No. 23-2969

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NETCHOICE, LLC,

Plaintiff-Appellee,

v.

ROB BONTA, in his official capacity as California Attorney General,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:22-cv-08861-BLF
The Honorable Beth Labson Freeman

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee NetChoice, LLC (NetChoice) states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The California Age-Appropriate Design Code Act, AB 2273, is one of the most expansive efforts to censor online speech since the inception of the internet. Born from British regulations unfettered by the First Amendment, Br. 8, the Act requires online services to: (1) develop and make available to the State plans to "mitigate or eliminate" any risks their services "could" expose a minor to "potentially harmful" content *before* publishing any content, (2) publish only content "appropriate" for minors without first verifying with "reasonable certainty" the user is an adult, (3) *not* publish content based on user preferences unless it is in minors' "best interests," and (4) enforce content moderation policies to the State's satisfaction. The district court's decision to preliminarily enjoin this direct attack on expression was correct.

The State argues the Act regulates "economic activity," so the First Amendment does not apply. Br. 1. This is plainly wrong. As the district court concluded, the law's "prohibitions and mandates regulate speech." 1-ER-16. That was the State's professed aim. Appellant Attorney General Bonta praised the Act for "protect[ing] children from … harmful material" and "dangerous online content." 2-ER-229–30. Likewise, Governor Newsom lauded the law for "protect[ing] kids" from harmful "content." 2-ER-232. Further, the State's expert used the word "content" more than 70 times in her declaration to justify the statute, deriding

existing laws because they "only" cover data management. 4-ER-677–714. Simply "[c]alling" the object of regulation "something other than speech" does not make it so. *Green v. Miss U.S. of Am., LLC*, 52 F.4th 773, 780 (9th Cir. 2022). Where the "conduct" regulated *is* publication of content, "the First Amendment protects" it. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001).

AB 2273 violates the First Amendment in numerous ways. It creates a regime of proxy censorship that coerces services to suppress protected speech; is massively overbroad; is rife with vague, undefined terms; and restricts and chills protected speech based on its content, speaker, and audience. The State has not shown the Act advances an interest unrelated to the suppression of speech, much less is narrowly tailored to serve such an interest (as the law applies to most of the internet). Accordingly, the Act flunks even intermediate scrutiny, as the district court found. But because the Act is a content-based regulation of speech, it is properly subject to strict scrutiny—a standard the State does not attempt to meet and the Act fails to satisfy.

The Court should affirm the district court's injunction under the First Amendment, and because AB 2273 violates the Commerce Clause and is preempted by the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501 *et seq.*, and Section 230 of the Communications Decency Act, 47 U.S.C. § 230.

JURISDICTIONAL STATEMENT

NetChoice agrees with the State's jurisdictional statement.

STATUTORY AUTHORITIES

Except for the following, all applicable statutes, etc., are contained in the State's addendum:

- Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-6506.
- Section 230 of the Communications Decency Act, 47 U.S.C. § 230.
- California Consumer Privacy Act of 2018 (CCPA), *as amended by* California Privacy Rights Act of 2020 (CPRA), Cal. Civ. Code §§ 1798.100 et seq.

ISSUES PRESENTED

1. Whether the district court correctly held AB 2273 regulates speech.

2. Whether the district court correctly held NetChoice is likely to succeed on its claim that AB 2273 violates the First Amendment.

3. Whether the Court should affirm the preliminary injunction on the alternative grounds NetChoice raised below.

4. Whether the district court correctly held that AB 2273 must be enjoined in its entirety.

STATEMENT OF THE CASE

A. Factual and statutory background

1. The internet provides a vibrant forum for speech.

The internet, a medium "as diverse as human thought," *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (citation omitted), has become "indispensable to the exchange of information." 1-ER-3. "[W]ebsites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and connect citizens with "principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). This "extraordinary advance in the availability of educational and informational resources" has "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(1), (4). It has been made possible by an open and accessible framework established by Congress to balance privacy and security with freedom of expression.

Online providers engage with users in different ways. Most allow users to view content, preview services, and read reviews. *See* 1-ER-3; 6-ER-1162; 7-ER-1212; 7-ER-1187–88. Many have features available only to users who create an account. *See, e.g.*, 6-ER-1162–63; 7-ER-1212; 7-ER-1187–88; 7-ER-1201. Some charge fees. *See, e.g.*, 6-ER-1161–62; 7-ER-1212; 7-ER-1201; 7-ER-1187–88.

Others provide content without charge, relying on advertisements to sustain their businesses. *See* 1-ER-3. As the State has noted, "today's internet would not exist without … digital advertising." Compl. ¶ 1, *United States v. Google LLC*, No. 23-108 (E.D. Va. Jan. 24, 2023), Dkt. No. 1 (complaint filed by California and others).

Regardless of business model, a hallmark of online services is their ability to tailor content and features to their users' interests. Suggesting a book or film based on a user's browsing, reading, or listening, for example, personalizes the distribution of expressive materials and information and connects content creators with an audience. *See, e.g.*, 7-ER-1186–87; 6-ER-1162, 1166; 6-ER-1155–56. Online providers across media also tailor services in other ways, such as saving a user's place in a documentary so the user can pick up where she left off.

Most online providers have adopted policies and guidelines governing their services. These policies foster a sense of community, encourage debate, set the tenor of discussion, preserve a respectful environment, and notify users of conduct or content that might result in losing access. *See* 6-ER-958–972 (sample privacy policies, terms of service); 6-ER-1154–55. Many also offer privacy-friendly features, including the option to "specify privacy settings for nearly every piece of information they post to the site," 7-ER-1202, and "minimiz[ing] how much data [is] collect[ed] and retain[ed]," 7-ER-1214.

As the State concedes, online services "facilitate important speech," Br. 1, and an essential building block for publishing that online speech is data. Just as a newspaper cannot exist without ink or paper, the internet cannot exist without the use and processing of data. Online content cannot even be delivered without basic device identifiers and user input. *See, e.g.*, 7-ER-1156–57; 7-ER-1213; 7-ER-1200–01. And data undergirds every aspect of a website's speech, from "order[ing] and shap[ing] content," 6-ER-1156, to "deliver[ing] content," "communicat[ing] with users," and "personaliz[ing] the user experience." 6-ER-1166; *see also* 7-ER-1191; 3-ER-403 (State's expert admitting data use is necessary to avoid "degrad[ed]" services).

2. Preexisting laws protected (and still protect) California children's privacy.

Californians, including minors, are protected by one of the nation's broadest and most stringent comprehensive data privacy and security regimes. *See* 1-ER-4–5. Under the 2018 California Consumer Privacy Act (CCPA), as amended by the 2020 California Privacy Rights Act (CPRA), online users have robust rights to be notified of and control the data collected about them. *See* Cal. Civ. Code §§ 1798.100 *et seq.* Services must "inform consumers as to the categories of" and "purposes for which" they collect personal information, *id*. § 1798.100(b); not collect more information absent notice, *id*. § 1798.100(a)(2); provide notice of sale or sharing of personal information, *id.* §1798.120(b); honor consumer requests not

to sell or share personal information, *id.* § 1798.120(d); and not sell or share personal information of a consumer the service knows is under 16 without authorization, *id.* § 1798.120(c). Online services have spent immense resources to comply with these stringent requirements. *See* 6-ER-915 (Appellant's estimate that initial compliance with the 2018 CCPA would cost $55 billion).

California's definition of "personal information" (including under AB 2273) is not limited to sensitive information traditionally associated with privacy concerns and instead includes any information that "relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly *or indirectly*, with a particular consumer or household." Cal. Civ. Code § 1798.140(v) (emphasis added). This definition extends far beyond quintessentially personal information—like birthdates, driver's licenses, or social security numbers—to data that could not easily be connected to a particular user, including IP addresses and basic information about how users "interact[]" with a website, such as "[i]nternet or … network activity," *id.*, data that is essential to the internet's function. 6-ER-1155–57; 7-ER-1213; 7-ER-1200–01.

Many other California laws also protect privacy and children, such as by requiring displaying privacy policies to users, Cal. Bus. & Prof. Code §§ 22575-22579; barring advertising certain products to minors, such as alcohol, firearms, and tobacco, *id.* §§ 22580-22582; protecting the privacy and security of student data, *id.*

§§ 22584-22585; and prohibiting cyber-bullying, Cal. Educ. Code §§ 48900 *et seq*. The State Constitution and common law also protect children's privacy, Cal. Const. art. I, § 1; *e.g.*, *McCoy v. Alphabet, Inc.*, 2021 WL 405816, at *7-8 (N.D. Cal. Feb. 2, 2021), and California has recently enacted a law that further combats child sexual exploitation online, AB 1394 (to be codified at Cal. Civ. Code §§ 3273.65 *et seq*.), adding to existing federal and state criminal prohibitions on the same topic.

Federal child privacy law, codified in COPPA and its regulations, also has long "limit[ed] the collection of personal information from children without parental consent." 144 Cong. Rec. S11657 (Oct. 7, 1998). *See* 1-ER-4. COPPA is not, as the State suggests, limited to websites that "*self*-identify as targeting children." Br. 8. Rather, COPPA applies to websites "directed to children" (which Congress defined as anyone under 13) or that have "actual knowledge" they are collecting (defined) personal information from a child. 15 U.S.C. §§ 6501(1), 6502. These websites must "provide notice" of information collection, use, and disclosure practices; obtain parental consent before collecting, using, or disclosing a child's personal information; provide parents "reasonable means" to refuse consent; and not condition a child's participation in certain activities on excessive disclosures. 16 C.F.R. § 312.3(a)-(d). COPPA preempts inconsistent child-focused state privacy rules. 15 U.S.C. § 6502(d).

