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18
19 IN THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF CALIFORNIA
20 SAN JOSE DIVISION

21 NETCHOICE, LLC d/b/a NetChoice,
22 Plaintiff,
23 v.
24 ROB BONTA, ATTORNEY GENERAL OF
25 THE STATE OF CALIFORNIA, in his official
capacity,
26 Defendant.
27

Case No. 5:22-cv-08861-BLF

**REPLY IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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AB 2273

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1 **I. INTRODUCTION**

2 The State claims that AB 2273 regulates data management—“nonexpressive conduct,”
 3 Opp. 11—not speech. Nonsense. AB 2273’s text expressly requires services to “mitigate or
 4 eliminate” risks that a child “could” encounter “potentially harmful ... content” online. Content
 5 was the through-line in the legislative process: Defendant Attorney General Bonta praised the Act
 6 precisely because it would “protect children from ... harmful material” and “dangerous online
 7 content”—in other words, speech—and Governor Newsom lauded the law for “protect[ing] kids”
 8 from harmful “content.” The State’s own expert, who mentions “content” in her declaration *71*
 9 *times*, derides preexisting laws specifically because they “only” cover data management, not
 10 content. Radesky Decl. ¶ 98. The State cannot evade the Constitution by pretending the Act
 11 regulates only “business practices ... related to the collection and use of children’s personal
 12 information,” Opp. 11, when the law’s text, purpose, and effect are to regulate and shape online
 13 content. Like California’s last attempt to “restrict the ideas to which children may be exposed,”
 14 *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792, 794 (2011), AB 2273 violates the First
 15 Amendment. The law also impermissibly regulates across state lines and is preempted by two
 16 federal statutes. It should be enjoined.

17 **II. NETCHOICE WILL PREVAIL ON THE MERITS.**

18 **A. AB 2273 Violates The First Amendment.**

19 **1. AB 2273 regulates speech, not conduct.**

20 “Speech is not conduct just because the government says it is.” *Telescope Media Grp. v.*
 21 *Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). The “conduct” the State focuses on here, *e.g.*, Opp.
 22 10-12, is making content available online—the regulation of which is subject to “First Amendment
 23 scrutiny.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Packingham v. North Carolina*, 582
 24 U.S. 98, 105 (2017) (First Amendment applies to laws affecting internet).

25 The Act’s entire purpose is to “create a safer online space for children”—*i.e.*, to make
 26 online content “safer”—including by “disabling features” that “offer detrimental material.” AB
 27 2273, Findings and Declarations § 1(a)(3), (a)(8). That the Act does so under the guise of “data
 28 management practices,” Cal. Civil Code § 1798.99.31(a)(1)(B), does not matter, as those practices

1 include and thus regulate the distribution of speech. For example, AB 2273 requires providers to:

- 2 • identify and disclose *to the government* risks that their features “could” expose minors
- 3 to “potentially harmful” “content,” § 1798.99.31(a)(1)(B)(i);
- 4 • develop a timed plan to “mitigate or eliminate” the identified risks, § 1798.99.31(a)(2);
- 5 • estimate user age with a certainty “appropriate to the[se] risks,” or apply the most-
- 6 restrictive “privacy and data protections ... to all consumers,” § 1798.99.31(a)(5);
- 7 • publish and enforce content moderation policies in a manner deemed appropriate *by*
- 8 *the State*, § 1798.99.31(a)(9); and
- 9 • refrain from publishing content based on a user’s preferences, § 1798.99.31(b)(1)-(4),
- 10 or through “dark patterns”—such as a “nudge” to view content, Radesky Decl. ¶ 54—
- 11 that might “lead or encourage” a minor to “take any action” the service should know
- 12 “is materially detrimental” to that user’s “well-being,” *id.* § 1798.99.31(b)(7).

13 The Opposition confirms that the Act regulates speech, not just “data management.” The
 14 State admits the law aims to “reduc[e] threats” to minors “based on what they are *seeing online*,”
 15 including by deterring participation in “extreme content generation.” Opp. 1, 5 (emphasis added);
 16 *see also id.* at 7 (conceding law requires services to “mitigate or eliminate” risk of “exposing
 17 children to harmful or potentially harmful content”). Similarly, the expert hired by the State
 18 repeatedly identifies “exposure to harmful content,” Radesky Decl. ¶ 48, as the law’s target,
 19 including “violent mobile games with horror characters,” *id.* ¶ 34; “ads with age-inappropriate
 20 content,” *id.* ¶ 35; “inappropriate video or advertising,” *id.* ¶ 38; and “detrimental online content,”
 21 *id.* ¶ 62. The State’s *amici* agree that the Act will stop publication to minors of “outrageous,”
 22 “harmful,” and “adult content” and “inappropriate” communications. Fairplay Am. Br. (Dkt. 53-1)
 23 4, 5, 11, 12. Although AB 2273 might “masquerade[] as a law designed to protect children’s
 24 privacy, it does far more than regulate how businesses can use children’s personal data.” CCIA
 25 Am. Br. (Dkt. 45-1) 2.

