdings are limited to statutes governing social media companies. The Court reads those decisions to stand for the proposition that where a statute's gateway coverage definition divides the universe into covered and uncovered business based on the type of content they publish, those statutes are content-based and subject to strict scrutiny.

*12 For example, in [Reyes](#), the district court concluded that the statute at issue was content-based because “the Act's Central Coverage Definition divide[d] the universe of internet platforms into social media services, defined as websites or applications that ‘allow users to interact socially with each other,’ and other internet platforms, such as platforms for ‘news, sports, commerce, [and] online video games.’ ” [Reyes](#), 748 F.Supp.3d at 1122. In the present case, the coverage definition divides the universe of businesses into those that publish content likely to be accessed by children and those that publish content not likely to be accessed by children. The fact that the dividing line is drawn differently does not render the CAADCA content-neutral. To the extent the [Yost](#) court found that drawing a line based on the likelihood that content will be accessed by children was not content-based, this Court respectfully disagrees.

The State argues that the CAADCA is not intended to regulate any particular expressive content, but rather is intended to protect children from harm. *See* Def.'s Opp'n at 12. In essence, the State argues that it may burden speech directed to, or likely to be accessed by, children because its intentions are good. *See id.* (asserting that in order to remediate harms to children, “regulate[] businesses that serve children, irrespective of what sort of content they host.”). However, “[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” [Reed](#), 576 U.S. at 165, 135 S.Ct. 2218. “No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” [Brown](#), 564 U.S. at 794, 131 S.Ct. 2729 (citations omitted). “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a

legislative body thinks unsuitable for them.” *See id.* at 794, 131 S.Ct. 2729 (internal quotation marks and citation omitted). Accordingly, the State's intentions in enacting the CAADCA cannot insulate the Act from the requirements of the First Amendment.

In summary, this Court finds that the CAADCA's coverage definition is content-based. The Court also finds persuasive the reasoning of [Reyes](#), [Fitch](#), and [Yost](#) that if a statute's gateway coverage definition is content-based, the statute as a whole is subject to strict scrutiny because the coverage definition applies in all applications of the statute. *See id.*, 748 F.Supp.3d at 1123 (“Accepting that the entire Act, through the Central Coverage Definition, is facially content based, strict scrutiny applies.”); [Fitch](#), 738 F. Supp. 3d at 771 (finding that the statute's coverage definition “makes the Act content-based, and therefore subject to strict scrutiny”); [Yost](#), 716 F. Supp. 3d at 558 (“Having concluded that NetChoice is likely to succeed on its argument that the Act is a content-based regulation, this Court considers whether the Act is likely to fail strict scrutiny.”).

c. Strict Scrutiny Applies to the Regulatory Provisions as a Whole

The parties disagree as to how strict scrutiny is to be applied. NetChoice argues that once it has established that the CAADCA is content-based, the burden shifts to the State to show that the Act's Regulatory Provisions, collectively, are narrowly tailored to achieve a compelling state interest. The State contends that the standard articulated by the Supreme Court in [Moody](#), 603 U.S. at 724-25, 144 S.Ct. 2383, and applied by the Ninth Circuit in this case, [NetChoice II](#), 113 F.4th at 1108, requires NetChoice to show that the CAADCA is unconstitutional on a provision by provision basis.

[Reyes](#), [Fitch](#), and [Yost](#) took the approach urged by NetChoice here. In those cases, the district courts applied strict scrutiny to the statutes as a whole, and found that the defendants had not shown the statutes were narrowly tailored to serve a compelling state interest. *See id.*, 748 F.Supp.3d at 1124-27; [Fitch](#), 738 F. Supp. 3d at 772-76; [Yost](#), 716 F. Supp. 3d at 558-60. [Yost](#) was decided before

[Moody](#), and [Fitch](#) was decided the same day, so neither court addressed the impact of [Moody](#) on the application of strict scrutiny to a statute.

*13 [Reyes](#) was decided after [Moody](#), and the [Reyes](#) court received supplemental briefing on the effect of [Moody](#). See [Reyes](#), 748 F.Supp.3d 1105 at 1117 n.71, 1121 n.92. “With respect to the scope-framing Central Coverage Definition,” the [Reyes](#) court found the inquiries mandated by [Moody](#) to be “easily answered,” as there was no dispute about who and what the statute regulated. [Id.](#) After determining that the state failed to show the statute passed strict scrutiny, the [Reyes](#) court determined that the plaintiff, NetChoice, had shown it was likely to succeed in showing that the statute had “no constitutionally permissible application.” [Id.](#) at 1121.

[SEAT](#) took a different approach, applying strict scrutiny to each challenged statutory provision individually. See [SEAT](#), — F.Supp.3d at —, 2025 WL 455463, at *11. The [SEAT](#) court opined that “[e]ven if HB 18 is a content-based regulation, it does not follow as a matter of course that the law is facially invalid.” [Id.](#) The same district court had concluded in a related case that “[p]er [Moody](#), the Court must instead go through each provision and examine its respective permissibility under the First Amendment.” [Computer & Commc’ns Indus. Ass’n](#), 747 F. Supp. 3d at 1034-35. Accordingly, in [SEAT](#) the district court held that “HB 18’s threshold coverage definition is a content-based regulation, such that strict scrutiny applies to all regulations in HB 18.” [SEAT](#), — F.Supp.3d at —, 2025 WL 455463, at *9.

This Court finds that applying strict scrutiny to the Regulatory Provisions as a whole, and applying [Moody](#) in that context, is the better approach. Under well-established precedent, a plaintiff’s showing that a statute is content-based shifts the burden to the State to show that the statute is narrowly tailored to promote a compelling Government interest. See, e.g., [Reed](#), 576 U.S. at 155, 135 S.Ct. 2218 (applying strict scrutiny to sign ordinance based on determination that it was

content-based); [United States v. Playboy Ent.](#), 529 U.S. at 813, 120 S.Ct. 1878 (applying strict scrutiny to content-based statute governing cable operators). [Moody](#) did not disturb that precedent; it clarified that the standard for analyzing a First Amendment facial challenge requires the court to assess the law’s scope and compare its unconstitutional applications to its constitutional ones. See [Moody](#), 603 U.S. at 724-25, 144 S.Ct. 2383. Thus, even where strict scrutiny applies, the plaintiff must show that the applications of the statute that fail strict scrutiny are substantial in comparison to any applications of the statute that do not. See [id.](#) at 718, 144 S.Ct. 2383 (“the question ... is whether a law’s unconstitutional applications are substantial compared to its constitutional ones”).

[Moody](#) does not require that a First Amendment facial challenge must be analyzed on a provision by provision basis. In most cases, as in [Moody](#), consideration of the full range of activities covered by a statute may well require analysis of each statutory provision. See [Moody](#), 603 U.S. at 724-25, 144 S.Ct. 2383. However, [Moody](#) did not involve, and does not speak to, a First Amendment facial challenge to a statute’s coverage definition that extends to every application of the statute’s substantive provisions. The Act’s coverage definition draws a line between businesses that provide an online service, product, or feature likely to be accessed by children (covered under the Act) and businesses that do not. NetChoice has shown that the vast majority (if not all) of such online services, products, and features will involve expressive content. Thus, even assuming the full sweep of the Act’s Regulatory Provisions, collectively, may apply to some online services, products, and features that do not implicate protected speech, any such applications of the Regulatory Provisions necessarily will be substantially outweighed by the applications of the Regulatory Provisions that do implicate protected speech. And the Supreme Court has made clear that imposing regulations on protected speech solely because the speech is directed at children is impermissible unless the regulations pass strict scrutiny. See [Brown v. Ent. Merchants Ass’n](#), 564 U.S. 786, 799, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (addressing California statute imposing restrictions and labeling requirements on the sale or rental of violent video games to minors). All of the Act’s Regulatory Provisions, not just those that directly regulate expression, impose burdens on covered businesses

based on the expressive content they provide. For that reason, the State's argument that certain of the Regulatory Provisions do not themselves regulate speech misses the mark with respect to NetChoice's challenge to the Regulatory Provisions as a whole based on the gateway content definition.

*14 NetChoice's prior First Amendment challenge to the CAADCA addressed only certain of the Act's Regulatory Provisions; it was not framed as a challenge based on the gateway coverage definition. Thus, the Ninth Circuit was not presented with, and did not address, a challenge to the Regulatory Provisions as a whole, as is raised in the present motion. See [NetChoice II](#), 113 F.4th at 1108. Considering that challenge for the first time here, this Court finds it appropriate to apply strict scrutiny to the Regulatory Provisions as a whole, and to perform the analysis required by [Moody](#) in that context.

d. The Act's Regulatory Provisions Likely Fail Strict Scrutiny

Because strict scrutiny applies to the Regulatory Provisions as a whole, those provisions of the Act “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” [Reed](#), 576 U.S. at 163, 135 S.Ct. 2218.

The State does not even attempt to satisfy strict scrutiny. Instead, the State argues that strict scrutiny does not apply. See Def.'s Opp'n at 11. Consequently, the State has failed to meet its burden to prove that the Regulatory Provisions, collectively, serve a compelling state interest and are narrowly tailored. For the sake of completeness, the Court nonetheless touches on the issues of compelling state interest and narrow tailoring.

The State asserts that it has a substantial interest in “protecting the privacy and well-being of children.” See Def.'s Opp'n at 24. In its order granting NetChoice's first motion for a preliminary injunction, this Court found that the State had submitted evidence sufficient to establish a substantial state interest in protecting the well-being of minors. See [NetChoice I](#), 692 F. Supp. 3d at 948. The Court will assume for purposes of discussion that the State would have asserted its interest in protecting the privacy and well-being of minors as a compelling state interest had it addressed

strict scrutiny. “The Supreme Court has recognized that ‘there is a compelling interest in protecting the physical and psychological well-being of minors.’ ” [Video Software Dealers Ass'n v. Schwarzenegger](#), 556 F.3d 950, 961-62 (9th Cir. 2009), *aff'd sub nom.* [Brown v. Ent. Merchants Ass'n](#), 564 U.S. 786, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (quoting [Sable Commc'ns of California, Inc. v. F.C.C.](#), 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)). The Court therefore accepts for purposes of the present analysis that the State has a compelling interest in protecting the privacy and well-being of children.

The demonstration of a compelling interest is not sufficient to satisfy strict scrutiny, however. The State must show that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” [Video Software Dealers Ass'n](#), 556 F.3d at 961-62 *Id.* (internal quotation marks, citation, and brackets omitted). The State's expert, Dr. Radesky, opines that children suffer many types of harm as result of being online. See Radesky Suppl. Decl. ¶¶ 22-27, 30, 43. According to Dr. Radesky, those harms include sleep disruption, bullying, harassment, interference with attention and learning, sexual exploitation, and invasion of privacy. See *id.* Dr. Radesky claims that research has shown a causal link between nighttime media use by teens and poor sleep. See *id.* ¶ 52. The State argues that the CAADCA will address these harms.

NetChoice challenges Dr. Radesky's opinions and the State's argument based thereon, submitting declarations from its own expert, psychology professor Christopher Ferguson. See Ferguson Decl., ECF 101-4; Ferguson Suppl. Decl., ECF 121-1. Professor Ferguson states his view that there is no evidence establishing a cause-and-effect relationship between social media and other online media on the one hand and mental health impacts on the other. See Ferguson Suppl. Decl. ¶¶ 22-25. Given the conflicting evidence submitted by the parties, the Court concludes that the State has not carried its burden to prove that being online harms children in a way that can be alleviated by the CAADCA. This conclusion is consistent with the Court's first preliminary injunction order, in which the Court found that the State had not shown that the CAADCA advanced the State's interest in the privacy and well-being of children. See [NetChoice I](#), 692 F. Supp. 3d at 948-59.

*15 Even if the Court were to accept that the Act advances a compelling State interest in protecting the privacy and well-being of children, the State has not shown that the CAADCA is narrowly tailored to serve that interest. The Act applies to *all* online content likely to be accessed by consumers under the age of 18, and imposes significant burdens on the providers of that content. For example, [California Civil Code § 1798.99.31\(a\)\(5\)](#) requires each covered business to “[e]stimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers.” Moreover, the legislative findings interpret the age estimation requirement as advising covered businesses to “take into account the unique needs of different age ranges, including the following developmental stages.” 2022 Cal. Stat. ch. 320 (A.B. 2273), § 1(a)(5) (listing five separate age ranges). Record evidence describes the difficulties of age estimation, and the threats to users’ privacy inherent in age estimation. *See* Paolucci Suppl. Decl. ¶ 6; Masnick Suppl. Decl. ¶ 7; Rumenap Decl. ¶¶ 7-10, ECF 29-30. If a business chooses not to take on the burden of age estimation, it must apply the privacy and data protections designed for children to all content accessed by children or adults. The State has not even attempted to explain why its interest in protecting children could not be served by a less restrictive statute. “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” [Playboy Ent., 529 U.S. at 813, 120 S.Ct. 1878](#).

In effect, the CAADCA controls access to features distinctive to the medium of online communication, and appears to suppress those features to the extent they offer “detrimental material” to children, 2022 Cal. Stat. ch. 320 (A.B. 2273), § 1(a)(8), but to protect the same features to the extent they deliver content in “the best interests of children,” [Cal. Civ. Code § 1798.99.29](#). A regulation that focuses on “[t]he emotive impact of speech on its audience” is content-based, [Boos v. Barry, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 \(1988\)](#), and therefore must be drawn as narrowly as possible. The State has not shown that the CAADCA is narrowly drawn here.

NetChoice also faults the State for failing to protect children by enforcing existing laws, including COPPA, instead of enacting a new regime that burdens expression. The State’s declarants assert that other laws are not adequately enforced. *See* Radesky Decl. ¶¶ 31-39; Radesky Suppl. Decl. ¶ 42;

Egelman Decl. ¶¶ 37-40. Those assertions cut both ways, however. A law is not narrowly tailored when the State’s interest could be served by vigorous enforcement of existing, less restrictive regulations. [Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc., 487 U.S. 781, 800, 108 S.Ct. 2667, 101 L.Ed.2d 669 \(1988\)](#); *see also* [NetChoice II, 113 F.4th at 1121](#) (finding that DPIA requirement was not narrowly tailored in part because the State could have relied on existing criminal laws prohibiting related unlawful conduct).

Based on the State’s failure to even attempt to satisfy strict scrutiny, and the evidence and authorities discussed above, the Court concludes that the Regulatory Provisions, collectively, are likely to fail strict scrutiny. That is not the end of the Court’s inquiry, however. Applying the two-step [Moody](#) framework, the Court must consider “the full range of activities” regulated by the Act, and then must decide whether the unconstitutional applications of the Act substantially outweigh the constitutional ones. [Moody, 603 U.S. at 724-25, 144 S.Ct. 2383](#). Here, the application of strict scrutiny is grounded in the content-based definition of a covered business, which applies in *all* applications of the Act.

Accordingly, as in [Reyes](#), the Act has “no constitutionally permissible application.” [Reyes, 748 F.Supp.3d at 1121](#); *see also* [NetChoice II, 113 F.4th at 1116](#) (finding *Moody* satisfied where “the DPIA report requirement, in every application to a covered business, raises the same First Amendment issues”).

Consequently, the Court concludes that NetChoice has demonstrated a likelihood of success on the merits of its First Amendment facial challenge to the CAADCA’s Regulatory Provisions, [Cal. Civ. Code §§ 1798.99.31\(a\), \(b\)](#).

The Court ordinarily would not go on to address NetChoice’s other First Amendment challenges, and in particular its challenges to Individual Provisions of the CAADCA. However, as noted above, at least one district court has construed [Moody](#) to require facial challenges to be analyzed provision by provision. *See* [SEAT, — F.Supp.3d at —, 2025 WL 455463, at *10](#). In light of the State’s insistence that NetChoice’s facial challenge to the Regulatory Provisions as a whole is improper, and the lack of clarity in the case law regarding the proper application of [Moody](#) when the plaintiff brings a facial challenge to the statute’s gateway

coverage definition, the Court will address NetChoice's challenges to Individual Provisions of the CAADCA.

4. Facial Challenge to Individual Provisions of CAADCA

*16 NetChoice independently asserts facial challenges to each of seven Individual Provisions of the CAADCA, “either in its entirety or as to certain applications.” Pl.’s Second Mot. for Prelim. Inj. at 14. NetChoice divides its arguments regarding the Individual Provisions into four categories:

(a) specific applications of [California Civil Code § 1798.99.31\(a\)\(9\)](#), requiring a covered business to “[e]nforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children”;

(b) specific applications of [California Civil Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#), restricting how and for what purpose a covered business may use the personal information of children;

(c) specific applications of [California Civil Code § 1798.99.31\(b\)\(7\)](#), prohibiting covered businesses from using dark patterns “to lead or encourage children to provide personal information beyond what is reasonably expected,” or to “take any action” the business has reason to know “is materially detrimental” to children’s health or well-being; and

(d) all applications of [California Civil Code § 1798.99.31\(a\)\(5\)](#), requiring covered businesses to “[e]stimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers.”

The State contends that under [Moody](#), NetChoice cannot challenge only specific applications of the Individual Provisions. In the State’s view, NetChoice must show that the asserted unconstitutional applications of an Individual Provision substantially outweigh the constitutional applications of the entire Individual Provision. The State also asserts that even if NetChoice may challenge specific applications of Individual Provisions, NetChoice has not defined a discrete, clear application of any Individual Provision that properly could be enjoined by the Court.

In [Doe v. Reed](#), 561 U.S. 186, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010), the Supreme Court considered a First Amendment facial challenge to the State of Washington’s Public Records Act (“PRA”), but only as the PRA applied to referendum petitions. The plaintiffs, who had signed and/or sponsored a petition to challenge by referendum a state law extending certain benefits to same-sex couples, sought to prevent private parties from obtaining copies of the petition under the PRA. See [id.](#) at 191, 130 S.Ct. 2811. The plaintiffs asserted that certain private parties intended to post the referendum petition online in searchable form, thus subjecting the plaintiffs to harassment and intimidation. See [id.](#) at 199, 130 S.Ct. 2811. In seeking to prevent that outcome, the plaintiffs claimed that the PRA was “unconstitutional as applied to referendum petitions.” [Id.](#) at 193, 130 S.Ct. 2811.

The Supreme Court acknowledged that the challenge had characteristics of both a traditional as-applied challenge and a facial challenge. See [Doe](#), 561 U.S. at 194, 130 S.Ct. 2811. The claim was as-applied in the sense that it was not directed to the PRA in all its applications, but it was facial in the sense that it went beyond the plaintiffs’ particular case by challenging the PRA’s application to all referendum petitions, not just the referendum signed by the plaintiffs. See [id.](#) Ultimately, the Supreme Court treated the challenge as a facial one, observing that the “plaintiffs’ claim and the relief that would follow – an injunction barring the secretary of state from making referendum petitions available to the public, – reach[ed] beyond the particular circumstances of these plaintiffs.” [Id.](#) (internal quotation marks and citation omitted).

*17 In considering the plaintiffs’ facial challenge, the Supreme Court found that “[t]he compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment.” [Doe](#), 561 U.S. at 194, 130 S.Ct. 2811. The Supreme Court went on to consider whether the PRA, as limited to referendum petitions, survived what it termed “exacting scrutiny.” [Id.](#) at 196, 130 S.Ct. 2811. “That standard requires a substantial relation between the disclosure requirement and a sufficiently important’ governmental interest.” [Id.](#) (internal quotation marks and citations omitted). The Supreme Court found

that “[t]he State’s interest in preserving the integrity of the electoral process is undoubtedly important,” encompassing efforts to identify invalid signatures caused by mistake or fraud, and to promoting transparency in the electoral process. [¶ Id. at 197-98, 130 S.Ct. 2811](#). The Supreme Court compared the State’s interest against any burdens to First Amendment rights that would be imposed by disclosure of referendum petitions generally. See [¶ id. at 200-01, 130 S.Ct. 2811](#). Observing that the plaintiffs had failed to show that disclosure of “typical referendum petitions concern[ing] tax policy, revenue, budget, or other state law issues” would result in the type of harm the plaintiffs feared in their particular circumstances, the Supreme Court found that “only modest burdens attend the disclosure of a typical petition.” [¶ Id.](#) Consequently, the Supreme Court “conclude[d] that disclosure under the PRA would not violate the First Amendment with respect to referendum petitions in general[.]”

Although it ruled against the [¶ Doe](#) plaintiffs at the end of the day, the Supreme Court did consider their First Amendment facial challenge to a specific application of the PRA (referendum petitions) to be properly before it. NetChoice argues that under the reasoning of [¶ Doe](#), it may raise First Amendment facial challenges not only to entire provisions of the CAADCA, but to specific applications of some provisions. This Court agrees that based on [¶ Doe](#), a plaintiff may assert a First Amendment facial challenge to a specific application of a statutory provision.

The State argues that such a challenge is foreclosed by the Ninth Circuit’s decision in [¶ Arizona Attorneys, 127 F.4th 105](#), which issued on the same day as the hearing on NetChoice’s second motion for a preliminary injunction. The Court requested supplemental briefing from the parties as to any potential impact [¶ Arizona Attorneys](#) may have on this case. NetChoice argues that [¶ Arizona Attorneys](#) is factually distinguishable from the present case and therefore does not apply here.

[¶ Arizona Attorneys](#) addressed a state statute that, among other things, prohibited criminal defense attorneys from initiating direct contact with crime victims, requiring the defense team to initiate any contact with victims through the prosecutor’s office. See [¶ Arizona Attorneys, 127 F.4th](#)

[at 107](#). The plaintiffs challenged that prohibition, referred to as the “Victim Contact Limit,” as facially invalid under the First Amendment. See [¶ id.](#) The Victim Contact Limit covered any communication during a criminal case, and its primary application was to requests for interviews with crime victims. See [¶ id. at 110](#). The plaintiffs did not challenge the primary application of the Victim Contact Limit, but instead restricted their challenge to defense team contacts with victims to share information about the crime, the case, and the legal system generally. See [¶ id. at 111](#). However, the plaintiffs sought to invalidate the Victim Contact Limit entirely, in all its applications, based on their challenge to the non-primary applications of the Victim Contact Limit. See [¶ id. at 107](#). Analyzing the plaintiffs’ facial challenge under [¶ Moody](#), the Ninth Circuit determined that the plaintiffs’ challenge was directed “to the edges of the Victim Contact Limit,” such that even if the challenged applications were assumed to be unconstitutional, they did not substantially outweigh the unchallenged primary applications of the Victim Contact Limit. See [¶ id. at 111-12](#).

NetChoice argues that because [¶ Arizona Attorneys](#) involved a facial challenge to the entire Victim Contact Limit, it sheds no light on the proper analysis of a facial challenge to only specific applications of a statutory provision. This Court agrees. Accordingly, the Court does not find persuasive the State’s assertion that [¶ Arizona Attorneys](#) precludes NetChoice’s proposed facial challenges to specific applications of the Individual Provisions under [¶ Doe](#). The Court addresses NetChoice’s facial challenges to the Individual Provisions below.

***18** This Court is mindful of the fact that the Ninth Circuit vacated the first preliminary injunction with respect to the Individual Provisions that NetChoice challenges again here. See [¶ NetChoice II, 113 F.4th at 1122-23](#). The Ninth Circuit stated that those Individual Provisions, “by their plain language, do not necessarily impact protected speech in all or even most applications.” [¶ Id. at 1122](#) (citing [¶ Cal. Civ. Code §§ 1798.99.31\(a\)\(5\)-\(6\), \(9\), \(b\)\(1\)-\(4\), \(7\)](#)). The Ninth Circuit indicated that “the record needs further development to allow the district court to determine the full range of activities” those provisions cover. [¶ Id. at 1123](#). In order to succeed on its second motion for preliminary

injunction, NetChoice at a minimum must address the concerns raised by the Ninth Circuit.

a. Policy Enforcement Requirement – Specific

Applications [Cal. Civ. Code § 1798.99.31\(a\)\(9\)](#)

[California Civil Code § 1798.99.31\(a\)\(9\)](#) requires each covered business to “Enforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children.” In the FAC’s Prayer, NetChoice asks the Court to “[d]eclare that [Section 1798.99.31\(a\)\(9\)](#) violates the First and Fourteenth Amendments to the United States Constitution on its face *to the extent* that section applies to covered services’ *content policies and community standards*.” FAC Prayer ¶ 5 (emphasis added).⁴ Under the holding of [Doe](#), NetChoice may assert a First Amendment facial challenge to these specific applications of [§ 1798.99.31\(a\)\(9\)](#).

⁴ At the hearing, NetChoice advised the Court that the scope of its challenge to each section was set forth in its Prayer for Relief.

The State argues that NetChoice has identified an “amorphous” range of applications in its challenges to the Individual Provisions, which are not sufficiently specific to be analyzed as facial challenges. Def.’s Opp’n at 1. While the Court finds that argument persuasive as to NetChoice’s challenges to specific applications of other provisions, it is not well-taken here. The meaning of “content policies” and “community standards” is readily understood. Requiring a business to enforce its own published content policies and community standards to the satisfaction of the State would burden the business’s right to exercise its editorial judgment whether to permit or prohibit any given content in any given instance. The Supreme Court has held that exercise of such editorial judgment is protected by the First Amendment, because “[a]n entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity.” [Moody](#), 603 U.S. at 731, 144 S.Ct. 2383 (internal quotation marks, citation, and brackets omitted). Consequently, even if the Court had not determined that all Regulatory Provisions are subject to strict scrutiny because of the content-based coverage definition, the Court

would find [§ 1798.99.31\(a\)\(9\)](#) subject to strict scrutiny on the ground that the provision itself is facially content-based to the extent applied to covered businesses’ content policies and community standards.

Applying strict scrutiny, the Court must determine whether the State has satisfied its burden to show that [§ 1798.99.31\(a\)\(9\)](#) is “narrowly tailored to serve compelling state interests” to the extent it applies to a business’s enforcement of its published content policies and community standards. [Reed](#), 576 U.S. at 155, 135 S.Ct. 2218. The State does not articulate any compelling interest in the portion of its brief addressing NetChoice’s facial challenge to [§ 1798.99.31\(a\)\(9\)](#). And assuming that it has a compelling interest in protecting children when they are online, the State has not identified a concrete harm this provision seeks to address or shown how the requirement at issue is narrowly tailored to serve that interest.

*19 The State argues that the First Amendment does not preclude it from requiring private parties to honor their promises, and that the provision requiring businesses to comply with their own content policies “simply requires that they adhere to the contract made with users, a private agreement between private parties.” Def.’s Opp’n at 14. The State cites two cases, [Cohen v. Cowles Media Co.](#), 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991), and [Belgau v. Inslee](#), 975 F.3d 940 (9th Cir. 2020), neither of which held that an internet business’s published content policy is a contract. In fact, neither [Cohen](#) nor [Belgau](#) involved content policies at all. *See id.* [Cohen](#) involved a confidential source’s claim that a newspaper breached a confidentiality agreement, while [Belgau](#) involved a contractual relationship between a union and its employees. *See* [Cohen](#), 501 U.S. at 665, 111 S.Ct. 2513; [Belgau](#), 975 F.3d at 950. Consequently, to the extent the State argues that content policies may be enforced as contracts, the State has failed to offer any legal support for its position.

Based on the foregoing, the Court finds that [§ 1798.99.31\(a\)\(9\)](#) likely fails strict scrutiny. That is not the end of the Court’s inquiry, however. Applying the two-step [Moody](#) framework, the Court must consider “the full range of activities” regulated by [§ 1798.99.31\(a\)\(9\)](#), as limited

to “content policies and community standards” pursuant to [Doe](#), and then must decide whether the unconstitutional applications of that provision substantially outweigh the constitutional ones. [Moody](#), 603 U.S. at 724-25, 144 S.Ct. 2383. With respect to the range of activities, the provision will raise the same First Amendment issues in every application to a covered business, as it will require every business to enforce its content policies to the satisfaction of the State, and will burden the business's editorial judgment in every instance. Because all applications are unconstitutional, the provision has no legitimate sweep.

Accordingly, the Court concludes that NetChoice is likely to prevail on its claim of facial invalidity with respect to [California Civil Code § 1798.99.31\(a\)\(9\)](#), as limited to content policies and community standards.

b. Information Use Restrictions – Specific

Applications [Cal. Civ. Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#)

[California Civil Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#) collectively restrict how and for what purpose a covered business may use the personal information of children. In the FAC's Prayer, NetChoice asks the Court to “[d]eclare that [Sections 1798.99.31\(b\)\(1\)-\(2\)](#), [\(b\)\(4\)](#) violate the First and Fourteenth Amendments to the United States Constitution on their face *to the extent* those sections apply to covered services’ *use of personal information to publish content or to make information available.*” FAC Prayer ¶ 6 (emphasis added). NetChoice also asks the Court to “[d]eclare that [Section 1798.99.31\(b\)\(3\)](#) violates the First and Fourteenth Amendments to the United States Constitution on its face *to the extent* that section applies to covered services’ *retention, sale, and sharing of personal information to publish content or to make information available.*” FAC Prayer ¶ 7 (emphasis added).

The Court finds the State's argument that NetChoice has identified an “amorphous” range of applications to be well-taken with respect to [§§ 1798.99.31\(b\)\(1\)-\(4\)](#). Def.’s Opp’n at 1. In [Doe](#), the Supreme Court found it appropriate to consider a facial challenge to a particular application of a state public records act, specifically, application of the act to referendum petitions. See [Doe](#), 561 U.S. at 194, 130

S.Ct. 2811. There was no ambiguity regarding the scope of the challenged application. See [id.](#) This Court determined that [Doe](#) may be applied to permit a challenge to a particular application of [California Civil Code § 1798.99.31\(a\)\(9\)](#), specifically, application of the provision to content policies and community standards. The Court made that determination based on its conclusion that there is no ambiguity regarding the scope of the challenged application.

*20 That is not the case with respect to NetChoice's proposed challenge to specific applications of [California Civil Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#). The State argues persuasively that NetChoice's use of the term “content” does not explain “*what* content – user-generated content, business-created content, editorial discretion content, webpage layout content?” Def.’s Opp’n at 16. NetChoice points to the declaration of the State's expert, which discusses the ways in which data profiling can lead to children receiving detrimental material online. See Radesky Decl. ¶¶ 65, 78, 89. NetChoice also directs the Court to its own declarants’ statements regarding ways that online businesses use information to target personalized compilations of expression to different audiences. See, e.g., Roin Decl. ¶¶ 2-6, 10-13; Cairella Decl. ¶¶ 8, 20; Masnick Suppl. Decl. ¶ 9; Paolucci Suppl. Decl. ¶ 9. These examples do not render NetChoice's identification of the challenged applications of the subject provisions any more definite. If the Court were to issue an injunction incorporating the language used by NetChoice to define the challenged applications of [§§ 1798.99.31\(b\)\(1\)-\(4\)](#), it likely would be unenforceable because it would be entirely unclear what businesses and what conduct would be encompassed.

Although the Court identified a number of likely unconstitutional applications of [§ 1798.99.31\(b\)\(1\)-\(4\)](#) in its prior preliminary injunction order, see [NetChoice I](#), 692 F. Supp. 3d at 955-57, the Ninth Circuit directed this Court to consider the fully [Moody](#) analysis, including identification of the full range of activities covered by the provision. See [NetChoice II](#), 113 F.4th at 1123.

Looking to NetChoice to present this analysis, the Court finds that NetChoice's simple narrowing of the scope of its claim under [Doe](#) to only “use of personal information to publish content or make other information available” does not answer the critical question of what is the full sweep of

the narrowed application of the provision as compared to the unconstitutional applications. The Court is not persuaded that every application is unconstitutional given the amorphous definitions offered by NetChoice such as “restrict[ions] [on] how services decide what speech to publish. Pl.’s Reply at 9.

Accordingly, the Court finds that NetChoice has not shown that it is likely to prevail on its claim of facial invalidity with respect to [California Civil Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#), as limited to specific applications.

c. Dark Patterns Restriction – Specific

Applications [Cal. Civ. Code § 1798.99.31\(b\)\(7\)](#)

[California Civil Code § 1798.99.31\(b\)\(7\)](#) prohibits covered businesses from using dark patterns “to lead or encourage children to provide personal information beyond what is reasonably expected,” or to “take any action” the business has reason to know “is materially detrimental” to children’s health or well-being. In the FAC’s Prayer, NetChoice asks the Court to “[d]eclare that [Section 1798.99.31\(b\)\(7\)](#) violates the First and Fourteenth Amendments to the United States Constitution on its face to the extent that section applies to covered services’ use of recommendation algorithms, continuous scroll, autoplay, and other design features that organize content[.]” FAC Prayer ¶ 8 (emphasis added).

The State argues that this challenge to [§ 1798.99.31\(b\)\(7\)](#) suffers from the same defect as the challenge to [§§ 1798.99.31\(b\)\(1\)-\(4\)](#), discussed above, in that it seeks to challenge an insufficiently definite range of applications. The Court agrees. The State argues persuasively that it is unclear what design features are used by covered businesses or how those design features involve protected editorial judgment or other expressive activity. It is equally unclear what are the “other design features that organize content.” The Court finds that NetChoice has not identified a specific application of [§ 1798.99.31\(b\)\(7\)](#) with sufficient particularity to allow the Court to consider a First Amendment facial challenge under [Doe](#).

Accordingly, the Court finds that NetChoice has not shown that it is likely to prevail on its claim of facial invalidity with

respect to [California Civil Code § 1798.99.31\(b\)\(7\)](#), as limited to specific applications.

d. Age Estimation Requirement – All

Applications [Cal. Civ. Code § 1798.99.31\(a\)\(5\)](#)

*21 [California Civil Code § 1798.99.31\(a\)\(5\)](#) requires each covered business to “Estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers.” In the FAC’s Prayer, NetChoice asks the Court to “[d]eclare that [Section 1798.99.31\(a\)\(5\)](#) violates the First and Fourteenth Amendments to the United States Constitution on its face[.]” FAC Prayer ¶ 4. NetChoice does not challenge specific applications of this provision, but asserts that the provision is facially invalid in all applications. NetChoice argues that the age estimation requirement would prevent covered businesses from providing expressive content protected by the First Amendment to both children and adults, and likewise would prevent children and adults from accessing expressive content protected by the First Amendment.

The State contends that estimating a user’s age is conduct, not expressive activity. But this provision does not merely require covered a business to estimate age. The business must estimate a user’s age “with a reasonable level of certainty appropriate to the risks” to that user. The legislature contemplated that businesses would consider “the unique needs of different age ranges, including the following developmental stages: 0 to 5 years of age or ‘preliterate and early literacy’; 6 to 9 years of age or ‘core primary school years’; 10 to 12 years of age or ‘transition years’; 13 to 15 years of age or ‘early teens’; and 16 to 17 years of age or ‘approaching adulthood.’ ” 2022 Cal. Stat. ch. 320 (A.B. 2273), § 1(a)(5). By requiring a business to estimate age for the purpose of determining what content is appropriate for that age, the CAADCA imposes limits on the content a covered business may publish and the content each user may view. In the alternative, all content must be sanitized to comport with the highest risk level, presumably, the youngest children. Imposing restrictions of that nature with respect to content published to, and accessed by, both children and adults would trigger strict scrutiny of this provision even if the Court had not already determined that strict scrutiny applies

to all Regulatory Provisions based on the gateway coverage definition.

Applying strict scrutiny, the Court must determine whether the State has satisfied its burden to show that § 1798.99.31(a)(5) is “narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 155, 135 S.Ct. 2218. The State has not addressed the requirements of strict scrutiny with respect to this provision, instead arguing that the age estimation requirement would meet the standard for intermediate scrutiny. *See* Def.’s Opp’n at 24. The State asserts that it has a substantial interest in “protecting the privacy and well-being of children.” *Id.* The Court will treat that as an assertion of a compelling state interest in the privacy and well-being of children for purposes of the present analysis.

The State contends that the age estimation requirement furthers its interest in the privacy and well-being of children, because a business that estimates a user’s age will know which of the Act’s substantive protections must be applied. For example, once a business has estimated that a user is under the age of 18, the business must “[c]onfigure all default privacy settings ... to settings that offer a high level of privacy,” unless “a different setting is in the best interests of children.” Cal. Civ. Code § 1798.99.31(a)(6). The business also is prohibited from using the personal information of children in certain ways. *Id.* §§ 1798.99.31(b)(1)-(6), (8).

The State’s argument is grounded in an assumption that greater data privacy for children means greater security and well-being. As NetChoice points out, however, the State ignores that the age estimation requirement will require businesses to collect private information that users may not wish to share. *See* Paolucci Suppl. Decl. ¶ 6; Masnick Suppl. Decl. ¶ 7; Rumenap Decl. ¶¶ 7-10, ECF 29-30. One of NetChoice’s declarants, Stacie Rumenap of the nonprofit organization Stop Child Predators, opines that the practical effect of the CAADCA’s age estimation requirement is that businesses will gather and create “a trove of sensitive data” regarding children. Rumenap Decl. ¶ 7. Ms. Rumenap considers it “an inevitability, given the realities of data security, that one or more of these data sets will be breached, exposing the personal information of children to bad actors.” *Id.*

*22 The State presents the declaration of Serge Egelman, Ph.D., who discusses a report on age estimation prepared by a French agency. *See* Egelman Decl. ¶¶ 64-65, ECF

112-2. Dr. Egelman states that the report describes France’s practice of using third parties for age estimation, as well as a prototype system for performing age estimation through access to restricted websites without sharing other personally identifiable data. *Id.* Dr. Egelman’s report does not explain how using third parties for age estimation would address the intrusive aspects of that process described by Ms. Rumenap, nor does Dr. Egelman’s report suggest that the prototype system described in the French report is widely available to covered businesses in the United States. *See id.* On this record, the Court finds that the State has not met its burden to show that age estimation furthers its interest in the privacy and well-being of children.

If a business chooses not to estimate the age of its users, it must apply the privacy and data protections afforded to children to all consumers. However, the Supreme Court has made clear that under the First Amendment, a state “could not reduce the adult population ... to reading only what is fit for children.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (internal quotation marks and citation omitted). “A statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another ... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *Ashcroft v. ACLU*, 542 U.S. 656, 665, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (internal quotation marks and citation omitted). While the State asserts that there are no less restrictive alternatives, it fails to carry its burden on that point because its statement is not supported by any evidence. *See* Def.’s Opp’n at 25.

Based on the foregoing, the Court finds that § 1798.99.31(a)(5) likely fails strict scrutiny. At the first step of the *Moody* analysis, the Court finds that the provision will impose the same barriers to speech on all covered businesses and their audiences. Every covered business will be forced to choose between intruding into user privacy, thereby chilling publication of and access to protected speech, or publishing only child-appropriate content, thereby restricting access to protected speech for users of all ages. The State has not demonstrate that this choice is narrowly tailored to advance the well-being of children. At the second step of *Moody*, the Court finds that because all applications of § 1798.99.31(a)(5) will impose barriers to protected speech, the provision has no legitimate sweep.

Accordingly, the Court concludes that NetChoice is likely to prevail on its claim of facial invalidity with respect to [California Civil Code § 1798.99.31\(a\)\(5\)](#).

5. Vagueness Challenge

In Claim 3 of the FAC, NetChoice asserts that the Individual Provisions are unconstitutionally vague under the First Amendment.⁵ Specifically, NetChoice raises vagueness challenges to the policy enforcement requirement, [Cal. Civ. Code § 1798.99.31\(a\)\(9\)](#); the information use restrictions, [Cal. Civ. Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#); the dark patterns restriction, [Cal. Civ. Code § 1798.99.31\(b\)\(7\)](#); and the age estimation requirement, [Cal. Civ. Code § 1798.99.31\(a\)\(5\)](#). The State disputes NetChoice's characterization of the Individual Provisions as vague.

⁵ As noted previously, Claim 3 also is brought under the Due Process Clause of the United States Constitution and under [Article I, Section 7\(a\) of the California Constitution](#). Because those aspects of the claim are not addressed in NetChoice's second motion for preliminary injunction, they are not discussed here.

“A statute can be impermissibly vague for either of two independent reasons.” [Hill v. Colorado](#), 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). “First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” [Id.](#) “Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” [Id.](#) “Although perfect clarity is not required even when a law regulates protected speech, vagueness concerns are more acute when a law implicates First Amendment rights, and, therefore, vagueness scrutiny is more stringent.” [Butcher v. Knudsen](#), 38 F.4th 1163, 1168 (9th Cir. 2022) (internal quotation marks and citation omitted). “Consistent with these principles, courts have not hesitated to reject on vagueness grounds laws regulating speech protected by the First Amendment.” [Id.](#) at 1169 (collecting cases).

a. Policy Enforcement, [Cal. Civ. Code § 1798.99.31\(a\)\(9\)](#)

*23 NetChoice's first vagueness challenge is asserted against [California Civil Code § 1798.99.31\(a\)\(9\)](#), which requires each covered business to “Enforce published by terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children.” The State argues that businesses should understand their own policies well enough to enforce them, and that under those circumstances the policy enforcement provision is not vague.

NetChoice does not contend that businesses will not understand the directive to enforce their own content policies. However, NetChoice contends that the provision will authorize and invite arbitrary and discriminatory enforcement because the State will have wide discretion to interpret businesses’ policies differently from the businesses themselves. NetChoice submits examples of covered businesses’ content policies to illustrate its point. Reddit's Content Policy states that Reddit “is a place for creating community and belonging, not for attacking marginalized or vulnerable groups of people” and so users who “promote hate based on identity of vulnerability will be banned.” Kumar Decl. Ex. 3., ECF 29-4. The New York Times’ content policy requires use of “respectful language” and tells users to “[d]ebate, but don't attack.” Kumar Decl. Ex. 5, ECF 29-6. NetChoice suggests that a State regulator might understand an “attack” on a “marginalized” person differently than Reddit, or might understand the phrase “respectful language” differently than the New York Times. Certainly we all understand that language a parent might find to be disrespectful will not comport with the view of the child who uses that language. The Court agrees with NetChoice that the provision at issue, which gives the State legal authority to decide whether a covered business is complying with its own content policies, grants the State nearly unfettered discretion.

The Court finds that NetChoice is likely to succeed on its vagueness challenge to the Act's policy enforcement provision, [California Civil Code § 1798.99.31\(a\)\(9\)](#). That provision would grant the State virtually unfettered discretion to enforce as law a variety of subjective content policies that might be viewed differently by the State than by the policies’ creators.

b. Information Use Restrictions,  **Cal.**
Civ. Code §§ 1798.99.31(b)(1)-(4)

 California Civil Code §§ 1798.99.31(b)(1)-(4) collectively restrict how and for what purpose a covered business may use the personal information of children. NetChoice asserts that several terms in those provisions are open-ended and subjective, rendering the provisions impermissibly vague. The terms identified by NetChoice are: “material detriment,” “best interests,” and “physical health, mental health, or well-being.” The challenged provisions are set forth in relevant part below, with the terms identified by NetChoice in italics:

Pursuant to  California Civil Code §§ 1798.99.31(b)(1)-(4), covered businesses may not:

- (1) Use the personal information of any child in a way that the business knows, or has reason to know, is *materially detrimental* to the *physical health, mental health, or well-being* of a child.
- (2) Profile a child by default unless both of the following criteria are met:
 - (A) The business can demonstrate it has appropriate safeguards in place to protect children.
 - (B) Either of the following is true:
 - (i) Profiling is necessary to provide the online service, product, or feature requested and only with respect to the aspects of the online service, product, or feature with which the child is actively and knowingly engaged.
 - *24 (ii) The business can demonstrate a compelling reason that profiling is in the *best interests* of children.
- (3) Collect, sell, share, or retain any personal information that is not necessary to provide an online service, product, or feature ... unless the business can demonstrate a compelling reason that [doing so] is in the *best interests* of children likely to access the online service, product, or feature.
- (4) If the end user is a child, use personal information for any reason other than a reason for which that personal information was collected, unless the business can

demonstrate a compelling reason that use of the personal information is in the *best interests* of children.