3. AB 2273 censors the internet under the guise of protecting privacy.

Before many of the requirements in the 2020 CPRA had even taken effect, California enacted AB 2273, which the district court rightly "contrast[ed]" with privacy laws. 1-ER-5. As the legislative history shows, the Act's purpose is to shield children from "adult content" and other "potentially harmful design features," whereas existing privacy laws "focus on … children's [personal information]." 2-ER-201. AB 2273's author claimed the Act would prevent minors from being "expose[d]" to "harmful material" inappropriate for their "minds, abilities, and sensibilities." 2-ER-220–21. The Attorney General's office praised the law for "address[ing] … dangerous online content." 2-ER-230. And Governor Newsom vowed to defend it precisely because it purports to "shield[]" youth from harmful "content." 2-ER-232.

AB 2273 applies to any "business" that "provides an online service, product, or feature likely to be accessed by children," Cal. Civ. Code § 1798.99.31(a), (b), defined as anyone under 18. *Id.* § 1798.99.30(b)(1). A "[b]usiness" is any for-profit entity that (i) earns more than $25M in gross annual revenue; (ii) buys, sells, or shares at least 100,000 consumers' information annually; or (iii) obtains more than half its revenue from data monetization. *Id.* § 1798.140(d). Non-profits and government entities are exempt, as are "broadband internet access" services, "telecommunications service[s]," the "delivery or use of a physical product," and

certain healthcare entities. *See id.* §§ 1798.99.30(b)(5), 1798.99.40, 1798.140(d). Parents may not opt their children out of the Act's provisions. *Id.*

The Act requires providers to:

Create plans to mitigate or eliminate "potentially harmful" content. Before offering any service, product, or feature "likely to be accessed by" a minor, providers must prepare a Data Protection Impact Assessment (DPIA) addressing whether the feature could expose minors to "potentially harmful" content, contacts, or communications; permit them to "witness" any "potentially harmful[] conduct"; or use "algorithms" or other methods to deliver "targeted" content and ads that "could harm" them. Cal. Civ. Code § 1798.99.31(a)(1)(B)(i)-(vii). Providers must "[d]ocument any risk of material detriment to" minors arising from each service, product, or feature, and "create a timed plan to mitigate or eliminate" those risks "before" the service is accessed by minors. *Id.* § 1798.99.31(a)(2). Providers must make DPIAs available to Appellant, *id.* § 1798.99.31(a)(4), though the State suggests a service could wait decades to mitigate any identified risks. 2-ER-95–98. "Harm" and "material detriment" are undefined.

Enforce content policies and community standards. Services must enforce (to the State's satisfaction) all "published terms, policies, and community standards … including, *but not limited to*, privacy policies and those concerning children." Cal. Civ. Code § 1798.99.31(a)(9). Thus, the government may oversee whether a

provider has adequately enforced its own rules about what speech to permit or block. Although the State faults the district court for finding this requirement overbroad on the ground that it is not "restricted to children," Br. 47, the State *agreed* that "a policy that actually only protects adults" "would be covered here," 2-ER-126, and that the Act reaches even services such as *The New York Times*, 2-ER-76–78, 94–95.

Restrict the use of information to publish or personalize content. AB 2273 prohibits services from using "personal information"—including freely shared and lawfully collected basic information about a user's activity—to publish content, unless "necessary to provide an online service, product, or feature with which a [minor] is actively and knowingly engaged" or supported by a "compelling reason" that such use "is in the best interests of children." Cal. Civ. Code § 1798.99.31(b)(2)-(4). Thus, a provider cannot use lawfully collected information to publish or promote content to a minor unless "necessary" to what the minor is already doing or "in the best interests of children." *Id*. § 1798.99.31(b)(3). Similarly, the law prohibits design interfaces ("dark patterns") that "lead or encourage" minors to provide more data (including by continuing to use the service) or "take any action" the provider "has reason to know, is materially detrimental to the [minor's] physical health, mental health, or well-being." *Id*. §§ 1798.99.31(b)(7), 1798.140(*l*); *see also id.* § 1798.99.31(b)(1) (similar). The term "dark patterns" includes common features that simplify and improve user experience, such as "autoplay" (*e.g.*, playing the next

episode of a series) and "newsfeed" functions that order and recommend content. *See, e.g.*, 6-ER-954–57.

Verify users' ages. Services must estimate users' ages 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." Cal. Civ. Code § 1798.99.31(a)(5). "[L]ogic[ally]," "data and privacy protections intended to shield children from harmful content, if applied to adults, will also shield adults from that same content." 1-ER-25. Thus, providers must either ascertain each user's age or make all their services child-appropriate. The level of certainty required for each service hinges on how "risk[y]" that service is deemed to be. Cal. Civ. Code § 1798.99.31(a)(5).

Penalties for violations. AB 2273 authorizes Appellant to obtain up to $7,500 per "affected child," as well as injunctive relief, for any "violation." *Id.* § 1798.99.35(a). But for the district court's injunction, regulated services would have been required to comply by July 1, 2024. *Id.* § 1798.99.33.

B. NetChoice challenges the constitutionality of AB 2273

NetChoice—a trade association of online businesses that promote free speech and free enterprise online—challenged AB 2273, alleging the Act violates the First Amendment, the Fourth Amendment, the Due Process and Commerce Clauses of

the United States Constitution, and Article I, Sections 2(a) and 7(a) of the California Constitution; and is preempted by COPPA and Section 230.

The district court granted NetChoice's motion for preliminary injunction. *See* 1-ER-46. The court first determined that the Act's mandates and prohibitions regulate the "distribution of speech," impede the "availability and use of information" for publication, and otherwise compel speech. 1-ER-14. Because the court found the Act did not survive even the intermediate scrutiny applicable to commercial speech, it assumed without deciding that the Act regulates only commercial speech. 1-ER-17–19. The court concluded that the State failed to demonstrate a means-ends fit as to each challenged provision, 1-ER-19–35; that NetChoice had satisfied the remaining *Winters* factors for preliminary injunctive relief, 1-ER-42–43; and that the invalid provisions were not severable from the rest of the Act, 1-ER-35–38.

This appeal followed.

SUMMARY OF ARGUMENT

This Court should affirm the district court's order enjoining AB 2273.

I. The district court correctly held that AB 2273 regulates speech and likely violates the First Amendment.

A. The State devotes scant space to arguing that the Act satisfies First Amendment scrutiny, claiming instead that it regulates "economic activity,"

not speech. Br. 40-48. This false premise permeates the State's argument, which, once debunked, dooms the law's defense. That the statute regulates speech cannot seriously be disputed.

First, the Act constructs a censorship regime. Unlike actual privacy laws, one of the Act's "main requirements" is to force "covered businesses to identify and disclose to the government potential risks" that minors might be exposed to "potentially harmful[] *content*" and "develop a timed plan to mitigate or eliminate the identified risks" before publication. 1-ER-14 (emphasis added). That is a regulation of speech—one materially identical to the ordinance invalidated in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968), which required exhibitors to inform the government whether a film was "suitable" for kids, even while permitting exhibitors to show an "unsuitable" film. Under the Act, the State may also second-guess services' interpretation and enforcement of their content moderation policies—which will constrain services' discretion to prioritize how they enforce these policies, giving the State considerable control over publication decisions. Courts consistently reject analogous attempts to disguise state censorship using laws that mandate enforcement of private rules. *See Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970) (invalidating ordinance codifying industry film ratings into city law because "the judgment as to what [was]

protected or unprotected" under those ratings was entrusted to private entities "using standards and procedures, if any, known only to them"). *See* Part I.A.1.

Second, the Act's age-verification rule burdens both adults' and minors' access to protected speech. It forces services to either assess the age of users to a "reasonable level of certainty," or subject *all* users to the highest "default privacy" settings. Cal. Civ. Code § 1798.99.31(a)(5)-(6). Even attempting to verify age requires services to collect identity information that many users are "simply unwilling to provide," thereby deterring access to speech. *ACLU v. Mukasey*, 534 F.3d 181, 192 (3d Cir. 2008). Nor may services escape speech regulation by forgoing verification, as then they must apply the "protections afforded to children" to "all consumers," Cal. Civ. Code § 1798.99.31(a)(5), "reduc[ing] the adult population … to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See* Part I.A.2.

Third, the Act regulates any speech that *could* be "potentially" harmful to children—a vast amount of protected speech. The First Amendment applies to, and "gives significant protection from," such "overbroad laws that chill speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). *See* Part I.A.3.

Fourth, the Act uses vague, undefined terms that fail to provide adequate notice of what the Act requires. Services are left to guess, for example, what it means

to be "harmful," "detrimental," or in children's "best interests"—uncertainty that the unrebutted evidence shows will chill speech. *See* Part I.A.4.

Fifth, the DPIA requirement compels services to speak, by requiring them to develop and make available to the State self-indictments explaining and proposing timed plans to mitigate or eliminate the risk that a child might be exposed to "potentially" harmful content. *See* Part I.A.5.

The State cannot evade this result by claiming to regulate only "data" or "economic activity." The Act's restrictions on the use of data also regulate speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011) (applying First Amendment to "restrictions on the sale, disclosure, and use of" information to publish content). It is irrelevant that services are businesses—just as the fact that "books, newspapers, and magazines" are published "for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)); *see also 303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023) ("[T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit."). *See* Part I.A.6.

B. Properly framed as a speech regulation, the Act unquestionably fails traditional First Amendment scrutiny. *See* Part I.B.

