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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

HANNAH PAISLEY ZOULEK, a Utah resident; JESSICA CHRISTENSEN, a Utah resident; LU ANN COOPER, a Utah resident; M.C., a Utah resident, by and through her parent, LU ANN COOPER; VAL SNOW, a Utah resident; and UTAH YOUTH ENVIRONMENTAL SOLUTIONS, a Utah association,

Plaintiffs,

v.

KATIE HASS, in her official capacity as Director of the Utah Division of Consumer Protection; SEAN REYES, in his official capacity as Utah Attorney General,

Defendants.

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (ECF 37) AND OPPOSITION TO MOTION TO DISMISS (ECF 51)

Case No. 2:24-cv-00031-RJS-CMR

Judge Robert J. Shelby

Magistrate Judge Cecilia M. Romero

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Statutes

Constitutional Provisions

Other Authorities

I. INTRODUCTION

The State's entire defense of the Minor Protection in Social Media Act is based on false premises. It assumes the government may restrict communication via social networks whether or not the hobbled speech falls into traditionally regulable categories, and that it may require *all* users (whether adults or children) to prove their age before accessing and engaging in unfettered speech because "children are different than adults." Def.'s Mem. in Opp. to Pl. Mot. for Prelim. Injunction ("Opp.") at 1. No authority ratifies these assumptions, and the State cites none that supports them.

The statement "children are different" is no doubt true—but not in ways the State imagines. The State cites *Roper v. Simmons*, 543 U.S. 551, 569 (2005), but *Roper* and like cases, Opp. 1., hold that these differences make it *harder*, not easier, to divest children of their rights. The State also relies on *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975), to argue that minors have limited First Amendment rights, but omits the ultimate conclusion—from the very next line—that "minors are entitled to a significant measure of First Amendment protection … and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* Contrary to the State's argument, the Supreme Court built on *Erznoznik* to reject the notion that government has a "free-floating power to restrict the ideas to which children may be exposed … 'solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 794-95 (2011) (quoting *Erznoznik*, 422 U.S. at 213-14).

The State's defense rests on the false assumption that the government has such power. Opp. 1, 9, 31, 34. That premise is wrong, and the State's defense unravels with it.

Lacking any foundation in law, the State devotes over half its brief to discussing the asserted harms of social networks as if it were listing scientific facts—like the link between smoking and cancer. But it willfully ignores conflicting evidence, including reservations expressed by the Surgeon General that it is impossible to generalize social media's overall effects, Dep't of Health & Hum. Servs., *Social Media and Youth Mental Health* 6 (2023), and the American Psychological Association's observation that social media "is not inherently beneficial or harmful to young people." Am. Psych. Ass'n, *Health Advisory on Social Media Use in Adolescence* 3 (May 2023). *See* FAC ¶¶ 2-4. The State assumes the government may limit speech for *all* if *some* may be adversely affected—a questionable proposition in itself, but rendered all the more wrong because the State ignores the absence of anything approaching a scientific consensus on the purported effects of social networks.

We have been here before. As the Supreme Court observed in striking down video game regulations based on the same type of contested social science evidence, governments have made similar claims to justify efforts to restrict dime novels, comic books, movies, music, and television. *Brown*, 564 U.S. at 797-98, 813 n.5. Unfortunately, when scientific findings mix with popular media coverage and political advocacy, they often become over-generalized to the point they are little more than "opinion with numbers."[1] That appears to be the case with the current moral panic over social media, where "there is a wide gulf between the rhetoric used by some politicians and scholars in support of the censorship or

[1] *See* Robert Corn-Revere, *Moral Panics, the First Amendment, and the Limits of Social Science*, COMMUNICATIONS LAWYER, Vol. 28 No. 3 at 3 (Nov. 2011). This is what happened with the debate over restricting violent video games, with certain advocate/researchers asserting that questioning the purported causal link between video games and psychological harm was to "argue against gravity." *Id.* at 4 (quoting Jeffrey McIntyre, then affiliated with the American Psychological Association).

regulation of social media and the actual research evidence to support such claims." Decl. of Dr. Christopher Ferguson, PhD ¶¶ 46-47 ("Ferguson Decl."). As the Supreme Court held in *Brown*, such claims are far from sufficient to uphold restrictions on protected speech—even for the laudable purpose of protecting minors. 564 U.S. at 800-01. The restrictions Plaintiffs challenge are but the latest in a chain of doomed endeavors to shield minors from new media the government declares too risky.[2]

Undeterred by this graveyard of failed censorship attempts, the State points to the fact that regulation of social networks is in vogue in other countries that lack a First Amendment, Opp. 6, and that some states have jumped on the bandwagon to pass measures regulating and restricting social media. But the internet enjoys the full protection of the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 870, 874 (1997). And although the State doesn't mention it, recent attempts to age-restrict, limit, or ban access to social networking services have run headlong into constitutional roadblocks in California, *NetChoice, LLC v. Bonta*, 692 F. Supp. 3d 924 (N.D. Cal. 2023), Arkansas, *NetChoice, LLC v. Griffin*, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023), Montana, *Alario v. Knudsen*, 2023 WL 8270811 (D. Mont. Nov. 30, 2023), Ohio, *NetChoice, LLC v. Yost*, 2024 WL 555904 (S.D. Ohio Feb. 12, 2024), and Mississippi, *NetChoice, LLC v. Fitch*, 2024 WL 3276409, at *1 (S.D.