26 The legislative history “dispel[s]” any doubt that the law “imposes an aimed, content-based
 27 burden.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-65 (2011). Lawmakers advocated for AB
 28 2273, on top of California’s already extensive data protection laws, because AB 2273 would shield

1 children from “adult content” and other “potentially harmful design features,” while existing laws
 2 “focus[ed] on ... children’s [personal information].” Sieff Decl. Ex. 1 at 1, 3. The law’s author
 3 claimed the Act would prevent minors from being “expose[d]” to “harmful material” inappropriate
 4 for their “minds, abilities, and sensibilities.” *Id.* Ex. 2 at 16-17. The Attorney General’s office
 5 praised the law for “address[ing] ... dangerous online content.” *Id.* Ex. 3 at 2. And after
 6 enactment, Governor Newsom vowed to defend the law precisely because it purports to “shield[]”
 7 youth from harmful “content.” *Id.* Ex. 4.

8 Relabeling the publication of expressive materials “commerce” or “conduct,” Opp. 11,
 9 does not dilute the level of required scrutiny. “[I]f the acts of ‘disclosing’ and ‘publishing’
 10 information do not constitute speech, it is hard to imagine what does fall within that category[.]”
 11 *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (citation omitted); *see also Near v. Minnesota*, 283
 12 U.S. 697, 720 (1931) (state cannot escape strict scrutiny of speech regulations by “[c]haracterizing
 13 [a] publication as a business”). Nor may the State invent a distinction between services’ use of
 14 information to publish content (which it calls “business practices”) and the content itself. Opp.
 15 10-12. Regulating use of data to publish content regulates speech. *Sorrell*, 564 U.S. at 563-64
 16 (“restrictions on the sale, disclosure, and use of” data intended to target speech violated the First
 17 Amendment); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1228, 1232 (10th Cir. 1999) (“restricting the
 18 use of ... customer proprietary information” to “target” content violated First Amendment).
 19 Indeed, content cannot be disseminated online without the collection and use of basic device
 20 identifiers and user input, which appear to fall within California’s broad definition of “personal
 21 information.” *See, e.g., Szabo Decl.* ¶¶ 13-14; *Masnack Decl.* ¶ 10; *Paolucci Decl.* ¶ 4; *see also*
 22 *CCIA Br.* 7-8 (“Displaying content on the Internet necessarily requires the ‘use’ of a person’s IP
 23 address[.]”). AB 2273’s restrictions on the use of data to deliver content therefore necessarily
 24 implicate the First Amendment. *Cf. Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231, 234
 25 (1987) (invalidating tax scheme that “singl[ed] out” instrumentalities of speech); *Minn. Star &*
 26 *Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 582 (1983) (same).

27 **2. AB 2273 establishes a system of prior restraint.**

28 The State claims the Act is not a prior restraint because it does not “authorize[]

1 suppression of speech in advance of its expression.” Opp. 13 (quoting *Long Beach Area Peace*
2 *Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009)). But the State’s advance
3 suppression of speech need not be explicit to be a prior restraint. AB 2273 is designed to—and
4 will—lead to self-censorship, placing it in the category of prior restraints held invalid in *Bantam*
5 *Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963), and *Interstate Circuit, Inc. v. City of Dallas*,
6 390 U.S. 676, 678-79 (1968). Neither law in those cases expressly “authorize[d] suppression,”
7 Opp. 13, before speech could be published, but the Supreme Court “look[ed] through forms to the
8 substance” to see them for what they were—cloaked efforts to silence speech before it could occur.
9 *Bantam Books*, 372 U.S. at 67; see Mot 9-10. The Act’s core provisions have the same effect.

10 First, “[b]efore” making any services available, a provider must devise “a timed plan” to
11 “mitigate or eliminate” the risk that its services “could” expose minors to “harmful” content.
12 § 1798.99.31(a)(1)(A)-(B), (a)(2). “Enforcement authorities” will then review the DPIAs in their
13 “investigation[s]” to “confirm[] whether businesses have made appropriate efforts to comply.”
14 EPIC Am. Br. (Dkt. 52-1) 14. If providers fail to mitigate or eliminate these risks, the Act in fact
15 “authorize[s] penalization based on the substance communicated in the DPIAs.” Cf. Opp. 13. This
16 framework is a blatant “attempt to control the content of” speech, *id.* (quoting *Hotel Emps. & Rest.*
17 *Emps. Int’l Union v. Nev. Gaming Comm’n*, 984 F.2d 1507, 1518 (9th Cir. 1993)). It places AB
18 2273 squarely in the camp of “informal censorship” regimes held invalid in *Bantam Books* and
19 *Interstate Circuit*. See *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) (Posner, J.)
20 (“scaring off” third parties from “facilitating future speech” was a prior restraint). In fact, the Act
21 is even more fraught than the laws in *Interstate Circuit* and *Bantam Books*, where film exhibitors
22 could ignore their self-reported film classifications, *Interstate Circuit*, 390 U.S. at 678, and
23 bookstores could ignore an unofficial morality commission’s warnings, *Bantam Books*, 372 U.S.
24 at 66-67. Here, providers *must* “mitigate or eliminate” the risk of harmful content.

25 Second, AB 2273’s policy enforcement rule—which would codify as law a provider’s own
26 content guidelines—is a form of censorship-by-proxy through “[i]ndirect discouragements,” *Am.*
27 *Commc’ns Ass’n v. Douds*, 339 U.S. 382, 402 (1950), and “subtle ... interference.” *Bates v. City*
28 *of Little Rock*, 361 U.S. 516, 523-24 (1960); see also, e.g., *Ent. Software Ass’n v. Foti*, 451 F.