The Act is subject to strict scrutiny because it regulates swaths of noncommercial speech based on its content. *See* Part I.B.1.a. The law fails strict scrutiny because the State offers only "mere conjecture" that the Act is necessary to protect children. *FEC v. Cruz*, 596 U.S. 289, 305-07 (2022) (citation omitted). *See* Part I.B.1.b. But whether strict or intermediate scrutiny applies, the law cannot survive. The State's aim—to suppress protected expression based on content—alone renders it invalid. *See* Part I.B.2.a. In any event, the means used would not "directly" advance that interest, *see* Part I.B.2.b, much less are they narrowly tailored to do so. *See* Part I.B.2.c.

II. This Court may also affirm the district court's holding on grounds that it did not reach, including that the Act violates the Commerce Clause, *see* Part II.A, and is preempted by COPPA, *see* Part II.B. and Section 230, *see* Part II.C.

III. The district court correctly concluded that the entirety of the law must be enjoined as the invalid provisions are not severable. *See* Part III.

STANDARD OF REVIEW

This Court reviews a preliminary injunction for an "abuse of discretion," but whether "factual findings satisfy a First Amendment legal standard … is reviewed de novo." *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1115 (9th Cir. 2023).

ARGUMENT

The district court was correct—and certainly did not abuse its discretion—in granting a preliminary injunction. The State addresses only NetChoice's likelihood of prevailing on the merits, conceding the remaining preliminary injunction factors. The only question before this Court is whether NetChoice demonstrated "serious questions on the merits" below. *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 860 (9th Cir. 2022) (cleaned up). It did.

I. The District Court Correctly Held That AB 2273 Violates The First Amendment.

The First Amendment applies with full force to AB 2273, *see* Part I.A, and the Act cannot stand First Amendment scrutiny, *see* Part I.B.

A. AB 2273 is a direct regulation of speech masquerading as a privacy law.

The State supports its argument that the First Amendment does not apply to AB 2273 only with wishful thinking. The First Amendment protects "the creation and dissemination of information" through "publishing." *Sorrell*, 564 U.S. at 570 (citing *Bartnicki*, 532 U.S. at 527). "Whether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011). Making content available online is a form of speech protected by the First Amendment. *See Reno*, 521 U.S. at 870. So are choices about how to present content digitally. *See 303 Creative*, 600 U.S. at 586-

87; *see also NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1213 (11th Cir. 2022), *cert. granted*, No. 22-277 (U.S. Sept. 29, 2023). The district court correctly held that AB 2273 restricts speech. *See* 1-ER-11–17.

1. The DPIA and content policy requirements are prior restraints.

AB 2273 is an impermissible prior restraint. Prior restraints are state-compelled schemes designed to prevent or deter speech deemed "objectionable" without first securing a judicial determination "that such publications may lawfully be banned." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963). They can take various forms, including licensing regimes, informal coercion, and taxation, and are "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 558-59 (1976) (citation omitted). A "system" of pre-publication content "classification" "create[s] a prior restraint" because "warning" that speech could be penalized if it falls into a proscribed class is intended to effect self-censorship. *Se. Promos., Ltd. v. Conrad*, 420 U.S. 546, 556 n.8 (1975).

AB 2273 unconstitutionally converts online providers into "a corps of involuntary government surrogates" charged to "suppress[] speech" "harmful" to minors. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978); *see also* 1-ER-15 (similar); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 732, 753-60 (1996) (invalidating regulations requiring cable operators to

restrict "patently offensive" programming); *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 806 (2000) (invalidating law deputizing cable operators to restrict channels "primarily dedicated to sexually[] oriented programming").

At least two aspects of AB 2273 establish prior restraints on speech:

First, the DPIA requirements create a precondition to publication. "Before" offering any feature that might affect what content is published, services must identify ways that "content" might be "harmful, or potentially harmful" to youth; propose "timed plan[s]" to "mitigate or eliminate" any "potentially harmful" effects; and make these self-indictments available to the State's chief law enforcement officer. Cal. Civ. Code § 1798.99.31(a)(1)-(4). The manifest aim of this scheme is not regulation of "conduct," but censorship of speech. *See Bantam Books*, 372 U.S. at 70-71 (system of informal oversight is a prior restraint). This system mirrors the one in *Interstate Circuit*, which would have required film exhibitors, "before any initial showing of a film," to categorize films as either "suitable" or "not suitable" for minors under 16. 390 U.S. at 678. Although a "not suitable" classification did not directly prevent showing the film, *id.* at 678-79, the scheme violated the First Amendment by pressuring content creators to "choose nothing but … innocuous" topics. *Id.* at 683-84.

So too here. But AB 2273 goes further than the laws in *Bantam Books* and *Interstate Circuit*. Providers not only must classify speech as "harmful or potentially

harmful"; they must also devise timed plans to "mitigate or eliminate" the risk of the harmful content. By authorizing the State to decide whether services sufficiently review, identify, and "mitigate or eliminate" the "risk" of "harmful" speech, the law leans on online services to err on the side of censorship. *See, e.g.*, 6-ER-1153–54; 7-ER-1208–09; 7-ER-1214–16. Suppression of speech is the entire point. Cal. Civ. Code § 1798.99.29(a)-(b) (requiring providers to tailor expression according to "the best interests" of children).

Second, AB 2273's requirements that providers enforce their private house rules, *id.* § 1798.99.31(a)(9), also seeks to restrain constitutionally protected speech before publication. Most providers have adopted "published terms, policies, and community standards" governing speech on their services. 1-ER-15. Requiring enforcement of these rules to the State's satisfaction would cause services to enforce those policies as they expect the government would prefer—thus "essentially press[ing] private companies into service as government censors," *id.* Courts have rejected such laws because they empower governments to suppress speech the governments cannot censor expressly. *See, e.g.*, *Engdahl*, 317 F. Supp. at 1136 (ordinance incorporating film ratings into city code); *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983) (similar). *Cf. Cmty.-Serv. Broad. of Mid-Am. v. FCC*, 593 F.2d 1102, 1116-17 (D.C. Cir. 1978) (en banc) (plurality op.) (program taping

requirement that provided government mechanism to second-guess editorial decisions).

2. AB 2273 burdens access to protected speech for minors and adults.

AB 2273's age verification rule also burdens access to protected speech by adults and minors alike—threatening the First Amendment right to "receive ideas," a "necessary predicate" to free expression. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982). The rule subjects online services to a Hobson's Choice: "[e]stimate" the age of minor users to a "reasonable level of certainty," or subject "all" users to child-appropriate experiences (as the State defines them). Cal. Civ. Code § 1798.99.31(a)(5). Both options burden access to speech.[1]

If a service chooses to age verify, individuals who wish to speak (or consume speech) anonymously or without providing their ages will be unable to access protected speech. *See Mukasey*, 534 F.3d at 196-97 (invalidating law that established age verification defense to liability for transmitting "harmful" speech to minors); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 236-37 (4th Cir. 2004) (identification rules

[1] The law violates both services' rights as publishers and users' rights to access speech—which, contrary to the State's (new) argument, Br. 36-37, the services have standing to protect. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 n.2 (9th Cir. 2017); *NetChoice, LLC v. Yost*, --- F. Supp. 3d. ---, 2024 WL 104336, at *5 (S.D. Ohio Jan. 9, 2024) (confirming NetChoice's standing to bring claims "on behalf of its member organizations and Ohioan minors"); *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *12 (W.D. Ark. Aug. 31, 2023) (similar).

"may deter adults" from accessing speech); *Griffin*, 2023 WL 5660155, at *17 (age-verification requirements for social media would "deter" and "chill" minors and adults' access to speech alike); *see also* 6-ER-1157; 6-ER-1163–64; 7-ER-1204–06; 7-ER-1213–14 (NetChoice declarants).

The alternative also limits access to protected speech: Services that do not verify users' ages must apply the "protections afforded to children to all consumers," Cal. Civ. Code § 1798.99.31(a)(5). "[T]he logical conclusion [is] that data and privacy protections intended to shield children from harmful content, if applied to adults, will also shield adults from that same content." 1-ER-25; *see Butler*, 352 U.S. at 383 (state cannot "reduce the adult population … to reading only what is fit for children"). Minors, who are "entitled to a significant measure of First Amendment protection," *Brown*, 564 U.S. at 794 (citation omitted), will also be deprived of their rights. "[O]nly in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to" minors. *Id.* "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 that a legislative body thinks unsuitable for them." *Id.* at 794-95 (citation omitted). California has no "power to restrict the ideas to which children may be exposed." *Id.*; *see also Yost*, 2024 WL 104336, at *8 (quoting same); *Griffin*, 2023 WL 5660155, at *17 (same).

3. The Act is unconstitutionally overbroad.

Even if AB 2273 were not expressly designed to censor protected speech, the State has not meaningfully disputed that the law in operation will regulate and burden access to tremendous amounts of it.

The First Amendment "gives significant protection from overbroad laws that chill speech." *Ashcroft*, 535 U.S. at 244. A law is "overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). As the district court noted, even if AB 2273 were in fact a privacy regulation, the law "throws out the baby with the bathwater" by restricting swaths of protected content. 1-ER-25, 32.

