

Office of the Attorney General



JONATHAN SKRMETTI
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September 7, 2026

Kelly L. Stephens
Clerk of the Court
U.S. Court of Appeals for the Sixth Circuit
540 Potter Stewart Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: *Welty v. Dunaway*, Nos. 25-5738/25-5739
FRAP 28(j) Response Letter

Dear Clerk Stephens:

Plaintiffs contend that *NetChoice, LLC v. Skrmetti*, --- F.4th ----, 2026 WL 2546423 (6th Cir. Aug. 28, 2026) (Op.), “support[s] Plaintiffs’ standing here.” Dkt.85. It does not. *NetChoice* does not excuse Plaintiffs’ failure to establish an intention to engage in conduct proscribed by Tenn. Code Ann. § 39-15-201, which alone defeats standing. First-Br.17-28; Third-Br.3-14. *NetChoice* also does not help Plaintiffs establish a certain threat of enforcement.

First, Plaintiffs have not shown any history of enforcement. First-Br.30; Third-Br.19-20. Although *NetChoice* noted that the “absence” of enforcement history is “far from dispositive” when the challenged statute is new, Op.*9, it did not hold that enforcement history is irrelevant in this context, *see* First-Br.32-33; Third-Br.19-20.

Second, Plaintiffs have not shown they received any warning letters. First-Br.30; Third-Br.19-20. They argue this factor carries “little weight” because they challenged § 39-15-201 before its effective date, Second-Br.30, but *NetChoice* proves warning letters still have relevance in the context of new statutes, Op.*9. Plaintiffs’ failure on this factor weighs against finding a certain threat of enforcement.

Third, Plaintiffs have not shown that anything about § 39-15-201 makes enforcement easier or more likely. First-Br.30-31; Third-Br.20-21. *NetChoice* isn't to the contrary.

Fourth, Plaintiffs cannot show that Defendants have refused to disavow enforcement. First-Br.31-32; Third-Br.21-23. Defendants have consistently maintained that § 39-15-201 *does not proscribe Plaintiffs' conduct* and disavowed *any* intent to prosecute them for that conduct. First-Br.29, 31-32; Third-Br.21-23. *NetChoice* is materially different. There, the defendant said certain of the plaintiff's members were *not* in compliance with the challenged law and did *not* "explicitly" disavow enforcement against them. Op.*10 (explaining defendant disavowed only enforcement without complying with the statute's notice period).

Beyond that, Plaintiffs reiterate that Defendants did not submit declarations disavowing enforcement or respond to Plaintiff Welty's pre-suit letter asking Defendants to forswear any enforcement against her in the abstract. Dkt.85. But this Court has never said (*NetChoice* included) that defendants must do either to disavow enforcement. First-Br.35-36; Third-Br.21-23. Defendants' consistent position has been that Plaintiffs *are not violating* § 39-15-201. That is enough. First-Br.29.

Plaintiffs lack standing. *NetChoice*, if anything, simply bolsters that conclusion.

Respectfully submitted,

/s/ Madeline W. Clark

Madeline W. Clark

Solicitor General

Counsel for Defendant-Appellants

CERTIFICATE OF COMPLIANCE

This letter complies with Rule 28(j) because its body contains 348 words. It also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font in Microsoft Word.

/s/ Madeline W. Clark
Madeline W. Clark
Solicitor General

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 6 Cir. R. 25(f), I certify that a true and exact copy of this letter has been filed via the Court's electronic filing system on September 7, 2026. That system sends a Notice of Docket Activity to all registered attorneys in this case. Under 6 Cir. R. 25(f)(1)(A), "[t]his constitutes service on them and no other service is necessary."

/s/ Madeline W. Clark
Madeline W. Clark
Solicitor General