 Cal. Civ. Code §§ 1798.99.31(b)(1)-(4) (italics added).

Reasonable minds may differ on what is “detrimental” to a child’s “physical health, mental health, or well-being,” as those terms are used in  California Civil Code § 1798.99.31(b)(1). NetChoice queries whether the qualifying effects on children might include sleep loss? Distraction? Hurt feelings? *See* Pl.’s Second Mot. for Prelim. Inj. at 14. The challenged terms have no established meaning and the CAADCA provides no guidance. Consequently,  § 1798.99.31(b)(1) runs afoul of the constitutional requirement that “a statute must clearly delineate the conduct it proscribes.”  *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). The State does not offer a proposed definition or means for determining how to decide what is “detrimental” to a child’s “physical health, mental health, or well-being.” Instead, the State argues that the provision is clear on its face. That argument lacks merit for the reasons discussed above. The State also argues that NetChoice has failed to submit evidence showing it would ever have to construe the challenged terms. The Court is at a loss to understand the State’s argument, as a covered business must understand what is “detrimental” to a child’s “physical health, mental health, or well-being,” in order to have fair notice of what conduct is prohibited by  § 1798.99.31(b)(1).

 California Civil Code §§ 1798.99.31(b)(2), (3), and (4) prohibit a covered business from taking certain acts unless the business can establish that those acts are in the “best interests” of children. The phrase “best interests” is not defined in the Act, and NetChoice argues that it has no established meaning in this context. The State argues that “best interests” of a child is a legal term of art that is well-established in family law. The State cites several cases demonstrating that family courts consider the “best interests” of the child when addressing custody arrangements, guardianship decisions, and delinquency proceedings. *See*  *In re Jonathan C.M.*, 91 Cal. App. 5th 1039, 1046, 308 Cal.Rptr.3d 724 (2023) (the “best interests” of the child must be considered in juvenile proceedings);  *In re Marriage of Vargas & Ross*, 17 Cal. App. 5th 1235, 1243, 226 Cal.Rptr.3d 442 (2017) (phrase “best interest of the child” was not ambiguous as used in child custody statute);  *Petition of Daniels*, 177 Cal. App. 2d 376,

377, 2 Cal.Rptr. 243 (1960) (identifying “the best interest of the child” as paramount consideration for deciding contest between nonparents for guardianship).

*25 The undersigned is quite familiar with the family law and juvenile proceedings referenced by the State, which indeed turn on the best interest of the child. Those are specialized proceedings, however, in which finite custodial or dependency options must be considered by the court as to a particular child, on a particular factual record. A state court’s application of the “best interest” standard in those specialized proceedings provides no useful guidance as to how a covered business should understand what the “best interests” of children generally means as used in the CAADCA. Without an understanding of that phrase’s meaning, covered businesses will not have notice of what conduct is proscribed and what conduct is permitted, as required to satisfy the constitution. See [Foti](#), 146 F.3d at 638.

The Court finds that NetChoice has demonstrated a likelihood of success on its vagueness challenge to [California Civil Code §§ 1798.99.31\(b\)\(1\)-\(4\)](#).

c. Dark Patterns Restriction,

[Cal. Civ. Code § 1798.99.31\(b\)\(7\)](#)

Under [California Civil Code § 1798.99.31\(b\)\(7\)](#), covered businesses may not:

Use dark patterns to lead or encourage children to provide personal information beyond what is reasonably expected to provide that online service, product, or feature to forego privacy protections, or *to take any action that the business knows, or has reason to know, is materially detrimental to the child’s physical health, mental health, or well-being.*

[Cal. Civ. Code § 1798.99.31\(b\)\(7\)](#) (italics added). NetChoice contends that this provision is impermissibly vague because it does not advise businesses what conduct

is prohibited, in part because the italicized terms have not established meaning.

The State contends that [§ 1798.99.31\(b\)\(7\)](#) is not vague, pointing out that “dark pattern” is defined under California law. “ ‘Dark pattern’ means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice, as further defined by regulation.” [Cal. Civ. Code § 1798.140\(l\)](#). The State contends that “[t]wo of the three relevant prohibited uses – to disclose more personal information or to forego privacy protections – are clear in their limits.” Def.’s Opp’n at 23. The State argues that the remaining prohibited use of dark patterns, taking action that the business knows or has reason to know is materially detrimental to the child, can be understood by a person of ordinary intelligence.

In its reply, NetChoice acknowledges the statutory definition of dark patterns, and clarifies that it does not challenge the prohibitions on using dark patterns to lead or encourage children to provide personal information or to forego privacy protections. See Pl.’s Reply at 15. However, NetChoice argues that [§ 1798.99.31\(b\)\(7\)](#) gives no guidance on how and when a business will have “reason to know” that a particular user interface covered by the restriction on dark patterns – for example, an autoplay feature or push notification – will be “materially detrimental” to the child’s “physical health, mental health, or well-being.”

The State argues that the phrase “reason to know” is not vague, relying on [United States v. Jae Gab Kim](#), 449 F.3d 933 (9th Cir. 2006). [Kim](#) addressed a criminal defendant’s vagueness challenge to a statute that, in relevant part, imposes penalties on “[a]ny person who knowingly or intentionally ... possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance....” [Id.](#) at 937 (quoting [21 U.S.C. § 841\(c\)\(2\)](#)). The Ninth Circuit found that the statute is not vague, because “[w]hether a defendant is guilty of having ‘reasonable cause to believe’ that [the listed chemical] will be used to produce illicit drugs turns on the facts actually known by the defendant in a particular case.” [Id.](#) at 942 (internal quotation marks and citation omitted). The Ninth Circuit explained that “[r]easonable cause to believe” is ... often proven largely through circumstantial

evidence and inferences, but *what* must be proven is not vague.” [Id.](#) at 943.

*26 The rationale set forth in [Kim](#) does not apply in the present case, where the “what” that must be proven is vague. While it may be easy to say that an individual has reason to know that a particular chemical will be used to produce illegal drugs based on the facts of a particular case, it is far more difficult to say that businesses have reason to know what effect a feature like autoplay or push notification will have on children generally. Moreover, as discussed above with respect to the Act’s information use restrictions, reasonable minds may differ on what is “detrimental” to a child’s “physical health, mental health, or well-being.” Those terms have no established meaning and the CAADCA provides no guidance. The State does not offer a proposed definition or means for determining how to decide what is “detrimental” to a child’s “physical health, mental health, or well-being.” Accordingly, the Court finds that [§ 1798.99.31\(b\)\(7\)](#) does not “clearly delineate the conduct it proscribes” as required under the constitution. [Foti](#), 146 F.3d at 638.

The Court finds that NetChoice has demonstrated a likelihood of success on its vagueness challenge to the dark pattern restriction, [Cal. Civ. Code § 1798.99.31\(b\)\(7\)](#).

d. Age Estimation, [Cal. Civ. Code § 1798.99.31\(a\)\(5\)](#)

[California Civil Code § 1798.99.31\(a\)\(5\)](#) requires each covered business to “Estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers.” NetChoice does not challenge the requirement that a business estimate the age of child users. NetChoice’s issue is with the requirement that such estimation be done “with a reasonable level of certainty appropriate to the risks” that arise from the business’s practices.

The State contends that [§ 1798.99.31\(a\)\(5\)](#) is not vague because it gives businesses an alternative to performing age estimation, that is, applying the privacy and data protections afforded to children to all consumers. That argument is unpersuasive. If the age estimation requirement were impermissibly vague, the fact that a business has an

alternative to performing age estimation would not render the age estimation requirement itself less vague. And, as discussed above, limiting all users to material appropriate to a 7-year-old is hardly a valid alternative.

However, the Court finds that the thrust of the age estimation requirement – that a business must estimate the age of child users – is clear. A vagueness challenge will fail when “it is clear what the ordinance as a whole prohibits.” [Hill](#), 530 U.S. at 733, 120 S.Ct. 2480 (internal quotation marks, citations, and brackets omitted). The Court agrees that the provision is less than precise with respect to the degree of certainty with which age estimation must be performed. But NetChoice has not cited, and the Court has not discovered, any authority suggesting that ambiguity in the degree of precision with which a task must be performed renders a statute vague when it is clear *what* task must be performed.

The Court concludes that NetChoice has not shown a likelihood of success on its vagueness challenge to [California Civil Code § 1798.99.31\(a\)\(5\)](#).

6. As-Applied Challenge

After the case was remanded to this Court by the Ninth Circuit, NetChoice amended its pleading to add as-applied challenges to its claims, which previously had asserted only facial challenges. See FAC ¶¶ 77-126. NetChoice devotes a single sentence of its motion to its as-applied claims, asserting, “For the same reasons the challenged provisions are facially invalid, they are also invalid as applied to NetChoice’s members.” Pl.’s Second Mot. for Prelim. Inj. The State did not respond to that argument. In its reply, NetChoice asserts that it is entitled to relief on its as-applied claims, citing case authority for the proposition that a party who fails to oppose an argument concedes it. See [Cody v. Ring LLC](#), 718 F. Supp. 3d 993, 1003 n.4 (N.D. Cal. 2024).

*27 “An as-applied challenge contends that the law is unconstitutional as applied to the litigant’s particular speech activity, even though the law may be capable of valid application to others.” [Project Veritas](#), 125 F.4th at 939-40. “Where a plaintiff seeks to challenge a statute prior to enforcement, there must be a genuine threat of imminent prosecution.” [Id.](#) at 941 (internal quotation marks and citation omitted). “To determine whether a plaintiff has

established such a threat, we consider: [1] whether the plaintiffs have articulated a concrete plan to violate the law in question, [2] whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute.” *Id.* (internal quotation marks and citation omitted). “[T]he mere existence of a statute is insufficient to create a ripe controversy[.]” *Id.* (internal quotation marks and citation omitted).

NetChoice does not address any of these factors. Accordingly, it is not entitled to a preliminary injunction based on its as-applied challenge, regardless of the State’s failure to respond.

B. Severability (Prayer for Relief)

In the FAC’s Prayer for Relief, NetChoice asks the Court to declare that the Individual Provisions, Cal. Civ. Code §§ 1798.99.31(a)(5), (9), (b)(1)-(4), (7), are facially invalid because they are not severable from the enjoined DPIA provisions. *See* FAC Prayer ¶ 9. NetChoice also asks the Court to declare any remaining provisions of the Act invalid to the extent the Court finds those provisions inseverable from the enjoined portions. *See id.*

Where a portion of a law has been found to be unconstitutional, invalidation of the entire law may be avoided if the unconstitutional portion may be severed from the remainder. *See* *Acosta v. City of Costa Mesa*, 718 F.3d 800, 817 (9th Cir. 2013). Severability of a state statute is governed by state law. *See Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014). Under California law, an invalid statutory provision may be severed, and the remainder of the statute enforced, if the invalid provision is “grammatically, functionally, and volitionally separable.” *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 271, 135 Cal.Rptr.3d 683, 267 P.3d 580 (2011). All three criteria must be met for the invalid provision to be severed. *See* *McMahan v. City & Cnty. of San Francisco*, 127 Cal. App. 4th 1368, 1374, 26 Cal.Rptr.3d 509 (2005).

NetChoice contends that the CAADCA cannot be saved by severing the enjoined DPIA provisions. The enjoined provisions include the DPIA requirement as well as the 90-day notice and cure provision, which the parties also refer to as the “safe harbor.” *See* *NetChoice, LLC v. Bonta*, 113

F.4th at 1108 (identifying enjoined provisions). NetChoice argues that the DPIA provisions are neither volitionally severable nor functionally severable from the remainder of the CAADCA.

While this Court’s order granting NetChoice’s first motion for a preliminary injunction addressed functional severability, as did the Ninth Circuit’s opinion, neither this Court nor the Ninth Circuit considered the issue of volitional severability.

See *NetChoice II*, 113 F.4th at 1125; *NetChoice I*, 692 F. Supp. 3d at 960-61. NetChoice raises the argument that the DPIA provisions are not volitionally severable from the remainder of the CAADCA for the first time in the present motion.

1. Volitional Severability

NetChoice argues that the DPIA provisions are not volitionally severable from the rest of the Act for two reasons. First, NetChoice contends that the plain text counsels against severance. Second, NetChoice asserts that the legislative history of the Act shows that the legislature would not have passed the Act without the DPIA provisions, and in particular the 90-day notice and cure provision. The State asserts that the DPIA provisions are volitionally severable.

An invalid portion of a statute “passes the test for volitional severability if it can be said with confidence that the enacting body’s attention was sufficiently focused upon the parts to be validated so that it would have separately considered and adopted them in the absence of the invalid portions.” *Acosta*, 718 F.3d at 817-18 (internal quotation marks, citation, and brackets omitted). A statutory provision “is volitionally separable if it was not of critical importance to the measure’s enactment.” *Jevne v. Superior Ct.*, 35 Cal. 4th 935, 961, 28 Cal.Rptr.3d 685, 111 P.3d 954 (2005) (internal quotation marks and citation omitted).

*28 “The issue, when assessing volitional separability, is not whether a legislative body would have preferred the whole to the part; surely it would have[.]” *Matosantos*, 53 Cal. 4th at 273, 135 Cal.Rptr.3d 683, 267 P.3d 580. “Instead, the issue is whether a legislative body, knowing that only part of its enactment would be valid, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid.” *Id.*

“In determining whether the invalid portions of a statute can be severed, we look first to any severability clause.”

🚩 *Matosantos*, 53 Cal. 4th at 270, 135 Cal.Rptr.3d 683, 267 P.3d 580. “The presence of such a clause establishes a presumption in favor of severance.” 🚩 *Id.* However, “the absence of such a clause is not conclusive.” 🚩 *Cnty. of Sonoma v. Superior Ct.*, 173 Cal. App. 4th 322, 352, 93 Cal.Rptr.3d 39 (2009). In the absence of a severability clause, “courts look to the statute's text, the intended function of the particular statutory scheme and the effect severance has on that intended function, any express policy statement or declaration of purpose, and legislative materials[.]” *Fowler Packing Co., Inc. v. Lanier*, 674 F. Supp. 3d 851, 877-78 (E.D. Cal. 2023) (internal quotation marks and citations omitted). Among the legislative materials considered by California courts are a Senate floor analysis, see *People v. Cornett*, 53 Cal. 4th 1261, 1267, 139 Cal.Rptr.3d 837, 274 P.3d 456 (2012), and the floor statement of the sponsoring legislator, see 🚩 *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 926, 12 Cal.Rptr.3d 262, 88 P.3d 1 (2004); 🚩 *In re Marriage of Siller*, 187 Cal. App. 3d 36, 46, 231 Cal.Rptr. 757 (1986).

NetChoice argues that the plain text of the statute supports a finding that the DPIA provisions are not severable, noting that the Act does not contain a severability clause. “Although the absence of a severability clause does not raise a presumption against severability, it does suggest an intent to have all components operate together or not at all.” *Matter of Reyes*, 910 F.2d 611, 613 (9th Cir. 1990) (internal quotation marks and citation omitted). NetChoice also points to legislative findings directing regulators to look to the United Kingdom for guidance. See 2022 Cal. Stat. ch. 320 (A.B. 2273), §§ (1)(d)-(e). Guidance from the Information Commissioner's Office in the U.K. focuses on compliance rather than monetary penalties. See Gossett Decl. Exs. 1-4, ECF 101-7. If the CAADCA is permitted to take effect without the DPIA provisions, covered businesses that violate the Act will not be given an opportunity to come into compliance before they are subject to stiff monetary penalties. The CAADCA provides for civil penalties of up to \$2,500 per child for each negligent violation and up to \$7,500 per child for each intentional violation. See 🚩 Cal. Civ. Code § 1798.99.35(a). That result, NetChoice argues, was not contemplated or intended.

NetChoice argues that the Act's legislative history shows that the CAADCA would not have passed without the DPIA safe harbor granting businesses the right to notice and a 90-day cure period before imposition of civil penalties. Assembly Bill 2273 went through five iterations before it ultimately passed and was codified as the CAADCA. See Pl.'s Request for Judicial Notice, ECF 129. ⁶ The first two versions of the bill, dated February 16, 2022 and April 26, 2022, are not at issue. The third version, dated June 30, 2022 (“Version 3”), was the last version without the notice and cure provision. See *id.* Ex. 3, A.B. 2273, 2021-2022 Leg., Reg. Sess. (Cal. June 30, 2022). The Senate Appropriations Committee referred Version 3 to the suspense file.

⁶ NetChoice's request for judicial notice of AB 2273's legislative history is granted. See 🚩 *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (“Legislative history is properly a subject of judicial notice.”).

*29 The bill was amended again on August 11, 2022 (“Version 4”) to make substantial changes, including the addition of a notice and cure provision with a 45-day cure period. See Pl.'s Request for Judicial Notice Ex. 4, A.B. 2273, 2021-2022 Leg., Reg. Sess. (Cal. August 11, 2022). On August 22, 2022, the full Senate read the bill a third time and amended Version 4 to become the fifth and final version (“Version 5”). See *id.* Ex. 5, A.B. 2273, 2021-2022 Leg., Reg. Sess. (Cal. August 22, 2022). Version 5 increased the notice and cure period to 90 days and did not include any other significant amendments. See *id.* NetChoice argues that the fact that the legislature actually considered, but did not adopt, the bill without the 90-day notice and cure period is strong evidence that the legislature would not have adopted with bill without that provision.

The Court notes that the DPIA regime as a whole, not just the safe harbor provision, is prominently highlighted in the Legislative Counsel's Digest in the August 11, 2022 and August 22, 2022 versions of the bill. See Pl.'s Request for Judicial Notice Exs. 4, 5.

NetChoice presents evidence that floor statements by the bill's co-author also support a finding that the DPIA provisions are not volitionally severable. Assemblymember Wicks highlighted the notice and cure provision when presenting the final version of the bill for a vote, explaining that the amendment ensures that businesses in substantial compliance with the Act have an opportunity to remedy violations prior

to being subject to civil penalties. See Transcript, Assembly Floor Analysis, AB 2273 (Aug. 11, 2022), Gossett Decl. Ex. 9. Floor statements of the sponsoring legislator may be considered when interpreting a statute. See *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 926, 12 Cal.Rptr.3d 262, 88 P.3d 1 (2004); *In re Marriage of Siller*, 187 Cal. App. 3d 36, 46, 231 Cal.Rptr. 757 (1986).

The Court finds persuasive NetChoice's showing regarding the importance of the DPIA provisions, and in particular the notice and cure provision, to the passage of the CAADCA. The State argues that the Act makes clear the depth of the legislature's concerns for the privacy and safety of child users. See *Cal. Civ. Code* § 1798.99.29 (stating purpose of protecting the privacy and well-being of children when they are online). In the State's view, the legislature would have enacted the remaining portions of the Act even had it known the notice and cure provision would not be included. The State's position is not supported by the record, which reflects that the legislature had the opportunity to pass the Act without the notice and cure provision but declined to do so. The legislature was presented with multiple versions of the bill omitting the notice and cure provision, and even a version including a shorter 45-day notice and cure period. The Act was not passed, however, until the 90-day safe harbor was included. Under those circumstances, the Court cannot "say with confidence" that the legislature would have separately considered and adopted the non-enjoined portions of the Act in the absence of the DPIA provisions. *Acosta*, 718 F.3d at 817. On this record, the Court simply cannot find that the DPIA provisions, including the safe harbor provision, were "not of critical importance to the measure's enactment." *Jevne v. Superior Ct.*, 35 Cal. 4th at 961, 28 Cal.Rptr.3d 685, 111 P.3d 954.

Accordingly, the Court finds that the enjoined DPIA provisions are not volitionally severable from the remainder of the statute.

2. Functional Severability

NetChoice also argues that the DPIA provisions are not functionally severable from the remaining provisions of the CAADCA. The State contends that the DPIA provisions are functionally severable.

An invalid provision is functionally severable if it is not necessary to the law's operation and purpose. *Acosta*, 718 F.3d at 820. "[T]he remainder after separation of the invalid part must be complete in itself and capable of independent application." *Abbott Labs. v. Franchise Tax Bd.*, 175 Cal. App. 4th 1346, 1358, 96 Cal.Rptr.3d 864 (2009) (internal quotation marks and citation omitted).

*30 NetChoice argues that the enjoined DPIA provisions are not functionally severable because they are critical to what NetChoice characterizes as "a compliance-based regime enforced primarily through internal compliance bureaucracies, not strict liability." Pl.'s Second Mot. for Prelim. Inj. at 25. NetChoice cites extensively to interview statements made by Assemblymember Wicks, the Act's co-author, indicating that the purpose of the Act is to bring covered businesses into compliance with its regulations, not to impose penalties on them. NetChoice argues that stripping out the DPIA provisions would change the Act's function and focus.

The State responds by pointing out that under California law, "the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation." *Quintano v. Mercury Cas. Co.*, 11 Cal. 4th 1049, 1062, 48 Cal.Rptr.2d 1, 906 P.2d 1057 (1995). As noted above, statements made on the floor may be considered, as they are presented to the legislature as a whole. See *Dowhal*, 32 Cal. 4th at 926, 12 Cal.Rptr.3d 262, 88 P.3d 1. However, the Court gives little weight to the statements of Assemblymember Wicks in an interview.

Considering the plain text of the CAADCA, it appears that the enjoined DPIA provisions are distinct from other provisions of the Act, such that the invalidity of the DPIA provisions does not prevent the independent application of the Act's remaining provisions. For example, a covered business still can comply with the Act's affirmative requirements that it "[e]stimate the age of child users ...," *Cal. Civ. Code* § 1798.99.31(a)(5); "[c]onfigure all default privacy settings provided to children by the online service, product, or feature to settings that offer a high level of privacy ...," *Id.* § 1798.99.31(a)(6); "[p]rovide any privacy information, terms of service, policies, and community standards ...," *Id.* § 1798.99.31(a)(7); "provide an obvious signal to the child

when the child is being monitored or tracked,” [id.](#) § 1798.99.31(a)(8); “[e]nforce published terms, policies, and community standards ...,” [id.](#) § 1798.99.31(a)(9); and “[p]rovide prominent, accessible, and responsive tools to help children ... exercise their privacy rights and report concerns,” [id.](#) § 1798.99.31(a)(10). A covered business likewise still can comply with the Act’s prohibitions set forth in [id.](#) § 1798.99.31(b)(1)-(8).

The Court concludes that the DPIA provisions are functionally severable from the remainder of the statute.

C. [Section 230](#), COPPA, and Dormant Commerce Clause (Claims 4-6)

NetChoice argues that it is likely to succeed on its claims that the CAADCA is preempted by [Section 230](#) (Claim 6); is preempted by COPPA (Claim 5); and is facially invalid under the dormant Commerce Clause (Claim 4). The State contends that NetChoice is not likely to succeed on those claims.

1. [Section 230](#) Preemption (Claim 6)

In Claim 6, NetChoice asserts that certain provisions of the CAADCA are preempted by [Section 230](#) of the Communications Decency Act, [47 U.S.C. § 230](#). Specifically, NetChoice asserts that [Section 230](#) preempts the Act’s policy enforcement requirement, [Cal. Civ. Code § 1798.99.31\(a\)\(9\)](#); several of the information use restrictions, [Cal. Civ. Code §§ 1798.99.31\(b\)\(1\), \(3\)-\(4\)](#); and the dark patterns restriction, [Cal. Civ. Code § 1798.99.31\(b\)\(7\)](#). The State argues that [Section 230](#) does not preempt any provisions of the CAADCA.

“[Section 230](#) of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties[.]” [Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC](#), 521 F.3d 1157, 1162 (9th Cir. 2008) (footnotes omitted). “The operative section of the law, [§ 230\(c\)](#) ... is divided into two working parts.” [Est. of Bride by & through Bride v. Yolo Techs., Inc.](#), 112 F.4th 1168, 1175 (9th Cir. 2024). “The first broadly states

that no service provider ‘shall be treated as the publisher or speaker of any information provided by another information content provider,’ or, more colloquially, by a third-party user of the service.” [Id.](#) (quoting [§ 230\(c\)\(1\)](#)). “The second part protects actions taken by a service provider to moderate and restrict material it ‘considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.’ ” [Id.](#) (quoting [§ 230\(c\)\(2\)](#)). “[Section 230](#) expressly preempts any state laws with which it may conflict.” [Id.](#) (quoting [§ 230\(e\)\(3\)](#)).

*31 The Ninth Circuit has emphasized “that [§ 230\(c\)\(1\)](#) does not declare a general immunity from liability deriving from third-party content.” [Calise v. Meta Platforms, Inc.](#), 103 F.4th 732, 740 (9th Cir. 2024) (internal quotation marks, citation, and brackets omitted). Immunity applies only if the website operator “is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.” [Roommates](#), 521 F.3d at 1162 (quoting [§ 230\(f\)\(3\)](#)). “A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content.” [Id.](#) “But as to content that it creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.” [Id.](#) “Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.” [Id.](#) at 1162-63.

Any assertion of [Section 230](#) immunity against enforcement of the CAADCA therefore will depend on the circumstances of the case. One business’s publication of content may implicate [Section 230](#) while another business’s publication of the same content may not, depending on each business’s role (or lack thereof) in creating the published content. Indeed, the Ninth Circuit has recognized that [Section 230](#) immunity “is a difficult and complex issue that requires case-specific, and indeed claim-specific, analysis.” [Calise](#), 103 F.4th at 739. Consequently, while it may be appropriate for a covered business to raise [Section 230](#) in response to the State’s attempted enforcement of the

CAADCA in a particular case, NetChoice has not shown that it is likely to succeed on its facial challenge to the CAADCA as preempted by [Section 230](#).

2. COPPA Preemption (Claim 5)

In Claim 5, NetChoice asserts that the CAADCA is preempted by COPPA, which contains a preemption clause providing, “No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section.”

[15 U.S.C.A. § 6502\(d\)](#) (emphasis added). A state law is not “inconsistent” with COPPA for preemption purposes unless the state law contains requirements that contradict those of COPPA or “stand as obstacles to federal objectives” embodied in COPPA. *Jones v. Google LLC*, 73 F.4th 636, 642 (9th Cir. 2023). A state law that supplements or requires the same thing as COPPA is not inconsistent with COPPA. *See id.*

NetChoice claims that the CAADCA is inconsistent with COPPA because the CAADCA's regulations reach more broadly to businesses providing services “likely to be accessed by children,” and because the CAADCA does not grant parents the power to decide what their children can access online, as does COPPA. The State argues that the cited provisions of the CAADCA do not contradict, and indeed supplement, COPPA.

It is not clear that the cited provisions of the CAADCA contradict those of COPPA, or would stand as an obstacle to enforcement of COPPA. A determination that there is preemption would require a careful and nuanced analysis, which is not consistent with the few paragraphs the parties have devoted to the issue. The Court finds that NetChoice has not shown it is likely to succeed on its claim of COPPA preemption.

3. Dormant Commerce Clause (Claim 4)

Finally, in Claim 4 of the FAC, NetChoice asserts that the CAADCA violates the dormant Commerce Clause. “[T]he Commerce Clause prohibits the enforcement of state laws driven by economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors.” [Nat'l Pork Producers Council v. Ross](#), 598 U.S. 356, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023). “When a state law ... completely bans – or even just directly affects – commercial transactions that take place entirely outside of the state's borders, it plainly contravenes the dormant Commerce Clause.” [Nat'l Shooting Sports Found. v. Bonta](#), 718 F. Supp. 3d 1244, 1256 (S.D. Cal. 2024) (internal quotation marks and citation omitted). “This is so even if the regulated commerce has effects within the State of California.” *Id.* (internal quotation marks and citation omitted).

*32 NetChoice argues that, because the CAADCA applies to “residents of California,” and such residents may be out of the state, the Act runs afoul of the dormant Commerce Clause. In response, the State contends that NetChoice applies the dormant Commerce Clause too broadly, and that in any event the CAADCA has no impact on transactions occurring wholly outside of the state. The briefing on these issues, comprising approximately one page per party, and the record regarding potential extraterritorial applications of the Act, are insufficient for the careful analysis that would be required before the Court could find the Act facially invalid under the dormant Commerce Clause. The Court therefore concludes that NetChoice has not shown it is likely to succeed on the merits of this claim.

D. Conclusion Re NetChoice's Entitlement to a Preliminary Injunction

The Court finds that NetChoice has shown a likelihood of success on its First Amendment claim (Claim 1), as NetChoice has established that the CAADCA likely is invalid on its face. NetChoice also has shown that the previously enjoined DPIA provisions are not volitionally severable from the remainder of the Act. Consequently, NetChoice has satisfied the first of the four [Winter](#) factors, as required to obtain a preliminary injunction barring enforcement of the CAADCA. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (listing factors).

In addition, NetChoice has shown a likelihood of success on its First Amendment claim (Claim 1) and its First Amendment Vagueness claim (Claim 3) as to the Act's Individual Provisions, as NetChoice has established that: the policy enforcement provision, [Cal. Civ. Code § 1798.99.31\(a\)](#)

(9), likely is both facially invalid with respect to content policies and community standards, and impermissibly vague; the use restrictions, *id.* §§ 1798.99.31(b)(1)-(4), likely are impermissibly vague; the dark patterns restriction, *id.* § 1798.99.31(b)(7), likely is impermissibly vague; and the age estimation requirement, *id.* § 1798.99.31(a)(5), likely is facially invalid.

The remaining *Winter* factors – the likelihood of irreparable harm, the balance of equities, and the public interest – are not contested, and the Court has no difficulty finding that they are satisfied here. Because NetChoice has a colorable First Amendment claim, it likely will suffer irreparable harm if the CAADCA takes effect. See *Am. Beverage Ass'n*, 916 F.3d at 758. The fact that NetChoice has raised serious First Amendment questions necessarily means that the balance of hardships tips sharply in NetChoice's favor. See *id.* And courts have consistently recognized the significant public interest in upholding First Amendment principles. See *id.*

When a plaintiff makes a sufficient showing on all four *Winter* factors, issuance of a preliminary injunction is warranted, even if issuance of the injunction will involve intrusion into an agency's administration of state law. See *Baird v. Bonta*, 81 F.4th 1036, 1041 (9th Cir. 2023). Accordingly, NetChoice's motion for a preliminary injunction will be GRANTED.

E. Security

Federal Rule of Civil Procedure 65(c) provides that “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs

and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). The Ninth Circuit has “recognized that Rule 65(c) invests the district court with discretion as to the amount of security required, if any.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks and citation omitted) (italics in original). Thus, the district court has discretion to dispense with the filing of a bond altogether, or to require only a nominal bond. See *id.*

*33 The parties have not addressed the issue of bond in their briefing. The Court issued the first preliminary injunction without a bond and without objection from the State. The Court again finds it appropriate to issue a preliminary injunction without requiring security.

IV. ORDER

(1) Plaintiff NetChoice's motion for preliminary injunction is GRANTED as follows:

- (a) Rob Bonta, Attorney General of the State of California, and anyone acting in concert with his office are ENJOINED from enforcing the California Age-Appropriate Design Code Act;
- (b) This preliminary injunction shall issue without the requirement of a security bond; and
- (c) This preliminary injunction shall take effect immediately and shall remain in effect until otherwise ordered by the Court.

(2) This order terminates ECF 101.

All Citations

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United States District Court, W.D.
Arkansas, Fayetteville Division.

NETCHOICE, LLC, Plaintiff

v.

Tim GRIFFIN, in his Official Capacity as
Attorney General of Arkansas, Defendant

CASE NO. 5:23-CV-5105

|

Signed March 31, 2025

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MEMORANDUM OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT
JUDGE

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I. INTRODUCTION

This case presents a constitutional challenge to Arkansas Act 689 of 2023, the “Social Media Safety Act” (“Act 689”). Act 689 requires certain social media platforms to verify the age of all account holders who reside in Arkansas in order to prevent minors from opening accounts without parental consent. This age verification must be performed by a third-party vendor using the account-seeker’s government identification or biometric information. Act 689 was set to go into effect September 1, 2023, but was preliminarily enjoined by this Court (Doc. 44). Plaintiff NetChoice, LLC, an Internet trade association, now moves for summary judgment on its First Amendment and vagueness claims. For the reasons that follow, NetChoice’s Amended Motion for Summary Judgment (Doc. 66) is **GRANTED**.

II. BACKGROUND

A. The Social Media Safety Act: Objectives and Requirements

As described by the State, “Arkansas passed the Social Media Safety Act (Act 689) to protect children from the widespread dangers of social media” and “prevent[] online sexual predators from exploiting children in online spaces” by requiring “reasonable age verification.” (Doc. 72, p. 1).

Act 689 is described in detail in the Court’s preliminary injunction order (Doc. 44).¹ The broad strokes are as follows. Under Act 689, “[a] social media company shall not permit an Arkansas user who is a minor to be an account holder on the social media company’s social media platform unless the minor has the express consent of a parent or legal guardian.” [Ark. Code Ann. § 4-88-1402\(a\)](#). To enforce this prohibition, social media companies “shall use a third-party vendor to perform reasonable age verification before allowing access to the social media company’s social media platform.” *Id.* § 1402(c)(1). “Reasonable age verification methods” include providing the account holder’s digital ID or other government-issued ID to the third-party vendor, or “[a]ny commercially reasonable age verification method” a third-party vendor might use. *Id.* § 1402(c)(2). Other age verification methods currently on the market utilize biometric data to perform face or voice analysis. (Doc. 45, pp. 17:12–20). Once their age is verified, an adult can access a social media platform. A minor, however, cannot access a social media platform unless and until the social media company confirms that the minor has express parental consent. *Id.* § 1402(b)(2). Act 689 does not say how a social media company should identify an account-seeking minor’s parents or verify a parent’s consent.

¹ Act 689 has since been recodified at subchapter 14, rather than subchapter 11, of Chapter 88 of the Arkansas Code. In the Court’s preliminary injunction order when reading a cite to, e.g., § 1102, the reader should now look to § 1402.

*2 Act 689 defines both “social media company” and “social media platform,” and neither definition follows common parlance. Under Act 689, a “social media company” is defined in terms of what *account holders* may do on the company’s platform. A “social media company” is one that permits its account holders to: (1) create a public profile “for the *primary purpose* of interacting socially with other profiles and accounts”; (2) upload or post content; (3) view

content of other account holders; and (4) interact with other account holders “through request and acceptance.” *Id.* at § 1401(7)(A) (emphasis added). The definition of “social media company” has multiple exclusions: companies that offer “career development opportunities”; exclusively gaming-related content; or exclusively “subscription content in which users follow or subscribe unilaterally.” *Id.* at § 1401(7)(B). That last exclusion comes with an exception: “A social media company that allows a user to generate short video clips of dancing, voice-overs, or other acts of entertainment in which the primary purpose is not educational or informative does not meet the exclusion” *Id.* § 1401(7)(B)(i)(b). And finally, companies that offer “cloud storage services, enterprise cybersecurity services, educational devices, or enterprise collaboration tools for kindergarten through grade twelve (K-12) schools” and derive “less than twenty-five percent (25%)” of their revenue “from operating a social media platform” are excluded. *Id.* § 1401(7)(B)(iii). This exemption shields Google (a subsidiary of Alphabet, Inc.) from compliance, so neither Google Hangouts nor Google’s video-sharing platform, YouTube, are required to verify the ages of their account holders under the Act.

Act 689 defines “social media platform” as a “public or semipublic internet-based service or application” of which the “*substantial function* ... is to allow users to interact socially with each other within the service or application.” *Id.* § 1401(8)(A)(ii)(a) (emphasis added). The “social media platform” definition also comes with multiple exclusions: platforms for which “the predominant or exclusive function is” email or direct messaging; e-commerce including classified ads for the sale of goods (but not personal services); business-to-business interaction; shared document collaboration; data visualization; tech support; “[a]cademic or scholarly research”; use by educational entities; or hosting content that is created, posted, or selected by the provider rather than the user or account holder. *Id.* § 1401(8)(B). Act 689 also exempts platforms controlled by businesses that generate less than \$100 million annually. *Id.* § 1401(8)(C). As a result, platforms like Parler, Gab, and Truth Social are not required to verify the ages of their account holders.

B. Social Media Use Among Minors

Social media is used broadly by adults and near-universally by teens. In 2021, about 70% of Americans reported that they have used social media. *Social Media Use in 2021*, Pew Rsch. Ctr. (Apr. 7, 2021).² And as of 2023, up to 95% of

people aged 13–17 reported using any social media platform. U.S. Surgeon General, Social Media and Youth Mental Health 4 (2023).³ “There is broad agreement among the scientific community that social media has the potential to both benefit and harm children and adolescents.” *Id.* at 5.

² <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/> [https://perma.cc/76X7-VFFQ].

³ <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> [https://perma.cc/3HU9-S6ZA].

“[A]dolescents who spent more than 3 hours per day on social media faced double the risk of experiencing poor mental health outcomes including symptoms of depression and anxiety.” *Id.* at 6. And “[a]s of 2021, 8th and 10th graders spent an average of 3.5 hours per day on social media.” *Id.* at 7. Social media users may encounter disturbing suicide-and self-harm-related content online. *Id.* at 8. “Social comparison driven by social media is [also] associated with body dissatisfaction, disordered eating, and depressive symptoms.” *Id.* And social media users can become victims of cyberbullying, which has “a consistent relationship [with] depression among children and adolescents.” *Id.* at 9.

In addition to the risks posed by other minors on social media, these platforms can also be used by adults to sexually exploit minors. The State relies on an FBI report that found:

Financial sextortion schemes occur in online environments where young people feel most comfortable—using common social media sites, gaming sites, or video chat applications that feel familiar and safe. On these platforms, online predators often use fake female accounts and target minor males between 14 to 17 years old, but the FBI has interviewed victims as young as 10 years old.

*3 FBI Nat’l Press Off., *FBI and Partners Issue National Public Safety Alert on Financial Sextortion Schemes* (Dec. 19, 2022) [hereinafter *Financial Sextortion*].⁴

⁴ <https://www.fbi.gov/news/press-releases/fbi-and-partners-issue-national-public-safety-alert-on-financial-sextortion-schemes> [https://perma.cc/K5MN-W7SU].

C. Types of Speech Available on NetChoice Members’ Platforms

It is undisputed that adults and minors use NetChoice members’ online services to engage in constitutionally protected speech. (Doc. 68, ¶¶ 4, 6, 14, 21, 30, 34, 37; Doc. 73, ¶¶ 2, 4, 6, 11, 12, 14, 15). Social media companies and platforms “allow[] users to gain access to information and communicate with one another about it on any subject that might come to mind.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). “[U]sers employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’ ” *Id.* at 105 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). “On [NetChoice member Meta’s platform,] Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos.” *Id.* at 104. On NetChoice member X, “users can petition their elected representatives and otherwise engage with them in a direct manner.” *Id.* at 104–05.

With all that said, the State reminds the Court that social media users “also engage in non-expressive activity not protected by the First Amendment, including criminal conduct and that which is harmful to minors.” (Doc. 73, ¶¶ 2, 4, 11, 14). The Court would note that “harmful to minors” is not a category of unprotected speech. See *United States v. Stevens*, 559 U.S. 460, 468 (2010) (“‘From 1791 to the present,’ ... the First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas,’ and has never ‘include[d] a freedom to disregard these traditional limitations.’ ” (second alteration in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992))). It is, however, true that despite these entities’ efforts to self-regulate, social media users of any age may still encounter some speech online that is not entitled to constitutional protection, including real threats, child pornography, obscenity, defamation, fighting words, or speech integral to criminal conduct. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012). In addition, minors may

encounter speech online that is constitutionally protected as to adults, but not as to minors, and some of that speech may be harmful to them.

D. Existing Parental Controls

Of course, parents may rightly decide to regulate their child's use of social media—including restricting the amount of time they spend on it, the content they may access, or even those they chat with. And many tools exist to help parents with this endeavor.

The first step to acquiring a social media account is an internet-capable device. Parents decide what, if any, internet-capable devices to give their child. Most manufacturers offer device-level parental controls for parents who chose to give their child internet-capable devices. For example, iPhones and iPads empower parents to limit the amount of time their children can spend on the device, choose which applications (e.g., YouTube, Facebook, Snapchat, or Instagram) their children can use, set age-related content restrictions for those applications, filter online content, and control privacy settings. *See* Apple, *Use Parental Controls on Your Child's iPhone, iPad, and iPod Touch* (Doc. 66, pp. 52–59).⁵ Google and Microsoft also offer parental controls for their devices. *See* Google, Safety Center, Parental Controls (Doc. 66, pp. 80–85);⁶ Microsoft, *Getting Started with Microsoft Family Safety* (Doc. 66, pp. 86–90).⁷ In addition, numerous third-party applications allow parents to control and monitor their children's use of Internet-connected devices and online services. *See* Ben Moore & Kim Key, *The Best Parental Control Apps for Your Phone*, PCMag (Mar. 29, 2022) (Doc. 66, pp. 99–115).⁸

⁵ <https://support.apple.com/en-us/HT201304> [https://perma.cc/9PLJ-7CR4].

⁶ <https://safety.google/families/parental-supervision/> [https://perma.cc/WGU8-KKVS].

⁷ <https://support.microsoft.com/en-us/account-billing/getting-Started-with-microsoft-family-safety-b6280c9d-38d7-82ff-0e4f-a6cb7e659344> [https://perma.cc/F47N-PTSL].

⁸ <https://www.pcmag.com/picks/the-best-parental-control-apps-for-your-phone> [https://perma.cc/ZK7Z-N5AQ].

*4 The next step is connecting that internet-capable device to the internet. Devices may access the internet through a wireless plan on a particular device, i.e., cell-phone data, or by connecting to a wireless or wired network, e.g., home WiFi. At both these connection points, parental controls are available. Cell carriers and broadband providers have tools that allow parents to block certain applications and websites from their children's devices, ensure that their children are texting and chatting with trusted contacts only, and restrict their children's access to screen time during certain hours of the day. *See, e.g.,* AT&T, *Learn About the AT&T Secure Family App* (Doc. 66, pp. 60–64);⁹ T-Mobile, *Family Controls and Privacy* (Doc. 66, pp. 135–43);¹⁰ Comcast Xfinity, *Set Up Parental Controls for the Internet*, (Doc. 66, pp. 65–70).¹¹

⁹ <https://www.att.com/support/article/wireless/KM1271913> [https://perma.cc/2NBP-PNDG].

¹⁰ <https://www.t-mobile.com/privacy-center/education/family-controls> [https://perma.cc/DJJ3-Q9S5].

¹¹ <https://www.xfinity.com/support/articles/set-up-parental-controls-with-comcast-networking> [https://perma.cc/7V5R-BLHC].