1 Supp. 2d 823, 834-35 (M.D. La. 2006) (“voluntary” industry “rating system” did “not give the
2 State license to impose its own” censorship based on that system “any more than the existence of
3 MPAA movie ratings give the State license to restrict” films); Mot 11. The State’s claim that the
4 rule just requires online services to do “what they say they are going to do,” Opp. 14, ignores that
5 what is being done is *choosing what to publish* under government oversight and the threat of
6 massive financial penalties. *See* Mot. 10-11; CCIA Br. 4. The State professes “there is nothing
7 the Attorney General can do” if a provider’s policies reserve for themselves “final decisions about
8 content.” Opp. 14. But the First Amendment protects content moderation decisions regardless of
9 whether providers have explicitly reserved those decisions to themselves. Mot. 11 (citing
10 authorities). And using discretion in publishing content is not a “deceptive” practice. *Cf.* Opp.
11 14-15; *see, e.g., Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (service’s
12 “statements concerning its content moderation policies” not actionable as deceptive advertising).

13 *Third*, the Act’s age-verification rule creates another prior restraint, like the law in *ACLU*
14 *v. Mukasey*, 534 F.3d 181, 196-97 (3d Cir. 2008), which made age verification a defense to
15 publication of “harmful” content. *See* Mot. 13; Goldman Am. Br. (Dkt. 34-1) 7-10. The State’s
16 claim that the rule simply requires “child-appropriate data and privacy protection” for all
17 consumers absent verification, Opp. 15, ignores that such protections include mitigating the risk
18 of harmful content. Even if some providers today *voluntarily* attempt some form of verification,
19 *id.* at 16, the First Amendment protects those editorial decisions as much as it protects other
20 services’ rights *not* to adopt such restrictions. *See NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196,
21 1210, 1213 (11th Cir. 2022). The State’s argument that the age-verification rule implicates only
22 “children’s right to access information,” Opp. 16, also ignores that the law impinges on *services’*
23 right to reach audiences of all ages. *See Mukasey*, 534 F.3d at 196-97; *see also Galvin v. Hay*, 374
24 F.3d 739, 752 (9th Cir. 2004) (First Amendment protects “speakers seeking to reach a particular
25 audience”). It makes no difference what “best practices” the State recommends, *cf.* Opp. 16, as
26 the constitutional evil is the *obligation* to tailor content and features to users’ verified ages. *See,*
27 *e.g., Levine v. Fair Political Practices Comm’n*, 222 F. Supp. 2d 1182, 1187-88 (E.D. Cal. 2002)
28 (enjoining law that violated the First Amendment, even though State had not yet “issued

1 regulations specifying the enforcement parameters for these provisions”).

2 **3. AB 2273 is overbroad.**

3 AB 2273 is also impermissible because it is overbroad. The Act reaches every kind of
4 online content—from images of war on a newspaper’s website, to political commentary on an
5 independent blog, to movie and book reviews. *See* Mot. 14-16; Roin Decl. ¶¶ 11-16; Cairella Decl.
6 ¶¶ 2, 6, 11; Masnick Decl. ¶¶ 2, 8, 15; Paolucci Decl. ¶ 6; CCIA Br. 9-10. The State neither
7 disputes this broad sweep nor denies that the Act will decimate the availability of online content
8 for everyone, “torch[ing] a large segment of the internet.” *Reno*, 521 U.S. at 882; *see also Ashcroft*
9 *v. ACLU*, 542 U.S. 656, 666-70 (2004) (universal restrictions on all users to protect minors from
10 content “harmful to minors” was overbroad). In fact, the State’s own expert confirms that the Act
11 sweeps boundlessly to prevent untold “harms” that could result from minors’ “contact with others”
12 online. Radesky Decl. ¶ 73; *see also* Opp. 5 (AB 2273 seeks to prevent harm to minors “based on
13 what they are seeing online” when they “us[e] platforms” to “engage” other users).

14 The State’s overbreadth defense again rests on the falsehood that the law restricts conduct,
15 not speech—debunked above, *supra* § II.A.1—and the bald assertion that even if AB 2273 reaches
16 speech, it “is not substantially overbroad relative to its legitimate sweep.” Opp. 23 (citation
17 omitted). The State neither substantiates this latter assertion nor distinguishes NetChoice’s
18 authorities. *See* Mot. 14-16. By forcing providers to modify their services to shield minors from
19 anything even potentially “harmful,” AB 2273 necessarily limits speech accessible to adults,
20 *Mukasey*, 534 F.3d at 197, and broadly intrudes on minors’ rights. The State does not have “free-
21 floating power to restrict the ideas to which children may be exposed,” such as political
22 commentary, the news, blog posts, book reviews, film summaries, and the like. *Brown*, 564 U.S.
23 at 794-95. “People are unlikely to become well-functioning, independent-minded adults and
24 responsible citizens if they are raised in an intellectual bubble.” *Am. Amusement Mach. Ass’n v.*
25 *Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.); *see also* NYT Am. Br. (Dkt. 56-1) 13
26 (Act “limits young people’s ability to access lawful news content and fully participate in public
27 life”). Even if AB 2273 had any legitimate sweep, it would pale in comparison to the law’s
28 impermissible applications. *See* Mot. 14-16; CCIA Br. 9-10; *United States v. Stevens*, 559 U.S.

1 460, 473 (2010).

