

David Wolf (6688)
Lance Sorenson (10684)
Assistant Attorney General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Fifth Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874
Telephone: (801) 366-0100
Email: lancesorenson@agutah.gov

Attorneys for the Defendants

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

NETCHOICE, LLC,

Plaintiff,

v.

SEAN D. REYES, in his official capacity as
Attorney General of Utah, KATHERINE HASS,
in her official capacity as Director of the
Division of Consumer Protection of the Utah
Department of Commerce,

Defendants.

**DEFENDANTS’ MOTION FOR
AMENDED BRIEFING SCHEDULE AND
TO VACATE HEARING OR, IN THE
ALTERNATIVE, REQUEST FOR
SCHEDULING CONFERENCE**

**[EXPEDITED CONSIDERATION
REQUESTED]**

Case No.: 2:23-cv-00911-DBB-CMR

Judge David Barlow

Magistrate Judge Cecilia M. Romero

Defendants Sean D. Reyes and Katherine Hass respectfully request that the Court amend the briefing schedule and vacate or continue the hearing currently set for February 12, 2024 because the effective date of the law at issue in this case has been postponed until October 1, 2024 and the Legislature is likely to repeal and replace the law during the current legislative session.¹ There is no reason to seek or grant emergency,

¹ See, e.g., “Utah’s controversial social media law likely to get a rewrite,” <https://www.fox13now.com/news/local-news/utahs-controversial-social-media-law-likely-to-get-a-rewrite>.

disfavored relief when there is no emergency or immediate threat of harm. And it makes little sense to preliminarily review, without the benefit of a full record, the constitutionality of a law that is likely to be repealed in the next few weeks and whose implementation date is months after that. Accordingly, the Court should amend the briefing schedule and vacate the hearing set for Plaintiff's motion for preliminary injunction. Defendants propose an amended briefing schedule herein. In the alternative, Defendants further request a scheduling conference to establish dates governing this action pursuant to DUCivR16-1(a).

BACKGROUND

Plaintiff filed a Motion for Preliminary Injunction (the "Motion") to enjoin Utah's Social Media Regulation Act ("the Act") on December 20, 2023. Pursuant to the Court's docket text order, ECF No. 34, of January 2, 2024, Defendants' response to the Motion is currently due on January 23, 2024 and Plaintiff's reply is due on February 6, 2024. The Court has scheduled a hearing on February 12 at 10:30 a.m. *See* ECF No. 25.

On January 19, 2024, the Utah Legislature passed Senate Bill 89 ("SB89), amending the Act to postpone its effective date until October 1, 2024, and the Governor signed the bill into law the same day. SB89 is attached hereto as Exhibit 1. Access to the recording of the Senate Judiciary Committee Hearing in which the sponsor of SB89 explained the purpose of moving the effective date, which includes giving the Legislature time to "repeal and replace" the Act, may be accessed at <https://le.utah.gov/av/committeeArchive.jsp?timelineID=239595>.

With the effective date of the Act postponed, there is no longer any immediacy to Plaintiff's request for injunctive relief. Plaintiff will not incur any alleged harm until October. Further, Defendants anticipate that the Legislature will likely amend or replace the Act during the current legislative session, which may

render Plaintiff's claims moot in part or in their entirety.² At the very least, the Court and parties should wait to see what the actual law will be before engaging in time-consuming and expensive litigation.

ARGUMENT

Pursuant to Fed. R. Civ. P. 16(a)(3) & (4), the Court has authority to manage litigation to discourage “wasteful pretrial activities” and to “improve the quality of the trial through more thorough preparation.” These purposes would be better served by postponing further briefing on Plaintiff's Motion until after the legislative session ends and vacating the scheduled hearing.

A. There is no immediacy to Plaintiff's request

The United States Supreme Court has determined that a court should not grant a preliminary injunction in the absence of evidence of “a real and *immediate* threat of future injury by the defendant.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) (emphasis added). To obtain a preliminary injunction, the moving party must show that harm is “both imminent and irreparable.” *Cerro Metal Products v. Marshall*, 620 F.2d 964, 973 (3rd Cir. 1980). *See also Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 358-59 (3rd Cir. 1980) (“Risk of harm . . . is not sufficient to satisfy the standard for granting a preliminary injunction. There must be an *imminent* threat[.]”) (emphasis added).