Wireless routers themselves offer parental controls, too. *See* Molly Price & Ry Crist, *How to Set Up and Use Your Wi-Fi Router's Parental Controls*, CNET (Feb. 11, 2021) (Doc. 66, pp. 126–34).¹² Parents can use these controls to block certain websites or online services that they deem inappropriate, set individualized content filters for their children, and monitor the websites their children visit and the services they use. *Id.* Parents can also use router settings to turn off their home internet at particular times of day or pause internet access for a particular device or user. *Id.*

¹² <https://archive.ph/wip/uGaN2>.

Finally, there are the internet browsers and the websites or mobile applications through which children create social media accounts and access social media content. Many browsers offer parents tools to control which websites their children can access. *See, e.g.,* Mozilla, *Block and Unblock Websites with Parental Controls on Firefox* (Doc. 66, pp. 116–

18).¹³ Microsoft offers “Kids Mode,” which allows children to access only a pre-approved list of websites. *See* Microsoft, *Learn More About Kids Mode in Microsoft Edge* (Doc. 66, pp. 91–98).¹⁴ Google has a similar feature. It provides parents with “activity reports,” allowing them to see what apps and websites their children access most frequently. *See* Google, Safety Center, Parental Controls (Doc. 66, pp. 80–85).¹⁵

¹³ <https://support.mozilla.org/en-US/kb/block-and-unblock-websites-parental-controls-firefox> [<https://perma.cc/2Q6Z-B4P6>].

¹⁴ <https://support.microsoft.com/en-us/microsoft-edge/learn-more-about-kids-mode-in-microsoft-edge-4bf0273c-1cbd-47a9-a8f3-895bc1f95bdd> [<https://perma.cc/96PS-SP65>].

¹⁵ <https://safety.google/families/parental-supervision/> [<https://perma.cc/96ZQ-Y4TJ>].

Some social media platforms also offer parental controls within the platform itself. For example, Facebook and Instagram have “supervision tools” through which parents can set time limits, view privacy and content settings, and monitor what accounts their child is connected with. *See* Declaration of Antigone Davis ¶ 28, (Doc. 66, pp. 11–32) [hereinafter Davis Decl.]. Snapchat also offers a “family center” through which parents can see who their child is communicating with in the app. *See* Declaration of David Boyle, ¶ 7, (Doc. 17-3) [hereinafter Boyle Decl.].¹⁶

¹⁶ NetChoice repeatedly cites “Boyle Declaration” which supposedly appears in the record as Exhibit C to NetChoice’s summary judgment motion. First, NetChoice filed its motion and all exhibits as a single nearly 200-page document. Second, while NetChoice initially cites to the Boyle Declaration as “Exhibit C,” the “Exhibit C” contained in the single 200-page summary judgment motion is, in fact, the Declaration of Justyn Harriman. The Declaration of David Boyle does, however, appear in the record at Doc. 17-3.

*5 To be sure, parents may or may not use these tools. The State’s expert explains that even though these filtering controls can be “applied in the home, on the router or on laptops, tablets, and smartphones through family cellular plans,” research indicates “that many parents are unaware of this technology” or “do not know how to use it, or discover

their children also know how to use it or have circumvented it some other way.” (Doc. 34-1, ¶ 85). Furthermore, he attests, “Children can be very persuasive, and parents might release the controls to allow them to play a game designed for 18+ within a social media platform, unaware the game or platform may be a portal to pornographic or other unsuitable content and dangerous functionality.” *Id.*

E. Existing Social Media Protections for Minors

Some NetChoice members have also developed policies and practices designed to protect minor users that operate on their platforms even without parental intervention. Facebook, Instagram, Pinterest, and Snapchat require users in the United States to be at least 13 years old before they can create an account—though account holders are asked only to self-report their ages. *See* Davis Decl. ¶ 17; Pinterest, *All About Pinterest* (Doc. 66, pp. 152–56);¹⁷ Boyle Decl. ¶ 5. While none of Plaintiff’s members currently use the age verification methods required by Act 689, Meta employs human content reviewers who are trained to flag, among other things, Facebook and Instagram users who appear to be under 13; if a flagged user cannot prove they meet minimum age requirements, their account is taken down. *See* Davis Decl. ¶ 27. Members also use different default settings based on age: Snapchat defaults all minors to private settings, while Facebook, Instagram, and Pinterest do so for minors under 16. *See* Boyle Decl. ¶ 6; Davis Decl. ¶ 17; Pinterest, *Teen Safety Options* (Doc. 66, pp. 167–72).¹⁸

¹⁷ <https://help.pinterest.com/en/guide/all-about-pinterest> [<https://perma.cc/S6YD-HY6R>].

¹⁸ <https://help.pinterest.com/en/article/teen-safety-options> [<https://perma.cc/NJL4-S9Y4>].

NetChoice members also attempt to curate the content that users post and see on their platforms. *See, e.g.*, Declaration of Justyn Harriman ¶ 9 (Doc. 66, pp. 33–46) [hereinafter Harriman Decl.]. Members attempt to restrict the uploading of violent and sexual content, bullying, and harassment. *See* Declaration of Carl Szabo ¶ 7 (Doc. 66, pp. 4–10) [hereinafter Szabo Decl.]; Davis Decl. ¶¶ 36–37, 39; Boyle Decl. ¶ 6. Some NetChoice members, like Meta, also use age-verification technology to try to keep minors from seeing certain content visible to adults, or to keep younger teens from seeing content visible to older teens. *See* Szabo Decl. ¶ 7; Davis Decl. ¶ 32. NetChoice members implement these

policies through algorithms, automated editing tools, and human review. *See* Davis Decl. ¶¶ 36, 27, 39–40. If a platform decides that certain content violates its policies, it may remove the content, restrict it, or add a warning label or disclaimer. *See* Davis Decl. ¶ 39. Nextdoor even gives “Kindness Reminders” before a user publishes a post containing potentially offensive language. *See* Harriman Decl. ¶ 7.b. Repeat violators of a platform’s policies may find themselves suspended or banned from the platform. *See* Davis Decl. ¶ 40.

NetChoice members also utilize tools directed at the particular issue of child sexual exploitation. Meta and Nextdoor use both automated and human review to take down harmful content, including child sexual abuse material. *See* Davis Decl. ¶¶ 36–37; Doc. 72-2, p. 21:1–17 (Knapp Depo.). Snapchat purports to protect its minor users by only recommending minors as friend connections to people already in their contacts or with whom they have mutual friends. *See* Boyle Decl. ¶ 6. Instagram warns minor users when a “suspicious” adult tries to interact with them and gives them an option to end the conversation and block, report, and/or restrict the adult; adults are flagged as suspicious if they are sending a large number of friend or message requests to people under age 18 or if they have recently been blocked by people under age 18. *See* Davis Decl. ¶ 30. Snapchat similarly provides “in-conversation warnings” if minors connect with someone with whom they do not share mutual friends. *See* Doc. 72-3, pp. 35:20–36:13 (Boyle Depo.).

III. LEGAL STANDARD

*6 A party moving for summary judgment must establish the absence of a genuine dispute of material fact and its entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56;  *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986);  *Nat’l Bank of Commerce of El Dorado v. Dow Chem. Co.*, 165 F.3d 602, 606 (8th Cir. 1999). “As a general rule, summary judgment is proper ‘only after the nonmovant has had adequate time for discovery.’”  *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. 2014) (citations omitted). Federal Rule of Civil Procedure 56(d) provides:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). “The party seeking additional discovery must show: ‘(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are essential to resist the summary judgment motion.’” *Marlow v. City of Clarendon*, 78 F.4th 410, 416 (8th Cir. 2023) (quoting  *Toben*, 751 F.3d at 895).

To secure a permanent injunction, a party’s claim must actually succeed on the merits. Once a successful merits claim is established, the Court “then considers the following factors in deciding whether to grant a permanent injunction: (1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest.”  *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). “The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.”  *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

IV. DISCUSSION

A. Standing

Arkansas asserts that “NetChoice does not have standing to bring First Amendment claims on behalf of third parties without first making any claims on behalf of itself.” (Doc. 72, p. 2). The State does not otherwise address NetChoice’s standing or attempt to rebut the Court’s prior standing determination. The factual and legal bases for NetChoice’s suit have not changed. Therefore, for the reasons explained in the Court’s preliminary injunction order, the Court finds that NetChoice has associational standing to assert claims based on the harms to be suffered by its member and third-party standing to assert the rights of its members’ users.

B. Need for Further Discovery

The State argues that, under the Supreme Court's recent decision in [Moody v. NetChoice, LLC](#), 603 U.S. 707 (2024), the Court should find that more discovery is needed to resolve a facial challenge so summary judgment is not appropriate at this juncture. The State does not specify what additional factual information it seeks.

In *Moody*, the Supreme Court addressed a facial First Amendment challenge to two state laws that “limit[ed] [social media] platforms’ capacity to engage in content moderation,” thereby infringing, on the plaintiff’s account, the platforms’ protected editorial discretion. [Id.](#) at 717. The Court vacated the lower courts’ rulings because “neither Court of Appeals properly considered the facial nature of NetChoice’s challenge.” [Id.](#) at 718. In ruling on a facial challenge under the First Amendment, the Supreme Court said, a court must decide “whether a law’s unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law’s full set of applications, evaluate which are constitutional and which are not, and compare the one to the other.” [Id.](#) at 718. Because “[t]he parties ha[d] not briefed the critical issues” and the record was “underdeveloped,” the court vacated and remanded for the lower courts “to consider the scope of the laws’ applications, and weigh the unconstitutional as against the constitutional ones.” [Id.](#) at 726.

*7 Here, NetChoice’s challenge is based on the First Amendment rights of users, not platforms. It is unclear how additional factual development would help illuminate the scope of users’ First Amendment interest in accessing regulated platforms. The laws’ scope is largely not in dispute. While the parties disagree about some of the platforms that are subject to the Act’s requirement, there is no dispute that users engage in protected speech on all the platforms that are arguably within the Act’s proscription. Moreover, as the Court determines below, the Act imposes a platform-wide burden on users’ right to engage in that speech, and the Court struggles to see how this would differ between the platforms regulated.

Notably, *Moody* went to the Supreme Court in a preliminary injunction posture. This case comes before the Court, now, at summary judgment. The State relies entirely on *Moody* and does not attempt to address the requirements for a court to

postpone ruling on a motion for summary judgment under Federal Rule of Civil Procedure 56(d).¹⁹ Turning to those requirements, the State has not “set forth in affidavit form the specific facts they hope to elicit from further discovery,” “that the facts sought exist,” or “that these sought-after facts are essential to resist the summary judgment motion.” [Marlow](#), 78 F.4th at 416. “If a party fails to carry its burden, ‘postponement of a ruling on a motion for summary judgment is unjustified.’ ” *Id.* (quoting [Stanback v. Best Diversified Prods., Inc.](#), 180 F.3d 903, 911 (8th Cir. 1999)).

¹⁹ In fact, the need for more time to conduct discovery has already been litigated here. The parties were originally permitted to commence discovery as of October 11, 2023. (Doc. 46, ¶ 6). On October 23, 2023, Arkansas requested six months of discovery. (Doc. 47, ¶ 6(a)). On November 30, 2023, Arkansas moved under Rule 56(d) to delay consideration of NetChoice’s Motion for Summary Judgment. (Doc. 58). After fulsome briefing, the Court defined the boundaries of continued limited discovery and granted Arkansas an extension of the discovery deadline to June 7, 2024. (Doc. 64). Even though *Moody* potentially changes the posture of the analysis, Arkansas makes no effort to explain why or how it remains prejudiced, despite its discovery opportunities to date.

NetChoice bears the burden of showing that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law, and the State can argue that NetChoice has not met that burden on the existing record, as it has in its Response. But the Court cannot “simply refrain” from ruling on Plaintiff’s motion and “instead allow this to proceed to full discovery” when the State has not made out the required showing under Rule 56(d).

C. Merits Claims

1. Burdens on First Amendment Rights: Platform Users’ Rights

a. Level of Scrutiny

NetChoice contends that Act 689’s age-verification requirement targets speech based on content, speaker, and viewpoint and is therefore subject to strict scrutiny. The

State disagrees and argues that Act 689's age-verification requirement “only regulates non-expressive conduct,” namely, minors “entering a social media establishment alone,” and so is not subject to First Amendment scrutiny at all. (Doc. 72, pp. 65–67). The State further argues that even if the Act regulates some speech, the effect is merely incidental.

Laws regulating speech or conduct unprotected by the First Amendment are subject to rational basis review. [Ginsberg v. New York](#), 390 U.S. 629, 641 (1968). On the other hand, laws that restrict protected speech or expression are subject to heightened scrutiny. Courts “apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.” [Turner Broad. Sys., Inc. v. F.C.C.](#), 512 U.S. 622, 642 (1994).

*8 The State focuses on the direct effect of the regulation on the social media platforms—ignoring NetChoice's assertion of users' rights—to argue that a platform's decision to allow minors on its platform is not “expressive.” The Court need not decide whether a social media platform's decision to distribute speech to minors and by minors is itself expressive because the Act ultimately impacts users' speech by “deputiz[ing] covered businesses into serving as censors for the State.” [NetChoice, LLC v. Bonta](#), 113 F.4th 1101, 1118 (9th Cir. 2024).

The First Amendment protects both the right to speak and the “right to receive information and ideas, regardless of their social worth.” [Stanley v. Georgia](#), 394 U.S. 557, 564 (1969). The protections of the First Amendment extended to social media: “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” [Packingham v. North Carolina](#), 582 U.S. 98, 108 (2017). And the State concedes that social media users use these platforms “to engage in a broad array of expressive activity, protected by the First Amendment, on a wide range of topics.” (Doc. 68, ¶ 4; Doc. 73, ¶ 2).

Act 689 forecloses access to social media for those minors whose parents do not consent to the minor's use of social media. It also burdens social media access for all Arkansans—both adults and minors whose parents would allow them to use social media. Requiring adult users to produce state-approved documentation to prove their age and/or submit

to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and “discourage[s] users from accessing [the regulated] sites.” [Reno](#), 521 U.S. at 856. Age-verification schemes like those contemplated by Act 689 “are not only an additional hassle,” but “they also require that website visitors forgo the anonymity otherwise available on the internet.” [Am. Booksellers Found. v. Dean](#), 342 F.3d 96, 99 (2d Cir. 2003); see also [ACLU v. Mukasey](#), 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to “relinquish their anonymity to access protected speech”).

Other courts examining similar regulations have found that “[r]equiring Internet users to provide ... personally identifiable information to access a Web site would significantly deter many users from entering the site[] because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet.” [ACLU v. Gonzales](#), 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007); see also [PSINET, Inc. v. Chapman](#), 167 F. Supp. 2d 878, 889 (W.D. Va. 2001), *aff'd*, [362 F.3d 227](#) (4th Cir. 2004) (“Fear that cyber-criminals may access their [identifying information] ... may chill the willingness of some adults to participate in the ‘marketplace of ideas’ which adult Web site operators provide.”). Record evidence also reflects this concern. See Harriman Decl. ¶¶ 28–29. The State has made no attempt to address this concern and, as in its preliminary injunction order, the Court agrees that the age-verification requirement will deter adults from speaking or receiving protected speech on social media.

Because the Act burdens users' speech, the Act is subject to intermediate scrutiny at a minimum. However, NetChoice also argues that the Act discriminates based on content, speaker, and viewpoint. “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” [Reed v. Town of Gilbert](#), 576 U.S. 155, 163 (2015). “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Id.* “Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.” *Id.*

*9 NetChoice argues that the law is content based because whether a particular “social media company” or “social media platform” is subject to the Act turns on content that users post on that platform. Under Act 689, a “social media company” is regulated if users use its online forum “for the primary purpose of interacting socially with other profiles.” [Ark. Code Ann. § 4-88-1401\(7\)\(A\)](#). Companies that “exclusively offer” “content for the purpose of interacting [sic] gaming, entertainment, or associated entertainment,” “provide[] career development opportunities,” or subscription content so long as that content is not “short video clips of dancing, voice-overs, or other acts of entertainment in which the primary purpose is not educational or informative,” are, however, exempt. *Id.* § 1401(7)(B). Similarly, a “social media platform” is regulated if “a substantial function” of the platform is “to allow users to interact socially.” *Id.* § 1401(8)(A). Here, too, platforms may be exempt from regulation if they predominantly feature certain types of content including “news, sports, entertainment,” “academic or scholarly research,” and “educational” programming. *Id.* § 1401(8)(B).

The State argues that Act 689 is not content based because it is not directed at “the message that is being expressed,” but instead at “the place where a message is expressed.” (Doc. 72, p. 9 (emphasis omitted)). This is a distinction without a difference. Under the Act, “whether any particular [company or platform] falls within the ban is determined by the content of the [posts] resting inside that [company or platform]. Thus, by any commonsense understanding of the term, the ban in this case is ‘content based.’ ” [City of Cincinnati v. Discovery Network](#), 507 U.S. 410, 429 (1993). A website operating in Arkansas, an enforcement official, a court, or a jury applying the Act, cannot determine whether the website is regulated without looking to the content posted on that website. And the State itself cannot seem to resist this conclusion either. In its Response, it says: “The Act regulates my [sic] subject matter, which is not a viewpoint.” (Doc. 72, p. 12).

“[I]t is well established that ‘[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.’ ” [Reed](#), 576 U.S. at 169 (quoting [Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N. Y.](#), 447 U.S. 530, 537 (1980)). “Thus, a speech regulation targeted at specific subject matter is content based

even if it does not discriminate among viewpoints within that subject matter.” *Id.*

NetChoice also argues that the Act is a speaker-based restriction. “Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.” [United States v. Playboy Ent. Grp., Inc.](#), 529 U.S. 803, 812 (2000). Courts are “deeply skeptical of laws that ‘distinguish[h] among different speakers, allowing speech by some but not others.’ ” [Nat’l Inst. of Fam. & Life Advocs. v. Becerra](#), 585 U.S. 755, 777–78 (2018) (citations omitted) (alteration in original) (quoting [Citizens United v. Fed. Election Comm’n](#), 558 U.S. 310, 340 (2010)). This is because “[s]peaker-based laws run the risk that ‘the State has left unburdened those speakers whose messages are in accord with its own views.’ ” *Id.* (quoting [Sorrell v. IMS Health Inc.](#), 564 U.S. 552, 580 (2011)).

Act 689 exempts platforms that distribute “licensed media” that is not licensed from users, “news, sports, entertainment or other content that is preselected by the provider and not user generated,” and digital news websites with social features “if the news content is posted only by the provider of the digital news website.” [Ark. Code Ann. § 4-88-1401\(8\)\(B\)](#). NetChoice argues that “the Act explicitly favors the speech of whoever provides the online service” over the speech of users of online services. (Doc. 67, p. 21). The Court agrees. This privileges institutional content creators—movie and TV studios, mainstream media outlets, and traditional journalists—over the Soundcloud artist, the TikTok chef, and the citizen journalist.

*10 Because the Act draws both content-based and speaker-based distinctions, the State bears the burden of demonstrating that it survives strict scrutiny. And Arkansas has not done so.

b. Act 689 Is Not Narrowly Tailored to Serve a Compelling State Interest

As described above, Act 689 is a content-based restriction on both adults’ and minors’ access to constitutionally protected speech. “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling

state interests.” [Reed](#), 576 U.S. at 163. “The distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” [Playboy Ent. Grp.](#), 529 U.S. at 812.

As in the Court’s preliminary injunction order, [Brown v. Entertainment Merchants Ass’n](#), 564 U.S. 786 (2011), remains instructive. There, a California law prohibited the sale or rental of violent video games to minors. [Id.](#) at 802. The law “straddle[d] the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children.” [Id.](#) at 805. The *Brown* Court recognized these goals as legitimate; however, because the law affected Californians’ First Amendment rights, the Court cautioned that the state’s objectives “must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.” [Id.](#) “As a means of protecting children from portrayals of violence, the legislation [was] seriously underinclusive, not only because it exclude[d] portrayals other than video games, but also because it permit[ted] a parental ... veto.” [Id.](#) If the material was indeed “dangerous [and] mindaltering,” the Court explained, it did not make sense to “leave [it] in the hands of children so long as one parent ... says it’s OK.” [Id.](#) at 802. And “as a means of assisting concerned parents,” the Court held that the regulation was “seriously overinclusive because it abridge[d] the First Amendment rights of young people whose parents ... think violent video games are a harmless pastime.” [Id.](#) at 805. Put simply, the legislation was not narrowly tailored.

In the end, the *Brown* Court rejected the argument “that the state has the power to prevent children from hearing or saying anything without their parents’ prior consent,” for “[s]uch laws do not enforce parental authority over children’s speech and religion; they impose governmental authority, subject only to a parental veto.” [Id.](#) at 795 n.3. “This is not the narrow tailoring to ‘assisting parents’ that restriction of First Amendment rights requires.” [Id.](#) at 804. The Court also expressed “doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority.” [Id.](#) at 802. “Accepting that position would largely vitiate the rule that ‘only in relatively narrow and well-defined

circumstances may government bar public dissemination of protected materials to [minors].’ ” [Id.](#) (quoting [Erznoznik v. City of Jacksonville](#), 422 U.S. 205, 212–13 (1975)).

*11 The Court does not doubt the reality, well supported by the record, that unfettered social media access can and does harm minors. And the State “has a compelling interest in protecting minor [children.](#)” [Mitchell v. Dakota Cnty. Soc. Servs.](#), 959 F.3d 887, 897 (8th Cir. 2020). The State does not, however, have “a free-floating power to restrict the ideas to which children may be exposed. ‘Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.’ ” [Brown](#), 564 U.S. at 794–95 (quoting [Erznoznik](#), 422 U.S. at 213–14).

The State regulation here, like the one in *Brown*, is not narrowly tailored to address the harms that the State has a compelling interest in preventing. The State maintains that Act 689 is not underinclusive because it “targets the types of social media that are most likely to lead to predators contacting minors while leaving others unregulated.” (Doc. 72, p. 20). The State’s evidence undermines this contention.

With respect to incidence of online exploitation, the State cites the National Center for Missing and Exploited Children’s (NCMEC) 2022 CyberTipline Report. *See* Doc. 72, p. 15 (citing *2022 CyberTipline Reports by Electronic Service Providers (ESP) 1*, National Center for Missing & Exploited Children (2023)²⁰). This report lists dozens of electronic service providers, including all of the platforms regulated by the Act, and notes the number of suspected incidents of child sexual exploitation that each platform self-reported over the past year. [Id.](#) As the Court noted in its preliminary injunction order, *see* Doc. 44, pp. 44–45, Act 689 regulates Facebook and Instagram, the platforms with the two highest numbers of reports.²¹ But, the Act *exempts* Google, WhatsApp, Omegle, and Snapchat—the sites with the third, fourth, fifth, and sixth highest numbers of reports. Nextdoor is at the very bottom of NCMEC’s list, with only one report of suspected child sexual exploitation in 2022, yet the State continues to justify Nextdoor’s inclusion based on the purported risk to minors. *See* Doc. 72, p. 21.

20 <https://www.missingkids.org/content/dam/missingkids/pdfs/2022-reports-by-esp.pdf> [<https://perma.cc/E9UH-ALR9>].

21 One shortcoming of this data is that it reports the number of total incidents but does not report the number of incidents in relation to the number of users. Naturally, platforms with more users may have more suspected incidents of sexual exploitation, but it is possible that smaller platforms present greater risk on a per-user basis.

The State likewise continues to cite the FBI's public safety alert on financial sextortion. *See* Doc. 72, p. 16 (citing *Financial Sextortion*). The alert notes “gaming sites or video chat applications that feel familiar and safe [to minors]” are common places where adult predators engage in financial “sextortion” of minors. *Id.* Act 689 also exempts these platforms from age verification.

The State acknowledges that “private conversations and interactions ... lead to much of the mental-health harm towards and predation on minors.” (Doc. 72, p. 20). Yet private-message focused platforms like Snapchat, Kik, and Omegle are unregulated. Mr. Tony Allen, the State's expert, noted this issue as well. When testifying during the preliminary injunction hearing, he stated that he did not “want to be unkind to the people who drafted [Act 689],” but at least some exempt platforms are ones that adult sexual predators commonly use to communicate with children, including Kik, Google Hangouts, and interactive gaming websites and platforms. (Doc. 45, pp. 67:17–70:19).

*12 The State attempts to justify this exclusion using Snapchat as the prototype. For self-identified minors, Snapchat does not “promote connecting with people that you wouldn't know in real life already.” (Doc. 72-3, p. 11:5–6 (Boyle Depo.)). Thus, minors are only discoverable by other Snapchat users with whom they share mutual friends or contacts. *Id.* at 14:8–14. Public content on Snapchat is also limited, and instead Snapchat is primarily used for the “private conversations and interactions” that the State purports to be concerned with.

The State invites the Court to contrast Snapchat with Nextdoor, pointing out that Nextdoor lacks “an extensive process confirming the user actually is who they say they are.” (Doc. 72, p. 21). Notably, there is no evidence that Snapchat has such a process. “To make matters worse,” the State says, “inappropriate and/or sexual messages between

users would only be flagged [on Nextdoor] if one of the users involved self-reports the conduct.” *Id.* But Snapchat uses roughly the same system. Boyle Decl. ¶ 6. Indeed, Snapchat's entire structure seems designed for the undetected exchange of sexually explicit materials because pictures and videos automatically delete after being opened. *Id.* ¶ 4.

The Act also exempts YouTube, “the most popular online activity” and “most widely used” platform among children. *See Children and Parents: Media Use and Attitudes Report 2022* at 2, 23, Ofcom (Mar. 30, 2022) (cited in Declaration of Tony Allen ¶ 85 (Doc. 34-1)).²² And it exempts platforms that generate less than \$100 million annually. So a large platform that may have a lower percentage of “harmful” content and robust tools for taking that content down must verify the ages of its users, while a small platform that may have relatively more “harmful” content and no tools for taking that content down need not. This “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes.”  *Brown*, 564 U.S. at 802.

22 https://www.ofcom.org.uk/__data/assets/pdf_file/0024/234609/childrens-media-use-and-attitudes-report-2022.pdf [<https://perma.cc/PA87-5PAD>].

For the platforms regulated by Act 689, the only constraint on minors is a one-time parental veto. Once a child receives a parent's blanket consent, the Act does nothing to protect users who have now been reliably identified as minors. The State points to “excessive data collection, which [social media platforms] use to deliver harmful content and troves of paid advertising.” *See* Doc. 72, p. 17. But the Act does not bar data collection from identified minors and instead seems to provide platforms with more accurate age data to feed to algorithms and advertisers because of the age-verification requirement. The Act also does not require regulated entities to screen the content that is shown to known minors by, for example, requiring platforms to hide obscene content. Thus, once a minor has parental permission to make an account, they can find, or even be recommended, harmful content.

The State's briefing also indicates that time spent on social media is highly correlated with the risk of adverse mental health effects. (Doc. 72, p. 14). But the Act does not require regulated entities to offer or inform parents about time restriction settings for minors' accounts. And still, the State has failed to present any evidence that a parent's involvement in account creation signals an intent to be involved in the

child's online experiences thereafter. *See* Doc. 44, p. 46–47. If the legislature's goal in passing Act 689 was to protect minors from materials or interactions that could harm them online, there is no evidence that the Act will be effective in achieving that goal.

*13 “The [Arkansas] Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent ... says it's OK.” [Brown](#), 564 U.S. at 802. “That is not how one addresses a serious social problem.” *Id.* “Because a ‘law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,’ [Act 689] fails strict scrutiny.” [Reed](#), 576 U.S. at 172 (citation omitted) (quoting [Republican Party of Minn. v. White](#), 536 U.S. 765, 780 (2002)).

The Court also concludes that Act 689 is seriously overinclusive. “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” [Frisby v. Schultz](#), 487 U.S. 474, 485 (1988) (citing [City Council v. Taxpayers for Vincent](#), 466 U.S. 789, 808–810 (1984)). Rather than targeting content that is harmful to minors, Act 689 simply impedes access to content writ large.

Arkansas's imposition of an age-verification requirement for account creation is maximally burdensome. It erects barriers to accessing entire social media platforms rather than placing those barriers around the content or functions that raise concern. It not only hinders adults’ ability to speak and receive protected speech online, it excludes minors whose parents do not consent (or cannot prove their consent) from “the vast democratic forums of the Internet.” [Reno](#), 521 U.S. at 868.

Minors, who cannot vote for the lawmakers that represent them, can use social media to make their voices heard on issues that affect them, like school shootings and school choice. The State does not have “the power to prevent children from hearing or saying anything without their parents’ prior consent.” [Brown](#), 564 U.S. at 795 n.3. “Such laws do not enforce parental authority over children's speech ...; they impose governmental authority, subject only to a parental veto.” *Id.*

In *Packingham*, the Court observed that it was possible for a state to “enact specific, narrowly tailored laws” targeted to “conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor”; but it would be unconstitutional for a state to unduly burden adult access to social media. [582 U.S. at 106–07](#). There, the state of North Carolina had made it a crime for a registered sex offender to access social media sites where minors were permitted. If a statute barring registered sex offenders from using social media is not narrowly tailored, the Court does not see how a statute barring minors from social media fares any better.

Age-verification requirements are also more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies. “Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source.” [Ashcroft v. ACLU](#), 542 U.S. 656, 657 (2004). And “[u]nder a filtering regime, adults ... may gain access to speech they have a right to see without having to identify themselves[.]” *Id.* Similarly, the State could always “act to encourage the use of filters ... by parents” to protect minors. *Id.*; *see also* [Playboy Ent. Grp.](#), 529 U.S. at 809–10, 815 (finding that voluntary, “targeted blocking” of certain content by viewers “is less restrictive than banning” the same content).

*14 Act 689 is also overinclusive as to the State's interest in “giv[ing] parents more control over what social-media platforms their children are using.” (Doc. 72, p. 18). “Not all of the children who are forbidden to [make social media accounts] on their own have parents who care whether they [use social media].” [Brown](#), 564 U.S. at 804. As in *Brown*, the State has presented no evidence that the Act “meet[s] a substantial need of parents who wish to restrict their children's access to [social media] but cannot do so.” *Id.* at 803. The State attempts to distinguish *Brown* by pointing out that, unlike the video game industry's uniform rating system, “regulated social media companies have no system writ large that self-polices their services.” (Doc. 72, p. 19). However, NetChoice points to myriad avenues for parents to control their children's social media use. *See infra* section II.D. The fact that these tools do not operate “writ large” proves nothing. Most minors cannot access social media

without a parent-funded device and internet connection, and “parents who care about the matter” have many tools at their disposal to restrict and monitor their children's internet use.

 *Brown*, 564 U.S. at 803. “Filling the remaining modest gap in concerned parents’ control can hardly be a compelling state interest.” *Id.*

To the extent that parents are not aware of these tools, notice to parents of their availability is a much less restrictive means of promoting the State's interest, and the State has offered no evidence to prove this alternative ineffective.  *Playboy Ent. Grp.*, 529 U.S. at 823. “While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want.”

 *Brown*, 564 U.S. at 804. “This is not the narrow tailoring to ‘assisting parents’ that restriction of First Amendment rights requires.” *Id.*

The State describes its age-verification requirement as “simple.” (Doc. 72, p. 1). Well spotted. But “[t]he First Amendment does not permit the State to sacrifice speech for efficiency.”  *Becerra*, 585 U.S. at 775 (quoting  *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988)). The Court finds that Act 689 is a content-based restriction on speech that is not narrowly tailored to serve a compelling government interest. Act 689 therefore violates the First Amendment.

The State argues that NetChoice's First Amendment claim nonetheless fails on the merits because “the record is far too underdeveloped for the Court” “to determine ‘which of the law[’s] applications violate the First Amendment.’ ” (Doc. 72, p. 24 (quoting  *Moody*, 603 U.S. at 725)). However, because the Court has found that Act 689 is a content-based restriction, the State bears the burden of showing the Act meets strict scrutiny. The State failed to do so, and a content-based restriction, insufficiently tailored to target a compelling government interest, is presumptively unconstitutional in all applications. The State has pointed to no applications of the Act that could be considered “plainly legitimate” and the Court is aware of none. By barring access to all content on regulated platforms, including that which is neither unprotected nor harmful, based on the content and speakers represented on those platforms, the Act is unconstitutional in all conceivable applications.

2. Void for Vagueness: NetChoice Members’ Claim

NetChoice also moves for summary judgment on its claim that Act 689 violates the due process rights of its members because pivotal terms are unconstitutionally vague. NetChoice argues that the Act is unconstitutionally vague because it is unclear which of its members are subject to the Act's requirements. The State responds that the Act is not unconstitutionally vague “because *some* of [NetChoice's] members’ conduct is clearly proscribed” and “ ‘primary purpose’ is not vague.” (Doc. 72, pp. 22–23 (emphasis added)).

As the Supreme Court explained in *Grayned v. City of Rockford*:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

*15  408 U.S. 104, 108 (1972) (footnotes omitted).

A regulation “violates the first essential of due process of law” by failing to provide adequate notice of prohibited conduct.  *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted). A court should find a regulation unconstitutional if it “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.” *Id.*

“The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.”  *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). “[E]conomic regulation is subject to a less strict vagueness test” as are “enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”  *Id.* at 498–99. “Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”  *Id.* at 499.

Here, Act 689 must meet “a more stringent vagueness test” because it both contains criminal penalties,  *Ark. Code. Ann. § 4-88-1403(b)(1)*, and interferes with the right of free speech, *see infra* section IV.C.1. “When speech is involved, rigorous adherence to th[e]se requirements is necessary to ensure that ambiguity does not chill protected speech.”  *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). Indefinite statutes “abut[ing] upon sensitive areas of basic First Amendment freedoms” may force the entities regulated “to ‘steer far wider of the unlawful zone’ than if the boundaries of the forbidden areas were clearly marked.”  *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting  *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). “Free speech may not be so inhibited.” *Id.*

“It is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.”  *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (striking down city ordinance imposing misdemeanor penalty on movie theaters for showing films “unsuitable for minors” as impermissibly vague); *see also*  *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (invalidating state law banning motion picture distributors from distributing “sacrilegious” movies due to vague standards);  *Winters v. New York*, 333 U.S. 507, 518–19 (1948) (finding unconstitutionally vague a

state law regulating the distribution of certain commercial publications).

Act 689 is unconstitutionally vague because it fails to adequately define which entities are subject to its requirements, risking chilling effects and inviting arbitrary enforcement. A “social media company” is defined as “an online forum that a company makes available for an account holder” to “[c]reate a public profile, establish an account, or register as a user for the *primary purpose* of interacting socially with other profiles and accounts,” “[u]pload or create posts or content,” “[v]iew posts or content of other account holders,” and “[i]nteract with other account holders or users, including without limitation establishing mutual connections through request and acceptance.” Ark. Code. Ann. § 1401(7) (A) (emphasis added). Act 689 does not define “primary purpose”—a term critical to determining which entities fall within its scope.

*16 Worse, Act 689 is ambiguous as to *whose* “primary purpose” is being considered—the user in creating the account or the company in making the forum available. “[A] regulation is not vague because it may at times be difficult to prove an incriminating fact *but rather because it is unclear as to what fact must be proved.*”  *Fox*, 567 U.S. at 253 (emphasis added) (citing  *United States v. Williams*, 553 U.S. 285, 306 (2008)). Even if the Court agreed that “primary purpose” is an acceptable “qualitative standard,” *see*  *Johnson v. United States*, 576 U.S. 591, 604 (2015), the Act does not identify whose primary purpose “courts, juries, and regulators” should look to in conducting their “standard factual inquiry.” (Doc. 72, p. 23). Companies must choose between risking unpredictable and arbitrary enforcement (backed by civil penalties, attorneys’ fees, and criminal sanctions) and implementing the Act’s costly age-verification requirements, at a minimum chilling their users’ constitutionally protected speech and at a maximum putting themselves out of business in the process. *See* Harriman Decl. ¶ 34 (attesting that “Arkansas may be an unviable market” if Nextdoor is forced to implement third-party age verification). Such ambiguity renders a law unconstitutional. Left to deal with the uncertainty, platforms may choose to “restrict[] their conduct to that which is unquestionably safe,” possibly by ending operation in the state altogether.

Other provisions of Act 689 are similarly vague. The Act defines the phrase “social media platform” as an “internet-based service or application ... [o]n which a *substantial*

function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application”; but the Act excludes services in which “the predominant or exclusive function is” “[d]irect messaging consisting of messages, photos, or videos” that are “[o]nly visible to the sender and the recipient or recipients” and “[a]re not posted publicly.” Ark. Code Ann. § 1401(8)(A)–(B) (emphasis added). Again, the statute does not define “substantial function” or “predominant ... function,” leaving companies to guess whether their online services are covered. Many services allow users to send direct, private messages consisting of texts, photos, or videos, but also offer other features that allow users to create content that anyone can view. Act 689 does not explain how platforms are to determine which function is “predominant,” leaving those services to guess whether they are regulated.

The State argues that Act 689’s definitions are clear “because any person of ordinary intelligence can tell that [Act 689] regulates Meta, Twitter [now X], and TikTok.” (Doc. 72, p. 22). The Court is less concerned with the straightforward applications of the Act and more concerned with the NetChoice members who are not certain whether they are regulated, namely Snapchat, Nextdoor, and Pinterest.

The State asserts that Snapchat is exempt, Nextdoor is not, and no mention of Pinterest is made at all. (Doc. 72, pp. 20–21). Snapchat, the State says, is exempted from the Act because it’s “different from a traditional social media platform.” (Doc. 72, p. 20) (quoting Doc. 72-3, p. 10:18–21 (Boyle Depo.)). The features the State points to—no public commenting, connections recommended based on contacts in one’s phonebook, curated but user-generated public content—are not related to any particular exemption. Snapchat features both public “stories” and private messaging. *See* Boyle Decl. ¶ 4. A “substantial function” of Snapchat is social interaction. Snapchat believes it is unregulated because its “predominant purpose is as a direct messaging service” but nonetheless fears being dragged into litigation if it does not comply with the age-verification requirement. *Id.* at ¶ 8.

NetChoice also points to uncertainty with respect to Nextdoor and Pinterest. The State does not explain why Nextdoor falls within the Act’s purview. Nextdoor users may passively “receive updates from nearby neighbors, businesses, and public services,” or they may interact socially by connecting with other users, joining groups, or exchanging direct messages. *See* Harriman Decl. ¶ 4; Doc. 72-2, p. 14:14–15:9 (Knapp Depo.). Pinterest describes itself as “a visual

discovery engine for finding ideas like recipes, home and style inspiration, and more.” *All About Pinterest* (Doc. 66, p. 153). But Pinterest, too, has some social features: users can follow other users, comment on Pins, and send messages. *Id.* pp. 153–56. It is unclear to the Court whether the “the primary ‘end to be attained’ of a profile” on either of these platforms is social interaction as opposed to say, finding a reliable plumber or planning a wedding. (Doc. 72, p. 23 (quoting *Purpose*, Merriam-Webster Dictionary²³)).

²³ <https://www.merriam-webster.com/dictionary/purpose> [<https://perma.cc/K98B-A8YS>].

*17 Snapchat provides the prime example of the arbitrary decisionmaking the Act invites. As the Court noted in its preliminary injunction order, the State’s attorney asserts that Snapchat is exempted from the Act’s requirements, while both a co-sponsor of the Act as well as the State’s own expert witness contend that Snapchat is regulated. *See* Doc. 44, pp. 33–34. The State is correct that courts, not experts, are tasked with interpreting statutes. However, due process requires that the legislature, not the Court, provide “explicit standards for those who apply the law” so that “arbitrary and discriminatory enforcement” may be avoided. 🚩 *Grayned*, 408 U.S. at 108. Here, three people possessing, the Court assumes, at least ordinary intelligence—and ostensibly all on the enforcement side—cannot agree whether the Act covers Snapchat. Snapchat is right to be worried about the risk of litigation.

Arkansas “cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David” while leaving Arkansans to bear constitutional deprivation in the meantime. 🚩 *Percoco v. United States*, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring in the judgment). That is precisely what the State has asked this Court to do; Act 689 is unconstitutionally vague.

D. Irreparable Harm

Because Act 689 abridges the First Amendment rights of Arkansans who use social media and contains terms too vague to be reasonably understood, NetChoice members and their users will suffer irreparable harm if the Act goes into effect. Because it is unclear which NetChoice members are subject to regulation, some members would be forced to choose between risking enforcement penalties—civil and criminal—

and implementing age-verification requirements that burden their users' First Amendment rights. Other members, those that are clearly regulated, would be pressed into service as the private censors of the State. No legal remedy exists to compensate Arkansans for the loss of their First Amendment rights.  *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). “[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”  *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008) (quoting  *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

E. Balance of the Equities and the Public Interest

When the government opposes the issuance of an injunction, the final two factors—the balance of the equities and the public interest—merge. See  *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of the equities and public interest decidedly favor NetChoice: “it is always in the public interest to protect constitutional rights.”  *Phelps-Roper v. Nixon*,

545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds* by  *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012). Act 689 is a content-based restriction on speech, and it is not targeted to address the harms the State has identified. Arkansas takes a hatchet to adults' and minors' protected speech alike though the Constitution demands it use a scalpel.

V. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Amended Motion for Summary Judgment (Doc. 66) is **GRANTED**. Act 689 of 2023, the “Social Media Safety Act,” is **PERMANENTLY ENJOINED**.

IT IS SO ORDERED on this 31st day of March, 2025.

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NETCHOICE, LLC, Plaintiff,

v.

Dave YOST, in his official capacity
as Ohio Attorney General, Defendant.

Case No. 2:24-cv-00047

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Signed April 16, 2025

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Held Unconstitutional

 [Ohio Rev. Code Ann. § 1349.09](#)

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OPINION AND ORDER

[ALGENON L. MARBLEY](#), UNITED STATES DISTRICT JUDGE

*1 This matter comes before this Court on Defendant Ohio Attorney General David Yost's Motion for Summary Judgment (ECF No. 42) and Plaintiff NetChoice, LLC's ("NetChoice") Motion for Summary Judgment (ECF No. 43). For the reasons set forth below, this Court **DENIES** Defendant's Motion (ECF No. 42) and **GRANTS** Plaintiff's Motion (ECF No. 43).

INTRODUCTION

This action raises a constitutional challenge to Ohio's Parental Notification by Social Media Operators Act (the "Act"), a state law that requires certain online platforms to obtain verifiable parental consent before any unemancipated minor below the age of sixteen agrees to the platform's terms of service to access or utilize the service.  [Ohio Rev. Code § 1349.09\(B\)\(1\)](#). The Act was signed into law in July 2023 and slated to take effect on January 15, 2024, before it was restrained and enjoined by this Court. (See ECF No. 33).

This Court lauds the State's effort through the Act to protect the children of this state. This Court finds, however, that the Act as drafted fails to pass constitutional muster and is constitutionally infirm. And in this constitutional democracy, it cannot be gainsaid that even the government's most noble entreaties to protect its citizenry must abide in the contours of the U.S. Constitution, in this case the First Amendment.

As Justice Scalia profoundly reasoned in  [Brown v. Entertainment Merchants Association](#), (see in-depth analysis *infra* Section III.B.1), which found unconstitutional under the First Amendment a California statute imposing restrictions on the sale or rental to minors of "violent video games":

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them No doubt a State possesses legitimate power to protect children from harm ... but that does not include a free-floating power to restrict the ideas to which children may be exposed. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them

 *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 794–95, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (internal quotation marks and citations omitted).