2 **4. AB 2273 is void for vagueness.**

3 AB 2273 is also constitutionally defective because it rests on vague, subjective terms that
4 provide little notice, much less fair notice, of what it prohibits. Mot. 16-19; CCIA Br. 1, 9, 11-12.
5 The State’s defense once again rests on its claim that the law regulates “conduct,” which is false.
6 *Supra* § II.A.1. The State’s remaining arguments that the terms are not vague also fail.

7 The State claims the phrases “dark patterns,” “best interest of the child,” and “likely to be
8 accessed” are not vague because they are defined. Opp. 24. But the State’s own declarants offer
9 subjective interpretations of “dark patterns” that are broader than the capacious statutory
10 definition, which limits “dark pattern[s]” to features with the “substantial effect” of “subverting or
11 impairing” user autonomy or decisions. Cal Civil Code § 1798.140(l); *see* Egelman Decl. ¶ 51;
12 Radesky Decl. ¶¶ 53-56, 97 (features that “nudge” a user to make a “decision” in the service’s best
13 interest). The State does not specify any laws that use “best interest of the child,” but the term
14 apparently is used most in family law, where it does not restrict speech and courts have deemed it
15 an “elusive guideline that belies rigid definition.” *In re Matthew B.*, 232 Cal. App. 3d 1239, 1263
16 (1991) (citation omitted). As for “likely to be accessed,” that definition rests on subjective and
17 undefined terms, like “routine[.]” and “significant number of children,” Mot. 17, which provide far
18 less guidance than those in *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1198 (9th Cir. 1988), Opp.
19 24, a case that did not even apply the heightened standard applicable to First Amendment
20 vagueness challenges.

21 The phrases “materially detrimental,” “a significant number,” and “substantial effect” are
22 not “modifiers” “of common understanding.” Opp. 24 (citation omitted). They are nothing like
23 the terms in *California Teachers Association v. State Board of Education*, 271 F.3d 1141, 1152
24 (9th Cir. 2001), which upheld a law requiring educators to provide instruction “overwhelmingly”
25 in English to all students and “nearly all” in English to English learners—terms that mean near
26 totality in a way the Act’s terms do not. And unlike in that case, NetChoice’s declarants have
27 testified that the law’s vagueness will substantially chill protected speech. Mot. 17; *see also* NYT
28 Br. 6 (Act will cause “news organizations” to “prevent those under the age of 18 from accessing

1 online news content, features, or services”). These terms are also not only “modifiers,” but core
2 determinants of the law’s applicability. Though statutes may not require “mathematical”
3 precision, Opp. 24 (citation omitted), they still must be “intelligible, defining a ‘core’ of proscribed
4 conduct.” *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000). These terms are neither
5 mathematical nor intelligible.

6 The State’s defense of the Act’s vague age-verification requirement is similarly flawed.
7 The meaning of the phrase “appropriate to the risks” is not evident from “common sense,” Opp.
8 24. *United States v. Evans*, 883 F.3d 1154, 1163 n.8 (9th Cir. 2018); *see also* Cairella Decl. ¶ 12.
9 The State fails to explain how “common sense” would help providers understand how much age
10 certainty is “appropriate to the risks” of their services. Nor can the Act be analogized to other laws
11 that “provide data privacy protections based on age,” such as COPPA and the CPPA, Opp. 24,
12 because those laws use standards that yield concrete, objective conclusions—such as whether a
13 provider has “actual knowledge” of the user’s age and whether a service is “directed” to children.
14 15 U.S.C. §§ 6501(1), 6502. In contrast, AB 2273’s sliding scale of age certainty rests on
15 “subjective” assessments that will result in discriminatory, haphazard enforcement. *Foti v. City of*
16 *Menlo Park*, 146 F.3d 629, 638-39 (9th Cir. 1998) (citation omitted) (requiring “ad hoc and
17 subjective” judgments risked enforcement “only against ... messages the officer ... dislikes”).

18 The State’s argument that the Act’s “scienter requirements” mitigate its vagueness, Opp.
19 24, misreads the statute. Although some (but not all) parts of the Act absolve services of liability
20 if they did not “know[]” or did not “ha[ve] reason to know” of potential harm to children,
21 § 1798.99.31(b)(1), (b)(7), that is not scienter. “[S]cienter” is “a degree of fault greater than
22 negligence.” *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1107 (1993); *cf. Cal. Teachers*, 271 F.3d at
23 1154 (upholding law’s “willfully and repeatedly” requirement).

24 Finally, the State claims NetChoice’s members must already comply with similar
25 requirements in the UK Children’s Code. Opp. 25. Even assuming all NetChoice members were
26 subject to the Code (they are not), the laws are not interchangeable. The Code is a flexible “code
27 of practice,” violations of which do not result in “liab[ility]” in “court.” Keaney Decl. ¶¶ 16, 27,
28 30, 41. And unlike AB 2273, the Code incorporates other “established UK government or industry

1 guidance and standards.” *See id.* ¶ 46. More to the point, unlike the Code, AB 2273 must be
 2 interpreted in light of the U.S. Constitution. *See Zuru, Inc. v. Glassdoor, Inc.*, 614 F. Supp. 3d
 3 697, 707 (N.D. Cal. 2022) (this country’s “commitment to free speech isn’t universally shared”).