AB 2273 is categorically overbroad because it presupposes that the internet's "vast democratic forums" of protected expression, *Packingham*, 582 U.S. at 104, must be "design[ed]" around "the unique needs" of children. AB 2273 Findings and Declarations § 1(a)(2), (5). Even if that premise has conceivable nonspeech applications, the law will apply to a "wide array of protected First Amendment activity on topics as diverse as human thought." *Packingham*, 582 U.S. at 105. AB 2273's application to any online feature "[l]ikely" to be accessed by anyone under 18, *see* Cal. Civ. Code § 1798.99.30(a)(4), and its presumption that users are minors unless proven otherwise, *id.* § 1798.99.31(a)(5), mean that virtually all online

content—from images of war on a newspaper's website, to political commentary on an independent blog, to movie reviews—is subject to the law. *See* 6-ER-1161–63; 7-ER-1188–90; 7-ER-1201–02; 7-ER-1211–13, 1215. The government cannot "torch a large segment of the Internet" to protect children. *Reno*, 521 U.S. at 882; *see also Butler*, 352 U.S. at 383-84 (invalidating ban on material "tending to the corruption of the morals of youth" because it "burn[ed] the house to roast the pig"); *Ashcroft v. ACLU*, 542 U.S. 656, 666-70 (2004) ("universal" restrictions enacted to protect minors from obscenity overbroad); *Playboy*, 529 U.S. at 812 (cable TV regulation that applied "regardless of the presence or likely presence of children" was overbroad); *Mukasey*, 534 F.3d at 207.

AB 2273 also adopts an overbroad (and virtually boundless) conception of *what* speech must be restricted, including speech that cannot constitutionally be restricted even for minors. Requiring services to strictly enforce content moderation policies, for example, will force them to err on the side of suppressing speech. *See* 1-ER-28 (provision "goes beyond enforcement of policies related to children, or even privacy policies generally"). The Act's bar on using lawfully collected information to recommend or promote content will restrict a provider's ability to transmit protected speech based on the user's expressed interests. And the law's restrictions on content that might be "detrimental" or "harmful" to a child's "well-being," Cal. Civ. Code § 1798.99.31(a)(1), (b)(1), (3)-(4), (7), will chill expression

on any topic that happens to distress *any* child or teen—whether commentary or news about immigration, the wars in Gaza and Ukraine, or school shootings; medical debates about Ozempic; and countless other controversial, significant events. *See* 1-ER-30 (use-of-information provisions would restrict access to important "resources regarding [LGBTQ+ youth's] personal health, gender identity, and sexual orientation"); 1-ER-32 (law would "restrict neutral or beneficial content"); *see also* 2-ER-277–278 (New York Times describing how standard news content may be found "potentially harmful").

More fundamentally, the abstract "harm" the law seeks to prevent—content that might impair someone's "well-being"—is an unavoidable consequence of allowing human expression. The Act applies to social media posts by teenagers, who may say unkind things, tease a classmate for not being invited to a party, or complain harshly about events at school; the use of language acceptable to some but not others; the omission of a "trigger warning"; and any other manner of discourse. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2043 (2021) (Snapchat post "fuck cheer" made high school students "visibly upset"); *see also, e.g.*, 6-ER-1043–44. "[S]peech cannot be restricted simply because it is upsetting" or "outrageous." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *see id.* at 460 ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and … inflict great pain.").

California has been down this road before. In *Brown*, the Supreme Court rejected the State's attempt to regulate violent video games, which sought to "create a wholly new category of content-based regulation … for speech directed at children" that allegedly caused psychological harm. 564 U.S. at 794. As the Court explained, "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Id*. at 791. California went too far then, *id.* at 794, and has gone too far now. *See also IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1121 (9th Cir. 2020) (rejecting another attempt by the State to "declare" a new "categor[y] of speech" unprotected) (citation omitted).

4. AB 2273 burdens online speech through impermissibly vague and subjective terms.

AB 2273 also affects online expression by resting on impermissibly vague and subjective standards and phrases.

Vague laws "trap the innocent by not providing fair warning" of proscribed conduct and invite "arbitrary and discriminatory application" by placing compliance at the whim of "ad hoc and subjective" regulators. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Laws regulating expression face an even "more stringent" test, *Holder v. Humanitarian Law Project*,

561 U.S. 1, 19 (2010) (citation omitted), because uncertainty leads citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (cleaned up).

The Act's substantive standards are vague. The phrases "material detriment," "potentially harmful," "best interests," and "physical health, mental health, and well-being" are open-ended and subjective—particularly as applied to any single minor, as the law appears to require. Cal. Civ. Code § 1798.99.31 (applying standards to "a child"). A child whose relative died of COVID-19 may find news about the pandemic profoundly upsetting. So, too, might a refugee who immigrated to California and sees a video of the Mexico-U.S. border, or a teen who is trying to eat healthfully and sees a recommended article about junk food. AB 2273 provides no notice whether such instances generate actionable "harm" or "material detriment," and thus will substantially chill speech. 6-ER-1153–54; 6-ER-1165–66; 7-ER-1188–90; 7-ER-1206–09; 7-ER-1215 (NetChoice declarants). *Cf. Mukasey*, 534 F.3d at 205 (holding COPA unconstitutionally vague partly because "a Web publisher will be forced to guess" what might be "harmful to minors") (citation omitted).

These vagueness problems are compounded because the meaning of terms like "best interests," "harmful" and "well-being" will vary based on users' specific ages. Content might be considered harmful as to an 8-year-old but not as to a 17-

year-old. Yet AB 2273 requires providers to abandon nuance and effectively impose a one-size-fits-all regime. *See Mukasey*, 534 F.3d at 205 (holding COPA impermissibly vague in part because "materials that could have 'serious literary, artistic, political, or scientific value' for a 16-year-old would not necessarily have the same value for a three-year-old"). And to the extent the State argues that the "best practices" produced by the California Children's Data Protection Working Group may ameliorate this vagueness, that guidance—initially mandated by the Act to be released by January 1, 2024—has been delayed to July 1, 2024, the same day the law takes effect. *See* Stat. 2023 Ch. 45 (AB 127), § 1 (amending Cal. Civ. Code § 1798.99.32); *compare* 3-ER-372 (State below pointing to availability of "best practices for [age verification] … six months before businesses are required to comply"); Denham and Wood Am. Br. 11-12 (referencing Working Group guidance's publication sufficiently in advance to "permit[] businesses the same opportunity [as in the UK] to consult with regulators" before the law takes effect).

Similar uncertainties extend to AB 2273's requirement that providers estimate the age of users to a "reasonable level of certainty appropriate to the risks that arise from the data management practices of the business." Cal. Civ. Code § 1798.99.31(a)(5). What does "data management practices" even mean in this content-focused context and what "risks" arising from such practices could possibly require the provider to be reasonably certain of a particular user's age? Does "data

management" include the use of data to distribute content to users (as appears to be the intent)? And what is a "reasonable" level of certainty "appropriate" to those risks? Providers cannot know. *E.g.*, 6-ER-1163.

The law's restrictions on "dark patterns" are also untenably vague. Providers cannot discern when the State will deem an interface to have had the "substantial effect of subverting or impairing [a minor's] autonomy, decision-making, or choice" so as to qualify as a "dark pattern," Cal. Civ. Code § 1798.140*(l*), or when the State will deem such an interface to have led minors to provide information beyond what is "reasonably expected" or to take action "materially detrimental" to the minor's "physical health, mental health, or well-being." *Id.* § 1798.99.31(b)(7). The State's own declarants offer subjective interpretations of "dark patterns" that are broader than even the statutory definition. *Compare id.* § 1798.140(*l*) *with* 3-ER-410–11 (Dr. Egelman); 4-ER-696–97, 711 (Dr. Radesky) (features that "nudge" a user to make a "decision" in the service's best interest).

AB 2273's "likely to be accessed by [minors]" standard is impermissibly vague as well because it fails to identify which services and features are subject to the law in the first place. A service falls under the law, for example, if "routinely" accessed by a "significant" number of minors, Cal. Civ. Code § 1798.99.30(b)(4). The law fails to define how many minors is "significant" and whether that number should be assessed in absolute terms or relative to the provider's user base. Nor is it

clear how frequent access must be—and over what period—to be "routine[]." *Id.* The other "indicators" that define the law's scope are similarly vague, subjective, and undefined. *See id.* § 1798.99.30(b)(4)(A), (C)-(F).

The First Amendment does not permit laws that are this "susceptible to many different interpretations" and "raise[] questions with no clear answers." *United States v. Hall*, 912 F.3d 1224, 1227 (9th Cir. 2019); *Interstate Circuit*, 390 U.S. at 686, 688 (determining what content was "unsuitable" was unconstitutionally vague). Particularly given the "absence of definitions" for "key phrases" in AB 2273, the State will be able to exercise its "discretion, subjectively," about any number of issues, inviting "arbitrary or discriminatory enforcement." *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999) (child protection speech regulation void for vagueness on this basis), *aff'd sub nom. Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). The Act's "absence of narrowly drawn, reasonable and definite standards … is fatal." *Interstate Circuit*, 390 U.S. at 690 (citation omitted).

5. AB 2273 compels speech.

The Act also requires First Amendment scrutiny because, in addition to censoring and burdening access to protected speech, it impermissibly compels speech. "[T]he government may not compel a person to speak" when "he would prefer to remain silent," nor may it "force" a speaker "to include other ideas with his own speech that he would prefer not to include." *303 Creative*, 600 U.S. at 586;

Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 797 (1988) ("'freedom of speech,' … necessarily compris[es] the decision of both what to say and what *not* to say"); *Att'y Gen.*, 34 F.4th at 1223 (disclosure provisions "indirectly burden" editorial judgment by "compelling" speech). By "requir[ing] a business to express its ideas and analysis about likely harm," 1-ER-14, the DPIA requirements "force" them to speak when they "otherwise would have refrained." *Wash. Post v. McManus*, 944 F.3d 506, 514 (4th Cir. 2019). That is *per se* unconstitutional. *303 Creative*, 600 U.S. at 589; *see also Book People, Inc. v. Wong*, --- F.4th ---, 2024 WL 175946, at *13 (5th Cir. Jan. 17, 2024) (law requiring schoolbook vendors to issue sexual-content ratings and flag sexually "explicit" or "relevant" materials is *per se* unconstitutional); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-54 (7th Cir. 2006) (invalidating labeling and sign requirements for sale of video games).