This case resides at the intersection of two unquestionable rights: the rights of children to “a significant measure of” freedom of speech and expression under the First Amendment, *see*  *id.*, and the rights of parents to direct the upbringing of their children free from unnecessary governmental intrusion, *see*  *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (finding that the “primary role of parents in the upbringing of their children is now established beyond debate”);  *Farrington v. Tokushige*, 273 U.S. 284, 298, 47 S.Ct. 406, 71 L.Ed. 646 (1927) (noting that the parental “right to direct the education of his own child without unreasonable restrictions”);  *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (emphasizing parents’ right “to direct the upbringing and education of children under their control”);  *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 590 (6th Cir. 2008) (noting that “parents have a liberty interest in the care, custody, and control of their children”) (citing  *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)).

*2 Much like the law at issue in  *Brown*, the Act here “straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children.”  564 U.S. at 805, 131 S.Ct. 2729. And while “[b]oth ends are legitimate,” when these goals affect First Amendment rights, the state must pursue them “by means that are neither seriously underinclusive nor seriously overinclusive.”  *Id.* As Justice Scalia’s majority opinion in  *Brown* makes clear, even if “the state has the power to enforce parental prohibitions”—for example, enforcing a parent’s decision to forbid their child to attend an event—“it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents’ prior consent.*”  *Id.* at 795 n.3, 131 S.Ct. 2729. “Such laws,” Justice Scalia emphasized, “do not enforce *parental* authority over children’s speech ... they impose *governmental* authority, subject only to a parental veto.”  *Id.* ¹

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Indeed, other courts have enjoined state statutes similar to the one at issue here. *See e.g.*, *NetChoice, LLC v. Griffin*, No. 5:23-CV-5105, 2025 WL 978607 (W.D. Ark. Mar. 31, 2025) (permanently enjoining age-verification and parental-consent law);  *NetChoice, LLC v. Bonta*, — F.Supp.3d —, 2025 WL 807961 (N.D. Cal. Mar. 13, 2025) (preliminarily enjoining regulation with age-estimation requirements);  *Comput. & Comm’n Indus. Ass’n v. Paxton*, 747 F. Supp. 3d 1011 (W.D. Tex. 2024) (preliminarily enjoining law requiring platforms to identify minors and monitor and filter out certain content from minor users’ accounts);  *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105 (D. Utah 2024) (preliminarily enjoining age-assurance and parental-consent law);  *NetChoice, LLC v. Fitch*, 738 F. Supp. 3d 753 (S.D. Miss. 2024) (preliminarily enjoining age-verification and parental-consent law).

Minors’ access to information is essential to their growth into productive members of our democratic public sphere. As Judge Posner observed when he cautioned of “the danger of allowing government to control the access of children to information and opinion”:

Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise.

 *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.)

I. BACKGROUND

A. NetChoice and the Internet Landscape

NetChoice is a trade association of Internet companies. Its members include: Google, which owns and operates YouTube; Meta, which owns and operates Facebook and Instagram; X (formerly Twitter); Nextdoor; Pinterest; and Dreamwidth. (ECF No. 2-2 ¶¶ 2, 7). These members' websites and platforms both "publish," "disseminate," "create," and "distribute" speech. (ECF No. 1 ¶ 18; ECF No. 2-1 ¶ 6). Adults and teens alike flock to NetChoice members' websites and generate billions of "posts" every day. (ECF No. 2-1 ¶ 6).

There are a number of good things to be said about social media platforms. Dreamwidth, for example, allows users to share their writing, artwork, and innermost thoughts. (ECF No. 1 ¶ 19). Facebook gives users a space to debate religion and politics or share vacation photos. Instagram lets people post and view friends' photos, showcase art, follow political commentary, and discover or start small businesses. (*Id.*). YouTube endeavors to show people the world in all its facets, from travel documentaries to step-by-step cooking instructions. (*Id.*). On Nextdoor, users can connect with neighbors, share local news, and borrow tools. (*Id.*). Pinterest houses recipes, style ideas, home designs for users to collect, explore, and compare. (*Id.*). And, on X, users can petition their elected representatives and directly engage with them. (*Id.*). The ability to form and to maintain social connections on these online platforms can have positive effects on children and adolescents, especially those who routinely feel marginalized or excluded. (*See* ECF No. 42-2, U.S. Dep't of Health and Human Serv., Office of the Surgeon General, *Social Media and Youth Mental Health* (2023) [hereinafter Surgeon General Advisory]). In addition to enabling peer connection and social support, social media can also promote positive and identity-affirming content and encourage behaviors that proactively address mental health care. (*Id.*).

*3 But as the Ohio Attorney General correctly illustrates, these benefits come with a cost. (*See* ECF Nos. 42-1–6). Extensive social media use also has been linked to higher rates of depression, anxiety, and loneliness among young people. Research from the University of Oxford identifies adolescents as particularly vulnerable, with social media use linked to decreased life satisfaction. (ECF No. 42-3, Amy Orben et al., *Windows of developmental sensitivity to social media*, 13 *Nature Communications* 1649 (2022), <https://ora.ox.ac.uk/objects/uuid:d4ce6392-53ef-41d1-a970-67f64b4e1c78>). As the evidence in the record suggests, these platforms do not appear to be incorporating user-agnostic judgments when promoting content. "Push notifications, autoplay, infinite

scroll, quantifying and displaying popularity (i.e., 'likes'), and algorithms that leverage user data to serve content recommendations are some examples of these features that maximize engagement." (*Id.*). One study led by the Harvard T.H. Chan School of Public Health confirms that "[s]ocial media platforms are highly incentivized to keep youth online"; and that children's and adolescents' online experiences are "heavily monetized through advertising revenue on platforms' websites and mobile applications," which draw upon "highly personalized computational advertising to match users' specific demographics and usage patterns with advertisers' financial interests." (ECF No. 42-1, Amanda Raffoul et al., *Social media platforms generate billions of dollars in revenue from U.S. youth: Findings from a simulated revenue model*, 18 *J. Pub. Lib. Sci.* 1 (2023), <https://doi.org/10.1371/journal.pone.0295337>). In 2022, six platforms including Facebook, Instagram, X, and YouTube collectively derived nearly \$11 billion in advertising revenue from U.S.-based users younger than 18 years old. (*Id.*).

B. Ohio's Parental Notification Act

Against this backdrop, lawmakers across the nation have sought to regulate online entities and cabin their deleterious effects, particularly on the youth. The task is an admittedly daunting one: Legislatures must craft laws broad enough to accommodate the pace with which digital platforms evolve, but not so broad that they cripple innovation or trample free speech. The resulting legislation can therefore be imperfect, but that does not prevent legislatures from trying.

Enter "Ohio's Parental Notification by Social Media Operators Act,"  [Ohio Rev. Code § 1349.09](#) [hereinafter "the Act"]. Slated to take effect on January 15, 2024, the Act requires unemancipated children under the age of sixteen to obtain "verifiable" parental consent before agreeing to terms and conditions on social media platforms that fit certain criteria.

1. Covered Operators

Specifically, the Act regulates "operator[s]" of "online web site[s], service[s], or product[s]" that: (1) have users in Ohio; (2) "target[] children," or are "reasonably anticipated to be accessed by children"; and that (3) allow users to do all of the following:

- (a) Interact socially with other users within the confines of the online web site, service, or product;
- (b) Construct a public or semipublic profile for the purpose of signing into and using the online web site, service, or product;
- (c) Populate a list of other users with whom an individual shares or has the ability to share a social connection within the online web site, service, or product;
- (d) Create or post content viewable by others, including on message boards, chat rooms, video channels, direct or private messages or chats, and a landing page or main feed that presents the user with content generated by other users.

 [Ohio Rev. Code § 1349.09\(A\)\(1\)](#).

In order to determine whether a platform “targets children, or is reasonably anticipated to be accessed by children,” the Attorney General or a court “may” consider eleven factors: (1) subject matter; (2) language; (3) design elements; (4) visual content; (5) use of animated characters or child-oriented activities and incentives; (6) music or other audio content; (7) age of models; (8) presence of child celebrities or celebrities who appeal to children; (9) advertisements; (10) empirical evidence regarding audience composition; and (11) evidence regarding the intended audience.  [Ohio Rev. Code § 1349.09\(C\)](#).

Two types of operators are exempted from the reach of the statute. The Act's requirements do not apply to platforms that “limit[]” “interaction between users” to:

- (1) Reviewing products offered for sale by electronic commerce or commenting on reviews posted by other users;
- (2) Comments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events.

*4 *Id.* § 1349.09(O). The Act likewise exempts websites “where the predominant or exclusive function is”: (1) “[c]loud storage or cloud computing services”; and (2) “[b]roadband internet access services.” *Id.* § 1349.09(N)(1) (a)-(b).

2. *Requirements*

All non-exempt operators that meet the specifications of  [Ohio Rev. Code § 1349.09\(A\)\(1\)](#) must adhere to three requirements. **First**, the operator must “[o]btain verifiable consent for any contract with a child, including terms of service, to register, sign up, or otherwise create a unique username to access or utilize the online web site, service, or product, from the child's parent or legal guardian.”  [Ohio Rev. Code § 1349.09\(B\)\(1\)](#). An operator can obtain this “verifiable consent” through “any of the following methods”:

- (a) Requiring a parent or legal guardian to sign and return to the operator a form consenting to the contract by postal mail, facsimile, or electronic mail;
- (b) Requiring a parent or legal guardian, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;
- (c) Requiring a parent or legal guardian to call a toll-free telephone number implemented by the operator and staffed by trained personnel;
- (d) Requiring a parent or legal guardian to connect to trained personnel by videoconference;
- (e) Verifying a parent's or legal guardian's identity by checking a form of government-issued identification against databases of such information, and promptly deleting the parent's or legal guardian's identification from the operator's records after such verification is complete.

Id. Unless parental consent is obtained, children under the age of sixteen “shall” be denied access to the “use of the online web site, service, or product.” *Id.* § 1349.09(E).

Second, the Covered Operator must “[p]resent to the child's parent or legal guardian a list of the features offered by an operator's online web site, service, or product related to censoring or moderating content, including any features that can be disabled for a particular profile.” *Id.* § 1349.09(B)(2). **Third**, the Covered Operator must “[p]rovide to the child's parent or guardian a web site link at which the parent or legal guardian may access and review the list of features [related to censoring or moderating content, including any features that

can be disabled for a particular profile] at another time.” *Id.* § 1349.09(B)(3).

3. Enforcement and Penalties

The Act authorizes the Ohio Attorney General to investigate any noncompliance and “to bring a civil action ... for appropriate relief including a temporary restraining order, preliminary or permanent injunction, and civil penalties.” *Id.* §§ 1349.09(G), (H). A court that finds that an operator has violated the terms of the Act “shall impose a civil penalty” under the following scheme: (1) up to \$1000 per day for the first 60 days of noncompliance; (2) up to an additional \$5000 per day for days 61-90; and (3) up to an additional \$10,000 per day for days 91 and beyond. *See id.* § 1349.09(I). Where an operator is “in substantial compliance,” the attorney general must provide the operator with written notice of the suspected violations, and a 90-day opportunity to cure, in which the operator must provide the attorney general with “written documentation that the violation has been cured and that the operator has taken measures sufficient to prevent future violations.” *Id.* § 1349.09(M).

C. Procedural History

*5 On January 5, 2024, NetChoice sued the State of Ohio (the “State”), through Ohio Attorney General Dave Yost in his official capacity, for declaratory and injunctive relief under [42 U.S.C. § 1983](#) and [28 U.S.C. § 2201](#), challenging the Act as unconstitutional under the First and Fourteenth Amendments. After a January 8, 2024 hearing on Plaintiff’s motion for a temporary restraining order (“TRO”), this Court granted the TRO and enjoined Defendant “from enforcing the Act against Plaintiff or its member organizations.” (ECF No. 27). On February 12, 2024, this Court granted a preliminary injunction on the same grounds. (ECF No. 33 (“PI Order”).

A month later, the parties agreed that “this case is ready to proceed to a final merits determination”; that “[t]here is not a jury demand;” that they “do not believe that settlement is likely;” and that they will not rely on expert testimony. (ECF No. 37 at 2–3). The parties also “agreed to forego discovery in this case,” explaining that “the parties will rely primarily on the record established through the preliminary injunction briefing,” and “stipulate that the evidence the

parties have submitted with their respective briefing thus far is admissible.” (*Id.*).

On May 3, 2025, the parties filed cross-motions for summary judgment (ECF Nos. 42, 43); opposed one another’s motions (ECF Nos. 44, 45); and filed their respective replies (ECF Nos. 47, 48). This Court held oral argument on the parties’ motions on March 13, 2025.

D. Effect of Intervening [Moody Decision](#)

As set forth in its Complaint, NetChoice alleges that Ohio’s Parental Notification by Social Media Operators Act violates the First Amendment rights of its covered members as well as those members’ current and prospective users, including Ohio minors. NetChoice raises both: (1) a traditional facial challenge under the First Amendment; and (2) alternatively, a First Amendment overbreadth facial challenge. Under a traditional facial challenge, “no set of circumstances exists under which [the Act] would be valid.” [Ams. for Prosperity Found. v. Bonta](#), 594 U.S. 595, 141 S. Ct. 2373, 2387, 210 L.Ed.2d 716 (2021) (quoting [United States v. Salerno](#), 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Under a First Amendment overbreadth facial challenge, “a substantial number of [the Act’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” [Id.](#) (cleaned up). NetChoice also alleges that the Act’s central coverage provision is unconstitutionally vague in violation of the First Amendment and Due Process Clause of the Fourteenth Amendment.

One week after the parties’ summary judgment briefing concluded, the Supreme Court decided [Moody v. NetChoice, LLC](#), 603 U.S. 707, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024), a case that considered whether Florida’s and Texas’s content-moderation laws are facially unconstitutional. There, the Supreme Court emphasized that although First Amendment facial challenges are subject to “a less demanding though still rigorous standard,” they remain difficult to mount successfully. [Id.](#) at 723, 144 S.Ct. 2383.² A proper First Amendment facial challenge, the Court reiterated, proceeds in two steps. The “first step” is to determine every hypothetical application of the challenged law. [Id.](#) at 724, 144 S.Ct. 2383. The second step is “to decide which of the law[’s] applications violate the First

Amendment, and to measure them against the rest.” *Id.* at 725, 144 S.Ct. 2383. Plaintiffs can satisfy their burden of showing the law is facially unconstitutional “only if the law’s unconstitutional applications substantially outweigh its constitutional ones.” *Id.* at 724, 144 S.Ct. 2383. Given this fact-intensive inquiry, the Court remanded the cases because “the record is underdeveloped.” *Id.* at 726, 144 S.Ct. 2383.³ On remand, the Fifth Circuit tossed the suit back to the district court, explaining that “these are fact-intensive questions that must be answered by the district court in the first instance after thorough discovery.” *NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 499 (5th Cir. 2024). The Eleventh Circuit likewise remanded the case “in full to the district court for further proceedings consistent with the Supreme Court’s opinion.” See Order, ECF No. 178-2, *NetChoice, LLC v. Attorney General*, No. 21-12355 (11th Cir. Aug. 16, 2024).

2 There are a “host of good reasons” for the Court’s judicial skepticism. *Id.* For example, facial challenges “rest on speculation,” *id.* (quotation omitted), “short circuit the democratic process,” *id.* (quotation omitted), and is “at odds with Article III,” see *id.* at 752, 144 S.Ct. 2383 (Thomas, J., concurring). Because of the significant risks associated with facial challenges, the Supreme Court reiterated that challengers bear a heavy burden. See *id.* at 723, 144 S.Ct. 2383 (majority opinion); *id.* at 745, 144 S.Ct. 2383 (Barrett, J., concurring) (“[T]hese cases illustrate the dangers of bringing a facial challenge In fact, dealing with a broad swath of varied platforms and functions in a facial challenge strikes me as a daunting, if not impossible, task.”); *id.* at 748, 144 S.Ct. 2383 (Jackson, J., concurring in part and concurring in the judgment) (“[A]s all Members of the Court acknowledge, plaintiffs bringing a facial challenge must clear a high bar.”); *id.* at 750, 144 S.Ct. 2383 (Alito, J., concurring in the judgment) (“Facial challenges also strain the limits of the federal courts’ constitutional authority to decide only actual ‘Cases’ and ‘Controversies,’ ” so “parties mounting facial attacks [must] satisfy demanding requirements.”).

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See also *id.* at 747, 144 S.Ct. 2383 (Barrett, J., concurring) (noting the record failed to “thoroughly expose[] the relevant facts about particular social-media platforms and functions”); *id.* at 749, 144 S.Ct. 2383 (Jackson, J., concurring in part and concurring in the judgment) (noting plaintiffs failed to show “how the regulated activities actually function”); *id.* at 750, 144 S.Ct. 2383 (Thomas, J., concurring in the judgment) (noting plaintiffs “failed to provide many of the basic facts necessary to evaluate their challenges to H.B. 20”); *id.* at 766, 144 S.Ct. 2383 (Alito, J., concurring in the judgment) (noting the “incompleteness of this record”).

*6 In light of *Moody*, this Court asked the parties at oral argument whether discovery should be re-opened or summary judgment briefing should be supplemented. The State opined that the record is insufficient but that the burden of proof rests with NetChoice. NetChoice, on the other hand, maintained that the record is sufficient under *Moody*.

II. STANDARD OF REVIEW

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine dispute exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When ruling on a motion for summary judgment, a court reviews the evidence in the light most favorable to the non-moving party, mindful that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge” *Id.* at 255, 106 S.Ct. 2505. A court, however, is not “obligated to wade through and search the entire record for some specific facts that might support the nonmoving party’s claim.” *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 805 F. Supp. 2d 396, 402–03 (S.D. Ohio 2011) (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990)). Rather, it need only consider “those portions of the record

specifically called to its attention by the parties.” [Id.](#) at 403. The standards for summary judgment “do not change when, as here, ‘both parties seek to resolve [the] case through the vehicle of cross-motions for summary judgment.’” [Craig v. Bridges Bros. Trucking LLC](#), 823 F.3d 382, 387 (6th Cir. 2016) (quoting [Taft Broad. Co. v. United States](#), 929 F.2d 240, 248 (6th Cir. 1991)).

When a motion for summary judgment also seeks a permanent injunction, the party seeking a permanent injunction must satisfy a four-factor test. [See eBay Inc. v. MercExchange, L.L.C.](#), 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. [Id.](#) The decision to grant or to deny permanent injunctive relief is “an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.” [Id.](#) In a case arising under the First Amendment, “a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer ‘continuing irreparable injury’ for which there is no adequate remedy at law.” [Am. C.L. Union of Kentucky v. McCreary Cnty., Ky.](#), 607 F.3d 439, 445 (6th Cir. 2010) (internal quotation marks and citation omitted).

III. LAW & ANALYSIS

NetChoice argues that it is entitled to a permanent injunction and summary judgment on its First Amendment facial challenges on behalf of both NetChoice’s covered members and those members’ current and prospective users. NetChoice also invokes the void-for-vagueness doctrine under the First and Fourteenth Amendments, arguing that the central coverage provision, the Act’s exceptions, and other key terms are unconstitutionally vague.

*7 The State, on the other hand, seeks summary judgment that NetChoice lacks standing to assert the free-speech rights of Ohio children, and that the Act is constitutional. Specifically, the State maintains that: (1) that the Act regulates contracts, not speech and, thus, rational basis review is appropriate; (2) that the Act, “at worst,” only “incidentally”

implicates speech and is therefore subject to intermediate scrutiny; (3) that the Act, in any event, satisfies any level of scrutiny given Ohio’s important and compelling interest in protecting minors and parental decision-making rights. The State also argues that the Act is not unconstitutionally vague.

A. Plaintiff’s Standing to Challenge the Act

Because Article III limits federal judicial jurisdiction to cases and controversies, *see* U.S. Const. art. III, § 2, federal courts are without authority “to render advisory opinions [or] ‘to decide questions that cannot affect the rights of litigants in the case before them,’” [Preiser v. Newkirk](#), 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (citation omitted). Standing is one doctrine that reflects and enforces those limitations. *See Davis v. FEC*, 554 U.S. 724, 732–33, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008); [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. \(TOC\), Inc.](#), 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). As the Supreme Court explained: “In essence, the question of standing is whether the litigant is entitled to have court decide the merits of the dispute or of particular issues.” [Warth v. Seldin](#), 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This inquiry involves “both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” [Id.](#) at 498, 95 S.Ct. 2197.

The “constitutional minimum of standing” flows from Article III’s case-or-controversy requirement and has three elements. [Kowalski v. Tesmer](#), 543 U.S. 125, 128–29, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citing [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). First, a plaintiff must show that he or she has suffered or imminently will suffer a concrete injury. [Memphis A. Philip Randolph Inst. v. Hargett](#), 2 F.4th 548, 555 (6th Cir. 2021). Second, a plaintiff must show that the injury is fairly traceable to the challenged conduct of the defendant. [Id.](#) Third, a plaintiff must show that a favorable federal court decision is likely to redress that injury. [Id.](#)

The federal judiciary also adheres to a set of “prudential” principles that bear on the question of standing and generally prohibit third parties from asserting the rights of others or

from asserting generalized grievances. See [Warth](#), 422 U.S. 490, 95 S.Ct. 2197; [Gladstone Realtors v. Village of Bellwood](#), 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); [Valley Forge College v. Americans United](#), 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). So, even when a case falls within the constitutional boundaries of the “case or controversy” requirement, a plaintiff may still lack standing under these prudential principles “by which the judiciary seeks to limit access to the federal courts to those litigants best suited to assert a particular claim.”

[Gladstone](#), 441 U.S. at 99–100, 99 S.Ct. 1601. As this Court recognized in its PI Order, there are exceptions to this general prohibition against third-party standing. See [Powers v. Ohio](#), 499 U.S. 400, 410–411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). An organization, for example, has “associational standing” to sue on behalf of its members when its members would otherwise have standing to sue in their own right; the interests at stake are germane to the organization’s purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” See [Hargett](#), 2 F.4th at 555 (quoting [Friends of the Earth](#), 528 U.S. at 181, 120 S.Ct. 693). Additionally, “[w]here plaintiffs challenge a statute or ordinance for vagueness or overbreadth, the Supreme Court has concluded that they have standing to assert the rights of third parties whose protected speech may have been impermissibly curtailed by the challenged prohibition, even though as applied to the plaintiffs themselves, the ordinances only curtailed unprotected expression.” [Brandywine, Inc. v. City of Richmond, Kentucky](#), 359 F.3d 830, 835 (6th Cir. 2004) (citing [Young v. American Mini Theatres, Inc.](#), 427 U.S. 50, 59 n.17, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)); see [Ison v. Madison Loc. Sch. Bd.](#), 395 F. Supp. 3d 923, 931–32 (S.D. Ohio 2019).

*8 The State challenges NetChoice’s standing to assert the free-speech rights of Ohio children. (See ECF No. 42 at 14–15; ECF No. 44 at 4). It suggests that NetChoice fails to satisfy Article III requirements, i.e., the constitutional requirements. Thus, the State argues, prudential principles—like the overbreadth exception to the general prohibition against third-party standing—are inapplicable here. (See ECF No. 42 at 14). NetChoice takes the position that the State “no longer disputes that NetChoice has organizational or associational standing to challenge the Act.” (ECF No. 45 at

12 & n.3 (“Defendant makes one reference to ‘associational’ standing and states that ‘[o]verbreadth ... is not an exception to Article III standing requirements,’ ... [b]ut Defendant does not argue that NetChoice lacks Article III standing.”)).

Unlike the preliminary injunction stage, when standing is challenged at summary judgment, “mere allegations of injury are insufficient.” [Dep’t of Com. v. U.S. House of Representatives](#), 525 U.S. 316, 329, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999). Rather, NetChoice “must establish that there exists no genuine issue of material fact as to justiciability or the merits.” [Id.](#) (citing [Lujan v. National Wildlife Federation](#), 497 U.S. 871, 884, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)). Plaintiff bears the burden of establishing standing. [McKay v. Federspiel](#), 823 F.3d 862, 867 (6th Cir. 2016) (citing [Lujan](#), 504 U.S. at 561, 112 S.Ct. 2130), and “must ‘show that [it] has standing for each type of relief sought.’ ” [Id.](#) (cleaned up) (quoting [Summers v. Earth Island Inst.](#), 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). Because this burden progresses “with the manner and degree of evidence required at the successive stages of the litigation,” a plaintiff “ ‘in response to a summary judgment motion,’ ... cannot rely on ‘mere allegations’ with respect to each standing element, ‘but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.’ ” [Id.](#) (quoting [Lujan](#), 504 U.S. at 561, 112 S.Ct. 2130).

Although the State focuses on NetChoice’s standing to bring claims on behalf of Ohio minors, NetChoice itself must still meet the “constitutional minimum” requirements regardless of any third-party rights it seeks to assert. See [Virginia v. Am. Booksellers Ass’n](#), 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (“To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact.”); [Birmingham v. Nessel](#), No. 21-1297, 2021 WL 5712150, at *2–3 (6th Cir. Dec. 2, 2021) (prudential standing doctrines, such as the prohibition on third-party standing “do[] not affect constitutional standing”); [Speech First, Inc. v. Schlissel](#), 939 F.3d 756, 764 (6th Cir. 2019) (“Even where a litigant challenges a law or regulation as overbroad, that litigant must still ‘show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action.’ ” (quoting [Laird v. Tatum](#), 408 U.S. 1, 13, 92

S.Ct. 2318, 33 L.Ed.2d 154 (1972)); [Prime Media, Inc. v. City of Brentwood](#), 485 F.3d 343, 350 (6th Cir. 2007) (“Even though Prime Media advances an overbreadth challenge, it is thus still required to show an injury in fact”). Because Defendant challenges NetChoice’s standing, this Court begins its analysis there.

1. Constitutional Standing

Under Article III, a plaintiff must establish that it has suffered an “injury in fact” that is “fairly traceable to the challenged action of the defendant” and is capable of being “redressed” by the court. [Lujan](#), 504 U.S. at 560–61, 112 S.Ct. 2130; see also [Morrison v. Bd. of Educ. of Boyd Cty.](#), 521 F.3d 602, 608 (6th Cir. 2008). While these requirements generally prevent a litigant from bringing a claim based on injuries experienced by others, associational standing permits an association or organization to sue based on injuries to its members. See [United Food and Commercial Workers v. Brown Group](#), 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). To establish associational standing, NetChoice must show that: “(1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” See [Hargett](#), 2 F.4th at 555 (quoting [Friends of the Earth](#), 528 U.S. at 181, 120 S.Ct. 693).

*9 NetChoice satisfies these requirements. First, it has shown that its members have individual standing to sue because they are subject to the Act and will face injury in the form of compliance costs and civil liability if they violate its operative provisions. See [Ohio Rev. Code § 1349.09\(B\)](#) (outlining parental consent methods); ECF Nos. 2-1 ¶ 14; 2-2 ¶ 13 (discussing compliance costs); [Ohio Rev. Code § 1349.09\(I\)](#) (imposing civil penalties); see also [Kentucky v. Yellen](#), 54 F.4th 325, 342–43 (6th Cir. 2022) (“[C]ompliance costs are a recognized harm for purposes of Article III.”); [Czyzewski v. Jevic Holding Corp.](#), 580 U.S. 451, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’ ”); [Am. Booksellers](#), 484 U.S. at 392, 108 S.Ct. 636 (plaintiffs suffered an injury in fact that satisfied constitutional standing

requirements where the challenged law was “aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution”). In [Lujan](#), the Supreme Court explained:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably *upon whether the plaintiff is himself an object of the action* (or forgone action) at issue. *If he is, there is ordinarily little question that the action or inaction has caused him injury*, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.

[504 U.S. at 561–562, 112 S.Ct. 2130](#) (emphasis in original). Because several of NetChoice’s members are the direct “object” of the Act, “there is little question” that they satisfy the injury requirement. [Id.](#)

Second, the injury is directly traceable to Defendant, whom the Act vests with enforcement authority. See [Ohio Rev. Code § 1349.09\(H\)](#) (“If it appears that an operator of an online web site, service, or product failed to comply with this section, the attorney general has the exclusive authority to bring a civil action in a court of common pleas, or other appropriate court, for appropriate relief including a temporary restraining order, preliminary or permanent injunction, and civil penalties.”).

And third, the injury would be redressed by an injunction blocking that authority. See *Mikel v. Quin*, 58 F.4th 252, 258 (6th Cir. 2023) (“Injunctions redress ... ‘imminent future’ injuries Injuries are ... ‘imminent’ when they are certain or perhaps substantially likely to occur in the future.” (internal quotation marks and citations omitted)), *cert. denied sub nom. Mikel v. Nichols*, — U.S. —, 143 S. Ct. 2660, 216 L.Ed.2d 1238 (2023).

NetChoice has also shown that this lawsuit is germane to its purpose “to make the Internet safe for free enterprise and free expression,” and the nature of the lawsuit is “unlikely to require fact-intensive inquiry of each member.” (See ECF No. 33 at 8–9 (citing ECF No. 2-1 ¶ 3)). In its PI Order, this Court concluded, based on the affidavits and evidence presented, that NetChoice has constitutional associational standing to bring claims on behalf of its members. (PI Order, ECF No. 33 at 6–8). Defendant offers no reason for this Court to depart from that ruling.

2. Prudential Considerations and Third-Party Standing

The only standing issue Defendant contests at summary judgment is whether NetChoice can raise the First Amendment interests of its members’ minor users. A party generally may assert only his or her own rights and cannot raise the claims of third parties who are not before the court. See *Warth*, 422 U.S. at 499, 95 S.Ct. 2197. This rule serves at least two judicial purposes. It fosters judicial restraint freeing the court from “unnecessary pronouncement on constitutional issues” that may affect the rights of those not before it, and it “assures the court that the issues before it will be concrete and sharply presented.” *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (quoting *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)). The underlying assumption is “that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.” *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004).

*10 There are, however, exceptions to this rule. See *Powers*, 499 U.S. at 410–411, 111 S.Ct. 1364. First, the Supreme Court has permitted third-party standing in circumstances where “the relationship between the litigant

and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.” Compare *Singleton v. Wulff*, 428 U.S. 106, 115, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion) (finding it “generally [] appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision,” given the closeness of doctors’ relationship to patients and the “decision is one in which the physician is intimately involved”), with *Kowalski*, 543 U.S. at 126, 125 S.Ct. 564 (attorneys “do not have ‘close relationship with their alleged [hypothetical] clients’ ” to challenge state law that made appointment of counsel discretionary for defendants who plead guilty or *nolo contendere*).

Second, a litigant may assert the rights of a third party not before the court if there are substantial obstacles to the third party asserting its own rights and the litigant will effectively represent the interests of the party. See e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 446, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (distributor of contraceptives to unmarried persons has standing to assert rights of unmarried persons “because unmarried persons denied access to contraceptives ... are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights”); *Barrows v. Jackson*, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953) (woman who was sued for selling her real property to an African American, in violation of a restrictive covenant applicable to her property, could defend the action by arguing that the covenant violated the equal protection rights of others where “the action of the state court ... might result in a denial of constitutional rights and ... it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court”).

Finally, a litigant may challenge a statute on the ground that it is overly broad and thus violates the First Amendment rights of third parties not before the court, even if the law is constitutional as applied to the litigants. See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 633–35, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (“Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.”). The reason for this “special rule in First Amendment cases,” the Supreme Court explained, “is apparent”: “An overbroad statute might serve to

chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute.”

[Bates v. State Bar of Arizona](#), 433 U.S. 350, 380–81, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); see also [Baird](#), 405 U.S. at 446 n.5, 92 S.Ct. 1029 (“[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.”).

NetChoice argues that “[b]ecause minors’ speech rights are so closely tied to covered websites’ rights to disseminate speech, NetChoice’s members are particularly ‘well positioned to raise’ users’ First Amendment ‘concerns.’ ” (See ECF No. 43 at 27 (quoting [NetChoice, LLC v. Griffin](#), No. 5:23-CV-05105, 2023 WL 5660155, at *12 (W.D. Ark. Aug. 31, 2023)).) In support, NetChoice cites [Brown v. Entertainment Merchants Association](#), 564 U.S. 786, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), a case that sustained a First Amendment challenge to California’s restrictions on minors’ access to violent video games. (See ECF No. 43 at 26–27). Because [Brown](#) plaintiffs were the “Video Software Dealers Association [] and the Entertainment Software Association [],” which are “associations of companies in the video game industry,” [Video Software Dealers Ass’n v. Schwarzenegger](#), 2007 WL 2261546, at *1 (N.D. Cal. Aug. 6, 2007), NetChoice contends that there can be “no question” that “trade associations could challenge a law regulating the industry they represent and raising the rights of affected minors.” (ECF No. 43 at 27).

*11 Standing, however, was never challenged in [Brown](#) so that case is not a precedent for standing. See [Grendell v. Ohio Supreme Ct.](#), 252 F.3d 828, 837 (6th Cir. 2001) (“As the Supreme Court has previously noted, ‘when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.’ [Hagans v. Lavine](#), 415 U.S. 528, 535 n.5, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). This is especially true as it relates to the issue of standing, ‘perhaps the most important of [the jurisdictional] doctrines.’ [FW/PBS v. City of Dallas](#), 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).”)

Plaintiff next relies on [Craig v. Boren](#), 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), to argue that “if purveyors of alcohol can raise the rights of 18-21-year-olds to purchase alcohol, surely NetChoice members can raise the rights of users to receive and express protected speech.” (ECF No. 45 at 13 (citing [429 U.S.](#) at 194, 97 S.Ct. 451)). In [Craig v. Boren](#), the Supreme Court allowed an alcohol vendor to challenge the constitutionality of gender-based differentials in state liquor laws by asserting the equal-protection rights of her male customers. [429 U.S.](#) 190, 97 S.Ct. 451. The Court’s analysis began, however, by noting that “prudential objectives[] thought to be enhanced by restrictions on third-party standing[] cannot be furthered here,” because “the lower court already has entertained the relevant constitutional challenge” and a decision “to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence.” See [id.](#) at 193, 97 S.Ct. 451 (noting that “limitations on a litigant’s assertion of *ius tertii* [third party standing] ... stem from a salutary ‘rule of self-restraint’ designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative”). In other words, the Court found that efficiency cautioned against sending the case back on standing grounds because the constitutional question had already been teed up and decided by the lower courts. See [id.](#) (noting that “despite having had the opportunity to do so,” the state “never raised before the District Court any objection to [vendor’s] reliance upon the claimed unequal treatment of 18-20-year-old males as the premise of her equal protection challenge to Oklahoma’s 3.2% beer law” and “at oral argument [] acknowledged that [it] always ‘presumed’ that the vendor, subject to sanctions and loss of license for violation of the statute, was a proper party in interest to object to the enforcement of the sex-based regulatory provision”). Proceeding to the merits, the Court concluded that “vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.” [Id.](#) at 195, 97 S.Ct. 451.

[Craig v. Boren](#) is arguably distinguishable on those procedural grounds, namely that unlike the state in that case, Ohio here has challenged Plaintiff’s standing from the outset.

But Defendant maintains that the case also stands for the proposition that “third-party standing exceptions ... generally scrutinize the relationship between the litigant and the third party and whether their interests align.” (See ECF No. 42 at 15). True, a plaintiff must establish that their relationship with the third party whose rights they wish to assert is sufficiently close such that the plaintiffs are “fully, or very nearly, as effective a proponent of the right” as the third party would be. [Singleton](#), 428 U.S. at 115, 96 S.Ct. 2868. The close-relationship standard is generally satisfied if the third parties’ rights are “inextricably bound up with the activity the litigant[s] wish[] to pursue.” [Id.](#) at 114, 96 S.Ct. 2868.

*12 Defendant contends that NetChoice members “burden children and parents with one-sided contractual terms of questionable enforceability ... to generate billions of dollars collecting and selling the userdata of American kids” and “employ user interfaces that are specifically designed to maximize user engagement (and profits) while exacerbating the risks of mental health illnesses and sexual abuse.” (ECF No. 42 at 15–16). These findings, according to Defendant, should cut against any conclusion that the “relationship” between NetChoice members’ social media platforms and their minor users is sufficiently “close,” or that their interests are adequately aligned, to justify third party standing. Stated differently, the Attorney General insists that Plaintiff cannot establish a close relationship with its minor users due to a conflict of interest.

The research Defendant submits is certainly compelling. It “underscore[s] the financial incentive for platforms to oppose government efforts to protect youth,” and the strong incentive they have to “keep youth online.” (See ECF No. 42-1 at 2–3; see also *id.* at 3 (“Social media platforms are suspected to derive hefty profits from youth users who may be vulnerable to negative mental health outcomes, including depression, anxiety, and eating disorders. Platforms, however, are not required to make these data publicly available, which may limit the abilities of researchers and policymakers to adequately investigate and regulate platform practices.”)).

But the “relationship” prong of the third-party standing inquiry does not ask whether NetChoice members are interested in protecting the general interests of the minors, be they health or privacy interests; the relationship between the third party and Plaintiff “only counts insofar as it is linked to the *right asserted*”—here, the right of minors to access social media platforms without obtaining parental consent.

See [Amato v. Wilentz](#), 952 F.2d 742, 752 (3d Cir. 1991) (emphasis added). It is for this reason that the Supreme Court has generally permitted vendors or sellers “to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market.” See e.g., [Craig v. Boren](#), 429 U.S. at 195, 97 S.Ct. 451; see also [U.S. Dep’t of Labor v. Triplett](#), 494 U.S. 715, 720–21, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (lawyer has third party standing to challenge a fee restriction by raising client’s due process rights); [Caplin & Drysdale, Chartered v. United States](#), 491 U.S. 617, 623–24, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) (law firm has third-party standing to challenge a drug forfeiture statute on behalf of Sixth Amendment rights of an existing client where forfeited assets were needed to pay attorney’s fees); [Barrows](#), 346 U.S. at 254–58, 73 S.Ct. 1031 (white sellers of land have standing to assert constitutional rights of potential black purchasers in defending a suit to enforce a racially restrictive land covenant).

Additionally, while a professional or transactional relationship may be sufficient, it is not necessary. In [Baird](#), for example, the Supreme Court held that a man convicted under state law “for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students” and for giving a young woman a contraceptive foam at the close of his address could “assert the rights of unmarried persons denied access to contraceptives.” [405 U.S. at 440-43](#), 92 S.Ct. 1029. The state argued that the claimant and young woman had no professional or doctor-patient relationship to support standing. [Id.](#) Rejecting that argument, the Court explained that the relationship between the litigant “and those whose rights he seeks to assert is not simply that between a [contraceptive] distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.” [Id.](#) at 445, 92 S.Ct. 1029. ⁴

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The Supreme Court also noted that its [Baird](#) ruling was consistent with its earlier ruling in [Barrows](#)—the case that held that “a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the

covenant violated the equal protection rights of prospective non-Caucasian purchasers”—noting that the relationship there “between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself.” [Baird](#), 405 U.S. at 445, 92 S.Ct. 1029.

*13 In [Triplett](#), 494 U.S. 715, 110 S.Ct. 1428, the Court permitted an attorney to challenge a restriction on attorney’s fees by asserting the due process rights of the client and, in so doing, clarified the key aspects of the third-party relationship prong:

When ... enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which a relationship the third party has a legal entitlement (typically a constitutional entitlement), third party standing has been held to exist.

[494 U.S. at 720, 110 S.Ct. 1428](#). What this line of cases makes clear is that the relevant “relationship” inquiry for purposes of third-party standing is whether the plaintiff and the third party have the sort of relationship “of special consequence” such that the plaintiff will be as vigorous as the third party in asserting the third party’s rights. See [Caplin & Drysdale](#), 491 U.S. at 623 n.3, 109 S.Ct. 2646. Paradoxically, it is precisely NetChoice members’ financial incentive to keep minors on their platforms that suggests that they are “fully, or very nearly, as effective a proponent” of the minors’ rights to access the platforms. See [Singleton](#), 428 U.S. at 115, 96 S.Ct. 2868; see also [Amato](#), 952 F.2d at 752 (noting that where “the vendor’s monetary interests are greater, it has more incentive to sue, and its advocacy will be at least as vigorous as the vendee’s”).

Aside from the relationship factor, this Court finds that the other two prudential standing factors—the impact of the litigation on minors’ interests and the ability of third-

party minors to advance their own rights—weigh in favor of conferring third-party standing. [Powers](#), 499 U.S. at 413–16, 111 S.Ct. 1364. In [Baird](#), the Supreme Court observed that “more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests.” [405 U.S. at 445, 92 S.Ct. 1029](#). Observing that enforcement of the statute would deny persons who “are not themselves subject to prosecution” access to contraceptives, the Court concluded that, “to that extent,” those persons “are denied a forum in which to assert their own rights,” making the case for third-party standing even “stronger.” [Id. at 446, 92 S.Ct. 1029](#).

Minors themselves are not the subject of the Act so, like the third party in [Baird](#), to the extent their constitutional rights are violated, they are “denied a forum in which to assert their own rights.” See [405 U.S. at 446, 92 S.Ct. 1029](#); see also [id. at 446 n.6, 92 S.Ct. 1029](#) (noting that in [Prince v. Massachusetts](#), 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), “a custodian, in violation of state law, furnished a child with magazines to distribute on the streets,” and “[t]he Court there implicitly held that the custodian had standing to assert alleged freedom of religion and equal protection rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself”).

Second, the statute, if it goes into effect, allegedly impacts Ohio minors’ First Amendment right to speech by foreclosing their access to social media platforms absent parental consent. See [Baird](#), 405 U.S. at 446 n.5, 92 S.Ct. 1029 (“[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.”); [Mumson](#), 467 U.S. at 957, 104 S.Ct. 2839 (“Although [failure to show an obstacle] might defeat a party’s standing outside the First Amendment context, this Court has not found the argument dispositive in determining whether standing exists to challenge a statute that allegedly chills free speech.”);

[Am. Booksellers](#), 484 U.S. at 392–93, 108 S.Ct. 636 (no inquiry into obstacle in summarily upholding booksellers’

standing to raise book buyers' First Amendment rights in facial challenge to statute).

*14 Based on the longstanding precedent described above and cited in this Court's PI order, as well as the record evidence, this Court concludes that there is no genuine issue of fact that NetChoice has standing to assert its members' rights and the rights of Ohio minors in this constitutional challenge.

B. Plaintiff's Constitutional Claims

Turning to the merits, this Court now considers the constitutionality of the Act. “[C]ourts usually handle constitutional claims case by case, not en masse.” *Moody*, 603 U.S. at 723, 144 S.Ct. 2383. In First Amendment cases, the Supreme Court has “lowered th[e] very high bar” of a “traditional” facial challenge, which would require a showing “that no set of circumstances exists under which the [law] would be valid.” See *id.* (internal quotation marks and citation omitted). The question is whether “a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.” *Id.* (internal quotation marks and citation omitted). As explained earlier, a First Amendment facial challenge has two parts: first, the courts must “assess the state laws’ ” scope; and second, the courts must “decide which of the laws’ ” applications violate the First Amendment, and ... measure them against the rest.” *Id.* at 708, 144 S.Ct. 2383. The Supreme Court recently admonished that courts cannot treat facial challenges “more like as-applied claims than like facial ones.” *Id.* at 704, 100 S.Ct. 826.