In *Plant Oil Powered Diesel Fuel Systems, Inc. v. ExxonMobil Corp.*, 778 F. Supp. 2d 1180, 1190 (D. New Mexico 2011), the New Mexico district court refused to grant a request for a preliminary injunction on the explicit basis that the “harm [plaintiff] alleges . . . is not imminent.” The court denied the motion because the plaintiff did “not face imminent injury” but did so without prejudice to a renewal of the motion if the case did not proceed “at an adequate pace.” *Id.* at 1191. *Imminent* harm, not just irreparable harm, is a necessary element of a preliminary injunction. It does not exist here.

² *See, e.g.*, KSL News, “Legislature may tweak Utah's social media law,” October 19, 2023, <https://www.ksl.com/article/50758859/legislature-may-tweak-utahs-social-media-law-but-cox-happy-with-age-verification>.

Now that the Act's effective date has been postponed, Plaintiff does not suffer any prejudice by postponing further briefing and vacating the scheduled hearing. Rather, the parties may litigate Plaintiff's Motion in a deliberate and thorough way rather than a hasty, expedited way. The issues presented in this case, found within *sixteen* causes of action, are legally complicated and involve emerging areas of technology and social science research demonstrating the significant harms of social media to children. The Court and the public would be well-served by allowing the parties to brief the issues fully and thoroughly.

B. It would be wasteful to litigate the constitutionality of a law that does not take effect for more than 8 months and is likely to be repealed before then

The Rules of Civil Procedure are to be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. Consistent with the purpose of the rule, it is important to ensure that the law at the heart of any litigation between Plaintiff and Defendants is the actual law being applied to Plaintiffs. Presently, the Act is not being enforced against Plaintiff and, if it is ever enforced, such enforcement will not take place until October 1. In the meantime, the sponsor of the Act has said that the Legislature has every intention of “repeal[ing] and replac[ing]” the Act during the current legislative session, which ends on March 1, 2024.

By the first week of March of this year, the parties and the Court will know whether the Act has been repealed or not. If the Act is repealed, the parties and the Court would be better off knowing what has replaced it before launching into litigation. If the Act is not repealed, then there is plenty of time between March 1, 2024 and October 1, 2024 to brief a preliminary injunction motion and do so in a way that gives the Court all of the legal and factual information it needs to reach the best decision it can. Accordingly, it would be prudent to wait to see if and how the Legislature amends the Act. Before then, further briefing and argument would be wasteful. And, with the Act's effective date extended to October 1, 2024, Plaintiff is in no way prejudiced by amending the current briefing schedule.

Therefore, Defendants respectfully move the Court for a provisional³ amended briefing schedule on Plaintiff's Motion as follows:

Defendants' Response Due: **April 15, 2024**

Plaintiff's Reply Due: **April 30, 2024**

Defendants respectfully request the hearing currently scheduled for February 12 be vacated and a hearing be provisionally set for a mutually convenient time between May 15 and August 15, 2024. In the alternative, given the fast-approaching deadlines for the parties to complete briefing on Plaintiff's motion, Defendants request the Court hold a scheduling conference.

Respectfully submitted this 19th day of January, 2024.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ Lance Sorenson
LANCE SORENSON
DAVID WOLF
Assistant Utah Attorney General
Counsel for the Defendants

³ Legislative repeal and replacement of the Act, as seems likely, may moot the current case. In the event of repeal and replacement, Defendants will seek to meet and confer with Plaintiff on the appropriate course of action and then inform the Court and seek appropriate relief.

CERTIFICATE OF SERVICE

I hereby certify that on **January 19, 2024** the foregoing **DEFENDANTS' MOTION FOR AMENDED BRIEFING SCHEDULE AND TO VACATE HEARING OR, IN THE ALTERNATIVE, REQUEST FOR SCHEDULING CONFERENCE** was filed using the court's electronic filing system. I further certify that a true and correct copy was served, via email, to the following:

Alexis Swartz

Jeremy Evan Maltz

Joshua P. Morrow

Scot A. Keller

Steven P. Lehotsky

Todd L. Disher

LEHOTSKY KELLER COHN LLP

alexis@lkcfirm.com

jeremy@lkcfirm.com

josh@lkcfirm.com

scott@lkcfirm.com

steve@lkcfirm.com

todd@lkcfirm.com

Kade N. Olsen

David C. Reymann

PARR BROWN GEE & LOVELESS

kolsen@parrbrown.com

dreymann@parrbrown.com

Attorneys for Plaintiffs

UTAH ATTORNEY GENERAL'S OFFICE

/s/ Seth A. Huxford

SETH A. HUXFORD

Legal Secretary

EXHIBIT 1

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S.B. 89

SOCIAL MEDIA MODIFICATIONS

2024 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kirk A. Cullimore

House Sponsor: Jordan D. Teuscher

LONG TITLE

General Description:

This bill changes when the provisions of the Utah Social Media Regulation Act become effective.

Highlighted Provisions:

This bill:

▸ delays the effective date for provisions of the Utah Social Media Regulation Act applicable to social media companies from March 1, 2024, to October 1, 2024.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a special effective date.

Utah Code Sections Affected:

AMENDS:

13-63-102, as enacted by Laws of Utah 2023, Chapter 498

13-63-103, as enacted by Laws of Utah 2023, Chapter 498

13-63-104, as enacted by Laws of Utah 2023, Chapter 498

13-63-105, as enacted by Laws of Utah 2023, Chapter 498

13-63-301, as enacted by Laws of Utah 2023, Chapter 498

13-63-401, as enacted by Laws of Utah 2023, Chapter 477

13-63-501, as enacted by Laws of Utah 2023, Chapter 477

Be it enacted by the Legislature of the state of Utah:

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58 (d) establish processes or means to confirm that a parent or guardian has provided
59 consent for the minor to open or use an account as required under this section;

60 (e) establish requirements for retaining, protecting, and securely disposing of any
61 information obtained by a social media company or its agent as a result of compliance with the
62 requirements of this chapter;

63 (f) require that information obtained by a social media company or its agent in order to
64 comply with the requirements of this chapter are only retained for the purpose of compliance
65 and may not be used for any other purpose;

66 (g) if the division permits an agent to process verification requirements required by this
67 section, require that the agent have its principal place of business in the United States of
68 America;

69 (h) require other applicable state agencies to comply with any rules promulgated under
70 the authority of this section; and

71 (i) ensure that the rules are consistent with state and federal law, including Title 13,
72 Chapter 61, Utah Consumer Privacy Act.

73 Section 2. Section 13-63-103 is amended to read:

74 **13-63-103. Prohibition on data collection for certain accounts -- Prohibition on**
75 **advertising -- Use of information -- Search results -- Directed content.**

76 Beginning ~~March~~ October 1, 2024, a social media company, for a social media
77 platform account held by a Utah minor account holder:

78 (1) shall prohibit direct messaging between the account and any other user that is not
79 linked to the account through friending;

80 (2) may not show the account in search results for any user that is not linked to the
81 account through friending;

82 (3) shall prohibit the display of any advertising in the account;

83 (4) shall not collect or use any personal information from the posts, content, messages,
84 text, or usage activities of the account other than information that is necessary to comply with,
85 and to verify compliance with, state or federal law, which information includes a parent or

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114 bypass restrictions on access as required by this section.

115 (5) Notwithstanding any provision of this section, a social media company shall permit
116 a parent or guardian with access to an account under Section 13-63-104 to access the account
117 without time restrictions.

118 Section 5. Section **13-63-301** is amended to read:

119 **13-63-301. Private right of action.**

120 (1) Beginning [~~March~~] October 1, 2024, a person may bring an action against a person
121 that does not comply with a requirement of Part 1, General Requirements.

122 (2) A suit filed under the authority of this section shall be filed in the district court for
123 the district in which a person bringing the action resides.

124 (3) If a court finds that a person has violated a provision of Part 1, General
125 Requirements, the person who brings an action under this section is entitled to:

126 (a) an award of reasonable attorney fees and court costs; and

127 (b) an amount equal to the greater of:

128 (i) \$2,500 per each incident of violation; or

129 (ii) actual damages for financial, physical, and emotional harm incurred by the person
130 bringing the action, if the court determines that the harm is a direct consequence of the
131 violation or violations.