It also is irrelevant that the DPIAs are, in the State's view, "confidential." Br. 34. The question is whether the law impugns the "right to speak freely" and "to refrain from speaking at all," not whether it does so under cover of darkness. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Regardless, neither the State nor the Act guarantees that DPIAs, once created, will not be leaked, publicized, used in an enforcement action, or produced to other regulators.

The State's claim that any speech burdens arising from DPIAs are merely "incidental" to economic regulation, Br. 33, is mistaken. Just last year, the Supreme

Court distinguished the State's primary authority, *Rumsfeld v. Forum for Academic. & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), Br. 33, finding that requiring regulated entities to speak on matters of importance is not "incidental" to but a direct regulation of speech. *303 Creative*, 600 U.S. at 596; *see also Book People*, 2024 WL 175946, at *13 (invalidating law requiring plaintiffs to "speak as the State demands"); *Blagojevich*, 469 F.3d at 651-54; *Riley*, 487 U.S. at 795-96 (compelled speech requirement for professional fundraisers cannot be regulated even under relaxed standards for commercial speech).

Nor may the State recharacterize DPIAs as "reporting requirement[s]." Br. 34. DPIAs do not compel the reporting of purely factual or uncontroversial information; they require providers to opine on how their content and publication practices might "potentially harm[]" minors, a subject that is "undeniably controversial" and prone to "robust disagreement." *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1278 (9th Cir. 2023) (invalidating reporting requirements where compelled speech was "controversial" and "subjective" from the "standpoint of the speakers"); *see Blagojevich*, 469 F.3d at 651-54; *IMDb.com*, 962 F.3d at 1120.

6. The State cannot avoid First Amendment scrutiny by claiming AB 2273 regulates only "conduct" or "data."

The State cannot escape AB 2273's obvious regulation of speech by claiming the statute regulates only "conduct," "economic activity," or "data." Br. 28; *see* Br. 21-32; Design Scholars Am. Br. 14-21. "Speech is not conduct just because the

government says it is." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). The "conduct" and "economic activity" the Act targets is the publication of "harmful" or "potentially harmful" content not in "the best interests" of children—*i.e.*, speech. And regulation of that so-called conduct—including design choices integral to publication, *303 Creative*, 600 U.S. at 587-88—requires "First Amendment scrutiny." *Reno*, 521 U.S. at 870; *see also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (First Amendment protects "the process of expression through a medium"). The State cannot seriously dispute the intended effect of AB 2273 is to censor content: Censorship was its primary aim and will indisputably be its effect.

Nor may the State escape the First Amendment by "characterizing" a website "as a business," *Near v. Minnesota*, 283 U.S. 697, 720 (1931), and a website's publishing operations as "economic activity," Br. 1. When the government tells a publisher it cannot use lawfully obtained information to create and publish content, the government regulates speech. *See Sorrell*, 564 U.S. at 563-64; *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102-03 (1979); *Bartnicki*, 532 U.S. at 535. So, too, when the government tells a publisher that it may not use information to publish content to a particular audience. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1228, 1232 (10th Cir. 1999) ("restricting the use … of … customer proprietary information" to "target" content violated First

Amendment). Just like the laws in *Sorrell* and *U.S. West*, the Act constrains the use of information to publish speech, including the types of speech and intended audience.

The State claims the proper "threshold determination" is whether a regulation of "conduct" *indirectly* restricts activity with "a significant expressive element." Br. 21-31. But this misses a critical step: Courts first ask whether a law restricts speech *directly*, in which case they go no further. Courts address whether the object of regulation contains an expressive element only if, as in the State's cases, Br. 22-30, the regulation restricts *non-expressive* activity—like the "classification" of an "employment relationship," *Am. Soc'y of Journalists & Authors, Inc. v. Bonta* (*ASJA*), 15 F.4th 954, 961 (9th Cir. 2021), short-term rental transactions, *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 684 (9th Cir. 2019), or the "payment of wages," *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895-96 (9th Cir. 2018) (assessing indirect effects of law "regulating conduct that merely alters incentives" rather than "the ingredients necessary for speech"). Where—as here—a law "restrict[s] when, where, or how someone can speak," that law directly regulates "speech," not "conduct" or "economic activity." *ASJA*, 15 F.4th at 961. The Supreme Court made this clear in *Bartnicki*, where it explained that "acts of

'disclosing' and 'publishing' information" "constitute speech" itself, "distinct" from the "category of expressive conduct." 532 U.S. at 527 (citation omitted).[2]

To the extent the State suggests *Sorrell* holds that a law is subject to First Amendment scrutiny only if it discriminates based on viewpoint, Br. 19-21, it is wrong. *Sorrell* held that "restrictions on the sale, disclosure, and use of" data to publish targeted content regulates speech. 564 U.S. at 563-64, 570. Whether the statute at issue in *Sorrell* discriminated based on viewpoint was relevant only to the applicable level of scrutiny, not if the law regulated speech or conduct in the first instance. *Id.* at 563; *see* Part I.B, *infra*.

B. The Act fails First Amendment scrutiny.

The Act violates First Amendment doctrines prohibiting prior restraints, overbreadth, compelled speech, and vagueness. *See* Parts I.A.1, 3, 4, *supra*. It also fails scrutiny under any level of First Amendment review.

1. The Act is subject to, and fails, strict scrutiny.

The district court "assumed" without deciding that AB 2273 regulates commercial speech and applied only intermediate scrutiny. Although the court (correctly) found that the Act cannot satisfy even intermediate scrutiny, 1-ER-18–19; *see* Part I.B.2, *infra*, this Court should apply strict scrutiny here. "Reviewing

[2] Even accepting the State's distortion of the test, its argument fails because AB 2273 restricts, burdens, and compels speech, *see* Part I.A, and therefore regulates activity with a "significant expressive element." Br. 23.

speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area*, 518 U.S. at 774 (Souter, J., concurring). This is such a moment. The State still claims that the First Amendment has *no* application to the Act, and fewer than 10 days ago announced two new, similar bills that likewise regulate and impose content- and speaker-based burdens on speech.[3]

a. The Act is a content-based restriction of noncommercial speech subject to strict scrutiny.

i. Non-commercial speech

AB 2273 regulates far more than "speech that does no more than propose a commercial transaction," *Harris v. Quinn*, 573 U.S. 616, 648 (2014) (citation omitted); *accord IMDb.com*, 962 F.3d at 1122 (same). It reaches *any* "content," "contacts," or features published by online providers that might be deemed "harmful" or "potentially harmful" to users under 18; "materially detrimental" to their "well-being"; not age "appropriate"; not in their "best interests"; or that violate the service's content standards. Cal. Civ. Code § 1798.99.31(a)(1),(5),(6),(9), (b)(1)-(4),(7).

[3] *See* Press Release, Attorney General Bonta, Assemblymember Wicks, Senator Skinner Introduce Legislation to Protect Youth Online (Jan. 29, 2024), https://oag.ca.gov/news/press-releases/attorney-general-bonta-assemblymember-wicks-senator-skinner-introduce.

The State suggests AB 2273 regulates only commercial speech because services may earn "revenue" from content. Br. 4, 40. But a "speaker's 'economic motivation' is 'insufficient by itself' to render speech commercial." *IMDb.com*, 962 F.3d at 1122 (quoting *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 67 (1983)); *see also Volokh v. James*, 656 F. Supp. 3d 431, 442-443 (S.D.N.Y. 2023) (content moderation is not commercial speech). If "a profit motive were determinative," every act "conducted with a view toward increased sales"—including content "selection"—could be regulated. *Dex Media*, 696 F.3d at 960 (citation omitted).

Finally, any commercial speech the Act happens to regulate is "inextricably intertwined" with the overwhelming amounts of non-commercial speech the Act also reaches, so this Court must "treat the entirety of the intertwined speech" as non-commercial. *Dex Media*, 696 F.3d at 962; *id.* at 964 (where newspaper advertisements "financed publication," commercial speech was "inextricably intertwined" with non-commercial speech, rendering entire paper non-commercial) (citation omitted). In finding it "difficult to determine" whether the Act regulates only commercial speech, 1-ER-18, the district court pointed only to provisions prohibiting the sale of personal information. *Id*. But NetChoice did not challenge those provisions, and, in any event, it would be "artificial and impractical" to "parcel [them] out" from provisions restricting fully protected speech. *Riley*, 487 U.S. at 796.

ii. Content-based regulation.

Strict scrutiny applies because the Act regulates based on content. "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." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *see also id.* at 163-64, 168-69 (content-based laws target "message," "subject matter," or "function or purpose" of speech, or "discriminate among viewpoints"). Facially neutral laws "that cannot be justified without reference to the content of the regulated speech" are also content-based. *Id.* at 164 (citation omitted). *E.g.*, *Cmty.-Serv. Broad. of Mid-Am.*, 593 F.2d at 1111-12 (requiring broadcasters to record programs on issues of public importance "is not content neutral"). So, too, is the injection of the state into decisions about "what" content "should be published" or the "placement" of that content. *Bursey v. United States,* 466 F.2d 1059, 1087-88 (9th Cir. 1972); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects "the exercise of editorial control and judgment"). And laws "designed to protect minors from viewing harmful materials" are content-based precisely because they restrict speech based on its propriety. *Ashcroft*, 542 U.S. at 670; *Brown*, 564 U.S. at 794, 799 (restriction on violent video games to protect minors from psychological harm was content-based).