NetChoice mounts a “traditional” First Amendment facial challenge to the Act's constitutionality, or, in the alternative, a First Amendment overbreadth challenge. In other words, NetChoice argues that the Act is unconstitutional under all circumstances, or even if it is constitutional in some circumstances, it is unconstitutional in such a great number of circumstances that it should be struck down. (ECF No. 43 at 24–25). NetChoice makes two central arguments to support its position: (1) the Act triggers strict scrutiny by requiring minors to secure parental consent before accessing protected speech; and (2) the Act triggers strict scrutiny and violates the First Amendment because certain provisions, *Ohio*

Rev. Code §§ 1349.09(A), (B), and (O), are content and speaker based. NetChoice also contends that the Act is unconstitutionally vague under the First and Fourteenth Amendment because NetChoice members do not have fair notice as to whether they must comply with the Act's dictates, and if so, how.

The State, on the other hand, maintains that the Act is constitutional and is not unconstitutionally vague. It argues that the Act regulates ordinary commercial transactions, contracts specifically, and is therefore subject to rational basis review. In the alternative, the State argues that the Act is subject to intermediate scrutiny because it is content-neutral “and, at worst, only incidentally implicates speech.” (ECF No. 42 at 23). In any event, the Act, according to the State, passes any level of scrutiny because it “advances Ohio's important and compelling governmental interests in protecting the health and safety of minors by requiring parental consent before a covered operator can contract with them.” (*Id.* at 35).

Beginning with the Act's scope, this Court concludes that, in every application to a covered website, the Act raises the same First Amendment issues. Specifically, whether it is a NetChoice member product—YouTube; Facebook and Instagram; X; Nextdoor; Pinterest; or Dreamwidth—or other covered websites that provide the “socially interactive” features outlined in the Act and considered to be “target[ing]” minors or likely to be accessed by minors—like Goodreads, Soundcloud, Substack, Yelp, or LinkedIn—they are all under the same statutory obligation to block access to unemancipated Ohio minors absent parental consent. Thus, unlike the provisions at issue in *Moody*, the regulation here “raises the same First Amendment issues” “in every application to a covered business.” See *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1116 (9th Cir. 2024).

1. First Amendment: Restrictions on Protected Speech

a. The Act Regulates Protected Speech

*15 The First Amendment, applicable to the States through the Fourteenth, prohibits laws “abridging the freedom of speech.” U.S. Const., amend. I; see also *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). A fundamental principle of the First Amendment

is that “all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” [Packingham v. North Carolina](#), 582 U.S. 98, 104, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017). While in the past, these places took the form of a street or a park, social media platforms today have become the “essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.” *Id.* Because freedom of speech is “the indispensable condition[] of nearly every other form of freedom,” [Palko v. Connecticut](#), 302 U.S. 319, 327, 58 S.Ct. 149, 82 L.Ed. 288 (1937), the First Amendment “bars the government from dictating what we see or read or speak or hear,” [Ashcroft v. Free Speech Coal.](#), 535 U.S. 234, 245, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), and protects “the right to distribute, the right to receive, the right to read and freedom of thought,” [Griswold v. Connecticut](#), 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Despite the “challenges of applying the Constitution to ever-advancing technology,” [Brown](#), 564 U.S. at 790, 131 S.Ct. 2729, the Act’s First Amendment implications come into focus when social media operators are thought of as publishers of opinion work—a newspaper limited to “Letters to the Editor,” or a publisher of a series of essays by different authors. (PI Order, ECF No. 33 at 12); see [Moody](#), 603 U.S. at 716, 144 S.Ct. 2383 (likening social media platforms to “[t]raditional publishers and editors”). The analogy is an imperfect one—social media operators are arguably less involved in the curation of their websites’ content than these traditional examples. (PI Order, ECF No. 33 at 12). But the comparison helps clarify that the Act regulates speech in two consequential ways: (1) it regulates operators’ ability to publish and distribute speech *to minors* and speech *by minors*; and (2) it regulates minors’ ability both to *produce speech* and to *receive speech*. (*Id.*) And as this Court noted in its PI Order, this Court is unaware of a “contract exception” to the First Amendment. (*Id.*)

These principles control here. The Act impedes minors’ ability to engage in and access speech by requiring covered websites to obtain parental consent before allowing any unemancipated child under the age of sixteen to register or create an account on their website. That means minors’ ability to contribute or access “a wide array of protected First Amendment activity on any number of diverse topics,” [Packingham](#), 582 U.S. at 98, 137 S.Ct. 1730, will be

contingent on securing parental consent—an impermissible curtailment of their First Amendment rights. See [Am. Amusement Mach. Ass’n](#), 244 F.3d at 578 (Posner, J.) (finding parental consent requirements for violent video games unconstitutional, noting that “even parents who think violent video games harmful or even edifying ... may rather prevent their children from playing these games than incur the time and other costs of [providing parental consent]” and “conditioning a minor’s First Amendment rights on parental consent of this nature is a curtailment of those rights”).

The State insists that the Act does not regulate speech, but the ability of minors to contract, which the Attorney General argues falls comfortably within the State’s authority to regulate non-expressive, economic conduct. (See ECF No. 42 at 17). Pointing to [Sorrell v. IMS Health, Inc.](#), 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), the Attorney General contends that “[r]estrictions on economic activity are distinct from regulations on protected expression,” (*id.* at 17), and that the Act governs economic activity because it “explicitly applies only where minors are required to enter into a contract with covered operators,” (*id.* at 18). When that contract is created, he continues, “an exchange occurs: a minor is given access to a particular platform, and the operator of that platform often gains an opportunity to advertise to the minor, collect the minor’s data, and engage in a wide array of other activities intended to benefit the operator financially.” (*Id.* at 18).

*16 But “the First Amendment right to the ‘freedom of speech’ protects against not just regulations that directly suppress speech but also those that target activities useful for speaking.” [Blick v. Ann Arbor Pub. Sch. Dist.](#), 105 F.4th 868, 882 (6th Cir. 2024). Like many of NetChoice’s member organizations, a publisher stands to profit from engagement with consumers. (See PI Order, ECF No. 33 at 12). That an entity seeks financial benefit from its speech, however, does not vitiate its First Amendment rights. See [New York Times Co. v. Sullivan](#), 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); see also [Bonta](#), 113 F.4th at 1120 (“The mere fact that a business may earn revenue from its services is ‘insufficient by itself’ to render its opinions about those services ‘commercial.’ ” (quoting [Bolger v. Youngs Drug Prods. Corp.](#), 463 U.S. 60, 67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983))). While the State is correct that regulations restricting commercial or non-expressive conduct are subject to a different standard of review than regulations restricting

protected expression, [Sorrell](#) is unhelpful because the Court there rejected a similar argument by Vermont “that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation.” [Sorrell](#), 564 U.S. at 566, 131 S.Ct. 2653.

The Vermont law at issue in [Sorrell](#) restricted the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors, with exceptions that allowed entities engaging in “educational communications” to purchase the information, but barred disclosure when the recipients would use the information for marketing. [Id.](#) at 557, 131 S.Ct. 2653. Additionally, “Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs,” but the law prevented pharmaceutical manufacturers from using the information for their own marketing purposes. [Id.](#) at 564, 131 S.Ct. 2653. Thus, the statute “disfavor[ed] marketing, i.e., speech with a particular content, as well as particular speakers, i.e., [entities] engaged in marketing on behalf of pharmaceutical manufacturers.” [Id.](#) at 552, 131 S.Ct. 2653; [id.](#) at 564, 131 S.Ct. 2653 (“The law on its face burdens disfavored speech by disfavored speakers.”). As the Court summarized:

Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

[Id.](#) at 557, 131 S.Ct. 2653.

Like the law considered in [Sorrell](#), the Act here “does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers.” [Id.](#) at 567, 131 S.Ct. 2653. Particularly, if a website “targets children” or is “reasonably anticipated to target children,” and offers socially interactive features—like the ability to interact with other users; construct a public or semipublic profile; populate a list of other users with whom an individual “shares or has the ability to share a social connection”; create or post visible content “including on message boards, chat rooms, video channels, direct or private messages or chats, and a landing page or main feed that presents the user with content generated by other users,” see [Ohio Rev. Code § 1349.09\(A\)](#)—then that website faces a dichotomy: (1) either minors secure parental consent and gain “access to” and “use of” all the speech on covered websites; or (2) minors do not secure parental consent and are denied “access to” and “use of” the covered websites. [Id.](#) §§ 1349.09(B), (E). These provisions do not strike at the commercial aspect of the relationship between covered websites and their users, they tackle the social speech aspect of it. (PI Order, ECF No. 33). As this Court noted in its PI Order, “a law prohibiting minors from contracting to access to a plethora of protected speech can[not] be reduced to a regulation of commercial conduct.” (PI Order, ECF No. 33 at 13). Because the Act implicates protected speech, at least to some degree, it is not subject to the deferential rational basis standard of review. (*Id.*).

b. The Law is Content Based

*17 Having concluded that the Act does indeed implicate the First Amendment, this Court next considers whether it should be subject to strict scrutiny or only to intermediate scrutiny. Courts “apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content,” but only “an intermediate level of scrutiny” when “regulations are unrelated to the content of speech.” [Turner Broad. Sys. v. FCC](#), 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).⁵ NetChoice argues that several provisions of the law discriminate based on content, whereas Defendant argues that the Act is content-neutral and that any effect it has on speech is incidental.

5 “Strict scrutiny” requires the government to show that the law at issue is “narrowly tailored to serve compelling state interests.” *KenAmerican Res., Inc. v. United States Sec’y of Lab.*, 33 F.4th 884, 893 (6th Cir. 2022) (quoting [Reed](#), 576 U.S. at 163, 135 S.Ct. 2218). On the other hand, “intermediate scrutiny” validates a law “under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Id.* (quoting [Holder v. Humanitarian L. Project](#), 561 U.S. 1, 26–27, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010)).

When considering whether a regulation is content based, the principal inquiry is whether the government has regulated the speech based on its communicative content. [Id.](#) at 643, 114 S.Ct. 2445. When a law “applies to particular speech because of the topic discussed or the idea or message expressed,” it is content based on its face. [City of Austin v. Reagan Nat’l Advert. of Austin, LLC](#), 596 U.S. 61, 69, 142 S.Ct. 1464, 212 L.Ed.2d 418 (2022) (cleaned up). And “a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a ‘function or purpose’ proxy that achieves the same result.” [Id.](#) at 74, 142 S.Ct. 1464 (quoting [Reed v. Town of Gilbert](#), 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015)). Nor can a facially content-based law escape strict scrutiny so long as it has a “benign motive.” [Reed](#), 576 U.S. at 165–66, 135 S.Ct. 2218. It is worth noting that “[g]overnment discrimination among viewpoints—or the regulation of speech based on ‘the specific motivating ideology or the opinion or perspective of the speaker’—is a ‘more blatant’ and ‘egregious form of content discrimination.’” [Id.](#) at 168–69, 135 S.Ct. 2218 (quoting [Rosenberger v. Rector and Visitors of Univ. of Va.](#), 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). But a law need not discriminate based on viewpoint to be content based. See [id.](#) at 169, 135 S.Ct. 2218 (“[I]t is well established that ‘the First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.’” (quoting [Consolidated Edison Co. of N.Y.](#)

v. Public Serv. Comm’n of N.Y., 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980))).

Other regulations are better described as speaker based. The Supreme Court is “deeply skeptical of laws that distinguish among different speakers,” [Nat’l Inst. Of Fam. & Life Advoc. v. Becerra](#), 585 U.S. 755, 138 S.Ct. 2361, 2378, 201 L.Ed.2d 835 (2018), but speaker-based restrictions “are not automatically content based or content neutral,” [Schickel v. Dilger](#), 925 F.3d 858, 876 (6th Cir. 2019). Speaker based restrictions are suspect only because they are often a proxy or pretext for regulation of content. *Id.* But if they distinguish between speakers “based only on the manner in which speakers transmit their messages to viewers, and not upon the messages that they carry,” they are subject only to intermediate scrutiny. [Turner Broad. Sys.](#), 512 U.S. at 645, 114 S.Ct. 2445.

NetChoice argues that the Act is facially content based because it targets some websites while exempting others. Specifically, the Act only purports to govern websites that are targeted at children, or reasonably anticipated to be accessed by children. [Ohio Rev. Code § 1349.09\(B\)](#).⁶ The Act also excludes from coverage websites where interaction between users is “incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events.” [Id.](#) § 1349.09(O).⁷ Similar is an exemption for websites where interaction is limited to reviews for “products for sale,” but the Act does not exempt reviews of, for example, services or art. *Id.* All of these, NetChoice argues, are content-based restrictions. NetChoice contends that even if these are just speaker-based restrictions, they cannot be justified without reference to content, and are therefore, content-based distinctions subject to strict scrutiny. [Schickel](#), 925 F.3d at 876 & n.2.

6 “(B) The operator of an online web site, service, or product that targets children, or is reasonably anticipated to be accessed by children, shall do all of the following:

- (1) Obtain verifiable consent for any contract with a child, including terms of service, to register, sign up, or otherwise create a unique username to access or utilize the online web site, service, or product, from the child’s parent or legal guardian using any of the following methods:

- (a) Requiring a parent or legal guardian to sign and return to the operator a form consenting to the contract by postal mail, facsimile, or electronic mail;
 - (b) Requiring a parent or legal guardian, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;
 - (c) Requiring a parent or legal guardian to call a toll-free telephone number implemented by the operator and staffed by trained personnel;
 - (d) Requiring a parent or legal guardian to connect to trained personnel by videoconference;
 - (e) Verifying a parent's or legal guardian's identity by checking a form of government-issued identification against databases of such information, and promptly deleting the parent's or legal guardian's identification from the operator's records after such verification is complete.
- (2) Present to the child's parent or legal guardian a list of the features offered by an operator's online web site, service, or product related to censoring or moderating content, including any features that can be disabled for a particular profile.
 - (3) Provide to the child's parent or guardian a web site link at which the parent or legal guardian may access and review the list of features described in division (B)(2) of this section at another time.”

7 “(O) This section does not apply to an online web site, service, or product respecting which interaction between users is limited to the following:

- (1) Reviewing products offered for sale by electronic commerce or commenting on reviews posted by other users;
- (2) Comments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events.”

*18 The State, on the other hand, maintains that the Act is “agnostic to content.” (ECF No. 42 at 24 (quoting *City of Austin*, 596 U.S. at 69, 142 S.Ct. 1464)). According to

the State, the Act's parental consent requirement is based on “extrinsic qualities unrelated to any ‘substantive message’ ” that the covered websites “might convey.” (*Id.*). The State also contends that the Act's exceptions, *O.R.C. 1349.09(O)(1)-(2)*, are not content-based because they apply “based on *how* or *where* user interaction occurs on a website—in public or private—and not on *what* message is being conveyed.” (*Id.* at 25).

Turning first to the language that defines the broad category of operators to which the Act applies—websites that “target[] children” or are “reasonably anticipated to be accessed by children”—NetChoice argues that these are transparently content-based restrictions because whether a website “targets children” is inextricably connected to its content. (ECF No. 29 at 12). The State argues, on the other hand, that this language is simply an example of tailoring, designed to prevent overbreadth by exempting websites that are unlikely to be accessed by children. (ECF No. 28 at 27-28).

As this Court noted at the PI juncture, since this language identifies a certain topic, it is tempting to apply strict scrutiny reflexively, particularly given that facially content-based regulations cannot be rehabilitated by an apparent benign purpose. *Reed*, 576 U.S. at 165–66, 135 S.Ct. 2218. In *Reed*, the Supreme Court invalidated a regulation that treated, for example, “Temporary Directional Signs” differently from “Ideological Signs.” *Id.* at 164, 135 S.Ct. 2218. The Supreme Court reasoned that the sign code was facially content based because it discriminated based on communicative content and was, therefore, subject to strict scrutiny. *Id.* at 159, 164, 135 S.Ct. 2218. But relevant here is the Supreme Court's “rejection of the view that *any* examination of speech or expression inherently triggers” strict scrutiny. *City of Austin*, 596 U.S. at 69, 142 S.Ct. 1464. That is, a law may still be content neutral, even if it requires reading the speech at issue to determine if the speech or speaker is covered. *Id.* In *City of Austin*, a sign was treated differently under the code based solely on whether it was located on the same premises as the topic being discussed, and the sign message mattered “only to the extent that it inform[ed] the sign's relative location.” *Id.* at 71, 142 S.Ct. 1464. Evaluation of speech was necessary there only to determine whether the sign was an on-premises sign or an off-premises sign. *Id.* The sign's location relative to its

content determined the regulation to which it was subject, but the topic was otherwise not considered. [Id.](#) The majority concluded that Austin's sign regulation was content-neutral because it did not “single out any topic or subject matter for differential treatment.” See [id.](#); see also [NetChoice, LLC v. Bonta](#), — F.Supp.3d —, —, 2025 WL 807961, at *9 (N.D. Cal. Mar. 13, 2025) (distinguishing regulation at issue in [City of Austin](#) from state law regulating social media platforms that “single[s] out particular subject matter, specifically, online content that is likely to be accessed by children”).

It is challenging to reconcile [City of Austin](#) with [Reed](#). Indeed, Justice Thomas, who wrote [Reed](#), dissented in [City of Austin](#), saying the majority's attempt to distinguish Austin's sign code from the one in [Reed](#) was unworkable. [Id.](#) at 91, 142 S.Ct. 1464. (Thomas, J., dissenting). In Justice Thomas's view, if the message matters at all when applying a regulation, the law is content based. [Id.](#) at 92, 142 S.Ct. 1464.

*19 The Act here certainly requires consideration of the content on an operator's platform to determine if it “targets children” or is “reasonably anticipated to be accessed by children.” The Act's eleven-factor list attempts to make clear that content is the essential consideration with respect to whether an operator is covered.⁸ [Ohio Rev. Code § 1349.09\(C\)\(1\)-\(11\)](#).⁹ But Justice Thomas's more rigid approach only garnered three votes in [City of Austin](#). The majority's opinion instead requires this Court to inquire whether the Act “single[s] out any topic or subject matter for differential treatment.” [City of Austin](#), 596 U.S. at 71, 142 S.Ct. 1464. The “targets children” or “reasonably anticipated to be accessed by children” language tailors the Act's applicability to only the platforms that have a chance of attracting the children the Act seeks to protect. Sites that are not reasonably likely to be accessed by children need not conform with the Act's dictates.

⁸ “Attempts to” because the Act remains vague with respect to which operators it regulates, as discussed further below.

⁹ “In determining whether an operator's online web site, service, or product targets children, or is reasonably anticipated to be accessed by children, the attorney general or a court may consider the following factors:

- (1) Subject matter;
- (2) Language;
- (3) Design elements;
- (4) Visual content;
- (5) Use of animated characters or child-oriented activities and incentives;
- (6) Music or other audio content;
- (7) Age of models;
- (8) Presence of child celebrities or celebrities who appeal to children;
- (9) Advertisements;
- (10) Empirical evidence regarding audience composition; and
- (11) Evidence regarding the intended audience.”

In any event, as this Court has concluded, the coverage provision's distinction on the basis of [websites'] functionalities”—i.e., their means of disseminating speech and facilitating users' speech— are “content-based.” (PI Order, ECF No. 33 at 21). In particular, the Act regulates websites that allow users to: (a) interact socially with other users; (b) construct a public or semipublic profile; (c) populate a list of other users with whom an individual “shares or has the ability to share a social connection”; (d) create or post visible content “including on message boards, chat rooms, video channels, direct or private messages or chats, and a landing page or main feed that presents the user with content generated by other users.” [Ohio Rev. Code § 1349.09\(A\)\(1\)](#). Similarly, the Act excludes websites that have any number of other “predominant or exclusive function[s].” [Id.](#) § 1349.09(N)(1).

As this Court has concluded, covered websites' choices about whether and how to disseminate user-generated expression “convey a message about the type of community the platform seeks to foster.” (PI Order, ECF No. 33 at 21). In other words, the Act's references to “function” are a proxy for “differential treatment” of specific types of speech. See [City of Austin](#), 596 U.S. at 71–74, 142 S.Ct. 1464. Among the messages the Act regulates are the ideas that: (1) user-generated content is not less valuable than speech authored by the websites themselves; and (2) social interactions and connections (as compared to other types of interactions,

such as business interactions) have unique value for online communities. Thus, the “features that the Act singles out are inextricable from the content produced by those features.” (PI Order, ECF No. 33 at 21). And by disseminating speech these ways (and according to their own editorial policies), many covered websites “engage[] in compiling and curating others’ speech into an expressive product of [their] own.”

Moody, 603 U.S. at 709–10, 144 S.Ct. 2383; see also *id.* at 729–30, 144 S.Ct. 2383 (“A private party’s collection of third-party content into a single speech product (the operators’ ‘repertoire’ of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.”).

*20 The exceptions to the Act for product review websites and “widely recognized” media outlets are also content based. Specifically, the Act excludes websites where “interaction between users is limited to”: (1) “[c]omments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events”; and (2) “[r]eviewing products offered for sale by electronic commerce or commenting on reviews posted by other users.” Ohio Rev. Code § 1349.09(O)(1)-(2). Both of these exclusions are “based on” the “content” of the “websites”: “report[ing] news and current events” and “reviewing” certain “products.” *Id.* Presumably, the public nature of comments—as opposed to private chats—reduces the predation risk to minors that Defendant argues covered operators pose. Even assuming, however, that requiring parental approval before a minor can engage in private user interaction is one of the Act’s goals—and a constitutionally sound one—the exceptions as written still distinguish between the subset of websites without private chat features based on their content. For example, a product review website is excepted, but a book or film review website is presumably not. The State is therefore favoring engagement with certain topics, to the exclusion of others. That is plainly a content-based exception deserving of strict scrutiny. (PI Order, ECF No. 33 at 22); see *Planet Aid v. City of St. Johns*, 782 F.3d 318, 327 (6th Cir. 2015) (“[W]hen a regulation ‘regulates speech on the basis of its subject matter,’ it is not content-neutral.” (citation omitted)).

The State nonetheless argues that the Act is aimed at the “unique risks” that covered operators’ platforms pose to minors “based on shared features and functions unrelated to speech.” (ECF No. 48 at 3). But “[a] law that is content based on its face is subject to strict scrutiny regardless of the

government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Reed*, 576 U.S. at 165, 135 S.Ct. 2218.

c. The Act Violates Ohioan Minors’ Rights

NetChoice also argues that the Act merits strict scrutiny because it infringes on minors’ rights both to access and to produce First Amendment protected speech. Generally, First Amendment protections “are no less applicable when government seeks to control the flow of information to minors.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511–14, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Brown*, 564 U.S. at 794, 131 S.Ct. 2729. For that reason, “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Erznoznik*, 422 U.S. at 212–213, 95 S.Ct. 2268 (citation omitted). While the State “possesses legitimate power to protect children from harm,” that “does not include a free-floating power to restrict the ideas to which children may be exposed.” *Brown*, 564 U.S. at 794, 131 S.Ct. 2729 (citations omitted). Indeed, governments lack “the power to prevent children from hearing or saying anything *without their parents’ prior consent.*” *Id.* at 795 n.3, 131 S.Ct. 2729. “No doubt” Defendant “would concede this point if the question were whether to forbid children to read without the presence of an adult the *Odyssey* ...; or *The Divine Comedy* ...; or *War and Peace.*” *Am. Amusement Mach. Ass’n*, 244 F.3d at 577.

Particularly relevant here is the Supreme Court’s analysis in *Brown*, which invalidated a California regulation prohibiting the sale of violent video games to minors. 564 U.S. 786, 131 S.Ct. 2729. The Act *sub judice* mirrors the requirements considered in *Brown*. And like content-based regulations, laws that require parental consent for children to access constitutionally protected, non-obscene content are subject to strict scrutiny.

d. The Act fails Strict Scrutiny

Having concluded that the Act is a content-based regulation, this Court considers whether the Act fails strict scrutiny. Strict scrutiny is “the most demanding test known to constitutional law,”  *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). It requires the government to show that the law “furthers a compelling governmental interest and is narrowly tailored to that end.”  *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. In other words, to survive strict scrutiny, the State must “specifically identify an actual problem in need of solving” and show that “the curtailment of free speech must be actually necessary to the solution.”  *Brown*, 564 U.S. at 799, 131 S.Ct. 2729.

Attorney General Yost toggles between several different interests in his motion and opposition to NetChoice's motion. Defendant argues both that it seeks to regulate the ability of operators to contract with minors, not to limit minors' access to expressive content, but in the same breath asserts that the State's compelling interest is in protecting minors from harms associated with covered operators' platforms, including mental health issues, data privacy issues, and sexual predation. (ECF No. 42 at 35–37). Defendant also argues that the State has a compelling interest in protecting and advancing parents' ability to make decisions about their children's care and upbringing. (*Id.* at 36). This Court will address each of these purported interests in turn.

*21 With respect to minors' ability to contract with operators, Defendant cites the risk to minors of “involuntary releases of personally identifiable and other personal information and data.” (ECF No. 42 at 16–17). Attorney General Yost also points out that courts have enforced these extensive “click-wrap” terms against minors. (*Id.*) As this Court previously held, however, the Act is not narrowly tailored to protect minors against oppressive contracts. The Act regulates access to and dissemination of speech when it could instead seek to regulate the—arguably unconscionable—terms of service that these platforms require. The Act is also underinclusive with respect to this interest. For example, as NetChoice explains, a child can still agree to a contract with the *New York Times* without their parent's consent, but not with Facebook.

Next, Defendant argues that scientific research supports the notion that engagement with operators' platforms can have

damaging mental health effects, and subject minors to sexual predation. (ECF No. 42 at 35–36). The research reports submitted by the State outline the potential risk of harm to children and teens from both: (1) exposure to harmful content; and (2) excessive use perpetuated by the features discussed above like “infinite scrolling.” (*Id.* at 29–31). To satisfy its burden, the State must come forward with “a compelling basis for believing” that these harms are “actually caused by” the socially interactive nature of these websites, “and not pretexts for regulation on grounds not authorized by the First Amendment.”  *Am. Amusement Mach. Ass'n*, 244 F.3d at 576. The record Defendant has assembled here, however, is much like the deficient record in  *Brown*, where “nearly all of the research” showing any harmful effects “is based on correlation, not evidence of causation.”  564 U.S. at 800, 131 S.Ct. 2729 (cleaned up; citation omitted).¹⁰ The record also does not show that the full range of “thousands” of websites covered by the Act *cause* harms to minors sufficient to suppress those minors' access to protected speech.

¹⁰ See e.g., ECF No. 42-2 at 5 (“More research is needed to fully understand the impact of social media[.]”), *id.* at 11 (“more research is necessary to understand whether one causes the other”), *id.* at 12 (“Most prior research to date *has been correlational*, focused on young adults or adults, and generated a range of results.” (emphasis added)); *id.* (identifying “Known Evidence Gaps”); ECF No. 42-3 at 3 (“Meta-analyses have identified small or negligible negative links between social media use and well-being, while experimental evidence is mixed. Longitudinal observational studies that have investigated the predictive relationships between social media use and well-being have found that they are either reciprocal, only present in a certain direction or sex or not present at all.”), *id.* at 6 (“The study has multiple limitations that need to be considered. First, to interpret the parameters from our analyses as estimates of causal effects one would need to adopt [five] assumptions[.] ... Only if these assumptions are met can this observational study be said to capture the causal effects between social media and life satisfaction. Second, the data are self-report and therefore only allow inferences about the impact of self-estimated time on social media, rather than objectively measured social media use.”).

But even if protecting children against these harms is a compelling interest, which it very well may be, *see* [Sable Communications of California, Inc. v. F.C.C.](#), 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (explaining that “there is a compelling interest in protecting the physical and psychological well-being of minors”), the Act is not narrowly tailored to those ends. As this Court previously concluded, “[f]oreclosing minors under sixteen from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, is a breathtakingly blunt instrument for reducing social media’s harm to children.” (PI Order, ECF No. 33 at 25). The State’s approach is an untargeted one, as parents must only give one-time approval for the creation of an account, and parents and platforms are otherwise not required to protect against any of the specific dangers that social media might pose. As the Supreme Court observed in [Brown](#), legislation preventing minors from buying violent video games was “seriously underinclusive” because the “Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent ... says it’s OK.... That is not how one addresses a serious social problem.” [564 U.S. at 802, 131 S.Ct. 2729](#).

*22 Finally, with respect to the rights of parents, Attorney General Yost fails to distinguish the State’s purported interest from an analogous—and rejected—state interest in [Brown](#). When the State of California tried a similar argument, that the legislation prohibiting minors from purchasing violent video games was “justified in aid of parental authority,” the Supreme Court noted that it doubted “punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.” [Brown](#), 564 U.S. at 802, 131 S.Ct. 2729. More conclusively, however, the Court detailed a series of preexisting protections to help parents—just as there are here—such that “filling the remaining modest gap in concerned parents’ control can hardly be a compelling state interest.” [Id.](#) at 803, 131 S.Ct. 2729. And the legislation was also overinclusive, in that it enforced a governmental speech restriction, subject to parental veto, as opposed to protecting only the interests of genuinely concerned parents. [Id.](#) at 804, 131 S.Ct. 2729. That is, some parents simply may not care. [Id.](#) The same is true here.

Indeed, Defendant concedes that “parents have certain parental-control options for overseeing how their minor children use the internet,” but contends that “these options are simply not preventative enough and ignore the reality of the pervasiveness ... of technology.” (ECF No. 42 at 39). The fact that parents may be unaware of these tools, however, is not a proper justification. *See* [Ginsberg v. New York](#), 390 U.S. 629, 639, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (“It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” (quoting [Prince](#), 321 U.S. at 166, 64 S.Ct. 438)). As another district court observed, “parents control whether their minor children have access to Internet-connected devices in the first place, and Defendant[] ha[s] not shown minors are so capable of evading parental controls that they are an insufficient alternative to the State infringing on protected speech.” [NetChoice, LLC v. Reyes](#), 748 F. Supp. 3d 1105, 1127 (D. Utah 2024) (cleaned up).

This Court, although sympathetic to what the Ohio legislature sought to do, finds that the evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech. In other words, the Act is either underinclusive or overinclusive, or both, for all the purported government interests at stake. Ohio’s response to a societal worry that children might be harmed if they are allowed to access adult-only sections cannot be to ban children from the library altogether absent a permission slip. As Justice Holmes put it, the Constitution “does not enact Mr. Herbert Spencer’s Social Statics.” [Lochner v. New York](#), 198 U.S. 45, 75–76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). This is not to suggest that the State is wholly without power to enact legislation that seeks to minimize social media harms. Protecting children’s well-being is a laudable, perhaps even achievable, goal. But Ohio’s imperative is to achieve this goal through legislation that is constitutional.

2. Due Process: Void for Vagueness

Laws run afoul of the Due Process Clause of the Fourteenth Amendment if they fail to “give fair notice of conduct that is forbidden or required.” [FCC v. Fox Television Stations, Inc.](#), 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). In addition to affording regulated parties notice,

precision is also essential to ensure that laws cannot be enforced in an arbitrary or discriminatory way. *Id.* The need for clarity is particularly acute when laws restrict speech. See *id.* Having concluded above that the Act does in fact regulate speech, this Court rejects Attorney General Yost's invitation to apply a relaxed vagueness standard.

NetChoice identifies several aspects of the Act that this Court finds troublingly vague. Specifically, the Act purports to apply to operators that “target[] children” or are “reasonably anticipated to be accessed by children.” [Ohio Rev. Code § 1349.09\(B\)](#). On its face, this expansive language would leave many operators unsure as to whether it applies to their website. The legislature's apparent attempt at clarity is also unilluminating. The Act provides an eleven-factor list that the Attorney General or a court may use to determine if a website is indeed covered, which includes malleable and broad-ranging considerations like “[d]esign elements” and “[l]anguage.” [Ohio Rev. Code § 1349.09\(C\)](#). All the listed considerations are undefined.

*23 The Act also contains an eyebrow-raising exception for “established” and “widely recognized” media outlets whose “primary purpose” is to “report news and current events,” the speaker and content-based flavor of which are discussed further below. [Ohio Rev. Code § 1349.09\(O\) \(2\)](#). But the Act also provides no guardrails or signposts for determining which media outlets are “established” and “widely recognized.” Such capacious and subjective language practically invites arbitrary application of the law.

Attorney General Yost does not focus his argument on these examples, but instead highlights aspects of the Act that are more precisely defined. For example, he points to the Act's “carve-outs,” (ECF No. 42 at 44), and a few of the eleven factors that are less vague: “[e]mpirical evidence regarding audience composition” and “[p]resence of child celebrities or celebrities who appeals to children.” (*Id.* at 46 (quoting [§ 1349.09\(C\)](#))). Defendant Yost also points to the Children Online Privacy Protection Act of 1998 (“COPPA”), a federal regulation that uses some of the same factors to explain which websites or online services are “directed to children,” and therefore, covered by COPPA. (*Id.* at 46–47). But he points to no case where a court has concluded that COPPA's language is not vague, nor can this Court find one.

These more specific factors and the existence of the COPPA scheme do not cure vagueness in the eleven-factor list. But even if they did, they do not address the broad-ranging language in the exceptions. None of these phrases or the definitions in COPPA rehabilitates, for example, amorphous descriptors like “established” or “widely recognized.”

C. Permanent Injunction

In determining whether to enter a permanent injunction, this Court considers a modified iteration of the factors it utilizes in assessing preliminary injunctions: (1) success on the merits; (2) whether the plaintiff will suffer irreparable injury absent an injunction; (3) whether, balancing the hardships, there is harm to the defendant; and (4) whether the public interest favors granting the injunction. See [Amoco Prod. Co. v. Village of Gambell](#), 480 U.S. 531, 546 n.12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”); [Am. C.L. Union of Kentucky](#), 607 F.3d at 445.

As discussed above, NetChoice prevails on the merits. And this Court has already determined that NetChoice satisfies the remaining factors for injunctive relief. (PI Order, ECF No. 33 at 27–28). Specifically, NetChoice members and their users will suffer multiple forms of irreparable harm. As a matter of law, “[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed.” [Mich. State A. Philip Randolph Inst. v. Johnson](#), 833 F.3d 656, 669 (6th Cir. 2016) (cleaned up). Most pertinent here, 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, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (internal quotation marks and citation omitted). The Act violates covered members’ and their users’ First Amendment rights for all the reasons discussed above. Covered members’ unrecoverable compliance costs also constitute sufficient irreparable injury. [Ala. Ass'n of Realtors v. HHS](#), 594 U.S. 758, 765, 141 S.Ct. 2485, 210 L.Ed.2d 856 (2021) (citing compliance costs “with no guarantee of eventual recovery”). This Court previously observed that the “engineering and compliance procedures” for some covered members are “extremely burdensome,”

and “there is no cause of action through which [NetChoice members] could seek to recover those compliance costs.” (PI Order, ECF No. 33 at 28).

*24 The last two factors in the balancing test merge when the government is a party. [Nken v. Holder](#), 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). It “is always in the public interest to prevent the violation of a party’s constitutional rights.” [Jones v. Caruso](#), 569 F.3d 258, 278 (6th Cir. 2009) (internal quotation marks and citation omitted). Here, a permanent injunction would ensure that minors could continue to access and engage in protected speech on the vast array of websites regulated by the Act. And those websites would be able to continue disseminating speech to the public without the Act’s burdens. On the other side of the ledger, “the State has no interest in enforcing laws that are unconstitutional.” (PI Order, ECF No. 33 at 29) (quoting *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 591 F. Supp. 3d 205, 215 (W.D. Ky. 2022)); [Martin-Marietta Corp. v. Bendix Corp.](#), 690 F.2d 558, 568 (6th Cir. 1982) (similar).

In short, where a First Amendment injury is both “threatened” and “occurring” and a plaintiff has prevailed on the merits, permanent injunctive relief is the appropriate remedy. *See* [Elrod v. Burns](#), 427 U.S. 347, 373–74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accordingly, this Court grants Plaintiff’s motion for a permanent injunction.

IV. CONCLUSION

Having considered the parties’ cross-motions for summary judgment, the declarations and exhibits in the record, and the arguments of counsel, and for the reasons set forth above, it is hereby **ORDERED** that Defendant’s motion for summary judgment (ECF No. 42) is **DENIED**; and Plaintiff’s motion for summary judgment and permanent injunction (ECF No. 43) is **GRANTED**. It is **FURTHER ORDERED** that Defendant David Yost, in his official capacity as Attorney General for the State of Ohio, and his respective officers, employees, representatives, and agents are **ENJOINED** from enforcing the Parental Notification by Social Media Operators Act, [Ohio Rev. Code § 1349.09](#), Am. Sub. H.B. No. 33 §§ 803.380, [1349.09](#), 135th Gen. Assemb., Reg. Sess. (Ohio 2023). It is **FURTHER ORDERED** that this Opinion and Order shall constitute a final judgment in this case, and the Clerk of Court is **DIRECTED** to close the case administratively.

IT IS SO ORDERED.

All Citations

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2020 WL 2617168

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Superior Court of Massachusetts,
Suffolk County..

Kurt STOKINGER, et al. ¹

v.

ARMSLIST, LLC, et al. ²

¹ Janella Stokinger.

² Grant Headley and Sara Johnson.

1884CV03236F

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April 28, 2020

*MEMORANDUM OF DECISION AND ORDER
ON ARMSLIST, LLC'S MOTION TO DISMISS*

Heidi E. Breiger, Justice of the Superior Court

***1** This action arises from the shooting of Boston Police Officer Kurt Stokinger (“Officer Stokinger”) during a police investigation. Officer Stokinger and his wife, Janella Stokinger (“Mrs. Stokinger”) (collectively, “the Stokingers”), assert various claims against the shooter, Grant Headley (“Headley”), the gun's seller, Sara Johnson (“Johnson”), and Armslist, LLC (“Armslist”), an online marketplace facilitating the purchase and sale of firearms. The Stokingers allege that Johnson used Armslist to purchase firearms—including the gun used to shoot Stokinger—and then illegally sold or transferred those firearms to individuals who were legally prohibited from possessing firearms. Before the court is Armslist's motion to dismiss the Stokingers' claims against it (Counts Three, Four, Five, Six, and Seven) on the ground that each claim is barred by the Communications Decency Act,  [47 U.S.C. § 230 \(2018\)](#). For the following reasons, Armslist's motion to dismiss is *ALLOWED*. ³

³ Armslist also filed a motion to dismiss for lack of personal jurisdiction but in light of the instant ruling, the court need not address the jurisdictional issue.

BACKGROUND

Following is a summary of the well-pleaded factual allegations of the First Amended Complaint (the “complaint”). ⁴ See  [Sisson v. Howe, 460 Mass. 705, 707, 954 N.E.2d 1115 \(2011\)](#).

⁴ As additional support for its motion, Armslist submitted a declaration from Jonathan Gibbon, the co-founder and President of Armslist, to which the Stokingers objected. Insofar as the court has resolved the instant motion without the benefit of Mr. Gibbon's declaration, this objection is moot.

A. Relevant Federal and State Regulation of Firearm Sales

Federal law requires that only federally licensed firearms dealers may engage in the firearms business. To obtain a federal firearms license, a person or entity must apply for—and be granted—a license from the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”). Federally licensed firearms dealers are subject to duly promulgated regulations. For example, licensed dealers are required to conduct background checks of potential buyers to ensure that guns are not sold to individuals who are prohibited from possessing firearms, such as felons, the mentally ill, domestic abusers, and minors (collectively, “prohibited purchasers”). In addition, licensed dealers must keep records of firearms sales to assist law enforcement with criminal investigations. Licensed dealers also must inform law enforcement whenever a purchaser engages in a “multiple sale,” which is when a purchaser buys more than one firearm within five business days as it may indicate firearms trafficking. Licensed dealers also have a duty to screen for suspicious sales and may refuse a sale when the dealer believes that the sale is dangerous or risky.

Under federal law, unlicensed “private sellers”—persons not engaged in the firearms business—are permitted to sell a maximum of four firearms per year. Such private sellers are not required to conduct background checks of potential buyers or keep a record of their transactions.

***2** In Massachusetts, all firearm purchasers—licensed or not—must obtain a permit prior to buying a firearm, and the

issuance of such a permit requires the individual to undergo a background check.  G.L.c. 140, §§ 129B- 129C.

B. Armslist.com

Armslist.com is a for-profit online firearms marketplace that facilitates sales of firearms and accessories. Armslist owns and operates Armslist.com, which it developed after several major websites chose to cease online firearm sales.

Armslist.com is not a federally licensed firearms dealer. Instead it functions as an intermediary by providing information to both firearms sellers and buyers so as to facilitate transactions. Prospective firearms customers use the website's internal e-mail system to contact firearms sellers to arrange a transaction. Customers may also contact sellers outside of the website by using the seller's contact information provided on the website.

C. The Firearm Involved in the Shooting

On January 8, 2016, Headley shot Stokinger in the leg with a .40 caliber Glock Model 27 semi-automatic handgun. Headley, a convicted felon, is a prohibited purchaser of firearms under Massachusetts law.  G.L.c. 140, § 129B. After the shooting, fellow officers recovered Headley's firearm. The post-shooting investigation produced information giving rise to the Stokingers' allegation that Headley's possession of the firearm was traced to Armslist.com transactions.⁵ The Stokingers believe that shortly after Johnson purchased the firearm from McNamara, either Johnson or Sullivan sold the gun to Headley.

⁵ In particular, ATF learned that Derek McNamara ("McNamara") purchased the firearm on March 3, 2015, from Black Op Arms, a federally licensed firearms dealer in Claremont, New Hampshire. McNamara informed ATF that he then sold the firearm to Johnson, a New Hampshire woman who contacted him through Armslist.com. McNamara met Johnson in a McDonald's parking lot in Warner, New Hampshire, in July 2015, and sold her the firearm. Her confederate, Daniel Ray Sullivan ("Sullivan"), was a convicted felon. On July 26, 2017, Johnson and Sullivan

were indicted in on federal firearms charges in the United States District Court in New Hampshire; each pleaded guilty. Sullivan admitted he contacted Armslist.com to arrange various firearms purchases.

According to ATF's investigation, Johnson purchased and then sold an estimated thirty to sixty-three firearms that she procured from Armslist.com. At least four of the firearms she purchased were recovered on the streets of Greater Boston within seven months of Johnson's purchase.

D. Instant Action

On October 18, 2018, the Stokingers filed this action against Headley, Johnson, and Armslist. Count One is a claim against Headley for assault and battery. Counts Two and Three are negligence claims against Johnson and Armslist, respectively. Count Four alleges that Armslist aided and abetted in Johnson's negligent sale of the firearm to Headley. Count Five asserts a claim of public nuisance against Armslist. Counts Six and Seven assert claims by Mrs. Stokinger against all defendants for loss of consortium and loss of support. Armslist now moves to dismiss each of the claims against it (Counts Three, Four, Five, Six, and Seven) on the ground that the Stokingers' claims are barred by the Communications Decency Act ("CDA" or the "Act"),  47 U.S.C. § 230.