4 **5. AB 2273 regulates speech based on content and fails strict scrutiny.**

5 **a. AB 2273 regulates speech based on its content.**

6 The State concedes that AB 2273 “refer[s] to content” and creates content-based
 7 obligations and “exceptions.” Opp. 18. The State’s experts and *amici* agree. Radesky Decl. ¶¶ 22,
 8 34-41, 48, 60, 62, 65, 67, 69-72 (law seeks to protect minors from “exposure to harmful content”);
 9 Fairplay Br. 4, 5, 11, 12-13. Even so, the State claims the Act is “facially neutral” and subject to
 10 deferential review because its “overriding objective” is “to prioritize the privacy, safety, and well-
 11 being of children.” Opp. 16-17 (citation omitted). But a law may be content-based no matter “the
 12 government’s justifications or purposes.” *Reed v. Town of Gilbert*, 576 U.S. 155, 164-65 (2015).
 13 And in any event, the Act regulates speech based on content in *both* purpose and effect. Mot. 19-
 14 20. The Act’s acknowledged purpose is to protect minors from harmful content. *See supra*
 15 § II.A.1. Laws “designed to protect minors from viewing harmful materials” are content-based
 16 precisely because they restrict speech based on its appropriateness. *Ashcroft*, 542 U.S. at 670;
 17 *Brown*, 564 U.S. at 794, 799 (restriction on violent video games to protect minors from
 18 psychological harm was content-based).

19 The State’s claim that businesses “can continue to offer, provide access to, and recommend
 20 any content they want” as “long as [they] do not use children’s data,” Opp. 17, is wrong. Many of
 21 the Act’s provisions have nothing to do with data collection or use, such as the requirements that
 22 services document and mitigate risks of “harmful, or potentially harmful, content,”
 23 § 1798.99.31(a)(1)(B)(i), (a)(2); enforce their own editorial policies to the State’s satisfaction,
 24 § 1798.99.31(a)(9); and refrain from using certain design interfaces that might “lead or encourage”
 25 a user to “take any action” the service should know “is materially detrimental” to a young user’s
 26 “well-being,” § 1798.99.31(b)(7). And because all online providers must use data to deliver their
 27 content and services, the undisputed effect of the Act’s mandates is censorship of content based
 28 on subject matter and audience. *See, e.g.*, Paolucci Decl. ¶¶ 18-19; Masnick Decl. ¶¶ 14-18; Roin

1 Decl. ¶¶ 11-17; Cairella Decl. ¶¶ 18-19; Szabo Decl. ¶¶ 6-14; *see also, e.g.*, Egelman Decl. ¶ 31
 2 (conceding data collection is necessary to avoid “degrad[ed] ... online experiences”). The law is
 3 thus content-based. *See Reed*, 576 U.S. at 163-64, 168-69 (regulation of “specific subject matter
 4 is content based even if it does not discriminate among viewpoints”).

5 None of the three more lenient standards proposed by the State applies here. *First*, the
 6 secondary effects standard does not apply merely because the Act aims to prioritize minors’
 7 “safety” and “well-being.” Opp. 17. Where, as here, “the designed benefit of a content-based
 8 speech restriction is to shield the sensibilities of listeners,” strict scrutiny applies. *United States v.*
 9 *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813, 815 (2000); *see also Boos v. Barry*, 485 U.S. 312, 320-
 10 21 (1988) (“secondary effects” test does not apply to laws designed to “prevent ... psychological
 11 damage” from speech). *Second*, the “commercial speech” standard, Opp. 19, is inapplicable
 12 because AB 2273 regulates speech that does far more than “propose a commercial transaction.”
 13 *Harris v. Quinn*, 573 U.S. 616, 648 (2014) (citation omitted). The fact that websites—like “books,
 14 newspapers, and magazines”—are published “for profit” does not render their content commercial
 15 speech. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012); *see also Volokh*
 16 *v. James*, --- F. Supp. 3d ---, 2023 WL 1991435, at *7-8 (S.D.N.Y. Feb. 14, 2023) (online
 17 moderation policies are not commercial speech). *Third*, the standard applicable to content-neutral
 18 must-carry laws for cable, *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622 (1994) (Opp. 17-19),
 19 flows from “technological difference[s]” inherent in the cable medium. *Id.* at 638-39. “Those
 20 factors are not present in cyberspace,” and the Supreme Court has refused to extend *Turner* to the
 21 internet, holding there is “no basis for qualifying the level of First Amendment scrutiny” online.
 22 *Reno*, 521 U.S. at 868-70.

23 In sum, AB 2273 regulates *any* content or interactive feature that is even “potentially
 24 harmful” to minors, “materially detrimental” to their “well-being,” not age “appropriate,” not in
 25 their “best interests,” or that otherwise violates website content rules. §§ 1798.99.31(a)(1)(B),
 26 (a)(5)-(6), (a)(9), (b)(1)-(4), (b)(7). Strict scrutiny applies.

27 **b. AB 2273 fails strict scrutiny.**

28 To survive strict scrutiny, the State must establish that AB 2273 is both “narrowly tailored

1 to promote a compelling Government interest” and “the least restrictive means to further the
2 articulated interest.” *Playboy*, 529 U.S. at 813, 827 (citation omitted); *contra* Opp. 21-22 (citing
3 *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073-74 (9th Cir. 2006), for a lower
4 standard, even though that case applied *intermediate scrutiny*). Even assuming a compelling
5 interest here, AB 2273 is not narrowly tailored or the least restrictive means to achieve it.