The State claims the Act does not "regulate what businesses say." Br. 1. But the Act's requirements that providers decide whether content is "likely to be accessed" by minors, prioritize content that promotes minors' "well-being," and take actions to protect minors from "harmful" content all are content-based. The State has conceded as much, admitting the "likely to be accessed" standard entails analyzing whether "you have features that are supposed to appeal to children." 2-ER-121; *see Boos v. Barry,* 485 U.S. 312, 320-21 (1988) (laws designed to "prevent … psychological damage" from effects of speech are content-based); *Playboy*, 529 U.S. at 813, 815 (similar).

The Act also carves out entire categories of speakers, including government and non-profit entities, based on an apparent preference for their speech. *See* Cal. Civ. Code §§ 1798.99.30(a), 1798.140(d). The *Sorrell* Court relied in part on "speaker-based" exemptions to apply heightened scrutiny. 564 U.S. at 563-64. *See also Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (content-based exemptions to telemarketing law violate the First Amendment).

The Act's individual provisions, too, are content-based. The DPIA provisions require services to assess "risks" that editorial decisions "could" expose minors to "potentially harmful" "content" and create a "timed plan" to "mitigate or eliminate" those risks. *See* Cal. Civ. Code § 1798.99.31(a)(1). The age-verification provisions impose a sliding scale of age certainty based on the degree to which content is

"risk[y]." *See id.* § 1798.99.31(a)(5), (b)(8). The State conceded in the district court that it would be "hard to say" that evaluating whether services have "enforce[d] their policies" regarding content is "not content-based." 2-ER-148. And the content restrictions, Cal. Civ. Code § 1798.99.31(b)(1)-(4), (7), require content-based assessments about speech, such as whether content is "materially detrimental" to the "health" or "well-being of a child," *id.* § 1798.99.31(b)(1), (7), or "in the best interests of children," *id.* § 1798.99.31 (b)(3), (4).

b. The Act fails strict scrutiny.

"It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown*, 564 U.S. at 799 (citation omitted). The State bears the burden to show AB 2273 is necessary to serve a compelling state interest and provides "the least restrictive means" of achieving it. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813. The State cannot possibly meet this standard.

The State has failed to show that the Act serves its interest at all, much less in a narrowly tailored way. With respect to its interest, the State provides only "mere conjecture" to show the Act is necessary to protect children. *Cruz*, 596 U.S. at 307 (citation omitted); *see* Part I.B.2.b, *infra* (discussing Dr. Radesky testimony). Nor is the Act the least restrictive means to achieve this purpose, given existing privacy

laws. *See* Part I.B.2.c.i, *infra.* The State's failure to even consider the application or extension of these less-restrictive regulations is dispositive. *See, e.g.*, *Playboy*, 529 U.S. at 816 (allowing parent to "request" to block certain content was "less restrictive alternative" to protect children from harmful speech); *Ashcroft*, 542 U.S. at 669 ("parental cooperation" was "less restrictive alternative" to do same).

2. The Act fails intermediate scrutiny.

Even assuming intermediate scrutiny applies, the district court properly found that the Act fails such scrutiny.

A restriction survives intermediate scrutiny only if *the State* proves, *first*, that the asserted government interest in regulating speech is "substantial" and "unrelated to the suppression of free expression"; *second*, that the regulation will "in fact" serve that interest in "a direct and material way" that is "not merely conjectural"; and *third*, that it will do so in a manner that is narrowly tailored to suppress no more speech "than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662-64 (1994) (citation omitted); Br. 40.

The State makes little effort to satisfy this burden, instead claiming courts "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." Br. 41 (quoting *Bd. of Trustee of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). But as the Supreme Court recently explained, "a restriction of speech must serve 'a substantial interest,' and it must be 'narrowly drawn,'"

meaning "'the regulatory technique may extend only as far as the interest it serves.'" *Matal v. Tam*, 582 U.S. 218, 245 (2017) (citation omitted). Applying this standard, the Ninth Circuit has held invalid several laws in just the last year. *See, e.g.*, *Junior Sports*, 80 F.4th at 1116-20 (state made "no showing" that "broadly prohibiting certain truthful firearm-related advertising is sufficiently tailored to significantly advance the state's goals of preventing gun violence and unlawful firearm possession among minors"); *Wheat Growers*, 85 F.4th at 1283 (law requiring herbicide warning); *Yim v. City of Seattle*, 63 F.4th 783, 793 (9th Cir. 2023) (ordinance barring landlord inquiries regarding tenant criminal history). The Act fails this test.

a. The State's interest is directly related to the suppression of expression.

The State's asserted interest is directly related to the suppression of expression, and thus the law fails intermediate scrutiny for this reason alone.

Since the inception of AB 2273, the State has asserted one overarching interest: the prevention of "harms to children." Br. 2. But that interest is stated at far too high a level of generality—as the Act does not even attempt to prevent most such harms. The State concedes that the *specific* purpose of this law is to protect children from harmful online content by certain online providers. *See* Br. 41 ("California's interest in protecting children from such harms as … being targeted for manipulative advertising, or being pushed knowingly harmful and unwanted material, such as

videos promoting self-harm, are indeed substantial."); *id.* at 7; *see also, e.g.*, 4-ER-694 (Dr. Radesky admitting law's target is minors' "exposure to harmful content," including "violent mobile games with horror characters," 4-ER-688; "ads with age-inappropriate content," *id.*; "inappropriate video or advertising," 4-ER-689; and "detrimental online content," 4-ER-699).[4] This interest is directly related to the "suppression of free expression," *Turner*, 512 U.S. at 662 (citation omitted), rendering the law invalid.

b. The State fails to show that AB 2273 will advance its interests in a "direct and material" way.

Even assuming the State had identified a legitimate interest, it has not shown the law materially advances that interest. The State accuses the district court of "fail[ing] to recognize the linkages between the Act's specific provisions and the reduction of the specific harms to children that California—like other States—is seeking to address." Br. 2. But it is the State's burden to establish such "linkage," *Turner*, 512 U.S. at 664, and it has not and cannot.

[4] So, too, do the State's amici, who praise the law for protecting minors from purportedly harmful "content[] they see" online, Fairplay Am. Br. 29, including "fictional characters" and "celebrities"; "idealized photos and videos" that cause "a negative self-image"; "video content" that can be "difficult to disengage from"; content promoting "unhealthy" choices; "viral" content promoting "dangerous and sometimes fatal behavior"; and newsfeeds that may carry "[h]ate speech" and "increase the visibility of bullying," Am. Acad. Ped. Am. Br. 7, 12-14, 16-18, 20; *see also* Tchrs. Am. Br. 27; States' Am. Br. 2-3; Lawyers' Comm. for Civ. Rts. Am. Br. 28; EPIC Am. Br. 8, 10-11; Cntr. for Hum. Tech. Am. Br. 14, 28.

The State relies heavily on the made-for-litigation views of Dr. Radesky. Dr. Radesky, however, relies on "a web of speculation—not facts or evidence," *Junior Sports*, 80 F.4th at 1119, and her analysis does not "bolster th[e] theory," *id*. at 1117, that online speech and features cause minors to suffer harm. Her opinions are hotly disputed and—at best—show minors' online use might correlate with certain behaviors or self-reported mental states, 4-ER-695.[5]

Indeed, the studies Dr. Radesky cites recognize the lack of reliable evidence for her arguments. *See* 4-ER-695 (Janssen et al.) (acknowledging "low" and "inconclusive" quality of evidence, "downgraded" study quality, and "variation in results," such that "cause and effect could not be established"); *id.* (Carter et al.) (recognizing research "limitations" including "difficulty in ascertaining causality"); *id.* (Wang et al.) (studies "limited" by "methodological weaknesses" that "do[] not allow causal inferences"). In any event, they were rebutted by studies NetChoice cites recognizing that online speech can *benefit* minors. *See* 2-ER-236 ("Using social

[5] Dr. Radesky, for example, speculates that "children seeking peer validation may take part in extreme content generation," 4-ER-698–99, but offers no evidence that purportedly harmful online content causes such effects, nor that other media do not. Similarly, she claims children are shown "violent-themed video games" featuring "injured" cartoon characters, 4-ER-702, without explaining how this harms them. *But see* every Wile E. Coyote cartoon; *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) ("To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming[.]").

media is not inherently beneficial or harmful to young people."); 2-ER-251 (surveying literature concerning benefits of internet to minors, e.g., "facilitat[ing] social connection, identity development, and positive emotions"). "[T]he fact that science is evolving is all the more reason to provide robust First Amendment protections." *Wheat Growers*, 85 F.4th at 1283 (affirming injunction of speech regulation using intermediate scrutiny).

In sum, the State's evidence is woefully insufficient to show that the law advances the State's asserted interest.

c. AB 2273 is not narrowly tailored.

Even assuming the State has identified a legitimate interest that AB 2273 would directly advance, the law is not narrowly tailored. AB 2273 suppresses far more speech than is necessary, and there are less restrictive means to accomplish the State's goals—and thus there is an insufficient "fit between the legislature's ends and the means chosen to accomplish those ends," 1-ER-20–21 (citation omitted).

i. More-tailored privacy laws

The law fails narrow tailoring because it was enacted despite "other laws … that would allow [the State] to achieve its stated interest while burdening little or no speech." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949-950 (9th Cir. 2011). The privacy of Californians—including minors—is already robustly protected by constitutional and common-law doctrines, *see, e.g.*,

McCoy, 2021 WL 405816, at *7-8, as well as a comprehensive statutory regime that prohibits the sale or sharing of data about consumers known to be younger than 16 absent authorization. *See* Part A.2, *supra*. The State does not explain why these "feasible" and "readily available alternatives" are ineffective. *Comite de Jornaleros*, 657 F.3d at 950 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)). Though the State vaguely claims that existing law is "underinclusive," Br. 8, its experts say only that COPPA is insufficiently enforced. 4-ER-687–90; 3-ER-406–07.

ii. Scope of the law (§ .30(b)(4)).