***3** The gravamen of the Stokingers' negligence claim (Count Three) is that Armslist.com's design and operational features facilitate illegal firearms sales and encourage illegal firearms trafficking because Armslist.com makes it easy for prospective buyers to locate private sellers by using a filter feature permitting prospective buyers to browse advertisements by private sellers. Insofar as most states do not require private firearm sellers to conduct background checks on prospective customers, private sales are more attractive to prohibited purchasers. Additionally, prospective customers may use the website's "location" filter to narrow their search to sales to specific states, enabling them to weed out sales in states with stricter gun laws.

The Stokingers further allege that Armslist is negligent because it permits users to maintain their anonymity, and takes no action to monitor or prevent illegal sales. The Stokingers also claim that Armslist is aware that its website is a magnet for illegal gun transactions and negligently failed to institute reasonable safeguards to minimize the risks of such

transactions, such as limiting the number of guns that can be sold or purchased by each user or requiring sellers to conduct background checks.⁶

⁶ Because the court concludes that Armslist is immune from the negligence claim pursuant to the CDA, the court need not determine whether Armslist owed a duty of care to the Stokingers.

Count Four alleges that in brokering the firearm transaction between Johnson and McNamara, Armslist aided and abetted in the negligent subsequent sale of the firearm to Headley.

Count Five alleges that Armslist created a public nuisance by designing and maintaining an online marketplace tailored to attract and encourage persons who wish to buy or sell firearms in contravention of federal and state gun laws. As a result, the Stokingers claim that Armslist substantially and unreasonably interfered with the public's safety and comfort.

Counts Six and Seven allege that Armslist's aforementioned conduct was the proximate cause of Mrs. Stokinger's loss of consortium and loss of spousal support.

For the following reasons, the court concludes that Armslist is immune from each of these claims pursuant to the CDA.

DISCUSSION

A. CDA Generally

In enacting the CDA, Congress recognized that the internet was an extraordinary advancement in the availability of education and informational resources as well as a forum for free speech and cultural development. ^{47 U.S.C. § 230(a)}. It also found that the internet had “flourished, to the benefit of all Americans, with a minimum of government regulation.” ^{47 U.S.C. § 230(a)(4)}. In light of its findings, Congress sought “to promote the continued development of the Internet” and “to preserve the vibrant and competitive free market that presently exists ...” ^{47 U.S.C. § 230(b)(1)-(2)}.

To achieve its goals, the CDA provides broad immunity to web-based service providers for all claims arising from their publication of information from third parties. ^{Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008)}, citing

^{47 U.S.C. § 230(c)(1)}. In fact, the CDA was enacted partially in response to cases in which internet publishers were held liable for defamatory statements posted by third parties on their message boards. ^{Doe v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016)}, citing ^{Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, *5-6, 1995 N.Y.Misc. LEXIS 229, *12-*14 (N.Y. Sup. Ct. May 24, 1995)}. In reaction, Congress recognized the threat and “obvious chilling effect” that tort-based lawsuits could pose to the free exchange of information over the internet.

^{Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997)}. The CDA addresses the chill by immunizing interactive computer service providers from claims or theories of liability that “would treat [it] as the publisher or speaker of ... information” provided by a third party. See ^{Universal Comm'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007)} (quotations omitted) (interactive computer service providers still liable for their own conduct and their own speech).

B. The Instant Claims

^{*4} The Stokingers' claims are predicated on Armslist's creation, design, and maintenance of Armslist.com. The CDA states, in pertinent part, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” ^{47 U.S.C. § 230(c)(1)}. An interactive computer service is as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” ^{47 U.S.C. § 230(f)(2)}. Here, the Stokingers do not dispute that Armslist.com is an interactive computer service. Rather, the central question before the court is whether the Stokingers' claims treat Armslist as the publisher or speaker of the content provided by the sellers and buyers of firearms who access its site.⁷ ^{Backpage.com, LLC, 817 F.3d at 19}. The Stokingers argue that their claims do not treat Armslist as the publisher or speaker of third-party content; instead, they claim that Armslist's liability is predicated on its role in developing, designing, and maintaining a website that facilitates and encourages illegal gun trafficking.

7 An information content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”  47 U.S.C. § 230(f)(3).

It appears that this issue is one of first impression in the Commonwealth, although the highest state court in Wisconsin and the Court of Appeals for the First Circuit have already addressed and resolved the same issue. Review of the pleadings and case law in this area leads the court to agree that Armslist's conduct falls within the scope of the immunity set out in the CDA, consequently barring the Stokingers' claims.

C. Analysis

There has been “near-universal agreement that  section 230 should be not be construed grudgingly.”  *Backpage.com, LLC*, 817 F.3d at 18. “This preference for broad construction recognizes that websites displaying third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content ‘would have an obvious chilling effect’ in light of the difficulty of screening posts for potential issues.”  *Id.* at 18-19, quoting  *Zeran*, 129 F.3d at 331. This broad construction has resulted in the recognition by courts across the country that many causes of action are premised on the publication or speaking of third-party content. See  *National Ass'n of the Deaf v. Harvard Univ.*, 377 F.Supp.3d 49, 65 (D. Mass. 2019).

For example, in  *Backpage.com, LLC*, 817 F.3d at 20-21, the court concluded that “publishing” functions include not only “editorial decision[s] with respect to” the content of a particular posting, but also “the structure and operation of the website.” In that case, three young sex trafficking victims filed suit against Backpage, alleging it engaged in a course of conduct that deliberately facilitated sex trafficking,  *Id.* at 16. In so doing, Backpage removed postings by victim support organizations as well as law enforcement “sting advertisements” from the “Escorts” section of the website.  *Id.* The plaintiffs also alleged that Backpage's rules governing advertising content were designed to encourage and facilitate sex trafficking, particularly where

it did not require a content poster to provide identifying information and did not require phone or email verification.

 *Id.* at 16 & n.2. Although Backpage's filtering system prohibited advertisements containing certain words or phrases associated with sex trafficking, a content poster could bypass that ban by using an abbreviated form of the word or phrase.  *Id.* at 16. The plaintiffs also claimed that Backpage charged for advertisements posted in the “Adult Entertainment” section, thus profiting from sex trafficking.  *Id.* at 17.

Plaintiffs argued that the CDA did not bar their claims because they did not seek to hold Backpage liable as a “publisher or speaker” of third-party content; rather, they sought to hold Backpage liable for designing a website that made it a participant in sex trafficking.  *Id.* at 20. The court disagreed, concluding that the complained-of conduct was “part and parcel of the overall design and operation of the website,” and consequently such features were editorial choices falling “within the purview of traditional publisher functions.”  *Id.* at 21. The court also noted that other jurisdictions had rejected similar claims attempting to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others. See  *id.* at 21, citing  *MySpace, Inc.*, 528 F.3d at 419-20 (failing to implement basic safety measures was another way of claiming website operator was liable for publishing third-party content).

*5 In response to  *Backpage.com, LLC*, Congress enacted Public Law 115-164, titled “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (the “2018 Amendment”) to clarify that the CDA “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution ...”  *Id.* The 2018 Amendment did not narrow the broad scope of the CDA's immunity—except in relation to sex trafficking. The court's holding in  *Backpage.com, LLC* was superseded by the enactment of the 2018 Amendment, but the broad legal principles immunizing other website operators, like Armslist, remain in effect.⁸

8 The Stokingers refer to various Congressional floor statements, claiming that the CDA should be read in light of its purpose, which is to promote decency

and to prevent results like [Stratton Oakmont, Inc.](#), 1995 WL 323710 at *, 1995 N.Y.Misc. LEXIS at *14, which held a website operator liable for publishing defamatory third-party posts. Is not the role of this court to rewrite legislation to comport with a perceived or presumed purpose motivating its enactment. The quite legitimate question of whether websites like Armslist.com should operate in the fashion they do must be addressed by Congress. If Congress did not intend to immunize firearms markets like Armslist, then it need only amend [§ 230](#) to reflect that intent as it did in response to the court's decision in [Backpage.com, LLC](#).

Here the Stokingers' challenges to Armslist.com, see *supra*, are the same as or similar to those raised in [Backpage.com, LLC](#). As was the case in [Backpage.com, LLC](#), the challenges relate to the design and structure of the website, which are editorial decisions, so the Stokingers' claims are precluded under the CDA. See [Backpage.com, LLC](#), 817 F.3d at 21 (“Features such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices ...”). See also [Green v. America Online \(AOL\)](#), 318 F.3d 465, 471 (3rd Cir. 2003) cert. denied, 540 U.S. 877, 124 S.Ct. 200, 157 L.Ed.2d 140 (2003) (“decisions relating to the monitoring, screening, and deletion of content from its network [are] actions quintessentially related to a publisher's role” and protected by CDA).

The Stokingers claim that Armslist could have done more to discourage or delete the offending or unlawful content or changed its policies so as to reduce the harmful content posted on its website is merely another way of stating that Armslist is liable for publishing the third-party content. See [MySpace, Inc.](#), 528 F.3d at 420-21, cert. denied, 555 U.S. 1031, 129 S.Ct. 600, 172 L.Ed.2d 456 (2008) (where sexual assault victim alleged website operator failed to implement measures that would have prevented her from communicating with predator, court dismissed victim's claims because her allegations were another way of claiming website was liable for publishing the communications of another). See also [Universal Commc'n Sys., Inc.](#), 478 F.3d at 422 (website operator's decision not to reduce misinformation by changing its website policies was “as much an editorial decision with respect to that misinformation as a decision not to delete

a particular posting”); [Green](#), 318 F.3d at 470 (failure properly to police its network for content transmitted by users treats website as “publisher or speaker” of that content).

The Stokingers allege that Armslist either knew or should have known that its website facilitates and encourages illegal gun trafficking. It is well-established that “notice of the unlawful nature or the information provided is not enough to make it the service provider's own speech.” [Universal Commc'n Sys., Inc.](#), 478 F.3d at 420. Immunity applies “even after notice of the potentially unlawful nature of the third-party content.” [Id.](#)

*6 The Stokingers suggest their claims are directed not to content-posters, but to Armslist's conduct and to the content that Armslist itself created.⁹ While the Stokingers are correct that an interactive computer service provider remains liable for its own conduct and its own speech, see [Universal Commc'n Sys., Inc.](#), 478 F.3d at 419, the Stokingers' claim that Armslist created the content at issue here was reviewed and rejected in a similar case. See [Daniel v. Armslist, LLC](#), 386 Wis.2d 449, 926 N.W.2d 710 (Wis. 2019), cert. denied. — U.S. —, 140 S.Ct. 562, 205 L.Ed.2d 356 (2019).

⁹ The Stokingers also argue that the presumption against the preemption of state common-law claims applies in this case. See [Ajemian v. Yahoo!, Inc.](#), 478 Mass. 169, 178, 84 N.E.3d 766 (2017) (“In interpreting a Federal statute, we presume that Congress did not intend to intrude upon traditional areas of State regulation or State common-law unless it demonstrates a clear intent to do so”). However, this argument fails because the CDA expressly preempts all state claims that are “inconsistent with this section.” See [47 U.S.C. § 230\(e\)\(3\)](#) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section”).

[Daniel](#) involved a mass shooting in Wisconsin, where the shooter purchased the firearm from a private seller on Armslist.com. [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 714. Daniel, a child of one of the victims, subsequently filed suit against Armslist asserting the same claims alleged in this case—negligence, aiding and abetting tortious conduct, and

public nuisance—among others. [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 716. Armslist moved to dismiss the complaint, arguing there, as here, that the CDA barred Daniel's claims. Daniel claimed there, as do the Stokingers here, that through the design and operation of its website, Armslist helped “develop” the content of the advertisement that led to the firearm sale; therefore, it was an “information content provider” within the meaning of [§ 230\(f\)\(3\)](#). See [id.](#), 386 Wis.2d 449, 926 N.W.2d at 718. Daniel also argued that her claims were not based on Armslist's publication of third-party content, but instead were based on Armslist's facilitation and encouragement of illegal firearm sales by third parties. *Id.* The Stokingers advance those same arguments in this case.

Initially, Wisconsin's court of Appeals agreed with Daniel, declaring that the CDA did not bar Daniel's claims. See [Daniel v. Armslist, LLC](#), 382 Wis.2d 241, 913 N.W.2d 211, 217-24 (Wis. 2018). The Supreme Court of Wisconsin disagreed, reversing, and holding that Armslist did not develop the content at issue (i.e., the firearm advertisement that led to the sale), and because Daniel's claims treated Armslist as the publisher of that content, her claims were barred. [Daniel v. Armslist, LLC](#), 926 N.W.2d at 722, 726-27, 386 Wis.2d 449.

In reaching its conclusion, the court employed the “material contribution” test to determine whether Armslist materially contributed to the illegality of the third-party content or whether it merely published content created by someone else.¹⁰ [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 720, citing [Fair Hous. Council v. Roomates.com](#), 521 F.3d 1157, 1168 (9th Cir. 2008). Whether a website's design features employ “neutral tools” is helpful in determining whether those features materially contribute to the unlawfulness of the content. [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 721. A “neutral tool” is a feature provided by an interactive computer service provider that can be “utilized for proper or improper purposes” (citations omitted). [Id.](#) “A defendant who provides a neutral tool that is subsequently used by a third party to create unlawful content will generally not be considered to have contributed to the content's unlawfulness,” even if the interactive computer service provider knew, or should have known, that its neutral tools were being used for illegal purposes. [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 721, 722.

10 “[M]aterial contribution ‘does not mean merely taking action that is necessary to the display of allegedly illegal content,’ such as providing a forum for third-party posts. ‘Rather, it means being responsible for what makes the displayed content allegedly unlawful.’” [Daniel](#), 926 N.W.2d at 719, 386 Wis.2d 449, quoting [Jones v. Dirty World Entm't Recordings, LLC](#), 755 F.3d 398, 410 (6th Cir. 2014).

*7 Although Daniel claimed that Armslist's design features made it easier for prohibited purchasers to illegally obtain firearms the court held that the complained-of design features were “neutral tools,” and therefore, Armslist did not materially contribute to the development of the firearm advertisement. [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 722. The court also concluded that the other design features that Daniel claimed could have been implemented were merely “precautions” that were permissible but not required under the CDA.¹¹ [Id.](#) Additionally, the court was not persuaded by Daniel's argument that Armslist.com made illegal firearm sales easier, stating that such an argument merely attempted to distinguish the case “from the litany of cases dismissing suits against website operators who failed to screen for unlawful content.” [Id.](#), 386 Wis.2d 449, 926 N.W.2d at 723. The court also noted that Armslist's intent did not affect immunity because the CDA does not contain a good faith requirement. [Id.](#) For those reasons, the court held that Armslist was not a content provider within the meaning of [§ 230\(f\)\(3\)](#); rather, the content at issue was provided by a third party. [Id.](#)¹²

11 Congress did not want to discourage interactive computer service providers from voluntarily screening unlawful third-party content. Therefore, under [§ 230\(c\)\(2\)](#), an interactive computer service provider is not liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable ...”

12 The court also concluded that with respect to Daniel's claims (negligence, aiding and abetting, and public nuisance), that the duty Armslist

allegedly violated derived from its immunized role
as a publisher of third-party content.  *Daniel*,
926 N.W.2d at 725-26, 386 Wis.2d 449.

ORDER

Here, the Stokingers' claims concern both the same design features and the same arguments raised in  *Daniel*. The court concludes that Armslist is not an information content provider, and that the Stokingers' claims are based on complaints about posted content created or developed by a third party. Armslist is thus entitled to immunity under the CDA, and the Stokingers' claims must be dismissed.

For the foregoing reasons, it is hereby *ORDERED* that the defendant Armslist, LLC's motion to dismiss is *ALLOWED*.

All Citations

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2025 WL 455463

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United States District Court, W.D. Texas, Austin Division.

STUDENTS ENGAGED IN
ADVANCING TEXAS, et al., Plaintiffs,

v.

[Ken PAXTON](#), in his official capacity as
the Texas Attorney General, Defendant.

1:24-CV-945-RP

|

Signed February 7, 2025

Synopsis

Background: Texas-based minors, adults who posted content on social media geared toward minors, and organizations whose members included minors filed action against Attorney General of Texas in his official capacity, claiming that a new state law that regulated social media websites chilled their speech and violated the First and Fourteenth Amendments. Plaintiffs moved for a preliminary injunction.

Holdings: The District Court, [Robert Pitman, J.](#), held that:

plaintiffs had standing to bring suit;

plaintiffs' challenges were ripe for adjudication;

strict scrutiny applied to challenged law's regulations, on plaintiffs' First Amendment challenge;

law's monitoring-and-filtering requirements were overbroad, overly restrictive, and underinclusive, and thus were properly preliminarily enjoined on their face;

law's targeted advertising requirements were likely to fail strict scrutiny;

law's content monitoring and age-verification requirements failed strict scrutiny;

law's monitoring-and-filtering requirements were unconstitutionally vague; and

in addition to a substantial likelihood of success on the merits, remaining preliminary injunction factors weighed in favor of plaintiffs.

Motion granted in part and denied in part.

Procedural Posture(s): Motion for Preliminary Injunction.

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Validity Called into Doubt

 [Tex. Bus. & C. Code §§ 509.052\(2\)\(D\)](#),  [509.053](#),
 [509.055](#),  [509.056\(1\)](#),  [509.057](#)

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Todd A. Dickerson, Office of the Attorney General of Texas, Austin, TX, for Defendant.

ORDER

[ROBERT PITMAN](#), UNITED STATES DISTRICT JUDGE

*1 Before the Court is Plaintiffs Ampersand Group LLC, Brandon Closson, M.F., and Students Engaged in Advancing Texas's (collectively "Plaintiffs") motion for a preliminary injunction, (Dkt. 17). Defendant Ken Paxton, ("Paxton"), in his official capacity as the Texas Attorney General, filed a response, (Dkt. 35), to which Plaintiffs replied, (Dkt. 37). Having considered the briefing, the evidence, and the relevant law, the Court will grant the motion as to  [Tex. Bus. & Com. Code §§ 509.052\(2\)\(D\)](#),  [509.053](#),  [509.055](#),  [509.056\(1\)](#), and  [509.057](#), and deny it in all other respects.

I. BACKGROUND

This case concerns Texas House Bill 18, a law that regulates social media websites (“HB 18” or “the Act”).  [Tex. Bus. & Com. Code §§ 509.001, et seq.](#) The law took effect on September 1, 2024. Before it took effect, the Court enjoined certain aspects of the law in another matter before it,  [Computer & Communications Industry Association v. Paxton](#), No. 1:24-CV-849-RP, — F.Supp.3d —, 2024 WL 4051786 (W.D. Tex. Aug. 30, 2024). The Court begins by describing the parties, then the Act, and then the procedural posture of the case.

A. The Parties

Plaintiffs are Texas-based minors, adults who post content on social media geared toward minors, and organizations whose members include minors, who allege that the Act chills their speech. (Mot. Prelim. Inj., Dkt. 17, at 8–9). Plaintiff Students Engaged in Advancing Texas (“SEAT”) “represents a coalition of Texas students, from middle-school to college, who seek to increase youth visibility and participation in policymaking, including via social media.” (*Id.* at 8). Plaintiff M.F. is “a 16-year-old high school student who uses social media to learn about current events and opportunities, follow the news, discover music, and conduct research for his debate team and other school activities.” (*Id.* at 8–9). Plaintiff The Ampersand Group (“Ampersand”) is an advertising agency in Austin, Texas which “publishes social-good and public service advertisements on YouTube, Instagram, Facebook, and gaming platforms.” (*Id.* at 9). Plaintiff Brandon Closson (“Closson”) is an adult resident of Texas who uses his social networks to share content about mental health and [bipolar disorder](#), including to minors. (Compl., Dkt. 1, at 5).

Paxton is the sole Defendant in this suit. He is the Attorney General of Texas, sued in his official capacity. (Compl., Dkt 1, at 5). Paxton and the Consumer Protection Division of the Attorney General's Office have authority to enforce HB 18. *See* § 509.151 (“A violation of this chapter is a deceptive act or practice actionable ... solely as an enforcement action by the consumer protection division of the attorney general's office.”).¹

¹ The law also creates a separate private right of action. § 509.152.

B. HB 18

1. Coverage

The Court described the scope of coverage of HB 18 in its order granting a preliminary injunction against the Act in  [Computer & Comm'ns Indus. Ass'n](#), — F.Supp.3d at —, 2024 WL 4051786, at *1, and briefly reiterates that background here. HB 18 regulates “digital service provider[s]” (“DSPs”) that “allow[] users to socially interact with other users,” “allow[] a user to create a public or semi-public profile,” and “allow[] a user to create or post content.” HB 18  §§ 509.001(2),  509.002(a). This definition includes standard social media platforms such as Facebook and Instagram as well as other “social” websites such as YouTube and Reddit. HB 18 defines DSPs as any “website,” “application,” “program,” or software that “collects or processes personal identifying information” (“PII”) “with Internet connectivity,”  § 509.001 (1), and:

- *2 (1) “determines” both the “means” and the “purpose of collecting and processing the [PII] of users,” HB 18  § 509.001(2)(B)–(C);
- (2) “connects users in a manner that allows users to socially interact with other users on the digital service,” *id.*  § 509.002(a)(1);
- (3) “allows a user to create a public or semi-public profile for purposes of signing into and using the digital service,” *id.*  § 509.002(a)(2); and
- (4) “allows a user to create or post content that can be viewed by other users of the digital service, including sharing content on: (A) a message board; (B) a chat room; or (C) a landing page, video channel, or main feed that presents to a user content created and posted by other users,” *id.*  § 509.002(a)(3).²

2  Section 509.057 is not limited to social platforms but otherwise retains the same exceptions. *Id.*  § 509.002(a-b).

Exceptions to the law include: state and local government websites, financial institutions, medical websites, small businesses, institutions of higher education, employee management software, school education software, and email services that only provide “social” functions “incidental” to their main service. *Id.*  § 509.002(b). Notably, the law also exempts DSPs that “primarily function[] to provide a user with access to news, sports, commerce, or content primarily generated or selected by the [DSP]” and “allow[] chat, comment, or other interactive functionality that is incidental to the digital service.” *Id.*

2. Requirements

(a) Age Registration and Parental Disputes

With the stated purpose of protecting minors, HB 18 imposes age registration and verification requirements on users. Under HB 18, covered DSPs must make users “register” their age before those users can create an account. *Id.* § 509.051(a) (covered DSPs “may not enter into an agreement with a person to create an account with a digital service unless the person has registered the person's age with the [DSP].”). A user cannot change their registered age “unless the alteration process involves a commercially reasonable review process.” *Id.* § 509.051(c).

HB 18 also allows parents to dispute the registered age of their child by “notif[ying] a [DSP] that the minor is younger than 18 years of age” or “successfully disput[ing] the registered age of the minor” *Id.* § 509.051(d)(2).³ If a parent disputes the age of their child, the DSP “shall treat the user as a known minor.” *Id.* § 509.051(e). To ensure parenthood, HB 18 requires DSPs to “verify, using a commercially reasonable method and for each person seeking to perform an action on a digital service as a minor's parent or guardian: (1) the person's identity; and (2) the relationship of the person to the known minor.” *Id.* § 509.101(a). When a known minor logs into a covered DSP, HB 18 imposes several new requirements, with the relevant requirements to this case set forth in more detail below.

3 The statute also allows parents to dispute the age of a minor if the parent “performs another function of a parent or guardian under this chapter.” HB 18 § 509.051(d)(2)(C).

(b) “Monitoring-and-Filtering” Requirements

Plaintiffs challenge  Sections 509.053 and  509.056(1) of HB 18, which the Court refers to as the “monitoring-and-filtering” requirements. The Court has previously enjoined the monitoring-and-filtering requirements with respect to a group of Plaintiff trade associations.  *Computer & Comm'ns Indus. Ass'n*, — F.Supp.3d at —, 2024 WL 4051786, at *21.

*3 As this label suggests, these requirements make DSPs monitor certain categories of content and filter them from being on display to known minors. Specifically, HB 18 requires covered DSPs to “develop and implement a strategy to prevent [a] known minor's exposure to” defined categories of prohibited speech. *Id.*  § 509.053(a). HB 18 prohibits content “that promotes, glorifies, or facilitates” the following:

- (A) “suicide, self-harm, or eating disorders”;
- (B) “substance abuse”;
- (C) “stalking, bullying, or harassment”;
- (D) “grooming, trafficking, child pornography, or other sexual exploitation or abuse.”

Id.

Strategies to prevent minors' exposure to these harmful categories “must include”:

- (A) creating and maintaining a comprehensive list of harmful material or other content described [above] to block from display to a known minor;
- (B) using filtering technology and other protocols to enforce the blocking of material or content on the list [above];
- (C) using hash-sharing technology and other protocols to identify recurring harmful material or other content described [above];

- (D) creating and maintaining a database of keywords used for filter evasion, such as identifiable misspellings, hash-tags, or identifiable homoglyphs;
- (E) performing standard human-performed monitoring reviews to ensure efficacy of filtering technology;
- (F) making available to users a comprehensive description of the categories of harmful material or other content described [above] that will be filtered; and
- (G) except as provided by Section 509.058, making available the digital service provider's algorithm code to independent security researchers.

Id. § 509.053(b)(1).⁴ So too, Section 509.056 requires that DSPs “that use[] algorithms to automate the suggestion promotion, or ranking of information to known minors” “shall ... make a commercially reasonable effort to ensure that the algorithm does not interfere with the [DSP]’s duties under” the above. *Id.* § 509.056(1).

⁴ In addition to the above mandatory strategies, HB 18 allows DSPs to use other strategies, including:

- (A) engaging a third party to rigorously review the digital service provider's content filtering technology;
- (B) participating in industry-specific partnerships to share best practices in preventing access to harmful material or other content described [above]; or
- (C) conducting periodic independent audits to ensure:
 - i. continued compliance with the digital service provider's strategy; and
 - ii. efficacy of filtering technology and protocols used by the digital service provider.

HB 18 § 509.053(b)(2).

(c) Targeted Advertising Requirements

In addition to the monitoring-and-filtering requirements, HB 18 Sections 509.052 and 509.055 impose regulations on how DSPs can display advertisements to known minors. The Plaintiffs challenge Sections 509.052(2)(D) and

509.055, which this Court calls the “targeted advertising requirements.”

In the relevant section of the Act, first, the law imposes limits on what kind of data a DSP may collect. Covered DSPs must “limit collection of the known minor's [PII] to information reasonably necessary to provide the digital service” and “limit use of the [PII] to the purpose for which the information was collected” HB 18 § 509.052(1). In addition, a covered DSP may not: “(A) allow the known minor to make purchases or engage in other financial transactions through the digital service; (B) share, disclose, or sell the known minor's [PII]; (C) use the digital service to collect the known minor's precise geolocation data; or (D) use the digital service to display targeted advertising to the known minor.” *Id.* § 509.052(2). Out of this section, Plaintiffs challenge only the last provision—§ 509.052(2)(D)’s restriction on using the DSP to display “targeted advertising” to a minor. In another section Plaintiffs challenge, HB 18 requires DSPs to “make a commercially reasonable effort to prevent advertisers on the digital service provider's [website] from targeting a known minor with advertisements that facilitate, promote, or offer a product, service, or activity that is unlawful for a minor in this state to use or engage in.” *Id.* § 509.055.

(d) Content Monitoring and Age-Verification Requirements

*4 Plaintiffs additionally challenge HB 18's provision that requires DSPs to track their overall published material and restrict harmful or obscene material from known minor viewers, which the Court will call the “content monitoring and age-verification requirement.” *Id.* § 509.057. This provision provides that “[a] digital service provider ... that knowingly publishes or distributes material, more than one-third of which is harmful material or obscene as defined by Section 43.21, Penal Code, must use a commercially reasonable age verification method to verify that” any user seeking to access the information is 18 or older. *Id.* § 509.057.

“Obscene” as defined in the Texas Penal Code means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes: (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

 [Tex. Penal Code Ann. § 43.21](#). “Harmful” is not defined in the statute.

(e) Other Requirements

HB 18 has other requirements, that Plaintiffs do not seek to enjoin, which this Court briefly summarizes by way of background. HB 18 requires DSPs to create and provide parental tools to “supervise ... [a] known minor's use” of the DSP. *Id.* § 509.054(a). Parents must be able to “control the known minor's privacy and account settings,” alter data collection and financial transaction settings for the minor, and “monitor and limit the amount of time the ... known minor spends” using the DSP. *Id.* § 509.054(b).

Also, HB 18 requires covered DSPs that “use[] algorithms to automate the suggestion, promotion, or ranking of information to known minors” to “disclose ... in a clear and accessible manner, an overview of”: (1) “the manner in which the digital service uses algorithms to provide information or content”; (2) “the manner in which algorithms promote, rank, or filter information or content”; and (3) “the [PII] used as inputs to provide information or content.” *Id.*

 [§ 509.056\(2\)](#). HB 18 contains various other provisions related to the practical enforcement of the law, such as clarifying that DSPs may share known minors’ PII to comply with legal investigations, HB 18 § 509.059(1–2); that DSPs need not disclose trade secrets, *id.* § 509.058; and that the

Department of Family and Protective Services may designate its staff as a minor's caregiver, if a minor is in the agency's conservatorship, *id.* § 509.104.

C. Procedural History

Plaintiffs filed suit on August 16, 2024, and filed a motion for a preliminary injunction on August 23, 2024. (Compl., Dkt. 1; Mot. Prelim. Inj., Dkt. 17). Plaintiffs argue that HB 18  §§ 509.001–002,  509.051,  509.052(2)(D),  509.053,  509.055,  509.056(1),  509.057, and 509.101–103 violate the First Amendment because they are content-based laws that do not survive strict or intermediate scrutiny; because they are unconstitutional prior restraints of speech; and because they are facially overbroad, (Compl., Dkt. 1, at 28–35). They also challenge HB 18  §§ 509.002(a)(1),  509.002(a)(2),  509.002(b)(10)(B),  509.053(a),  509.052(2)(D),  509.055,  509.057(a), and 509.101 as unconstitutionally void for vagueness. (*Id.* at 36). Their preliminary injunction motion addresses the monitoring-and-filtering, targeted advertising, and the content monitoring and age-verification requirements. (Mot. Prelim. Inj., Dkt. 17, at 8–27). Plaintiffs seek a preliminary injunction: more specifically, they “request an order enjoining  [Tex. Bus. & Com. Code §§ 509.001–002](#),  509.051,  509.052(2)(D),  509.053,  509.055,  509.056(1),  509.057, and 509.101–103 on their face.” (Mot. Prelim. Inj., Dkt. 17, at 27).

*5 Paxton filed a response in opposition to the motion. (Dkt. 35). Paxton argues that Plaintiffs lack standing, that strict scrutiny does not apply to the analysis of HB 18, and that Texas has an interest in HB 18 sufficient to satisfy this Court's review under the First Amendment. (*Id.* at 20–42). Paxton also argues that HB 18 is subject to limiting constructions and is not unconstitutionally vague, and that it cannot be called a prior restraint. (*Id.* at 42–46). Plaintiffs filed a reply, (Dkt. 37), two notices of supplemental authority, (Dkts. 38, 39), and two supplements to the motion for preliminary injunction in the form of supplemental Plaintiff declarations, (Dkts. 40, 41).

II. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. See [Valley v. Rapides Par. Sch. Bd.](#), 118 F.3d 1047, 1050–52 (5th Cir. 1997). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” [Winter v. Nat. Res. Def. Council, Inc.](#), 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. [PCI Transp. Inc. v. W. R.R. Co.](#), 418 F.3d 535, 545 (5th Cir. 2005).

III. DISCUSSION

As Paxton notes, Plaintiffs’ motion turns on the likelihood of success on the merits. (Resp., Dkt. 35, at 47 (“The remaining preliminary injunction factors will not meaningfully impact this case.”)). The Court will begin its likelihood of success analysis with the jurisdictional issue of Plaintiffs’ standing to bring suit. Finding that Plaintiffs have standing, the Court will then turn to the merits of Plaintiffs’ motion.⁵

⁵ The Court addressed sovereign immunity in its [Computer & Comm’ns Indus. Ass’n](#) preliminary injunction order and found that Paxton has the authority and demonstrated willingness to enforce HB 18, establishing sufficient connection to the law to render him a proper defendant for prospective injunctive relief under [Ex parte Young](#), 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). [F.Supp.3d at ———, 2024 WL 4051786, at *5–*7](#). Paxton did not raise the defense of sovereign immunity in this suit, so the Court does not further address it here.

A. Standing

First, the Court addresses Plaintiffs’ standing to bring suit. Standing requires a plaintiff to show they have: “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” [Book People, Inc. v. Wong](#),

91 F.4th 318, 328 (5th Cir. 2024). Paxton raises several arguments on this point: He argues that Plaintiffs lack a concrete injury; that Plaintiffs did not make a showing that HB 18 injures them as users, who are not directly regulated, as opposed to injuring the DSPs, as third parties which are actually regulated; that SEAT lacks associational standing; and that Plaintiffs’ injuries are not ripe. (Resp., Dkt. 35, at 20–28). The Court will address each argument in turn.

For the following reasons, the Court finds that Plaintiffs have standing and agrees with Plaintiffs that First Amendment standing doctrine allows for third parties not directly regulated by a law, but whose speech is prevented or chilled by it, to assert claims for relief. Moreover, due to the penalties and enforcement provisions of HB 18, the Court finds that HB 18 produces a “determinative or coercive effect” on providers, which results in preventing speech and produces Plaintiffs’ injuries, as is required to show standing. [Bennett v. Spear](#), 520 U.S. 154, 169, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (injury may be “produced by determinative or coercive effect upon the action of someone else”). In other words, Plaintiffs have demonstrated that a third party, the DSPs, “will likely react in predictable ways” to the three sets of requirements which include preventing them from viewing or posting certain types of content, and this confers Plaintiffs with standing to challenge the requirements. [Daves v. Dallas Cnty., Tex.](#), 22 F.4th 522, 543 (5th Cir. 2022).

1. Plaintiff internet users have a cognizable First Amendment injury

*6 First, Plaintiffs are users of the Internet—minors and those that engage with them—with specific, demonstrated interests in sharing and engaging with the types of content that HB 18 prohibits DSPs from showing to known minors. This demonstrates an injury-in-fact. In a pre-enforcement challenge, Plaintiffs can establish an injury in fact if they show that “(1) they have an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) their intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial.” [Book People](#), 91 F.4th at 335 (quoting [Speech First, Incorporated v. Fenves](#), 979 F.3d 319, 330 (5th Cir. 2020)) (internal quotation marks omitted).

As an initial matter, Plaintiffs have made this showing as to each group of challenged restrictions. As to the filter-and-monitoring requirements, Plaintiff SEAT's previous and planned educational Instagram posts concern bullying, sexual assault, and suicide. (Samuels Decl., Dkt. 21, at 2–5). Plaintiffs reasonably understand HB 18 to require social media to prohibit those posts. (*Id.*). Similarly, Plaintiff Closson fears that HB 18 will lead social media companies to prevent him from posting about bipolar disorder, eating disorders, substance abuse, and his identity as a member of the LGBTQ+ community, as he has in the past. (Closson Decl., Dkt. 21, at 1–7). As another example, Plaintiff M.F. notes that he arguably will not be able to listen to music like The Fray's song “How to Save a Life” or R.E.M.'s song “Everybody Hurts” on covered sites because of their references to suicide. (M.F. Decl., Dkt. 20, at 3).

As to the targeted advertising requirements, Plaintiff Ampersand wishes to share posts that help teens better understand topics like sex trafficking and substance abuse, and they have done so in the past. (Janeway Decl., Dkt. 18, at 2–5). Plaintiff Ampersand reasonably believes that the targeted advertising requirements will restrict digital services providers from allowing such advertising to minors in the future, and moreover, HB 18 will prevent them from distributing planned advertisement campaigns to minors via social media on other topics like vaccines, public health, and census participation. (*Id.*). Plaintiff M.F. testifies that he wants to receive advertisements and that he regularly learns about topics ranging from politics, to local events, to clothing available for purchase, via targeted advertisements. (M.F. Decl., Dkt. 20, at 5).

As to the content monitoring and age-verification requirements, Plaintiffs allege the requirements will prevent them from viewing posts deemed harmful or obscene (for example, content related to sexuality). (*E.g.*, Janeway Decl., Dkt. 18, at 5). And Plaintiff Internet users may be unwilling to submit the personal details required for age verification, which itself creates standing by preventing potential users from accessing the DSP. (*E.g.*, Closson Decl., Dkt. 21, at 6); *cf.* *Free Speech Coal. v. Knudsen*, No. CV 24-67-M-DWM, --- F.Supp.3d ---, ---, 2024 WL 4542260, at *8 (D. Mont. Oct. 22, 2024) (requirement to provide PII to seek to access adult content sufficed to allege standing).

In the ways described above, Plaintiffs have demonstrated that they have an intention to engage in a course of conduct—speaking on social media—affected with their First

Amendment interests, and that their intended future conduct—posting or viewing advertisements on any topic and content related to certain topics—is arguably proscribed by the policy in question. *Book People*, 91 F.4th at 335. This type of “chilled speech or self-censorship” “is an injury sufficient to confer standing.” *Barilla v. City of Houston, Tex.*, 13 F.4th 427, 431 (5th Cir. 2021) (collecting cases); *see also*  *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (same).

*7 To the third prong of the injury-in-fact test, there exists a threat of enforcement. *Book People*, 91 F.4th at 335. HB 18 includes enforcement provisions. *See* § 509.151 (“A violation of this chapter is a deceptive act or practice actionable ... solely as an enforcement action by the consumer protection division of the attorney general's office.”); § 509.151 (creating private right of action). Paxton has begun enforcing the Act. Compl., *Texas v. TikTok Ltd.*, No. 24-CV-1763 (56th Dist. Ct., Galveston Cnty., Tex. Oct. 3, 2024) (Dkt. 39, at 15) (Paxton asserting complaint against TikTok for violating the Act, including “ Sections 509.052, 509.101, and  509.054.”). And, as this Court already found, all indications suggest, in this case as well as  *Computer & Comm'ns Indus. Ass'n*, that Paxton wishes to continue enforcing HB 18. Paxton has repeatedly emphasized, including in this case, (Resp., Dkt. 35, at 14–17), that he believes social media is severely harming children. *See also*  *Computer & Comm'ns Indus. Ass'n*, — F.Supp.3d at —, 2024 WL 4051786, at *6 (finding same).

2. Plaintiffs' injury is fairly traceable to government action and redressable by a judicial order

The injury-in-fact Plaintiffs attest to is also fairly traceable to government action, and redressable by a judicial order enjoining sections of HB 18. Traceability requires that Plaintiffs show “a causal connection between the injury and the conduct complained of.” *Book People*, 91 F.4th at 332 (quoting  *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Plaintiffs demonstrate that HB 18 requires DSPs to make certain changes to their policies; this is a causal connection to their injuries-in-fact described above. And redressability requires Plaintiffs show “a favorable decision will relieve a discrete injury” and that it is “likely” to redress the injury. *Id.* (internal quotation marks and citations omitted). The redressability

prong is obviously met here—if HB 18's enforcement is enjoined in relevant part, DSPs have no reason to make the policy changes it requires.

3. Plaintiffs may assert a challenge as a third party not directly regulated by HB 18

That HB 18 regulates DSPs—and not Plaintiffs directly—does not negate Plaintiffs' injury-in-fact, nor the traceability or redressability of that injury, as Paxton argues.⁶ Each of the three provisions of HB 18 described above have a “determinative or coercive effect” of the Act on DSPs, and Plaintiffs' injuries result. *Book People*, 91 F.4th at 331. More specifically, HB 18 has enforcement provisions that will predictably prevent DSPs from allowing Plaintiffs to share or view certain content because of the risk that Paxton or a private actor will enforce HB 18 against them.

⁶ Indeed, Paxton suggested when opposing the motion for preliminary injunction in *Computer & Communications Industry Association, Case No. 1:24-cv-849-RP*, — F.Supp.3d —, 2024 WL 4051786 (W.D.Tex. 2024), the opposite: that the internet providers could not sue on First Amendment grounds because they are not the users who experience the chilled speech. (Resp., Dkt. 18, at 22) (“[I]ndividual plaintiffs routinely sue on First Amendment grounds to challenge acts that allegedly restrict their use of or access to social media. Nothing prevents [digital services providers plaintiffs'] users from doing the same.”).

And Plaintiffs may challenge the regulation of intermediaries (the DSPs) who control their access to the chilled speech, consistent with longstanding First Amendment principles.

Plaintiffs' standing is analogous to that in *Bantam Books, Inc. v. Sullivan*, where book publishers had standing to challenge state regulations on bookstores, despite the state not intending to enforce the law as to the publishers themselves.

⁷ 372 U.S. 58, 64 n.6, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

The Fifth Circuit also recently upheld standing when a bookseller brought a challenge to a law restricting school districts' book purchases: the injury “depend[ed] upon the decision of an independent third party,” the school district, but booksellers had standing because “the school districts' purchasing decisions” were “coerced by the State” and school districts would “react in predictable ways” that resulted in

injury to booksellers. *Book People*, 91 F.4th 318, at 329–33.⁷ The same principle applies here: HB 18 confers standing on Plaintiffs whose speech and listening will be chilled because of DSPs' predictable reactions to the law.⁸

⁷ As another analogy, courts have also found that news agencies can assert challenges to orders that restrict their information or access to proceedings, even when they are not “restrained directly” by a given order. See *Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 926–27 (5th Cir. 1996) (collecting cases).

⁸ This case is distinct from *Murthy v. Missouri*, which Paxton describes as having rejected a “right to listen” theory for social media users asserting a First Amendment injury. ⁹ 603 U.S. 43, 144 S.Ct. 1972, 219 L.Ed.2d 604 (2024); (Resp., Dkt. 35, at 23). In *Murthy*, the Supreme Court found that nothing demonstrated the government had coerced any content moderation policies on the relevant social media platforms; the plaintiffs, rather, based their standing on the fact that federal government officials, as part of an overall focus on COVID-19-related misinformation, had spoken with and met with social media companies about the topic. ¹⁰ 603 U.S. at 51–54, 144 S.Ct. 1972. The Court concluded that Plaintiffs made no showing of any specific “government-coerced” social media moderation decisions, as opposed to decisions made by the platforms in their own independent judgment. ¹¹ *Id.* at 61, 144 S.Ct. 1972. Here, government coercion exists because HB 18 has directly banned certain types of speech among minors on social media, as described above. As in other First Amendment cases, such as *Book People*, this Court can logically deduce that the threat of penalties on covered entities would result in changes to their practices. 91 F.4th at 330.

*8 As to the Fourteenth Amendment vagueness challenges, Plaintiffs have standing for the same reasons: the unconstitutional vagueness of the relevant provisions, combined with their coercive effect on DSPs, will predictably result in the DSPs preventing their speech on social media. Plaintiffs have standing as speakers and listeners to challenge

an unconstitutionally vague regulation of intermediaries. See [Bantam Books](#), 372 U.S. at 64 n.6, 71, 83 S.Ct. 631.

4. SEAT may assert its members' First Amendment rights

An association has standing to bring suit on behalf of its members when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” [Ass'n. of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.](#), 627 F.3d 547, 550 (5th Cir. 2010) (citing [Hunt v. Wash. St. Apple Adver. Comm'n](#), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)); see also [Computer & Comm'n's Indus. Ass'n](#), — F.Supp.3d at —, 2024 WL 4051786, at *8.