6 Rather than establish a “direct causal link” between unregulated internet access and harm
7 to minors, *Brown*, 564 U.S. at 799, the State offers the “predictive judgment,” *id.*, of a single
8 physician, Dr. Radesky. The Court should not credit Dr. Radesky’s made-for-litigation testimony.
9 *United States v. Virginia*, 518 U.S. 515, 516 (1996) (“justification” for law subject to heightened
10 scrutiny “must be genuine, not hypothesized or invented post hoc in response to litigation”). At
11 any rate, Dr. Radesky’s testimony is even less compelling than the evidence held insufficient in
12 *Brown*, which likewise comprised opinions from “research psychologists” “whose studies”
13 “purport[ed] to show a connection between exposure to” certain content “and harmful effects on
14 children.” 564 U.S. at 800. As in *Brown*, Dr. Radesky’s conclusions “do not prove that”
15 unmitigated access to internet speech and interactive features “cause[s] minors” to suffer harm,
16 but “at best” show “some correlation” between “exposure” and small “real-world effects.” *Id.* at
17 800-01. Dr. Radesky finds “associat[i]ons” between minors’ unregulated access to online speech
18 and “poorer sleep,” which could “contribut[e] to youth mental health” problems—citing studies
19 finding “small” correlations “between time spent on digital media and” symptoms like
20 “depression” and “sedentary behaviors.” Radesky Decl. ¶ 50. But she neither claims that
21 unmitigated internet use *causes* these symptoms nor shows how the Act would prevent them. In
22 fact, competing studies reach conflicting conclusions. *See* Sieff Decl. Ex. 5 at 3 (“Using social
23 media is not inherently beneficial or harmful to young people.”); Ex. 6 at 5 (surveying literature
24 concerning benefits of internet to minors, e.g., “facilitat[ing] social connection, identity
25 development, and positive emotions”); Ex. 7 at 824 (literature linking technology and poor mental
26 health based on “suboptimal” methodologies, including faulty self-reporting).

27 The State’s evidence also rests on “anecdote and supposition.” *Playboy*, 529 U.S. at 822.
28 Dr. Radesky speculates that “children seeking peer validation *may* take part in extreme content

1 generation” like “posting dangerous challenges,” Radesky Decl. ¶ 61 (emphasis added), but offers
 2 no evidence that access to purportedly harmful content online causes such effects, nor that other
 3 media do not. *See Brown*, 564 U.S. at 800-01 (rejecting tailoring evidence where claimed effects
 4 were “indistinguishable from effects produced by other media”). Dr. Radesky’s other opinions do
 5 not even propose causal mechanisms between online speech and harm. *Id.* ¶ 72 (claiming children
 6 are shown “violent-themed video games” featuring “injured” cartoon characters, such as “Peppa
 7 Pig apparently injured with [her] eyes crossed out,” without explaining how this harms them); *but*
 8 *see* every Wile E. Coyote cartoon. *See also Kendrick*, 244 F.3d at 577 (“To shield children right
 9 up to the age of 18 from exposure to violent descriptions and images would not only be quixotic,
 10 but deforming[.]”). It is “with good reason” that “every court to consider” this kind of evidence
 11 has found it inadequate to justify the censorship of speech. *Brown*, 564 U.S. at 800.

12 The State likewise fails to rebut NetChoice’s evidence that AB 2273 is overinclusive and
 13 not the least restrictive alternative. AB 2273 is overinclusive because it takes a universal medium-
 14 focused approach that abridges protected speech on any subject, including speech sent to and
 15 received exclusively by adults. *See* Mot. 14, 21-22; *supra* § II.A.1. It is not the least restrictive
 16 alternative because the State could accomplish its putative privacy goals by enforcing existing
 17 laws like COPPA, the CCPA, and the CPRA. Mot. 21-22. The State claims these laws have not
 18 been adequately enforced, *see* Opp. 4; Radesky Decl. ¶¶ 31-39; Egelman Decl. ¶¶ 37-40. In fact,
 19 existing law prohibits the practices the State’s experts criticize. *See, e.g., Egelman Decl.* ¶¶ 19, 24
 20 (criticizing “convoluted user interfaces” and lengthy privacy policies), *but see* Cal. Civ. Code
 21 § 1798.100(b) (requiring services to provide privacy information “prominently and
 22 conspicuously”); § 1798.135(a)(1) (requiring “clear and conspicuous link” on homepage to opt out
 23 of data selling). The Act is not the least restrictive means to achieve data privacy where “the State
 24 may vigorously enforce” existing law. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S.
 25 781, 800 (1988); *see also Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (same).

26 Even as to AB 2273’s actual purpose—to shield minors from content—the Act is still not
 27 the “least restrictive” means since it uses a one-size-fits-all method instead of a “household-by-
 28 household” approach. *Playboy*, 529 U.S. at 816, 818, 823 (enjoining universal approach, holding

1 “these judgments are for the individual to make, not for the Government to decree”). Dr. Radesky,
 2 for instance, admits some services already enable parents to create “child subaccounts” that limit
 3 access to “age-appropriate video content.” Radesky Decl. ¶ 96. The State does not explain why
 4 it did not, for example, mandate similar family-focused rules.

5 Citing *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727,
 6 744-45 (1996), the State claims AB 2273 survives strict scrutiny because it only “restrict[s]
 7 content” rather than “ban[ning]” it “all together [sic].” Opp. 20. This “startling and dangerous”
 8 suggestion, *Brown*, 564 U.S. at 792, misreads the quoted passage of *Denver Area*, which analyzed
 9 Section 10(a) of the Cable Act under the *intermediate scrutiny* applicable to cable regulations that
 10 permitted (but did not require) cable operators to prohibit channels from broadcasting sexually
 11 explicit programming. 518 U.S. at 733. AB 2273, in contrast, *limits* services’ discretion, and is
 12 akin to Section 10(c), the provision *Denver Area* invalidated (even under intermediate scrutiny)
 13 because it required operators to block “patently offensive” content. 518 U.S. at 754.