The law also fails narrow tailoring because its primary scoping provision—to services "likely to be accessed" by a minor, Cal. Civ. Code § 1798.99.30(b)(4)—is wildly "overinclusive." *Comite de Jornaleros*, 657 F.3d at 948. This provision renders the law unconfined to social media or minors, much less to features that cause the asserted potential harms. *See, e.g.*, *Reno*, 521 U.S. at 882. The State does not even try to explain why this standard—the law's linchpin—is narrowly tailored. Nor could it. By the State's own admission, this provision sweeps in nearly the entire internet. 2-ER-76–78, 94–95. The Legislature "used an axe to solve its professed concerns when it should have used a constitutional scalpel." *Alario v. Knudsen*, --- F. Supp. 3d ---, 2023 WL 8270811, at *10 (D. Mont. Nov. 30, 2023); *see Reno*, 521 U.S. at 882.

The State claims "the Act includes multiple safeguards to ensure that the fit between [its] means and the goals served is adequate," Br. 41, but its examples fall flat. It is of no help that the Act is limited to services "with a profit motive that will make them susceptible to abusing children's information and a size that would make such abuses potentially widespread," *id.* at 41-42. The Act would affect almost all online services, from blogs to newspapers to review websites, many of which the State has not even attempted to show cause the harms it seeks to address.

iii. DPIA requirements (§ .31(a)(1)-(4)).

Even assuming, like the district court, that DPIAs aim to encourage services to reconsider their design choices up front—instead of taking a "reactive" approach to "risk management," 1-ER-21; *see* 2-ER-64—the State does not show how the DPIA requirement "in fact" serves that interest, much less is tailored to doing so. 1-ER-22; *Turner*, 512 U.S. at 662. To the contrary, the State apparently concedes that the requirement will be ineffective to achieve this goal—agreeing in the district court that, despite the statutory text, mitigation need not happen soon (or perhaps ever). 2-ER-97; 1-ER-22 ("no actual requirement" to adhere to mitigation plan).

iv. Age verification (§ .31(a)(5)).

The district court correctly held the State failed to show that the age-verification requirement is narrowly tailored to advance its asserted interest in children's privacy. 1-ER-23–24.

The State claims the district court "erroneously required the State to prove" this provision "completely eradicate[s] any potential harm," Br. 43. Not so. The district court found that this provision would actually *exacerbate* the asserted harm by requiring invasive data collection. 1-ER-23–24; *see also* 7-ER-1220–21 (NetChoice declarant concluding data breaches "not a risk but an inevitability," therefore "exposing the personal information of children to bad actors"). The State also claims the district court wrongly relied "on its own assessment that other methods might better advance the State's interest." Br. 44. In fact, the district court based its decision on the unrebutted evidence (including from the State's own expert). 1-ER-23–24 (citing 4-ER-709–10 (admitting provision may require facial and biometric scanning)); *see also Griffin*, 2023 WL 5660155, at *17 (age verification's likely requirement of "upload[ing] official government documents and submit[ting] to biometric scans" would deter users and chill speech).

The age verification requirement also effectively requires that all the law's mandates and prohibitions apply universally (unless a user has proven they are over 18), *see* 5-ER-818–24, and will cause services to censor their speech. 6-ER-1157; 6-ER-1163–64; 7-ER-1191; 7-ER-1204–06; 7-ER-1213–14 (NetChoice declarants); *see also* 2-ER-281–82 (law could force *New York Times* to limit minors' access to website). This is necessarily "more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information" and "burden[s]

adult access" to online services. *Griffin*, 2023 WL 5660155, at *20-21 (Arkansas law requiring age-verification and parental consent for minors' social media accounts "impedes access to content writ large").

Further, the evidence before the district court showed age verification is neither "viable" nor "practical." Br. 38. As NetChoice's declarants stated, they are not aware of any existing means "to verify or even estimate … users' ages with any degree of accuracy," let alone without intruding on privacy and compromising user anonymity. 7-ER-1204–05; *see* 7-ER-1214; 7-ER-1191; 6-ER-1157. The evidence cited by the State's experts reinforces this conclusion. *See* 3-ER-411 (State expert citing French data protection agency guide, reproduced at 6-ER-1034, which states "There is currently no [online age verification] solution that satisfactorily meets the[] three requirements [of reliability, accuracy, and data privacy]."). And it is not just "grossly outdated cases" that find age verification infeasible, Br. 38; courts in the *past year* have found age verification requires "state-approved documentation" and/or "biometric [] testing," which "imposes significant burdens on [] access to constitutionally protected speech." *Griffin*, 2023 WL 5660155, at *17; *Free Speech Coal., Inc. v. Colmenero*, 2023 WL 5655712, at *15-16 (W.D. Tex. Aug. 31, 2023) (available age verification services "amplif[y]" privacy concerns and "exacerbate[]" "First Amendment injury," including chilling effect).

v. Age-appropriate content (§ .31(a)(6)).

The district court correctly found that this provision is not tailored because it is not limited to "privacy settings on accounts created by children," but applies to "any child visitor of an online website." 1-ER-26. Far from "speculation," Br. 47-48, these uncertainties are likely to cause services to restrict access to children altogether, "chill[ing] a 'substantially excessive' amount of protected speech." 1-ER-26.

vi. Age-appropriate policy language (§.31(a)(7)).

The State identifies the district court's analysis of this provision as "the most egregious" error, claiming the court found "there was no evidence that children would not understand policies written at the college level." Br. 42. That is manifestly false. The district court, having studied the State's declarations—which contain only circular and conclusory statements, 1-ER-27 (citing 3-ER-411); *see* 4-ER-709; 3-ER-441–42—concluded the State failed to show this provision "would materially alleviate a harm to minors caused by current privacy policy language, let alone by the terms of service and community standards" the Act also includes. 1-ER-27. To the extent the State relies on "common sense," that too is insufficient. *See Ent. Software Ass'n. v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008); *Junior Sports*, 80 F.4th at 1118 ("common sense" relevant only where the "connection between the

law restricting speech and the government goal is so direct and obvious that offering evidence would seem almost gratuitous.").

vii. Content policy enforcement (§.31(a)(9)).

The district court correctly held the State did not establish narrow tailoring for this provision because the State did not provide "anything remotely nearing a causal link" between a business's consistent enforcement of its own house rules and "some harm to children's well-being." 1-ER-28. Even if the State had, this provision is not narrowly tailored because it goes far beyond "enforcement of policies related to children, or even privacy policies generally." *Id.* If a service had a policy of posting information the State finds harmful, *enforcing* that policy would not, in the State's own view, promote children's wellbeing. Indeed, the "lack of any attempt at tailoring … suggests that the State here seeks to force covered businesses to exercise their editorial judgment in permitting or prohibiting content that may, for instance, violate a company's published community standards." *Id*.

The State ignores these points, instead claiming the district court wrongly concluded that this requirement is "not restricted to children." Br. 47. But the district court was right: the Act applies to services "*likely* to be accessed by children," which is far broader, including even—as the State represented below—services such as *The New York Times*. 2-ER-76–78, 94–95.

viii. Content restrictions (§ .31(b)(1)-(4), (7)).

The district court correctly concluded that the State fails to show each of these provisions is adequately tailored. 1-ER-29–35.

The State does not even attempt to explain what kinds of "harm" and "material detriment" it seeks to avoid, or the "best interests" it seeks to promote, much less how these rules protect children from such harms. Nor does it distinguish the district court's reference to *Mukasey*, which precluded the "sliding scale of potential harms to children as they age" the State advocates here; or rebut NetChoice's evidence that "covered businesses might well bar all children from accessing their online services" rather than risk hefty penalties. 1-ER-29–30. Without any definition of an actual, non-speech harm the State seeks to avoid—or confining "harm" to a proscribable category of speech—these provisions impermissibly restrict protected speech.

These provisions are also underinclusive when judged against the asserted justification to protect children's well-being. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 (9th Cir. 2009) (underinclusiveness undercuts "direct advancement" inquiry). They leave unregulated a wide range of potential harms that occur offline or on exempt services—such as TV, video games, print media, junk food, late bedtimes, and not-for-profit websites. *Compare* Br. 7 & 4-ER-699 (Dr. Radesky critiquing "online content [that promotes] unsafe eating disorder[s]")

with, e.g., https://electricliterature.com/the-book-that-fueled-my-eating-disorder (discussing "book" "that fueled [author's] eating disorder."

The State's only rebuttal is that the district court wrongly invalidated *one* of these provisions, (b)(2), because enforcement "may" hinder children's access to online resources. Br. 44. But that misses the point. As the district court found, NetChoice's evidence indicates the provision "would likely prevent the dissemination of a broad array of content beyond that which is targeted by the statute," and therefore easily defeats the State's showing on tailoring. 1-ER-31.

* * * * *

AB 2273 is unconstitutional under the First Amendment. The district court certainly did not err in preliminarily enjoining it.

II. The Court May Affirm On The Alternative Grounds Raised Below.

Because this Court may affirm the preliminary injunction "on any ground supported by the record," *Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011), this Court may also uphold it based on NetChoice's claims—which the district court did not reach, 1-ER-38–42—under the Commerce Clause, COPPA, and Section 230.