132 Section 6. Section **13-63-401** is amended to read:

133 **13-63-401. Social media platform design regulations -- Enforcement and auditing**
134 **authority -- Penalties.**

135 (1) Beginning [~~March~~] October 1, 2024:

136 (a) the division shall administer and enforce the provisions of this section; and

137 (b) the division may audit the records of a social media company in order to determine
138 compliance with the requirements of this section or to investigate a complaint, including a
139 random sample of a social media company's records and other audit methods.

140 (2) Beginning [~~March~~] October 1, 2024, a social media company shall not use a
141 practice, design, or feature on the company's social media platform that the social media

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- 170 (b) passively displaying content that is created entirely by a third party;
- 171 (c) information or content for which the social media company was not, in whole or in
172 part, responsible for creating or developing; or
- 173 (d) any conduct by a social media company involving a Utah minor account holder
174 who would otherwise be protected by federal or Utah law.
- 175 (5) If a court of competent jurisdiction grants judgment or injunctive relief to the
176 division, the court shall award the division:
- 177 (a) reasonable attorney fees;
- 178 (b) court costs; and
- 179 (c) investigative fees.
- 180 (6) Nothing in this section may be construed to negate or limit a cause of action that
181 may have existed or exists against a social media company under the law as it existed before
182 the effective date of this section.
- 183 (7) All money received for the payment of a fine or civil penalty imposed under this
184 section shall be deposited into the Consumer Protection Education and Training Fund
185 established in Section 13-2-8.
- 186 Section 7. Section **13-63-501** is amended to read:
- 187 **13-63-501. Private right of action for harm to a minor -- Rebuttable presumption**
188 **of harm and causation.**
- 189 (1) Beginning [~~March~~] October 1, 2024, a person may bring an action under this
190 section against a social media company to recover damages incurred after [~~March~~] October 1,
191 2024 by a Utah minor account holder for any addiction, financial, physical, or emotional harm
192 suffered as a consequence of using or having an account on the social media company's social
193 media platform.
- 194 (2) A suit filed under the authority of this section shall be filed in the district court for
195 the district in which the Utah minor account holder resides.
- 196 (3) Notwithstanding Subsection (4), if a court finds that a Utah minor account holder
197 has been harmed as a consequence of using or having an account on the social media

Official Signature Sheet for Bills and Resolutions State of Utah

SB 89 was read
by title three separate times and passed the Senate on a vote of
25 yeas 2 nays and 2 absent.



Signed on 1/19/2024
Certified by [Signature]
Secretary of the Senate

[Signature]
President of the Senate
 President Pro Tempore

SB 89 was read
by title three separate times and passed the House on a vote of
69 yeas 0 nays and 6 absent.



Signed on 1-19-2024
Certified by [Signature]
Chief Clerk of the House

[Signature]
Speaker of the House
 Speaker Pro Tempore

Received from the Legislature on 1-19-2024

Approved on 1-19-2024



Received from the Governor and filed in the office of the Lieutenant
Governor on _____

[Signature]
Governor

Lieutenant Governor

David Wolf (6688)
Lance Sorenson (10684)
Assistant Attorney General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Fifth Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874
Telephone: (801) 366-0100
Email: lancesorenson@agutah.gov

Attorneys for the Defendants

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NETCHOICE, LLC,

Plaintiff,

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SEAN D. REYES, in his official capacity as
Attorney General of Utah, KATHERINE HASS,
in her official capacity as Director of the
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Department of Commerce,

Defendants.

**[PROPOSED] ORDER GRANTING
DEFENDANTS’ MOTION FOR
AMENDED SCHEDULING ORDER AND
TO VACATE HEARING**

Case No.: 2:23-cv-00911-DBB-CMR

Judge David Barlow

Magistrate Judge Cecilia M. Romero

The Court, having reviewed Defendant’s Motion for Amended Briefing Schedule and to Vacate Hearing or, in the alternative, for Scheduling Conference, and for good cause appearing, hereby GRANTS the motion and ORDERS the following:

The hearing currently scheduled for February 12, 2024 is VACATED;

The briefing schedule on Plaintiff’s Motion for Preliminary Injunction (the “Motion”) is amended;

Defendants’ response to Plaintiff’s Motion is due: **April 15, 2024;**

Plaintiff’s Reply is due: **April 30, 2024**

A hearing on Plaintiff’s Motion shall be held: _____.

BY THE COURT