14 **B. AB 2273 Violates The Commerce Clause.**

15 AB 2273 not only violates the First Amendment, it also violates the Commerce Clause.

16 **1. AB 2273 unduly burdens interstate commerce.**

17 The State’s defense to NetChoice’s argument under *Pike v. Bruce Church, Inc.*, 397 U.S.
 18 137, 142 (1970), rests on the assumption that online services can exclude California users through
 19 geofencing. Opp. 26. But geofencing is far more complex and imperfect than this presumes and
 20 can be circumvented. *See* Masnick Decl. ¶ 16. Further, the law is based on a user’s *residency*, not
 21 *location*. Regardless, the State cannot deny the Act’s obvious burdens on interstate commerce, or
 22 establish the advancement of an adequate local interest.

23 Insulating whole populations from parts of the internet by its very nature impedes the flow
 24 of commerce online. *See ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (internet
 25 “requires national regulation”); *see also Nat’l Pork Producers Council v. Ross*, 589 U.S. ---, 2023
 26 WL 3356528, at *11 n.2 (May 11, 2023) (preserving rule that “state regulations on
 27 instrumentalities” of commerce are impermissible “when a lack of national uniformity would
 28 impede *the flow*” of commerce). Unlike the closed-captioning requirement in *Greater L.A. Agency*

1 *on Deafness, Inc. v. CNN*, 742 F.3d 414 (9th Cir. 2014), Opp. 27, AB 2273 would restrict the
 2 distribution of information across state lines. *Cf. Bigelow v. Virginia*, 421 U.S. 809, 822-29 (1975)
 3 (state “may not, under the guise of exercising internal police powers, bar a citizen of another State
 4 from disseminating information” to its residents). And it would directly conflict with other states’
 5 laws mandating publication of content that California would require services to block. *See CTS*
 6 *Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (Commerce Clause bars “statutes that
 7 may adversely affect interstate commerce by subjecting activities to inconsistent regulations”);
 8 Mot. 24. The State dismisses this as a “provider’s choice.” Opp. 26. The Commerce Clause does
 9 not permit the State to place a service “in jeopardy of being subjected to inconsistent legislation”
 10 in “other states.” *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

11 The State also offers no evidence that AB 2273 achieves “substantial local benefits,” Opp.
 12 27, for the welfare of minor internet users, much less benefits that outweigh the law’s interstate
 13 burdens. Dr. Radesky asserts a “small” “associated” *correlation* between unmitigated internet use
 14 and adverse mental health symptoms, but nothing approaching causation, nor that AB 2273 itself
 15 could meaningfully reduce these harms. *E.g.*, Radesky Decl. ¶ 50. The State fails to distinguish
 16 decisions rejecting similar efforts. *See* Mot. 25. Weighed against the un rebutted testimony that
 17 AB 2273 will undermine privacy and could harm minors, *see* Rumenap Decl. ¶¶ 7-11; Goldman
 18 Br. 3; NYT Br. 12-13; CHOP Am. Br. (Dkt. 42-1) 6-15, the Act’s putative benefits simply have
 19 “not been proven,” *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004).

20 **2. AB 2273 regulates beyond state lines.**

21 The State does not dispute that regulations targeting interactive communication services
 22 beyond state borders are impermissible. Opp. 26; *see also Am. Booksellers Found. v. Dean*, 342
 23 F.3d 96, 103 (2d Cir. 2003); Mot. 22-23. In fact, the Supreme Court just reaffirmed that a
 24 regulation would violate the Constitution’s “horizontal separation of powers” if its practical effect
 25 reached activities “wholly outside” the State’s borders. *Nat’l Pork*, 2023 WL 3356528, at *10 n.1
 26 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982)).

27 That is precisely what AB 2273 does. *See* Mot. 22-23. The law restricts operations of any
 28 online service that does business in California, including operations outside the State. *See* Cal.

1 Civ. Code §§ 1798.99.30(a), 1798.140(d), (i); *see also* Mot. 23. That the law is limited to minors
2 “who are residents of California,” Opp. 26, is irrelevant. *See Sam Francis Found. v. Christies,*
3 *Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (holding invalid law regulating conduct having
4 “no necessary connection with the state other than the residency”). Before a provider offers any
5 service to anyone, it must discern the age and residence of each user, and if a user is under 18 and
6 a California resident—not merely present in California—tailor its offerings accordingly. The
7 CCPA does not suffer this flaw, as it exempts activity “wholly outside California,” such that
8 providers need only determine whether a user is in California when collecting data, Cal. Civ. Code
9 § 1798.145(a)(7)—not whether a user is a California *resident*.

10 Nor is AB 2273 like the regulation upheld in *CNN*, 742 F.3d 414; *contra* Opp. 26. That
11 law required CNN to add closed captioning to programming it was already distributing through
12 CNN.com to California audiences. 742 F.3d at 426. There was no obligation to prevent or alter
13 content, such as by moderating comments in an article. AB 2273 is thus more like the law enjoined
14 in *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997 (E.D. Cal. 2017), which required websites to remove
15 California legislators’ personal information on command, no matter who posted the content or
16 where the website was located. *Id.* at 1025. AB 2273 similarly requires internet services to take
17 actions that have no nexus with California other than a user’s (possible) California residency. *See*
18 *also Christies*, 784 F.3d at 1323. The State does not even attempt to respond to NetChoice’s
19 evidence or examples. *Cf.* Egelman Decl. ¶¶ 55-62.