A. AB 2273 violates the Commerce Clause.

AB 2273 violates the "dormant" Commerce Clause, which limits the power of states to "directly control[]" or "unduly burden interstate commerce." *Sam*

Francis Found. v. Christies, Inc., 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (citations omitted). "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority … regardless of whether the statute's extraterritorial reach was intended" or "whether or not the commerce has effects within the State." *Id.* (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). Even state laws that regulate only intrastate activities are impermissible when they "multipl[y] the likelihood" for "inconsistent obligations" across states, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986), and the resultant burden "is clearly excessive in relation to [its] putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

AB 2273 unduly burdens interstate commerce because it regulates the internet, a subject that is in "[its] nature national, or admit[s] only of one uniform system, or plan of regulation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987) (citation omitted). Insulating whole populations from parts of the internet necessarily impedes the flow of information across state lines. *See ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (internet "requires national regulation"). And the State has never offered any evidence that the Act achieves "substantial local benefits," much less benefits that outweigh the law's interstate

burdens. *See Alario*, 2023 WL 8270811, at *17 (invalidating TikTok ban under Commerce Clause).

The district court worried that "it would be imprudent to engage in an analysis of NetChoice's dormant Commerce Clause claim" given the Supreme Court's decision in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). 1-ER-40. But *Ross* preserved the rule that "state regulations on instrumentalities" of commerce are impermissible "when a lack of national uniformity would impede the flow" of commerce. 589 U.S. at 379 n.2. And the Sixth Circuit has held that *Pike* remains valid. *Truesdell v. Friedlander*, 80 F.4th 762, 773 (6th Cir. 2023).

In *Pork Producers*, the Supreme Court also separately reaffirmed that a regulation would violate the Constitution's "horizontal separation of powers" and the sovereignty of states if its practical effect reached activities "wholly outside" the State's borders. 598 U.S. at 376 n.1 (citing *Edgar v. MITE Corp.,* 457 U.S. 624, 641-43 (1982)). That is precisely what AB 2273 does. It restricts operations of any online service that does business in California, including operations outside the State. *See* 2-ER-161 (district court noting that the Act "may cause these providers to change their practices nationwide"). The law's limitation to "residents of California" underscores the problem: Before a provider offers any service to anyone, it must discern the age and residence of each user, and if a user is under 18 and a California resident—even if then located in New York—tailor its services accordingly.

Compare Cal. Civ. Code § 1798.145(a)(7) (CCPA exempts activity "wholly outside California"); *see also Christies*, 784 F.3d at 1323 (holding invalid law regulating conduct having "no necessary connection with the state other than the residency").

B. COPPA preempts AB 2273.

AB 2273 is also invalid because it conflicts with, and therefore is preempted by, COPPA. *See New Mexico ex rel. Balderas v. Tiny Lab Prods.,* 457 F. Supp. 3d 1103, 1120-21 (D.N.M. 2020); *H.K. through Farwell v. Google LLC,* 595 F. Supp. 3d 702, 711 (C.D. Ill. 2022). Though the district court noted in dicta that it was "not clear" if AB 2273 was "inconsistent with" or merely "supplemented" COPPA, 1-ER-40–41, a comparison of the requirements in AB 2273 and COPPA proves the former.

State laws are "inconsistent with," and therefore preempted by, COPPA if they impose "contradictory … requirements" or "stand as obstacles to federal objectives." *Jones v. Google LLC*, 73 F.4th 636, 642 (9th Cir. 2023). COPPA applies to services "directed to children," 15 U.S.C. § 6502(a)(1), whereas AB 2273 applies to those services children "are likely to access." Cal. Civ. Code § 1798.99.29. COPPA empowers parents to decide what their children can access online; AB 2273 strips parents of that power. And AB 2273 imposes liability for conduct permissible under COPPA—for example, failing to age estimate with enough "certainty," *id.* § 1798.99.31(a)(5), whereas COPPA expressly relieves companies of any need to

estimate the ages of their users. AB 2273 is neither "parallel to" nor "proscribe[s] the same conduct" as COPPA. *Jones*, 73 F.4th at 644. It is preempted.

C. Section 230 preempts AB 2273's third-party speech restrictions.

Section 230 expressly preempts AB 2273's requirement that providers enforce their own policies to the State's liking, Cal. Civ. Code § 1798.99.31(a)(9), and restrictions on the use of personal information, *id.* § 1798.99.31(b)(1),(3),(4),(7).

Section 230(c)(1) bars imposing liability on (1) an "interactive computer service" (2) in a way that treats it as the "publisher or speaker" of (3) "information provided by another information content provider." *Dyroff v. Ultimate Software Grp., Inc.,* 934 F.3d 1093, 1097 (9th Cir. 2019) (citations omitted). Section 230(c)(2) "provides an additional shield from liability" for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene or otherwise objectionable." *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1105 (9th Cir. 2009).

Section 230(c)(1) preempts the provision that online providers enforce their published terms because it impermissibly empowers the State to limit providers' discretion to review, edit, promote, and decide whether to publish user content. *Airbnb, Inc. v. City of Boston,* 386 F. Supp. 3d 113, 123 n.11 (D. Mass. 2019). It preempts AB 2273's restrictions on the use of minors' personal information because that information is used to "decid[e] whether" and how to publish such

content. *Fair Hous. Council v. Roommates.com, LLC,* 521 F.3d 1157, 1170-71 (9th Cir. 2008). And Section 230(c)(2) preempts the published-terms provision because it requires publishers either to over-moderate—censoring protected speech—or to forgo discretionary moderation altogether, effectively penalizing the provider for having content moderation policies in the first place. *See X Corp. v. Bonta*, 2023 WL 8948286, at *3 (E.D. Cal. Dec. 28, 2023) (Section 230(c) preemption claim would succeed if State imposed "liability stemming from a company's content moderation activities per se"); 7-ER-1220 (NetChoice declarant expressing concern that services "will stop having community standards … rather than expose themselves to liability for failing to enforce in a manner acceptable" to the State).

The district court suggested Section 230 may not be a proper basis for facial challenges. 1-ER-41. But it routinely is. *See, e.g.*, *Free Speech Coal.*, 2023 WL 5655712, at *27 (facial Section 230 preemption challenge likely to succeed on the merits); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *6 (D.N.J. Aug. 20, 2013) (same); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1274 (W.D. Wash. 2012) (same).

III. The Whole Law Must Be Enjoined.

The district court correctly found that the Act must be enjoined in its entirety. 1-ER-35–38. Because the Act does not contain a severability clause, it is only severable if "grammatically, functionally, and volitionally separable." *Garcia v. City*

of Los Angeles, 11 F.4th 1113, 1120 (9th Cir. 2021) (citation omitted). The State argues that the remaining provisions are "distinct and separate" from the invalid provisions. Br. 49. This is not the test, but in any event the State is wrong.

The law's provisions are not grammatically or functionally severable because, as the district court concluded, the Act's "interdependencies" indicate how "intertwined with—and thus inseverable from—the challenged provisions" are with respect to the remainder. 1-ER-38. For example:

- The "likely to be accessed" standard defines the "operation" and application of the entire law. *Garcia*, 11 F.4th at 1120; *see* Findings and Decls. § 1(a)(5). Without it, there is no basis to decide what services are subject to the law.

- The DPIA provisions cannot be severed because they create a regulatory safe harbor across the law, *see* Cal. Civ. Code § 1798.99.35(c), and are therefore a "condition precedent" for enforcement, 1-ER-36. *Acosta v. City of Costa Mesa,* 718 F.3d 800, 820 (9th Cir. 2013) (court may not "rewrit[e]" law).

- The requirement that services provide tools to help children "exercise their privacy rights," Cal. Civ. Code § 1798.99.31(a)(10), is tethered to "rights" enumerated in the invalid provisions.

- The "linchpin" age-estimation requirements, 1-ER-37, underlie most other provisions.

- "Five of the six required recommendations of the working group" track invalid provisions. 1-ER-37.

- Provisions related to the law's application, penalties, and compliance, Cal. Civ. Code §§ 1798.99.32, .33, .35, cannot operate alone.

Nor is the law volitionally separable. The absence of a severability clause is the best evidence the Legislature intended a law's components to "operate together

or not at all." *In re Reyes,* 910 F.2d 611, 613 (9th Cir. 1990). Content-based language—such as "harmful" and "best interests" and "material detrimental" and "risks"—is "interwoven" in the law, *Acosta*, 718 F.3d at 818, and severing it would yield a hollowed-out statute untethered to the State's "express policy statement[s]" to protect children from harmful content. *Fowler Packing Co. v. Lanier*, 2023 WL 3687374, at *18 (E.D. Cal. 2023). Contrary to the State's unsupported assertion, Br. 50, there is no indication the Legislature would have adopted what little remains of the law had it foreseen invalidation of the unconstitutional provisions. *Cal. Redev. Ass'n v. Matosantos*, 53 Cal. 4th 231, 271 (2011); *cf.* Findings and Decls. § 1(a). The fact that it was "passed unanimously," Br. 50, has no bearing on this inquiry. The law operates and should be invalidated as a "unitary whole." *Garcia*, 11 F.4th at 1120.

CONCLUSION

This Court should affirm the district court's preliminary injunction.

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Dated: February 7, 2024

CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES

I am unaware of any related cases currently pending in this Court.

Signature: s/ *David M. Gossett*

Date: February 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s): 23-2969

I am the attorney or self-represented party.

This brief contains 13,998 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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