SEAT meets these requirements. To the first prong, for the same reasons that individual minor Plaintiffs have standing, SEAT's members (who are middle-school to college-aged youths participating in advocacy and civic engagement) would have standing to sue. SEAT asserts that its members receive information via its advertisement campaigns and view its posts about proscribed topics such as the decriminalization of currently illegal activities, sex education, and mental health conditions. (Samuels Decl., Dkt. 21, at 3, 5). HB 18 would likely prevent them from viewing those forms of content on social media.

Paxton does not contest the second or third prongs of associational standing. To the second prong, the Court finds that SEAT's interest in posting content and advertisements on social media is germane to its mission of mobilizing students in Texas. (Compl., Dkt. 1, at 4). And, to the third prong, SEAT's members do not need to participate in this suit. That inquiry does not derive from Article III but is “solely prudential.” [Ass'n. of Am. Physicians & Surgeons, Inc.](#), 627 F.3d at 550. There is no prudential reason why SEAT's members need participate; there are not heavily contested fact issues that would benefit from SEAT's members participating, for example. And member participation “is not normally necessary” in actions for injunctive relief. [United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.](#), 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (citation omitted). As such, SEAT has met its burden at the preliminary

injunction stage to show associational standing to challenge the three provisions of HB 18.⁹

⁹ SEAT does not assert a theory of organizational standing in its motion or reply, so the Court does not address Paxton's arguments as to organizational standing. (Dkt. 35, at 18).

B. Ripeness

The general test for ripeness examines “(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” [Book People](#), 91 F.4th at 333. That test is met. Legal issues predominate this challenge and are ready for judicial review, while withholding that review would impose irreparable harm on Plaintiffs and Plaintiffs' members. See also [Computer & Comm'n's Indus. Ass'n v. Paxton](#), — F.Supp.3d at —, 2024 WL 4051786, at *9 (finding same).

C. First Amendment Analysis

Having found that Plaintiffs have standing to bring suit, the Court turns its analysis to the merits of the case. “[T]he First Amendment provides in relevant part that ‘Congress shall make no law ... abridging the freedom of speech,’ and ‘the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States.’” [NetChoice, LLC v. Fitch](#), 738 F.Supp.3d 753, 768–69 (S.D. Miss. 2024) (quoting [Manhattan Cmty. Access Corp. v. Halleck](#), 587 U.S. 802, 808, 139 S.Ct. 1921, 204 L.Ed.2d 405 (2019)). The First Amendment protects both freedom of speech as well as the “right to receive information and ideas, regardless of their social worth.” [Stanley v. Georgia](#), 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). First Amendment protection extends to social media, which “allows users to gain access to information and communicate with one another about it on any subject that might come to mind.” [Packingham v. North Carolina](#), 582 U.S. 98, 107, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017). “[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” [Id.](#) at 108, 137 S.Ct. 1730.

1. Level of Scrutiny

*9 The threshold question is what level of scrutiny applies to HB 18's regulations. See [Turner Broad. System, Inc. v. FCC](#), 512 U.S. 622, 637, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The Court has previously found that HB 18's threshold coverage definition is a content-based regulation, such that strict scrutiny applies to all regulations in HB 18. [Computer & Comm'ns Indus. Ass'n v. Paxton](#), — F.Supp.3d at —, 2024 WL 4051786, at *10 (interpreting HB 18 [§ 509.002\(a\)\(1\)](#)). The Court will briefly reiterate its reasoning here. HB 18 regulates [DSPs] that specifically host or broadcast “social” speech, thereby subjecting “social” content to heightened regulation. HB 18 [§ 509.002\(a\)\(1\)](#). Non-social interactions, such as professional interactions, are not covered, while social interactions are. That is clear in HB 18's content-based exceptions. DSPs that provide “content primarily generated or selected by the” provider or primarily “functions to provide a user with access to news, sports, [or] commerce” are exempted. HB 18 [§ 509.002\(b\)\(10\)\(A\)](#). This “singles out specific subject matter for differential treatment,” by using the “function or purpose” of speech as a stand-in for its content. [Reed v. Town of Gilbert](#), 576 U.S. 155, 163–64, 169, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). HB 18 is therefore a content- and speaker-based regulation, targeting DSPs whose primary function is to share and broadcast social speech. “[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.” [Id.](#) at 170, 135 S.Ct. 2218. When the government favors some speakers over others for their content, the law must be subject to strict scrutiny. [Barr v. Am. Assn. of Political Consultants, Inc.](#), 591 U.S. 610, 619–21, 140 S.Ct. 2335, 207 L.Ed.2d 784 (2020) (controlling plurality op.); [Reed](#), 576 U.S. at 163, 135 S.Ct. 2218 (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”). The elevation of news, sports, commerce, and provider-generated content over user-generated content is a content-based regulation.

In response, Paxton suggests that these arguments are foreclosed by the Fifth Circuit. (Resp., Dkt. 35, at 28) (citing [NetChoice, LLC v. Paxton](#), 49 F.4th 439, 480

(5th Cir. 2022) (“[NetChoice P](#)”), *vacated and remanded sub nom.* [Moody v. NetChoice, LLC](#), 603 U.S. 707, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024)). In [NetChoice I](#), the Fifth Circuit rejected a similar argument brought by Plaintiffs by holding that regulations targeting social media did “not render [the law at issue] content-based because the excluded websites are fundamentally dissimilar mediums.” [NetChoice I](#), 49 F.4th at 480.

But Paxton fails to recognize that the [NetChoice I](#) decision does not control the analysis, as the Court held in [Computer & Comm'ns Indus. Ass'n](#), — F.Supp.3d at —, 2024 WL 4051786, at *10. The Court will again reiterate its analysis on this point: The [NetChoice I](#) ruling is no longer binding because the Supreme Court vacated [NetChoice I](#), “void[ing] each of the judgment's holdings.” [Doe v. McKesson](#), 71 F.4th 278, 286 (5th Cir. 2023); *see also* [Moody](#), 603 U.S. at 745, 144 S.Ct. 2383 (vacating judgment). Paxton suggests that [Moody](#) “effectively confirmed, or at least did not disturb, the Fifth Circuit's analysis” on this point. (Resp. Dkt. 35, at 29). But the Supreme Court “disturbed” the analysis when it vacated the opinion. Paxton suggests that the Supreme Court's own opinion “also rebuffed” Plaintiffs theory—but it is not clear how. (*See id.*). To the contrary, the Supreme Court expressly stated that “there has been enough litigation already to know that the Fifth Circuit, if it had stayed the course, would get wrong at least one significant input” [Moody](#), 603 U.S. at 744, 144 S.Ct. 2383. While the Supreme Court did not determine “whether to apply strict or intermediate scrutiny[,]” that was only because “Texas's law [did] not pass” either intermediate or strict scrutiny, at least applied to key respects of the law. [Id.](#) at 740, 144 S.Ct. 2383.

Cutting against the Fifth Circuit's analysis in [NetChoice I](#), the Supreme Court noted that “presenting a curated and edited compilation of [third-party] speech is itself protected.” [Id.](#) at 744, 144 S.Ct. 2383. (internal citations omitted). It noted that “editorial judgments influencing the content of [Facebook's News Feed and YouTube's homepage] are, contrary to the Fifth Circuit's view, protected expressive activity.” [Id.](#) If the discretion to favor social content over

other messages is protected editorial judgment, then laws like HB 18 are not just targeting “fundamentally dissimilar mediums.” Those laws are targeting DSPs based on those protected editorial judgments. So, at the very least, [Moody](#) calls into serious question [NetChoice I](#)’s discussion of “content-based” laws.

The district court’s reasoning in [NetChoice, LLC v. Yost](#) is instructive. [716 F.Supp.3d 539, 553–58 \(S.D. Ohio 2024\)](#). There, a district court dealt with a highly similar Ohio law that targeted DSPs hosting “social” speech and excluded sites focused on news and product reviews. [Id. at 553–54](#). The district court grappled with whether the “social” distinction was “content-based” (as would require strict scrutiny) or merely regulated the “manner in which” companies “transmit” the content (which would trigger intermediate scrutiny). [Id. at 555](#) (quoting [Turner Broad. Sys.](#), 512 U.S. at 645, 114 S.Ct. 2445).¹⁰ Although emphasizing that “[i]t is a close call[,]” the court ultimately found that social media DSPs “are not ‘mere conduits’ ” but ‘curate both users and content to convey a message about the type of community the platform seeks to foster.’ ” [Id. at 557](#) (quoting [NetChoice, LLC v. Paxton](#), 573 F. Supp. 3d 1092, 1107 (W.D. Tex. 2021)).¹¹

10

But see [Reed](#), 576 U.S. at 163–64, 135 S.Ct. 2218 (“Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”).

11

In [NetChoice I](#), the Fifth Circuit ruled that these editorial decisions fall outside the First Amendment, which in turn allowed the court to consider social media platforms “mere conduits.” [NetChoice I](#), 49 F.4th at 480. But in reversing [NetChoice I](#) on the First Amendment value of editorial judgments, [Moody](#) undercut the premise that had allowed the Fifth Circuit to consider social media regulations content neutral.

[Moody](#), 603 U.S. at 727, 144 S.Ct. 2383 (“The Fifth Circuit was wrong in concluding that Texas’s restrictions on the platforms’ selection, ordering, and labeling of third-party posts do not interfere with expression.”).

*10 In an even more similar case, a Mississippi district court found a nearly identical law (H.B. 1126) to be content- and speaker-based:

In essence, H.B. 1126 treats or classifies digital service providers differently based upon the nature of the material that is disseminated, whether it is “social interaction,” as opposed to “news, sports, commerce, [or] online video games[.]” [HB 1126] can thus be viewed as either drawing a facial distinction based on the message the digital service provider conveys (i.e., news and sports), or based on a more subtle content-based restriction defining regulated speech by its function or purpose (i.e., providing news and sports). Either way, [b]oth are distinctions drawn based on the message a speaker conveys.

[Fitch](#), 738 F.Supp.3d at 770 (quoting HB 1126) (cleaned up). Most recently, a Montana district court found a statute nearly identical to the content monitoring and age-verification requirements to be subject to strict scrutiny because it requires assessing the content of a website to determine whether it is harmful to minors; the analogous requirements do the same here and are subject to strict scrutiny for the same reason. [Free Speech Coal.](#), — F.Supp.3d at — — —, 2024 WL 4542260, at *5–*7.

Like the district courts in [Yost](#), [Fitch](#), and [Free Speech Coalition](#), this Court finds that HB 18 discriminates based on the type of content provided on a medium, not just the type of medium. A DSP that allows users to socially interact with other users but “primarily functions to provide” access to news or commerce is unregulated. An identical DSP, with the exact same medium of communication and method of social interaction, but which “primarily functions to provide” updates on what a user’s friends and family are doing (e.g., through Instagram posts and stories), *is* regulated. If there is a difference between the regulated DSP and unregulated DSP, it is the content of the speech on the site, not the medium through which that speech is presented. When a site chooses not to primarily offer news but instead focus on social engagement, it changes from an uncovered to covered platform. But the type of medium has not changed, only the content primarily expressed on the platform. In sum,

strict scrutiny applies to HB 18's provisions because the law regulates DSPs based on the content of their speech and the identity of the speaker.

One additional point. Paxton argues that the targeted advertising requirements constitute a regulation on commercial speech, such that strict scrutiny does not apply. (Resp., Dkt. 35, at 31). The Court disagrees. The word “advertisement” in the statute could apply to any number of forms of speech that does not propose a commercial transaction. [Serafine v. Branaman](#), 810 F.3d 354, 365 (5th Cir. 2016) (“Commercial speech is speech ‘that proposes a commercial transaction.’”) (quoting [Bd. of Trustees of State Univ. of New York v. Fox](#), 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)). Paxton proposes that “[t]he better interpretation is that this statute restricts paid advertising,” (Dkt. 35, at 30), but the word “paid” is not in the statute, and this Court cannot “rewrite a ... law to conform it to constitutional requirements.” [Serafine](#), 810 F.3d at 369 (citation omitted). If the legislature intended to cover only advertisement proposing a commercial transaction, or “paid announcements,” (Dkt. 35, at 21), as Paxton suggests, it could have easily added clarifying language saying as much.¹² “The best course, as always, is to stick with the ordinary meaning of the text that actually applies.” [Corner Post, Inc. v. Bd. of Governors](#), 603 U.S. 799, 817, 144 S.Ct. 2440, 219 L.Ed.2d 1139 (2024). The targeted advertising requirements are not commercial speech; strict scrutiny applies to them equally.

¹² Paxton's proposed revision of the statute to cover only “paid” advertising, (Dkt. 35, at 20–21), also ignores the fact that “commercial speech” is not the same thing as “speech for profit,” and “indeed, some of our most valued forms of fully protected speech are uttered for a profit.” [Serafine](#), 810 F.3d at 365. As a result, even if the statute only covered “paid” advertising, strict scrutiny would still apply.

2. HB 18 and Strict Scrutiny

*11 Because strict scrutiny applies, Paxton must therefore prove that HB 18 is “the least restrictive means of achieving a compelling state interest.” [Nat'l Inst. of Family & Life Advoc. v. Becerra](#), 585 U.S. 755, 766, 138 S.Ct. 2361, 201

L.Ed.2d 835 (2018) (“[NIFLA](#)”) (citation omitted). As the next step in the analysis, this Court must also determine whether the law is facially invalid. Even if HB 18 is a content-based regulation, it does not follow as a matter of course that the law is facially invalid. In the First Amendment context, facial challenges can only succeed if litigants show that “a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.” [Ams. for Prosperity Found. v. Bonta](#), 594 U.S. 595, 615, 141 S.Ct. 2373, 210 L.Ed.2d 716 (2021) (quoting [United States v. Stevens](#), 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). So, a law regulating First Amendment activity may only be struck down in its entirety if its “unconstitutional applications substantially outweigh its constitutional ones.” [Moody](#), 603 U.S. at 724, 144 S.Ct. 2383.

[Moody](#), including the majority opinion and all four concurrences, emphasized that courts should not treat facial challenges lightly, even in the First Amendment context. It clarified that courts should “address the full range of activities the laws cover, and measure the constitutional against the unconstitutional applications.” [Id.](#) That analysis requires a two-step process. First, courts must “assess the state laws’ scope” and ask, “What activities, by what actors, do the laws prohibit or otherwise regulate?” [Id.](#) Second, a court must “decide which of the laws’ applications violate the First Amendment, and to measure them against the rest.” [Id.](#) at 725, 144 S.Ct. 2383. Only after making these inquiries can a court determine if a law’s “unconstitutional applications substantially outweigh its constitutional ones.” [Id.](#) at 724, 144 S.Ct. 2383.

(a) The Monitoring-and-Filtering Requirements

This Court already held that the monitoring-and-filtering requirements likely violate the Constitution. The Court again reiterates its analysis here. These requirements force providers to develop strategies to “prevent [a] known minor's exposure to harmful material and other content that promotes, glorifies, or facilitates: (1) suicide, self-harm, or eating disorders; (2) substance abuse; (3) stalking, bullying, or harassment; or (4) grooming, trafficking, child pornography, or other sexual exploitation or abuse.” HB 18 [§ 509.053](#).

Irrespective of whether HB 18 as a whole is content-based, there can be little dispute that this provision is. The monitoring-and-filtering requirements explicitly identify discrete categories of speech and single them out to be filtered and blocked. That is as content based as it gets.

It is far from clear that Texas has a compelling interest in preventing minors' access to every single category of information listed above. Some interests are obvious—no reasonable person could dispute that the state has a compelling interest in preventing minors from accessing information that facilitates child pornography or sexual abuse.

See [Sable Commc'ns of California, Inc. v. FCC](#), 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (“[T]here is a compelling interest in protecting the physical and psychological well-being of minors.”). On the other end, many interests are not compelling, such as regulating content that might advocate for the deregulation of drugs (potentially “promoting” “substance abuse”) or defending the morality of physician-assisted suicide (likely “promoting”

“suicide”). See [Brown v. Ent. Merchants Ass'n](#), 564 U.S. 786, 794, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.”) (internal citation omitted). The Supreme Court has repeatedly emphasized that “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”

[Erznoznik v. Jacksonville](#), 422 U.S. 205, 213–14, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). Many of the regulated topics are simply too vague to even tell if they are compelling. Terms like “promoting,” “glorifying,” “substance abuse,” “harassment,” and “grooming” are undefined, despite their potential wide breadth and politically charged nature. While these regulations may have some compelling applications, the categories are so exceedingly overbroad that such a showing is unlikely.

*12 Even accepting that Texas has a compelling interest in blocking select categories under HB 18, the law is not narrowly tailored. HB 18 requires DSPs to implement strategies that include: listing harmful material, using filtering technology, using hash-sharing technology to identify recurring material, creating a database of keywords used for filter evasion, performing human-monitoring reviews to ensure the filtering technology works, publishing descriptions

of the filtered content, and making the code available to independent researchers. HB 18 [§ 509.053\(b\)\(1\)](#). This broad, multi-faceted approach fails for two reasons: it does not employ the least restrictive means, and it is not narrowly tailored.

As in [Fitch](#), Paxton “has not shown that the alternative suggested by [Plaintiffs], a regime of providing parents additional information or mechanisms needed to engage in active supervision over children's internet access would be insufficient to secure the State's objective of protecting children.” [738 F.Supp.3d at 774](#). And Paxton has not shown that methods such as “hash-sharing technology” and publishing depictions of filtered content are necessary to prevent harm to minors. In short, HB 18 does not employ “the least restrictive means” to stop minors from accessing harmful material. See [United States v. Playboy Ent. Grp.](#), 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

HB 18 also employs overbroad terminology. Again, the monitoring-and-filtering requirements impose sweeping *ex-ante* speech restrictions, akin to prior restraints, but does little more than vaguely gesture at what speech must be restrained. For example, what does it mean for content to “promote” “grooming?” The law is not clear. So, by requiring filtering as a matter of law with only vague reference to what must be filtered, HB 18 will likely filter out far more material than needed to achieve Texas's goal.

More problematically, the law is underinclusive. That a law “is wildly underinclusive when judged against its asserted justification ... is alone enough to defeat it.” [Brown](#), 564 U.S. at 802, 131 S.Ct. 2729. Websites that “primarily” produce their own content are exempted, even if they host the same explicitly harmful content such as “promoting” “eating disorders” or “facilitating” “self-harm.” The most serious problem with HB 18's under-inclusivity is it threatens to censor social discussions of controversial topics. “[S]ocial media in particular” operates as one of “most important places ... for the exchange of views” [Packingham](#), 582 U.S. at 104, 137 S.Ct. 1730. But HB 18 specifically cuts teenagers off from this critical “democratic forum[] of the Internet” even though the same harmful content is available elsewhere. [Reno v. ACLU](#), 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). A teenager can read Peter Singer advocate for physician-assisted suicide in

Practical Ethics on Google Books but cannot watch his lectures on YouTube or potentially even review the same book on Goodreads. In its attempt to block children from accessing harmful content, Texas also prohibits minors from participating in the democratic exchange of views online. Even accepting that Texas only wishes to prohibit the most harmful pieces of content, a state cannot pick and choose which categories of protected speech it wishes to block teenagers from discussing online. [Brown](#), 564 U.S. at 794–95, 131 S.Ct. 2729.

Of course, [Moody](#)'s instruction on facial challenges still applies: the Court must analyze what each provision of the monitoring-and-filtering requirements does and individually assess those provisions' constitutionality. Here, however, the strict scrutiny test parallels the facial challenge framework. See [United States v. Edge Broad. Co.](#), 509 U.S. 418, 430, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) (“[T]he validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case.”); [NetChoice, LLC v. Bonta](#), 113 F.4th 1101, 1116 (9th Cir. 2024) (slip op.) (affirming facial challenge where strict scrutiny regulation “raises the same First Amendment issues” “in every application to a covered business”); [Stevens](#), 559 U.S. at 473 n.3, 130 S.Ct. 1577 (noting that overbroad law was facially invalid).

*13 The monitoring-and-filtering provisions are more restrictive and less tailored than they need to be at the outset. The provisions' facial under-inclusivity also cannot be cured by identifying examples of HB 18's constitutional applications—the point is that HB 18 does *not* regulate the same harmful content elsewhere. The lack of narrow tailoring and use of overly restrictive means apply to all speech regulated under the provision and “raises the same First Amendment issues.” [Bonta](#), 113 F.4th at 1116. Nor are the monitoring-and-filtering requirements like the laws at issue in [Moody](#), where some provisions might restrict protected speech and others do not. [603 U.S. at 725–26](#), 144 S.Ct. 2383. Instead, the monitoring-and-filtering requirements exclusively target speech, only a small portion of which falls outside First Amendment coverage.¹³ Because the monitoring-and-filtering requirements are overbroad,

overly restrictive, and underinclusive, they are properly enjoined on their face.¹⁴

13 For example, child pornography generally does not receive First Amendment protection. See [New York v. Ferber](#), 458 U.S. 747, 765, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). But the large majority of the proscribed content, such as speech promoting eating disorders, harassment, and bullying, is covered speech, even if highly distasteful. A state may not “create a wholly new category of content-based regulation that is permissible only for speech directed at children.” [Brown](#), 564 U.S. at 794, 131 S.Ct. 2729.

14 The preliminary injunction will also apply to [Section 509.056\(1\)](#), which requires DSPs to “make a commercially reasonable effort to ensure that [their] algorithm does not interfere with the digital service provider's duties under” the monitoring-and-filtering requirements.

(b) Targeted Advertising Requirements

Turning to the targeted advertising requirements, the Court finds them likely to fail strict scrutiny for similar reasons. First, Paxton specified no compelling state interest. As with the monitoring-and-filtering requirements, there may exist a compelling state interest in promoting teen mental health by limiting teens' exposure to certain advertising, but nowhere does the Court see a specific interest articulated for removing teens' access to targeted advertising of all kinds, much less a compelling one, as is required. [NIFLA](#), 585 U.S. at 766, 138 S.Ct. 2361. Paxton devotes some briefing to the general harms of social media, citing that teens use it too constantly, that exposure to some types of content may promote suicidality or eating disorders, and that “malicious actors” “target children and adolescents” on social media. (Dkt. 35, at 14–17). The issue, again, is that these purported state interests could, under Paxton's argument, justify restricting any social media for teenagers; why prevent targeted advertising on the covered DSPs toward them, in particular? To that question, Paxton offers no answer. For lacking a compelling state interest alone, the provision fails strict scrutiny. [NIFLA](#), 585 U.S. at 766, 138 S.Ct. 2361.

So, too, the targeted advertising requirements lack the required narrow tailoring. [Playboy Ent. Grp.](#), 529 U.S. at 813, 120 S.Ct. 1878. The targeted advertising requirements do nothing to distinguish between potentially harmful advertising and advertising that is not harmful, or that could be beneficial, to minors. Lacking narrow tailoring is, again, an independent reason that the targeted advertising requirements fail strict scrutiny. See [Junior Sports Mags. Inc. v. Bonta](#), 80 F.4th 1109, 1119 (9th Cir. 2023) (enjoining advertising ban that was “too broad” because it “effectively constitutes a blanket restriction on firearm-product advertising,” where no tailoring existed to ensure it advanced the state’s interest of curbing unlawful firearm use or gun violence). Plaintiffs submit evidence of the beneficial aspects of targeted advertising and its positive uses; for example, they show that Plaintiff Ampersand uses advertisements to reach its members with informational campaigns about public health. (Mot. Prelim. Inj., Dkt. 17, at 8–9; Janeway Decl., Dkt. 18, at 2–5). Paxton agrees that advertising can be beneficial to minors in some contexts. Paxton calls some forms of advertising “public service advertising”: “speech such as a university’s post on its own social media identifying upcoming ‘scholarship opportunities’ or a nonprofit organization’s announcement of an upcoming conference to discuss ‘free speech’ issues.” (Resp., Dkt. 35, at 31). But the statute restricts those forms of advertising. Paxton agrees restricting such content is “absurd,” (*id.* at 31), but this results from the statute’s plain language, which uses the word “advertising” and creates no caveats to focus on any particularly harmful type of advertising.¹⁵ That the statute includes within its ambit prohibiting speech that Paxton agrees is beneficial only underscores that the statute is over-inclusive.

¹⁵ As discussed in Section III(C)(1), Paxton insists that the proper reading would carve-out those “public service” advertisements, because the law has the purpose of “protecting children from abuse and their privacy.” (*Id.*). But as explained previously, Paxton offers—and the Court can identify—no basis for that limiting principle within the text of the targeted advertising requirements, and the Court cannot rewrite the statute. [Serafine](#), 810 F.3d at 369; [Am. Booksellers](#), 484 U.S. at 397, 108 S.Ct. 636.

*14 On the other hand, the targeted advertising requirements are fatally under-inclusive, for similar reasons as the

monitoring-and-filtering requirements. [Brown](#), 564 U.S. at 802, 131 S.Ct. 2729. Why, if the very use of targeted advertising toward minors creates a harm so acute as to create a compelling state interest, can a teenager view a targeted advertisement on a sports or shopping website but not on a social platform? And why may the DSPs allow it so long as one parent logs onto their account and permits it? See [Brown](#), 564 U.S. at 802, 131 S.Ct. 2729 (finding that statute which enabled minors to access “dangerous, mind-altering material” to minors “so long as one parent ... says it’s OK” was under-inclusive and failed strict scrutiny). For that third independent reason, the provisions fail strict scrutiny.

As with the monitoring-and-filtering requirements, the statute is invalid on its face. The targeted advertising requirements exclusively target speech, only a small portion of which, such as child pornography or defamation, falls outside First Amendment coverage. See [Brown](#), 564 U.S. at 794, 131 S.Ct. 2729. In every application, they limit DSPs’ editorial “choices about ... how to display” speech. [Moody](#), 603 U.S. at 716, 144 S.Ct. 2383. A substantial majority of the prevented speech is protected First Amendment activity, [id.](#) at 724, 144 S.Ct. 2383, including both targeted advertising sharing undisputedly beneficial speech, and targeted advertising on topics that are highly disfavored by the state but retain First Amendment protection, [Brown](#), 564 U.S. at 794, 131 S.Ct. 2729. The court will facially enjoin the provision.

(c) Content Monitoring and Age-Verification Requirements

The content monitoring and age verification requirements suffer the same flaws. Paxton does not seriously contest that the restriction fails strict scrutiny, instead, he acknowledges that on “the merits,” [§ 509.057](#) realistically shares the same fate as [§ 509.053\(a\)](#).” (Dkt. 35, at 42). The Court agrees and finds that [§ 509.057](#) fails strict scrutiny for the same reasons that [§ 509.053](#) does.

Nowhere does Paxton make clear what compelling state interest in particular these provisions serve or how they are narrowly tailored to it. Protecting minors against speech the state deems offensive or inappropriate is not by itself a compelling state interest. [Erznoznik](#), 422 U.S. at 213–

14, 95 S.Ct. 2268. Again, Paxton gestures toward mental health impacts of social media use, privacy concerns, and the presence of “predator[s]” on the Internet, (Dkt. 35, at 14–17), but nothing suggests the content monitoring and age-verification requirements would address any of those general problems. See [NetChoice, LLC v. Reyes](#), No. 2:23-CV-00911-RJS-CMR, — F.Supp.3d —, —, 2024 WL 4135626, at *15 (D. Utah Sept. 10, 2024) (enjoining similar law where Utah failed to “offer any evidence that these specific measures will alter the status quo to such an extent that mental health outcomes will improve and personal privacy risks will decrease”); [Brown](#), 564 U.S. at 799, 131 S.Ct. 2729 (strict scrutiny requires the law “be actually necessary to the solution”). And even if there were a measurable impact of the requirements on mental health for teens, why would nothing less restrictive than the content-monitoring and age-verification requirements suffice? See [Playboy Ent. Grp.](#), 529 U.S. at 816, 826, 120 S.Ct. 1878. [Section 509.057](#) requires limiting any speech on covered DSPs that Paxton or the DSP deems “harmful” (which is broad and undefined) or “obscene” (which is defined, but still reaches a broad range of speech); Paxton nowhere shows that a more targeted limitation would fail.

And, like the other provisions, the content monitoring and age-verification requirements are also fatally under- and over-inclusive. [Brown](#), 564 U.S. at 802, 131 S.Ct. 2729. They are under-inclusive, because the requirements would allow teenagers to view the same piece of sexually-oriented material on one DSP but not another, depending on whether it is a sports or shopping platform or not. See [§ 509.002\(b\) \(10\)](#) (exempting those platforms). They are over-inclusive, because the content monitoring and age-verification regime also deters adults’ access to protected speech, as DSPs have an incentive to limit their overall “harmful” or “obscene” content available. Finally, the content monitoring and age-verification regime denies minors access to DSPs even where most of the content is *not* “harmful” or “obscene.” As such, the Court finds at this stage that the content monitoring and age-verification restrictions fail strict scrutiny.

*15 As with the other requirements, the statute is invalid on its face. The content monitoring and age-verification requirements exclusively target speech; they limit DSPs’ editorial “choices about ... how to display” speech in all of their applications, [Moody](#), 603 U.S. at 716, 144 S.Ct. 2383,

and a substantial majority of the prevented speech is protected First Amendment activity, [id.](#) at 724, 144 S.Ct. 2383, even where the state views certain topics as inappropriate or unseemly for minors, [Brown](#), 564 U.S. at 794, 131 S.Ct. 2729. The Court will facially enjoin the provision.

D. Vagueness

In addition to their First Amendment challenge, Plaintiffs argue that the three challenged provisions (monitoring-and-filtering, targeted advertising, and content monitoring and age-verification requirements) are void for vagueness. (Mot. Prelim. Inj., Dkt. 17, at 24–25). As to the monitoring-and-filtering requirements, Plaintiffs argue the terms “promote[],” “glorify,” and “facilitate[]” are void for vagueness. (*Id.* at 26–27 (quoting HB 18 [§ 509.053\(a\)](#))). As to the targeted advertising requirements, Plaintiffs argue that the term “advertising” is unconstitutionally vague (*id.*, quoting [§ 509.052\(2\)\(D\)](#)), and so are the terms “facilitate” and “promote” when they appear in [§ 509.055](#), (*id.*). Finally, they challenge the content monitoring and age-verification requirements, as well as the “verified parent” definition, as unconstitutionally vague due to the term “commercially reasonable method.” (*Id.* (quoting [§§ 509.057\(a\), 509.101](#))).

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” [FCC v. Fox Television Stations, Inc.](#), 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). “A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement.” [McClelland v. Katy Indep. Sch. Dist.](#), 63 F.4th 996, 1013 (5th Cir.), *cert. denied* — U.S. —, 144 S.Ct. 348, 217 L.Ed.2d 186 (2023). “A regulation is void for vagueness when it is so unclear that people ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” *Id.* (quoting [Connally v. Gen. Constr. Co.](#), 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). “The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the

enactment.” [Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.](#), 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Supreme Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” [Id.](#) at 498–99, 102 S.Ct. 1186. However, if “the law interferes with the right of free speech or association, a more stringent vagueness test should apply.” [Id.](#) at 499, 102 S.Ct. 1186.

(a) Monitoring-and-Filtering Requirements

This Court has already held that the terms “promote, glorify, and facilitate” are vague within HB 18’s monitoring and filtering requirements, and holds the same here. [Computer & Comm’ns Indus. Ass’n](#), — F.Supp.3d at —, 2024 WL 4051786, at *16. To reiterate: those provisions require social media DSPs to track, filter, and block material that “promotes,” “glorifies,” or “facilitates” “suicide, self-harm, [] eating disorders[,] substance abuse[,] stalking, bullying, [] harassment[,] grooming, trafficking, child pornography, [] other sexual exploitation or abuse” and material that is sexually explicit for minors. HB 18 [§ 509.053](#). Those provisions are vague because both the verbs (promotes, glorifies, and facilitates) and the objects of those verbs (e.g., stalking, bullying, substance abuse, and grooming) are broad and undefined. Especially when put together, the provisions are unconstitutionally vague.

*16 Begin with the verbs: promote, glorify, and facilitate. One of those words—“promote”—has already been held to be vague when regulating First Amendment activity. In [Baggett v. Bullitt](#), 377 U.S. 360, 371–72, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), the Supreme Court dealt with a regulation that imposed a loyalty oath for teachers to swear that they will “*promote* respect for the flag and the institutions of the United States.” (emphasis added). The Supreme Court found that the term “promote” was “very wide indeed” and failed to “provide[] an ascertainable standard of conduct.” [Id.](#)

The problem is even more acute with the term “glorifying.” The word encompasses so wide an ambit that people “of common intelligence” can do no more than guess at its application. [McClelland](#), 63 F.4th at 1013. To “glorify”

potentially includes any content that favorably depicts a prohibited topic, leaving no clear answer on what content must be filtered. Do liquor and beer advertisements “glorify” “substance abuse?” Does *Othello* “glorify” suicide? Given the substantial liability companies face for failing to comply (to say nothing of the private rights of action), it is reasonable to expect that companies will adopt broad definitions that do encompass such plainly protected speech.

In sum, HB 18 imposes requirements for entire categories of speech to be blocked. If those *ex-ante* restrictions are to be imposed, they cannot arguably cover such broad categories of protected speech. [Grayned v. City of Rockford](#), 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (“[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.”) (cleaned up).¹⁶

¹⁶ Paxton contends that the monitoring-and-filtering provisions are not vague to Plaintiffs because they “mirror social media companies’ own content-moderation policies.” (Resp., Dkt. 35, at 24). But a self-policed rule does not suffer the same vagueness problems as a state-backed proscription. Facebook may know their internal definition of “glorify” but the company cannot be assured that Paxton or Texas courts will abide by the same definition.

Paxton suggests that these terms can be “narrowly construed in a manner that would be constitutional,” but he does not explain how. (Resp., Dkt. 35, at 43) (citing [United States v. Williams](#), 553 U.S. 285, 290, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), then quoting [United States v. Hansen](#), 599 U.S. 762, 770–73, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023)). To the extent Paxton suggests those terms can be interpreted to mean “speech integral to unlawful conduct,” as in [Hansen](#), nowhere did the state make such a caveat explicit from the statute, even though it could have chosen to do so. Instead, the state used terms that reach a broader swath of conduct than criminal assistance or advocacy. And there are good reasons to believe the state deliberately sought a broader definition than criminal assistance or advocacy, because HB 18 also proscribes speech related to lawful conduct, such as having an eating disorder. Indeed, Paxton’s brief would suggest that the law intends to prevent certain forms of

legal speech because of their negative effects on teens (like access to information about dieting because of its potential to promote eating disorders). (See Resp., Dkt. 35, at 14–17). As a result, HB 18 is not “readily susceptible” to a “narrowing construction” to make it constitutional, as Paxton suggests. [Am. Booksellers](#), 484 U.S. at 397, 108 S.Ct. 636 (“[T]he statute must be readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements.”) (internal quotation omitted).

*17 The final issue for HB 18 is that the law fails to define key categories of prohibited topics, including “grooming,” “harassment,” and “substance abuse.” At what point, for example, does alcohol use become “substance abuse?” When does an extreme diet cross the line into an “eating disorder?” What defines “grooming” and “harassment?” Under these indefinite meanings, it is easy to see how an attorney general could arbitrarily discriminate in his enforcement of the law. See [Smith v. Goguen](#), 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (“Statutory language of such a standardless sweep allows [] prosecutors [] and juries to pursue their personal predilections.”). These fears are not too distant—pro-LGBTQ content might be especially targeted for “grooming.” See [Little v. Llano Cnty.](#), No. 1:22-CV-424-RP, 2023 WL 2731089, at *2 (W.D. Tex. Mar. 30, 2023) (finding that several books supporting pro-LGBTQ views were removed from library shelves for allegedly promoting “grooming”), *aff’d as modified*, [103 F.4th 1140](#) (5th Cir. 2024), *reh’g en banc granted, opinion vacated*, [106 F.4th 426](#) (5th Cir. 2024). Content related to marijuana use might be prosecuted as “glorifying” “substance abuse,” even if cigarette and alcohol use is not. This vast indefinite scope of enforcement would “effectively grant[] [the state] the discretion to [assign liability] selectively on the basis of the content of the speech.” [City of Houston, Tex. v. Hill](#), 482 U.S. 451, 465 n.15, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). Such a sweeping grant of censorial power cannot pass First Amendment scrutiny.

(b) Targeted Advertising Requirements

Plaintiffs argue that the term “advertising” is unconstitutionally vague in [§ 509.052\(2\)\(D\)](#), and so are the terms “facilitate” and “promote” when they appear in [§ 509.055](#). (Mot. Prelim. Inj., Dkt. 17, at 26–27). The Court

finds that the words “facilitate” and “promote” also render [§ 509.055](#) unconstitutionally vague, for the same reasons as when they appear elsewhere in the statute. As to the term “advertising,” however, at this stage, the Court agrees with Paxton. Several courts have held that the term “advertising” has a “common understanding” or is otherwise not void for vagueness in other contexts. See, e.g., [Free Speech Coal., Inc. v. Shurtleff](#), No. 2:05CV949DAK, 2007 WL 922247, at *16 (D. Utah Mar. 23, 2007) (“The term advertises has a common understanding.”); see also [StreetMediaGroup, LLC v. Stockinger](#), No. 1:20-CV-03602-RBJ, 2021 WL 5770231, at *5 (D. Colo. Dec. 6, 2021); [Helms Realty Corp. v. City of New York](#), 320 F. Supp. 3d 526, 534 (S.D.N.Y. 2018); [Texans Against Censorship, Inc. v. State Bar of Tex.](#), 888 F. Supp. 1328, 1369–71 (E.D. Tex. 1995), *aff’d*, 100 F.3d 953 (5th Cir. 1996). Plaintiffs have not responded to this caselaw, nor provided examples of courts finding “advertising” to be an unconstitutionally vague term in similar contexts to HB 18. So, Plaintiffs have not established a substantial likelihood that “advertising” is unconstitutionally vague, as is their burden at this stage. Regardless, since the Court will enjoin the targeted advertising requirements because they fail strict scrutiny, it need not reach this issue.

(c) Content Monitoring and Age-Verification Requirements

Finally, Plaintiffs argue that the content monitoring and age-verification requirements, ([§ 509.057](#)), as well as its “verified parent” definition, is rendered unconstitutionally vague by the term “commercially reasonable method.” (Mot. Prelim. Inj. Dkt. 17, at 27). In turn, Paxton argues that “commercial reasonableness” is used in many contexts across the Uniform Commercial Code and federal law. (Resp., Dkt. 35, at 44) (citing [17 U.S.C. § 115](#), [15 U.S.C. § 7706\(f\)\(3\)\(D\)](#), [U.C.C. § 2614\(1\)](#), and [U.C.C. § 2-402\(2\)](#)). Plaintiffs do not respond other than to note that none of Paxton’s examples involve protected speech. (Dkt. 37, at 27). While it is true that the standard for vagueness in a statute is stricter in First Amendment cases, [Vill. of Hoffman Ests.](#), 455 U.S. at 498, 102 S.Ct. 1186, the Court still finds it persuasive that numerous other statutes use the same term, and Plaintiffs have not at this stage provided evidence demonstrating the term’s vagueness when it appears in HB 18. Given that the Court has enjoined the statute on the grounds that it fails strict scrutiny, the Court will decline to reach this ground.

3. Prior Restraints

*18 Separate from their other arguments, Plaintiffs argue that the challenged restrictions are unconstitutional because they impose a “system of prior restraint.” (Mot. Prelim. Inj., Dkt. 17, at 19–21). Paxton responds that prior restraints must typically come from “administrative and judicial orders,” so HB 18 does not qualify. (Resp., Dkt. 35, at 46). Finding the provisions invalid under strict scrutiny, and finding § 509.053 and § 509.055 unconstitutionally vague, the Court need not reach the issue.

E. Remaining Preliminary Injunction Factors

Paxton does not seriously contest the remaining preliminary injunction factors, other than to suggest that Plaintiffs delayed in bringing suit. (Resp., Dkt. 35, at 47). Lengthy delays in filing suit do count against irreparable harm, especially in the context of a temporary restraining order. *See Luckenbach Texas, Inc. v. Skloss*, No. 1:21-CV-871-RP, 2022 WL 5568437, at *4–5 (W.D. Tex. July 8, 2022); *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, No. 1:17-CV-444-RP, 2017 WL 5588190, at *3 (W.D. Tex. Nov. 20, 2017). That doctrine is less applicable here, where the law created a 14-month gap between enactment and taking effect, and Plaintiffs’ delay does not automatically negate a finding of irreparable harm.

Setting aside their delay, Plaintiffs make a clear showing that they will suffer irreparable injury in the absence of an injunction. “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, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (citation omitted). As described above in Section III(A)(1), Plaintiffs have submitted declarations attesting to their chilled speech because of HB 18, which suffices to show irreparable harm.

The balance of equities and public interest follow likelihood of success. These last two factors merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). “[I]njunctive protecting First Amendment freedoms are always in the public interest.” *Texans for Free Enter. v. Texas Ethics*

Comm’n, 732 F.3d 535, 539 (5th Cir. 2013) (internal citation omitted). Because the Court has found that Plaintiffs have shown a substantial likelihood of success on the merits of their First Amendment claims, the Court finds that an injunction is in the public interest. *See id.*; *see also, e.g., Book People, Inc.*, 91 F.4th at 341 (“Because Plaintiffs are likely to succeed on the merits of their First Amendment claim, the State and the public won’t be injured by an injunction of a statute that likely violates the First Amendment.”).

IV. CONCLUSION

Plaintiffs have shown that HB 18 is a content-based statute and is therefore subject to strict scrutiny. As to the monitoring-and-filtering requirements, HB 18 § 509.053 and § 509.056(1), the targeted advertising requirements, § 509.052(2)(D) and § 509.055, and the content monitoring and age-verification requirements, § 509.057, Plaintiffs have carried their burden in showing that the law’s restrictions on speech fail strict scrutiny and should be facially invalidated, and in § 509.053 and § 509.055, are unconstitutionally vague. Because Plaintiffs also show that the remaining equitable factors weigh in their favor, the Court preliminarily enjoins Paxton from enforcing those provisions.¹⁷ However, Plaintiffs do not show that the remaining provisions of HB 18 unconstitutionally regulate a meaningful amount of constitutionally protected speech or otherwise fail strict scrutiny. Accordingly, the preliminary injunction is limited only to the provisions listed above.¹⁸

¹⁷ Plaintiffs are not required to post a security bond. *See Fitch*, 738 F.Supp.3d at 779–80.

¹⁸ More specifically, HB 18 Sections 509.001–002 are definitions and applicability provisions, and Plaintiffs do not show that they independently create an injury and likely violate the Constitution.

Also, as to Section 509.051, Plaintiffs reference that the Act requires Texans to register their age before accessing a DSP but do not show how age registration alone (without the separate content-monitoring requirements requiring that DSPs bar known minors’ access, which this Court will enjoin) independently prohibits speech

and likely violates the Constitution. Similarly, as to Sections 509.101–102, Plaintiffs do not show that the process for verifying a parent and the powers of a verified parent under HB 18 independently creates an injury and violates the Constitution when not combined with the targeted advertising requirements, which this Court will enjoin. Accordingly, the Court will deny the motion in all other respects.

***19 IT IS THEREFORE ORDERED** that Plaintiffs’ Motion for a Preliminary Injunction, (Dkt. 17), is **GRANTED IN PART** and **DENIED IN PART** as set forth in this order.