20 C. COPPA Preempts AB 2273

21 AB 2273 is also invalid because it is preempted by COPPA. The State claims AB 2273
22 “supplements” COPPA’s “minimum” notice and consent framework. Opp. 28. But AB 2273
23 conflicts with COPPA. COPPA applies to services “directed to children,” 15 U.S.C. § 6502(a)(1),
24 whereas AB 2273 specifies that “children should be afforded protections *not only* by online
25 products and services *specifically directed at them* but by all online products and services they are
26 likely to access.” § 1798.99.29 (emphasis added); *see also* Egelman Decl. ¶ 44 (criticizing
27 COPPA’s “actual knowledge” standard). COPPA empowers parents to decide what their children
28 can access online; AB 2273 strips parents of that power. Chamber of Commerce Am. Br. (Dkt.

1 33-1) 12. And AB 2273 bars conduct that is permissible under COPPA. *See* Mot. 25-27; Chamber
 2 of Commerce Br. 9-10, 12-14. The State fails to explain why all these differences are consistent.
 3 Nor does it mention, let alone distinguish, the cases holding COPPA preempts laws with different
 4 threshold or substantive requirements or that “treat[] like conduct differently.” *N.M. ex rel.*
 5 *Balderas v. Tiny Lab Prods.*, 457 F. Supp. 3d 1103, 1120-21 (D.N.M. 2020); *see also* Mot. 26;
 6 *H.K. through Farwell v. Google LLC*, 595 F. Supp. 3d 702, 711 (C.D. Ill. 2022).

7 Finally, the State misconstrues NetChoice’s arguments related to AB 2273’s application to
 8 minors over 13. NetChoice makes no claim of “field preemption,” Opp. 28. Rather, AB 2273
 9 cannot be saved for minors aged 13-17 because its age restriction is not severable. *See infra* § IV.

10 **D. Section 230 Preempts AB 2273’s Regulation of Third-Party Speech.**

11 Section 230 preempts the Act’s content policy enforcement and content publication rules.
 12 Mot. 27-29. The State admits Section 230 preempts state laws creating liability for a service’s
 13 decisions about what content to block or publish, as well as a service’s discretion to publish or
 14 remove objectionable content. Opp. 29. The State claims enforcement of a service’s own rules is
 15 first-party conduct. *Id.* But that “conduct” is the *publication* of third-party speech. The content
 16 policy rule holds a service liable for failing to publish or remove content, putting it in the heartland
 17 of Section 230’s protections. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009); *see*
 18 *also, e.g., Bride v. Snap Inc.*, 2023 WL 2016927, at *7 (C.D. Cal. Jan. 10, 2023) (Section 230
 19 barred claims based on Snapchat’s “own alleged misrepresentations and false statements” in its
 20 content policy). The rules governing use of information likewise impose a duty not to publish
 21 third-party content and cannot be limited to the “conduct” of using information. *Cf. Sorrell*, 564
 22 U.S. at 564 (use of information to make a publication decision is speech).

23 **III. OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION ARE MET.**

24 The State does not dispute that the loss of First Amendment freedoms constitutes
 25 irreparable harm. Mot. 29-30. And its argument that the Act promotes the public interest in
 26 protecting minors, Opp. 30, lacks evidence. The State’s other arguments are makeweight. The
 27 fact that AB 2273 does not become enforceable until July 2024, *id.*, makes no difference because
 28 services undisputedly are already preparing for AB 2273. *See* Roin Decl. ¶¶ 20, 24-25; Cairella

1 Decl. ¶¶ 14, 19-22; Masnick Decl. ¶¶ 12, 14-19; Paolucci Decl. ¶¶ 16-18; Szabo Decl. ¶¶ 5-7, 12-
2 17. “One does not have to await the consummation of threatened injury to obtain preventive relief.
3 If the injury is certainly impending, that is enough.” *PG&E v. State Energy Res. Conserv. & Dev.*
4 *Comm’n*, 461 U.S. 190, 201 (1983). This is true even if some services already comply with the
5 UK Code. *See supra* § II.A.4. The non-compensable financial injuries described in NetChoice’s
6 declarations are thus neither “vague” nor “speculative,” Opp. 30. NetChoice’s members will
7 *certainly* suffer these injuries absent an injunction.

8 **IV. THE WHOLE LAW MUST BE ENJOINED**

9 The State does not dispute that AB 2273 is not severable. Mot. 27. Accordingly, if the
10 Court holds invalid the challenged provisions of AB 2273, the entire law must be enjoined. *See*
11 *Henry v. Napa Valley Unified*, 2016 WL 7157670, at *4 (N.D. Cal. Dec. 8, 2016).

12 **V. CONCLUSION**

13 NetChoice respectfully requests an order preliminarily enjoining AB 2273.

14
15 DATED: May 19, 2023

DAVIS WRIGHT TREMAINE LLP

16
17 By: /s/ Ambika Kumar
Ambika Kumar

18 Attorneys for Plaintiff
19 NetChoice LLC, d/b/a NetChoice

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