IT IS FURTHER ORDERED that Paxton, his agents, employees, and persons working under his direction or control are **PRELIMINARILY ENJOINED** from enforcing the monitoring-and-filtering requirements, HB 18 § 509.053 and § 509.056(1), the targeted advertising requirements, § 509.052(2)(D) and § 509.055, and the content monitoring and age-verification requirements, § 509.057, pending a final judgment in this case or other modification of this order.

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
JUDICIAL DISTRICT OF WATERBURY.
COMPLEX LITIGATION DOCKET.

V.V., et al.

v.

META PLATFORMS, INC., et al.

DOC. NO.: X06-UWY-CV-23-5032685-S

FEBRUARY 16, 2024

MEMORANDUM OF DECISION
RE MOTION TO STRIKE #143

Bellis, J.

*1 In this matter, the plaintiffs, V.V. and E.Q., individually and as next friends to the minor C.O., have brought suit against Snap, Inc., Snapchat, LLC (collectively, the defendants),¹ Reginald Sharp, and Eddie Rodriguez.² As alleged in the plaintiffs' complaint, the plaintiffs V.V. and E.Q. are the parents and guardians of C.O. At the time of the commencement of this lawsuit, C.O. was a fifteen-year-old girl. The defendants own and operate the Snapchat social media platform, which is distributed and widely available to users in the state of Connecticut. Originally developed in 2011, Snapchat allows individuals to form groups and share posts known as "Snaps" that disappear after being viewed by the recipients. This feature was developed, in part, to make users feel more comfortable sharing nude photographs. The application also allows for text and video chat conversations. By 2015, Snapchat had over 75 million monthly active users and was the most popular social media application with American teenagers. Indeed, since its creation, Snapchat's leadership team has specifically designed new product features to increase its popularity among the teenage demographic. In particular, the self-destructing content portion of Snapchat is popular with teenagers because it makes it more difficult for parents to monitor their social media activity. At the same time, however, this attribute of the Snapchat application makes it easier for sexual

predators to communicate with minors. Over the years, the defendants have received multiple reports of child abuse and bullying occurring through the Snapchat application, but the defendants have not altered their extremely lucrative business model. By 2021, Snapchat had collected \$4.12 billion in revenue and had 347 million daily active users worldwide.

1 As Snap, Inc. and Snapchat, LLC are the parties to the motion to strike that is currently before the court, they will collectively be known as "the defendants." Sharp and Rodriguez will be referred to by their surnames.

2 When originally commenced, Meta Platforms, Inc. was also named as a defendant in this case. The plaintiffs withdrew their claims against Meta Platforms, Inc. on December 28, 2023. Accordingly, the court need not consider any of the plaintiffs' allegations against this former defendant.

Specifically, the plaintiffs allege that Snapchat utilizes a user recommendation technology called Quick Add that selects and sends recommendations to the user regarding people with whom they should connect. These algorithms function by taking user data such as age, gender, on and off-platform activities, usage history, habits, and interactions to formulate these recommendations. According to the plaintiffs, these technologies function in a manner that "reward" users who have historically targeted young women by increasing the number of suggested connections from the same age and gender demographic. Snapchat further has implemented product designs that allow a user's followers to enable the sharing of their location and identify friends of friends who are physically near them. Moreover, Snapchat utilizes technologies such as push notifications, Snap Streak, and photo decoration functions in order to facilitate young people to become addicted to the application and maximize the number of viewing sessions. Despite knowing that Snapchat is addictive, especially with respect to developing adolescent brains, the defendants have actively concealed this fact from governments around the world. Additionally, although the Snapchat application is free to use, the defendants, unbeknownst to the users, are still making money through advertisers that are targeted to specific demographics.

*2 When she was twelve years old, C.O. opened her first Snapchat account without her parents' knowledge or consent. Even though Snapchat's terms of service purport to prohibit an individual from having multiple personal accounts, the

defendants have chosen not to use available technologies to enforce these terms. C.O. eventually opened multiple Snapchat accounts, so that when her parents eventually realized she was using these products, she was able to hide her continued usage. The defendants assist minors and other predatory users in creating multiple accounts because they do not verify the individuals' phone numbers, e-mail addresses, or inconsistent birthdates. Shortly after opening her Snapchat accounts, C.O. began having trouble sleeping, and eventually experienced anxiety, depression, and moodiness. Snapchat further inundated C.O. with harmful social media content that encouraged disordered eating and self-harm. C.O. was also subjected to highly sexualized content. Furthermore, other children began to bully C.O. through Snapchat's direct messaging feature. Thereafter, C.O. began to experience personality changes and her grades at school began slipping. Despite all of these negative consequences from using Snapchat, C.O. could not stop utilizing the application because she was addicted to it. After she opened her own account, C.O. began receiving unsolicited pictures of male genitalia. C.O. reported these incidents to Snapchat and stated that she did not want these strangers to harass her further. Despite these complaints, the defendants did nothing to block these individuals from sending her inappropriate photographs.

On July 15, 2019, when C.O. was only twelve³ years old, Snapchat directed her to the defendant Sharp. This individual was a registered sex offender using the profile name JASONMORGAN5660. Sharp quickly began messaging C.O. sexually inappropriate comments and he offered her money in exchange for C.O. sending him sexually explicit photographs. After C.O. acquiesced to Sharp's requests, he threatened to post the photographs to Snapchat unless she had sex with him. On July 23, 2019, Sharp coerced C.O. into sneaking out of her home in the middle of the night in order to meet him. At that time, Sharp raped C.O. The following day, C.O.'s mother immediately knew something was wrong, and the incident was reported to the police, who were quickly able to discover Sharp was the individual behind the fake profile. Despite Sharp's subsequent arrest and incarceration, and Snapchat's knowledge of same, Sharp's Snapchat account was still active as of December 10, 2022.

³ At various points, the complaint alleges that C.O. was both twelve and thirteen years old at the time of this incident. This decision will assume that C.O. was twelve years old at the time of the 2019 sexual assault because the plaintiffs also allege that C.O.

was fourteen in 2021 and fifteen when this lawsuit was commenced in January, 2023.

Subsequently, in October, 2021, C.O. connected her with the defendant Rodriguez, a former police officer and sex offender. Rodriguez used Snapchat to obtain C.O.'s phone number and address, and he began sending her sexually explicit messages and photographs. One morning in October, 2021, Rodriguez convinced C.O. to meet him in-person, and Rodriguez offered to give C.O. a ride to school. When C.O. entered Rodriguez's car, he sexually assaulted her. Like Sharp, Rodriguez is also currently incarcerated. Following these incidents, C.O. has been hospitalized and in counseling. She suffers from anxiety and depression and has had thoughts of self-harm and suicide.

In their complaint, the plaintiffs allege the following causes of action against the defendants: (1) count one—strict product liability (design defect); (2) count two—strict product liability (failure to warn); (3) count three—negligence; (4) count four—violations of the Connecticut Unfair Trade Practices Act (CUTPA), [General Statutes § 42-110g et seq.](#); (5) count five—unjust enrichment; (6) count six— invasion of privacy; (7) count seven—negligence (arising out of the Quick Add feature); (8) count eight—assault and battery (as to Sharp) and (9) count nine—assault and battery (as to Rodriguez).⁴

⁴ It appears that counts one through seven are brought against Snap, Inc. and Snapchat, LLC, whereas counts eight and nine state claims against Sharp and Rodriguez, respectively.

On September 14, 2023, the defendants filed a motion to strike all counts of the plaintiffs' complaint on a plethora of different grounds along with a memorandum of law in support of their motion. The plaintiffs filed a memorandum of law in opposition to the motion to strike on October 26, 2023. On November 16, 2023, the plaintiffs filed their reply memorandum.⁵ The court heard oral argument on the motion to strike and the opposition thereto on January 8, 2024.

⁵ Following the reply memorandum, the parties have also filed multiple pleadings that contain both copies of unreported cases and substantive argument. As indicated during the January 8, 2024 oral argument, the court will only consider the cases that counsel have attached and not the arguments set forth in those documents.

*3 “The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted.” (Internal quotation marks omitted.) [Fort Trumbull Conservancy, LLC v. Alves](#), 262 Conn. 480, 498, 815 A.2d 1188 (2003). “The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party] has stated a legally sufficient cause of action.” (Internal quotation marks omitted.) [Coe v. Board of Education](#), 301 Conn. 112, 117, 19 A.3d 640(2011). “If any facts provable under the express and implied allegations in the plaintiff’s complaint support a cause of action ... the complaint is not vulnerable to a motion to strike.” [Bouchard v. People’s Bank](#), 219 Conn. 465, 471, 594 A.2d 1 (1991). Nevertheless, “[a] motion to strike admits all *facts* well pleaded; it does not admit *legal conclusions or the truth or accuracy of opinions* stated in the pleadings.” (Emphasis in original; internal quotation marks omitted.) [Faulkner v. United Technologies Corp.](#), 240 Conn. 576, 588, 693 A.2d 293 (1997). “A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged.” (Internal quotation marks omitted.) [Santorso v. Bristol Hospital](#), 308 Conn. 338, 349, 63 A.3d 940 (2013).

First, the defendants move to strike all of the counts asserted against them on the ground of improper joinder. According to the defendants, the plaintiffs’ complaint impermissibly combines the assault and battery causes of action brought as to Sharp and Rodriguez with claims against them that are different and factually distinct. Specifically, the defendants contend that: (1) the plaintiffs’ claims do not affect all of the parties to this action; (2) the causes of action alleged against them and Sharp/Rodriguez do not arise out of the same transaction or occurrence; and (3) the claims against the two groups cannot be conveniently heard together. In response, the plaintiffs argue that each of the defendants are properly joined. The plaintiffs contend that the present action falls squarely within the statutory requirements for joinder. Furthermore, the plaintiffs assert that this case involves identical claims of injury and damage as between all the defendants. Therefore, the plaintiffs believe that each of the parties are affected because they will inevitably blame each other for C.O.’s injuries at trial. Finally, the plaintiffs contend that equitable considerations favor trying this matter in one case because there will be substantial overlap in the evidence that will be presented against the various defendants.

Our Supreme Court has determined that “in this state ... joinder of claims and of remedies is permissive rather than mandatory.” (Internal quotation marks omitted.) [Beaudoin v. Town Oil Co., Inc.](#), 207 Conn. 575, 584, 542 A.2d 1124 (1988). Indeed, the provision of the rules of practice governing joinder “by its terms spells out when certain separate causes of action may be joined in one complaint. It does not purport to mandate when they must be so joined.” [Danbury v. Dana Investment Corp.](#), 249 Conn. 1, 26, 730 A.2d 1128 (1999). Nevertheless, “[t]he public has an interest in the prevention of unnecessary litigation, both because of the burden it places on the [s]tate and the resulting crowding of the dockets of the courts. This procedure of trying cases together, which has long been the established practice in this state, assists in expediting business without doing anyone an injustice.” (Internal quotation marks omitted.) [DiBella v. Greenwich](#), Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-09-5012500-S (May 22, 2012, [Brazzel-Massaró, J.](#)). Under our rules of practice, “[t]he exclusive remedy for misjoinder of parties is by motion to strike.” (Internal quotation marks omitted.) [Costello v. Goldstein & Peck, P.C.](#), 187 Conn. App. 486, 497, 203 A.3d 611, cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019). See also [Practice Book § 11-3](#).⁶ Therefore, a motion to strike is the correct procedure mechanism to determine if defendants are properly joined.

⁶ [Practice Book § 11-3](#) provides: “The exclusive remedy for misjoinder of parties is by motion to strike. As set forth in Section 10-39, the exclusive remedy for nonjoinder of parties is by motion to strike.”

*4 [General Statutes § 52-97](#) provides in relevant part: “In any civil action the plaintiff may include in his complaint both legal and equitable rights and causes of action ... but, if several causes of action are united in the same complaint, they shall all be brought to recover ... (2) for injuries, with or without force, to person and property, or either, including a conversion of property to the defendant’s use or (7) upon claims, whether in contract or tort or both, arising out of the same transaction or transactions connected with the same subject of action. *The several causes of action so united shall all belong to one of these classes, and, except in an action for the foreclosure of a mortgage or lien, shall affect all the parties to the action, and not require different places of trial, and shall be separately stated; and, in any case in which several causes*

of action are joined in the same complaint, or as matter of counterclaim or set-off in the answer, if it appears to the court that they cannot all be conveniently heard together, the court may order a separate trial of any such cause of action or may direct that any one or more of them be expunged from the complaint or answer.”⁷ (Emphasis added.) See also [Practice Book § 10-21](#) (setting forth substantially similar language.)

⁷ The plaintiffs in this matter only rely on [General Statutes §§ 52-97 \(2\) and \(7\)](#). The other subsections of [§ 52-97](#) clearly do not apply to the facts alleged in this case.

There is a dearth of appellate authority interpreting the scope [§ 52-97](#) and its Practice Book equivalent. Nevertheless, according to the statutory text, “a plaintiff is permitted to bring several causes of action in a single complaint if: (i) the causes of action belong to one of the classes described in [General Statutes § 52-97](#) and [Practice Book § 10-21](#); (ii) the causes of action affect all the parties to the action; and (iii) if the causes of action are joined, the court deems it convenient to hear the causes of action together.” *Ocasio v. Buchanan*, Superior Court, judicial district of Hartford, Docket No. CV-15-6059597-S (January 13, 2016, *Dubay, J.*) (61 Conn. L. Rptr. 624, 626).

The plaintiffs rely on [§§ 52-97 \(2\) and \(7\)](#) in support of their position that the claims against the corporate and individual defendants are properly joined. By its plain language, the plaintiffs appear to satisfy [§ 52-97 \(2\)](#) in that they allege injury “to person.” See, e.g., [Persaud v. Harris](#), Superior Court, judicial district of Hartford, Docket No. CV-18-6092289-S (September 6, 2018, *Noble, J.*) (67 Conn. L. Rptr. 31, 32) (stating that “both claims qualify as a cause of action for injury to person thus falling within the ambit of [§ 52-97 \(2\)](#) ...”). The court also concludes that the language of [§ 52-97 \(7\)](#) is applicable here because the plaintiffs allege causes of action sounding in contract or tort that arise out of the same transaction. For the purposes of the law governing joinder, our courts have determined that “[a] transaction is something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other ...” (Internal quotation marks omitted.) *Collazo v. Hamilton Street Enterprises, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-16-6060339-S (December 27, 2016, *Wilson, J.*) (63 Conn. L. Rptr. 613, 614), quoting, *Craft Refrigerating Machine Co. v. Quinpiac Brewing Co.*, 63 Conn. 551, 560, 29 A. 76

(1893). In the present case, the plaintiffs allege that C.O. was injured when Sharp and Rodriguez contacted her by using the social media application owned and operated by the defendants. Sharp and Rodriguez then subsequently sexually assaulted C.O. If construed in a manner most favorable to the pleader, the court determines that all these alleged acts occurred as part of the same transaction.

*5 With respect to the second prong of the joinder test, “[t]here is a split of opinion among judges of the [S]uperior [C]ourt regarding the interpretation of the phrase ‘shall affect all the parties to the action,’ employed in both [§ 52-97](#) and [Practice Book § 10-21](#). Some courts adopt a strict interpretation of the phrase, holding that there must be a ‘commonality’ between all parties such that the existence of different defendants, as is the case here, defeats joinder. Other courts construe the phrase more liberally and only require joined parties to have an interest in the outcome of each claim.” (Internal quotation marks omitted.) *Gabel v. Guay*, Superior Court, judicial district of New Haven, Docket No. CV-21-6111322-S (January 14, 2022, *Abrams, J.*). One group of cases, relying primarily on a quote from 1 Stephenson’s Connecticut Civil Procedure (3rd Ed., 1997) [§ 47 \(c\)](#), has determined that “[i]n addition to the requirement that all claims must fall within a single one of the categories listed, the rule of joinder of actions requires that all plaintiffs and all defendants must be common to all the claims and that all counts be triable at the same place under the rules as to venue.” (Internal quotation marks omitted.) *Ciamciolo v. Musumano*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5008286-S (August 12, 2008, *Alvord, J.*). Nevertheless, “[o]ther courts have concluded that ‘shall affect all the parties’ does not require that all parties must be common to all the causes of action, but rather that ‘affect’ only requires joined parties to have an interest in the outcome of each claim.... This is because each party to [the] action is affected by each claim in the fundamental sense that, there being injuries of the same nature (with other injuries) to both plaintiffs ... the extent of negligence of each party claimed to have contributed to the plaintiff’s injuries is determined by the trier of fact.” (Citations omitted; internal quotation marks omitted.) *Rivera v. Schwager*, Superior Court, judicial district of New Britain, Docket No. CV-166033541-S (February 6, 2017, *Wiese, J.*) (63 Conn. L. Rptr. 395, 397).

When determining which side of this split of authority the court agrees with, the court is guided by the persuasive historical analysis found in *Vrenezi v. Louzada*, Superior Court, judicial district of Danbury, Docket No.

CV-20-6036141-S (December 9, 2020, *Kowalski, J.*). In *Vrenezi*, the court stated that “the broad interpretation of the statute is consistent with the maxim that statutes that abrogate the common law must be constructed strictly and not enlarged beyond the scope of the text.... At common law, 101 causes of action properly pleadable under the same writ could be joined as separate counts in one action, whether or not they had any other relationship or similarity.... The common law tradition of little restriction on joinder was replaced by the Practice Act of 1879, which today is codified in [General Statutes § 52-97](#) and [Practice Book § 10-21](#).... The statute limited the use of joinder to instances when the specific requirements of the statute are met. So when interpreting the statute, it must be interpreted in a way that does not further enlarge the abrogation of common law joinder. If the phrase ‘shall affect all parties’ is construed narrowly with the requirement that the parties be common to all claims, it would enlarge the statute’s encroachment against the common law rule because it would further limit the use of joinder. Contrastingly, a broad interpretation that requires only that the parties have an interest in the outcome of the claims would not enlarge the statute’s encroachment against the common law because this interpretation is more favorable to allowing joinder.” (Citations omitted; internal quotation marks omitted.) *Id.*, quoting 1 E. Stephenson, Connecticut Civil Procedure (3d Ed. 1997), § 47 (a), p. 145 and § 47 (b), p. 146. This interpretation also more closely tracks the plain meaning of the applicable statutory and Practice Book provisions. “The use of ‘shall affect’ rather than a more specific phrase, such as ‘shall include’ or ‘shall be parties to’ suggests such a broader meaning. Therefore, the better view is that ‘affect’ merely requires joined parties to have an interest in the outcome of each claim.” (Internal quotation marks omitted.) *Tigre v. Espinal-Baez*, Superior Court, judicial district of Waterbury, Docket No. CV-22-6065344-S (October 14, 2022, *D’Andrea, J.*).

The court’s decision in *Mills v. Rita H. Carver Revocable Trust*, Superior Court, judicial district of New London, Docket No. CV-12-6015038-S (February 19, 2013, *Devine, J.*) ([55 Conn. L. Rptr. 605](#)) is illustrative of the broad interpretation of the “shall affect all the parties to the action” language. *Mills* involved a plaintiff who brought suit against one group of defendants for a slip and fall and another group of defendants for a car accident that occurred on different dates. The various defendants filed motions to strike claiming improper joinder. When concluding that the plaintiff’s action satisfied the “shall affect all the parties to the action” requirement, the *Mills* court stated that “the plaintiff

alleges that the collision exacerbated injuries to the cervical and lumbar areas of her spine, which were originally caused by the slip and fall, and further that both incidents resulted in head, neck, back, and [lower extremity injuries](#) and shock to her nervous system. This is the type of case where medical testimony will be necessary to determine which injuries were caused by which incidents. In addition, each defendant will try to claim that the other incident was the primary cause of the worst injuries.” [Id.](#), 607.

*6 The *Mills* court relied, in part, on [Card v. State](#), 57 Conn. App. 134, 747 A.2d 32 (2000) to support its interpretation of [General Statutes § 52-97](#) and [Practice Book § 10-21](#). In *Card*, the Appellate Court implicitly approved the consolidation of multiple cases for the purpose of trial because “[t]he trier of fact’s responsibility in cases involving injuries sustained in successive accidents is to apportion the damages among the parties whose negligence caused the plaintiff’s injuries.” [Id.](#), 145. “Although joinder was not the issue on appeal, *Card* is helpful [in considering a motion to strike for misjoinder] in that it resulted in approval of a single [jury] hearing the claims against multiple defendants notwithstanding the unique circumstances creating liability on each of their parts.” (Internal quotation marks omitted.) [Swaney v. Estrella](#), Superior Court, judicial district of New London, Docket No. CV-15-6023670-S (October 27, 2015, *Cole-Chu, J.*) (61 Conn. L. Rptr. 175, 176). *Card*, therefore, provides further support for the conclusion that the more lenient interpretation of the second joinder element is the correct one.

When applying this standard to the present case, it becomes apparent that both sets of defendants will have an interest in the outcome of each claim. In this matter, the plaintiffs allege that C.O. suffered injuries arising out of the individual defendants’ alleged misuse of the Snapchat social media platform. At trial, there will no doubt be testimony from medical experts regarding C.O.’s injuries, and the fact finder will have to determine which damages are properly attributable to which set of defendants. Moreover, as correctly noted by the plaintiffs in their memorandum of law in opposition, “[w]hile apportionment of liability under [\[General Statutes § 52-102b\]](#) may not strictly apply, there is little doubt that as a practical matter of trial tactics, defendants will seek to foist ultimate blame for C.O.’s injuries on each other.”⁸ Accordingly, the court determines that this matter satisfies the second prong of the requirements for joinder.

8 Under Connecticut law, apportionment of damages between the defendants and Sharp/Rodriguez will be legally impermissible because “the apportionment principles of [General Statutes] § 52-572h do not apply where the purported apportionment complaint rests ‘on any basis other than negligence,’ and that these other bases include, without limitation, ‘intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute’ ”

📌 *Allard v. Liberty Oil Equipment Co., Inc.*, 253 Conn. 787, 801, 756 A.2d 237 (2000). Simply put, as a general rule, “[t]he liability of intentional tortfeasors may not be apportioned between parties liable for negligence.” *Maza v. Montes-Vazquez*, Superior Court, judicial district of Waterbury, Docket No. CV-17-6033664-S (June 26, 2023, *Massicotte, J.*). Although apportionment (in the strict legal sense) may be prohibited between the two groups of defendants in this case by the governing statutory and case law, the fact still remains, as a practical matter, that each set of defendants will be affected by the disposition of the claims asserted against the other.

The court will now turn to the third element of the legal test for joinder, i.e., whether it would be convenient to hear the various legal claims together. “In line with this provision, courts often determine whether to allow joinder based on a variety of equitable considerations, such as whether judicial economy would be served by joining or consolidating the causes of action.” (Internal quotation marks omitted.) *Moulter v. Pina*, Superior Court, judicial district of New Haven, Docket No. CV-19-6094952-S (December 13, 2019, *Wilson, J.*). “Other courts have referenced the general policy in favor of joinder stated by the Supreme Court in the early case of *Evergreen Cemetery [Assn.] v. Beecher*, 53 Conn. 551, 552, 5 A. 353 (1886), wherein the Supreme Court stated that allowing joinder is ‘in harmony with our practice in analogous proceedings ... [if] it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights.’ ” (Internal quotation marks omitted.) *Id.* “Still other cases have extrapolated from the holding of *Card v. State*, [supra,] 57 Conn. App. [144] ... in which three automobile accidents were consolidated for trial so that damages could be fairly apportioned. There, the Appellate Court stated that ‘[i]n the rare case where damages cannot be apportioned between

two or more accidents, the plaintiff who can prove causation should not be left without a remedy. One judicial response to situations in which a jury is unable to make even a rough apportionment of damages is to apportion damages equally among the various accidents.’ ” (Internal quotation marks omitted.) *Id.*

*7 Once again, the court’s discussion in *Vrenezi v. Louzada*, supra, Superior Court, Docket No. CV-20-6036141-S, is helpful here. In *Vrenezi*, the court stated that “trying the claims before separate juries could result in inconsistent verdicts that drastically undercompensate the plaintiff, or even overcompensate the plaintiff. Overcompensation could result if each jury blames the defendant before it for the majority of the injuries. Contrastingly, the joinder of the two claims maximizes the likelihood of complete and consistent verdicts. The jury will be able to consider the actions of both defendants, evaluate all the injuries, and determine the extent of liability for each defendant according to the evidence. Splitting the case before separate juries would be inefficient because it would force the plaintiff to proffer much of the same evidence, including expert medical testimony, twice. This would impose an additional expense upon the plaintiff, and an added burden for courts to have hear the same evidence before two different juries Having two jury trials would require the court to assemble two venire panels, and have two juries sit for two trials where duplicative evidence is presented. Conducting two trials instead of one would also delay the start of evidence in another case that is ready for trial [Therefore,] the remaining equitable considerations overwhelmingly favor the joinder of the claims by the plaintiff against the defendants.” *Id.* The court agrees with this analysis of the relevant equitable factors, and it determines that the same result is mandated here with respect to the third prong of the joinder test.

Accordingly, the court denies the motion to strike on the ground of improper joinder.

Next, the defendants move to strike each of the counts asserted against them on the ground that all the claims are barred by the federal Communications Decency Act of 1996 (CDA), 📌 47 U.S.C. § 230 et seq. According to the defendants, the CDA immunizes interactive computer service providers from liability for causes of action that treat them as the publisher of third-party user content. The defendants assert that all the plaintiffs’ claims arise out of allegations that they acted as the publisher or speaker of content provided by someone else. As the defendants’ alleged

conduct fits within the ambit of the protections afforded by the CDA and that immunity has been construed broadly by the courts, the defendants argue that the plaintiffs' claims are legally insufficient. In opposition, the plaintiffs assert that the defendants' arguments are misplaced because they have not engaged in a proper preemption analysis. As argued by the plaintiffs, federal preemption of state law is generally disfavored, and there is no irreconcilable conflict between the CDA and Connecticut law. The plaintiffs assert that the CDA is not a comprehensive grant of immunity for third-party content, and as result, the CDA does not mandate a "but-for" test that would provide immunity. Rather, the appropriate focus is whether the defendant at issue was acting as a publisher or speaker. According to the plaintiffs, none of their claims seek to treat the defendants as publishers or speakers, and therefore, CDA immunity does not apply here. The plaintiffs assert that this fact is especially true with respect to their claims sounding in product liability. Finally, the plaintiffs argue that the authorities relied upon by the defendants are unpersuasive and distinguishable.

As explained by the Appellate Court, "Congress enacted the CDA as Title V of the Telecommunications Act of 1996 ... primarily to protect minors from exposure to obscene and indecent material on the Internet." (Citation omitted; internal quotation marks omitted.) *Vazquez v. Buhl*, 150 Conn. App. 117, 123, 90 A.3d 331 (2014). "At the same time, however, Congress was also concerned with ensuring the continued development of the Internet. See 47 U.S.C. § 230 (b).

Section 230 ... was enacted based on a congressional concern that treating providers of computer services the same way as traditional publishers would impede the development of the Internet. Accordingly, Congress, [w]hether wisely or not ... made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others." (Internal quotation marks omitted.) *Id.*

The text of the CDA provides in relevant part that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230 (c) (1). The term "interactive computer service" is defined to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by

libraries or educational institutions." 47 U.S.C. § 230 (f) (2). "Information content provider" is statutorily defined to mean "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230 (f) (3). Importantly, the CDA provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230 (e) (3). At the same time, under the CDA: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230 (e) (3). "Taken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties.... Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them.... State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." (Citations omitted.) *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

*8 "In applying the statute, courts have broken [it] down into three component parts, finding that [i]t shields conduct if the defendant (1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." (Internal quotation marks omitted.) *Desilet v. East Hartford Police Officers Assn.*, Superior Court, judicial district of Hartford, Docket No. CV-21-6146962-S (December 27, 2022, *Rosen, J.*), citing *Poole v. Tumblr, Inc.*, 404 F. Supp. 3d 637, 641 (D. Conn. 2019). "There is general consensus among the [federal] circuits that the CDA should be construed broadly in favor of immunity" (Internal quotation marks omitted.) *Brodie v. Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 11 (S.D.N.Y. 2020). Accordingly, the court may appropriately determine whether a defendant is entitled to immunity under the CDA within the context of a motion to strike. *Vazquez v. Buhl*, *supra*, 150 Conn. App. 128.

The parties do not dispute that the defendants, as the operator of a social media application, qualify as a "provider ... of an interactive computer service." See, e.g., *Thomas v. Twitter*

Corporate Office, United States District Court, Docket No. 22 Civ. 5341 (KPF) (S.D.N.Y. December 6, 2023) (“[c]ourts have repeatedly concluded that ... social media sites qualify as ‘interactive computer services’ ”); *Jackson v. Airbnb, Inc.*, United States District Court, Docket No. CV 22-3084 DSF (JCx) (C.D. Cal. November 2, 2022) (stating that “Snap is clearly ‘a provider of an interactive computer service.’ ”). Nor do the plaintiffs explicitly argue in their written submissions that the harmful content at issue was not provided to Snapchat by a third-party users acting as an “information content provider.”⁹ See, e.g., *L.W. v. Snap, Inc.*, United States District Court, Docket No. 22CV619-LAB-MDD (S.D. Cal. June 5, 2023) (wherein the court determined that CDA immunity applied when “the harm animating [p]laintiffs’ claims is directly related to the posting of third-party content on [Snapchat]”).

⁹ The plaintiffs’ counsel did make clear at oral argument that he is not “conceding” this element. Nevertheless, it is apparent that the harms alleged in this case arise out of communications that originated from third parties.

The more difficult question, however, is whether the plaintiffs’ claims would require the defendants to be considered the publisher or speaker of the speech at issue. “By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.

Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” (Internal quotation marks omitted.) *Doe One v. Oliver*, 46 Conn. Supp. 406, 410, 755 A.2d 1000 (2000), aff’d, 68 Conn. App. 902, 792 A.2d 911, cert. denied, 260 Conn. 911, 796 A.2d 556 (2002). “[W]hat matters is not the name of the cause of action ... what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.”

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-02 (9th Cir. 2009). Indeed, § “230 (c) (1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant’s role, broadly defined,

in publishing or excluding third party [c]ommunications.” *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017), aff’d in relevant part sub nom., 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761, 206 L. Ed. 2d 936 (2020).

*⁹ According to the plaintiffs, they are not attempting to hold the defendants liable for the publication of material from third parties.¹⁰ Rather, the plaintiffs assert that “claims that [the] [d]efendants violated their duties as publishers are distinct from [the] [p]laintiffs’ allegations in this case that [the] [d]efendants breached their duty as manufacturers to design a reasonably safe product.” As framed in the parties’ briefs, the plaintiffs allege the following categories of product defects: (1) user recommendation technologies (specifically, design features that facilitated connecting adult sexual predators with vulnerable minors); (2) lack of identify and age verification; (3) recommendation algorithms that are designed to make children addicted; (4) “other design features” such as push notifications and (5) failure to warn users and/or parents of the addictive design defects in Snapchat.

¹⁰ On page forty-nine of their complaint, the plaintiffs allege that they “Expressly Disclaim Any and All Claims Seeking to Hold Defendants Liable as the Publisher or Speaker of Any Content Provided, Posted, or Created by Third Parties.” Despite this attempt to plead around any potential CDA immunity, the court will read the allegations of the complaint as a whole to determine if the plaintiffs are actually alleging that the defendants were acting as a “publisher or speaker.” In any event, such an allegation is a legal conclusion, and it is the court’s role to analyze the legal soundness of the allegations of a complaint, construed in a manner most favorable to the pleader, and not necessarily accept the plaintiffs’ characterization of their own allegations.

It appears that the precise questions raised in this motion to strike have yet to be squarely adjudicated by any Connecticut state court. Nevertheless, similar issues have been addressed by the Second Circuit Court of Appeals. In *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761, 206 L. Ed. 2d 936 (2020), the plaintiffs, legal representatives of victims of terrorist attacks perpetrated by Hamas in Israel, brought suit against Facebook and alleged “that Hamas used Facebook to post content that

encouraged terrorist attacks in Israel during the time period of the attacks in this case.” [Id.](#), 59. According to the plaintiffs in *Force*, “Facebook ha[d] allegedly failed to remove the ‘openly maintained’ pages and associated content of certain Hamas leaders, spokesmen, and other members.... It [was] also alleged that Facebook’s algorithms directed such content to the personalized newsfeeds of the individuals who harmed the plaintiffs.” (Citation omitted.) *Id.* In an opinion authored by Judge Droney, the Second Circuit Court of Appeals determined that Facebook was shielded from liability under the protections of the CDA. The court stated that it “disagree[d] with plaintiffs’ contention that Facebook’s use of algorithms renders it a non-publisher. First, we find no basis in the ordinary meaning of ‘publisher,’ the other text of [Section 230](#), or decisions interpreting [Section 230](#), for concluding that an interactive computer service is not the ‘publisher’ of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer’s interests.” [Id.](#), 66. “Like the decision to place third-party content on a homepage, for example, Facebook’s algorithms might cause more such ‘matches’ than other editorial decisions. But that is not a basis to exclude the use of algorithms from the scope of what it means to be a ‘publisher’ under [Section 230 \(c\) \(1\)](#).” [Id.](#), 67. According to the *Force* court, the “alleged conduct by Facebook falls within the heartland of what it means to be the ‘publisher’ of information under [Section 230 \(c\) \(1\)](#).” [Id.](#), 65. The court reached this determination because “[a]ll of [Facebook’s] decisions, like the decision to host third-party content in the first place, result in ‘connections’ or ‘matches’ of information and individuals, which would have not occurred but for the internet services’ particular editorial choices regarding the display of third-party content.” [Id.](#), 67.

*10 The court finds this discussion in *Force* to be persuasive,¹¹ and concludes that the fact that an interactive computer service allegedly created user recommendation technologies and algorithms that operate to connect users together does not change the computer service’s status as a publisher.¹² See, e.g., *L.W. v. Snap, Inc.*, supra, Docket No. 22CV619-LAB-MDD (wherein the court specifically held that Snapchat’s “Quick Add” feature “more closely implicate[s] a publication function than a design or development function.”). Nor do allegations of an

application’s lack of identify and age verification remove the “publisher” designation. See, e.g., *Mother Doe v. Grindr, LLC*, United States District Court, No. 5:23-CV-193-JA-PRL (M.D. Fla. October 26, 2023) (appeal filed) (stating that a claim raising “failure to implement basic safety measures to protect minors ... treat[s] [d]efendants as a publisher of information ... [because it] is ‘inextricably linked’ to [d]efendants’ publication of [the individual who sexually assaulted the minor’s] messages to [the victim]”). Similarly, allegations of failure to warn of an application’s potential danger do not remove the “publisher” status. See, e.g., [Herrick v. Grindr, LLC](#), 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018), aff’d, [765 Fed. Appx. 586 \(2d Cir.\)](#), cert. denied, 140 S. Ct. 221, 205 L. Ed. 2d 135 (2019) (stating that “[t]o the extent [the plaintiff] has identified a defect in Grindr’s design or manufacture or a failure to warn, it is inextricably related to Grindr’s role in editing or removing offensive content—precisely the role for which [Section 230](#) provides immunity”).

- 11 Although technically not binding on this court, “[i]t is well established that when Connecticut courts interpret federal statutes, [t]he decisions of the Second Circuit Court of Appeals carry particularly persuasive weight” (Internal quotation marks omitted.) *Modzelewski’s Towing & Recovery, Inc. v. Commissioner of Motor Vehicles*, 322 Conn. 20, 32, 139 A.3d 594 (2016), cert. denied, 580 U.S. 1216, 137 S. Ct. 1396, 197 L. Ed. 2d 554 (2017). Accordingly, this court relies on the precedent of cases from the Second Circuit Court of Appeals when they are applicable.
- 12 Notably, at oral argument, the plaintiffs’ counsel essentially admitted that the court would have to rule in favor of the defendants, at least with respect to the Quick Add feature, if it followed the reasoning of the *Force* case.

In an attempt to avoid this result, the plaintiffs cite to a number of different cases. Almost all of them are distinguishable from the present matter. For example, in [Lemmon v. Snap, Inc.](#), 995 F.3d 1085 (9th Cir. 2021), the parents of children who died in a high-speed automobile accident brought suit after their decedents used a Snapchat filter to determine how fast they were going. The plaintiff parents alleged that Snapchat’s filter encouraged the decedents to drive at over 100 miles per hour, and thus it incentivized them to drive at too fast of a

speed. The Ninth Circuit Court of Appeals determined that “[i]t is ... apparent that the [p]arents’ amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat’s reward system and the Speed Filter). Thus, the duty that Snap allegedly violated springs from its distinct capacity as a product designer.... This is further evidenced by the fact that Snap could have satisfied its alleged obligation—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat’s users generate.... Snap’s alleged duty in this case thus has nothing to do with its editing, monitoring, or removing of the content that its users generate through Snapchat.” (Citations omitted; internal quotation marks omitted.) [Id.](#), 1092. The result in *Lemmon* makes sense, of course, because the plaintiffs there did not attempt to hold the defendant liable for publication of third-party content. Rather, the case rested solely on an alleged defect in the Snapchat application that did not involve statements made by third parties when using Snapchat.¹³ Another factually similar case cited by the plaintiffs is [Maynard v. Snapchat, Inc.](#), 870 S.E. 2d 739 (Ga. 2022). *Maynard*, however, does not even analyze the potential relevancy of the CDA. That case, therefore, is also not helpful for the plaintiffs.

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One of the cases cited by the plaintiffs is [A.M. v. Omegle.com, LLC](#), 614 F. Supp. 3d 814 (D. Or. 2022). In *A.M.*, the minor plaintiff brought a product liability claim against an online chat room that randomly paired her with a much older man who proceeded to sexually abuse her online. The *A.M.* court denied the defendant’s Fed R. Civ. P. 12 (b) (6) motion to dismiss and stated that the “[p]laintiff does not seek to treat [the defendant] as a publisher of information under Section 230 of the CDA under *Lemmon*.” [Id.](#), 820. The court acknowledges that this case does support the arguments advanced by the plaintiffs in this matter. Nevertheless, in the court’s view, if *A.M.* would have been decided in accordance with Second Circuit precedent, the result may have been different. Similarly, in the California trial-level decision recently submitted by the plaintiffs, *Neville v. Snap, Inc.*, California Superior Court, Los Angeles County, Docket No. 22STCV3500

(January 2, 2024), the court acknowledged the existence of [Force v. Facebook, Inc.](#), supra, 934 F.3d 53, but it chose not to follow that case. Indeed, the *Neville* court quoted the *Force* concurring and dissenting opinion at length instead of the majority opinion. Therefore, *Neville* is of little persuasive value to this court.

*11 A different group of cases relied on by the plaintiffs is also inapposite. In both [Bolger v. Amazon.com, LLC](#), 53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (2020) and [Erie Ins. Co. v. Amazon.com, Inc.](#), 925 F.3d 135 (4th Cir. 2019), the plaintiffs sued an online marketplace for selling them an allegedly defective product. The *Bolger* and *Erie* courts rejected the applicability of CDA immunity because the “products liability claims ... are not based on the publication of another’s speech. The underpinning of [the plaintiffs] claims is its contention that Amazon was the seller of the [product] and therefore was liable as the seller of a defective product. There is no claim made based on the content of speech published by Amazon — such as a claim that Amazon had liability as the publisher of a misrepresentation of the product or of defamatory content.” (Emphasis omitted.) [Id.](#), 139-40. Unlike *Bolger* and *Erie*, there is no allegation here that C.O. actually purchased any product from the defendants. Therefore, *Bolger* and *Erie* are not persuasive precedent in support of the plaintiffs’ arguments.

Accordingly, the court determines that the allegations of this case fall squarely within the ambit of the immunity afforded to “an interactive computer service” that acts as a “publisher or speaker” of information provided by another “information content provider.” [47 U.S.C. § 230 \(c\) \(1\)](#). The plaintiffs clearly allege that the defendants failed to regulate content provided by third parties such as Sharp and Rodriguez when they were using the defendants’ service. Therefore, as recently held by a federal district court judge when analyzing similar claims against the dating application Grindr, “as [the plaintiffs]’ claims in essence seek to impose liability on Grindr for failing to regulate third-party content, they require that the [c]ourt treat Grindr as a publisher or speaker.” *Doe v. Grindr, Inc.*, United States District Court, Docket No. 2:23-CV-02093-ODW (PDx) (C.D. Cal. December 28, 2023) (appeal filed) (dismissing plaintiff’s claims sounding in defective product design, defective product manufacturing, defective product warning, negligence and negligent misrepresentation). As each of the plaintiffs’ causes of action arise out of this same factual

background, the court is compelled to conclude that all of the plaintiffs' claims are legally insufficient.¹⁴ Moreover, as the plain language of the CDA "preempts any state law that is inconsistent with its protections," the court must strike all of the counts of the plaintiffs' complaint.¹⁵ *Baiqiao Tang v. Wengui Guo*, United States District Court, Docket No. 17 Civ. 9031 (JFK) (S.D.N.Y. November 2, 2020).

¹⁴ Notably, the plaintiffs make no written argument that certain of their causes of action may not be covered by CDA immunity. Rather, in the section of their memorandum of law that discusses the applicability of the CDA, there is no attempt by the plaintiffs to differentiate between their various claims. Moreover, as the court has concluded that it must strike all of the plaintiffs' causes of action, it need not examine the myriad of other arguments raised by the defendants in support of striking each of the individual counts.

¹⁵ The court need not engage in the extensive preemption analysis urged by the plaintiffs because "when a federal law contains an express preemption clause, [the court] focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent [A court] do[es] not invoke any presumption against pre-emption when a statute contains an express-preemption clause." (Citations omitted; internal quotation marks omitted.) *Buono*

v. Tyco Fire Products, LP, 78 F.4th 490, 495 (2d Cir. 2023). According to its plain text, the CDA clearly preempts state law claims are that inconsistent with its protections.

As previously noted by the First Circuit Court of Appeals when ruling on a case that raised similar issues: "This is a hard case—hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that [the court] ... deny relief to plaintiffs whose circumstances evoke outrage. The result [the court] must reach is rooted in positive law. Congress addressed the right to publish the speech of others in the Information Age when it enacted the [CDA]"

 *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir. 2016), cert. denied, 580 U.S. 1083, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017). It is the court's function to apply the law in its current form. As stated by our Appellate Court when previously ruling on a case involving the CDA, matters such as this one "can make faithful interpretation of statutes difficult. Without further legislative action, however, there is little [this court can] do in [its] limited role but join with other courts and commentators in expressing [its] concern with the statute's broad scope." *Vacquez v. Buhl*, supra, 150 Conn. App. 133 n.8.

*12 For the foregoing reasons, the court grants the defendants' motion to strike in its entirety.

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CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this application complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of applications, including Rules 11, 16, 20, and 21. The application is in Times New Roman 14-point font, contains 10,969 words, and was prepared using Microsoft Word for Office 365, version 2408. I have relied on the word count feature of this word processing system in preparing this certificate.

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May 12, 2025

CERTIFICATE OF SERVICE

I, Felicia H. Ellsworth, hereby certify, under the penalties of perjury, that on May 12, 2025, I caused a true and accurate copy of this application to be filed and served via the Massachusetts Odyssey File & Serve site, and, with consent of counsel, I also served copies on the following counsel by electronic mail:

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