[2] The list is a long one. But the First Amendment has never permitted moral panic to justify such sweeping censorship, whether it is about magazines, *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1023-24 (5th Cir. 1987), board games, *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822 (W.D. Ky. 1989), *aff'd*, 904 F.2d 378 (6th Cir. 1990), movies, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), television, *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 205-06 (S.D. Fla. 1979), rock music, *Waller v. Osbourne*, 763 F. Supp. 1144, 1152-53 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992), or, of course, video games, *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264, 1279-81 (D. Colo. 2002) (rejecting claims of video game "addiction"). *See Brown*, 564 U.S. at 798-99.

Miss. July 1, 2024). The Supreme Court's ruling in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024) bolstered these decisions, confirming the First Amendment protects speech published through these networks.

The State cannot carry its burden under the First Amendment. Its defense of the Act also fails under the Commerce Clause, and the State concedes Plaintiffs will suffer irreparable harm absent preliminary injunctive relief. Likewise, it does not dispute that the challenged provisions are inseverable from the rest of the Act. The Court should issue the requested injunction and prevent the State from enforcing it.[3]

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Act Violates the First Amendment.

The State admits "social media platforms contain speech" and that its attempt to restrict access to and use of those platforms must therefore survive First Amendment scrutiny. Opp. 11. *See Packingham v. North Carolina*, 582 U.S. 98, 108 (2017) (First Amendment protects access to and use of social networks). The Opposition specifically confirms that each of the challenged provisions restricts speech: it makes clear the ***age verification mandate*** in Utah Code §§ 13-71-201 and 13-71-101(2) requires all Utahns to hand over personal identifying information—such as government identification, financial records, or biometric information—before they can engage in speech through social networks (Opp. 22); that the ***content sharing restrictions*** in Utah Code § 13-71-202(1)(a),

[3] Plaintiffs' response to the State's motion to dismiss their Commerce Clause claim is addressed in Part III.B below, in conjunction with their reply in support of their motion for preliminary injunction under that claim. Plaintiffs did not move for a preliminary injunction on their Section 230 preemption claim, and in a concurrent filing, have voluntarily dismissed that claim. This brief is within the combined page limitations allowed for these two submissions, *see* Civ. L.R. 7-1(a)(4)(A) & (C), and the State has consented to a consolidated filing.

(b), (d), and (e) presumptively bar minors from communicating with unconnected accounts, unless their parents consent (Opp. 8, 28, 35); and that the ***content presentation restrictions*** in Utah Code § 13-71-202(5) ban minors from accessing and disseminating speech through autoplay functions, continuous feeds, and push notifications, *even with parental consent* (Opp. 9, 20).

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 816 (2000). This includes when the government restricts minors from accessing or engaging in protected speech for their own supposed benefit. *See Brown*, 564 U.S. at 794-95, 795 n.3. The question is thus whether the challenged restrictions satisfy the "heightened judicial scrutiny" that applies to laws abridging protected speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 563 (2011). Because they do not, and because they violate numerous independent First Amendment doctrines, Plaintiffs are likely to prevail on the merits of their First Amendment claim.

1. The Act's age verification and content-sharing provisions impose prior restraints subject to at least strict scrutiny.

The State concedes the age verification requirement requires Utahns like Plaintiffs to preclear a state-mandated "age assurance system" *before* they can access and share content through covered social networks. *See* Utah Code §§ 13-71-201(1), 13-71-101(2); Opp. 22. And it admits the content-sharing restrictions layer on additional barriers to speech, barring even those minors willing to identify themselves from communicating freely with new contacts *unless* a parent exercises state-ordered authority to preapprove the communication. *See* Utah Code § 13-71-202(1)(a), (b), (d), (e); Opp. 8, 28, 35. These restrictions impose prior restraints because they prevent communication before it can occur

without adjudication of the First Amendment's application to the barred expression. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The State incorrectly asserts that prior restraints are confined to "administrative and judicial orders" prohibiting speech in advance. Opp. 23 (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)). Rather, as the State acknowledges, these are just "typical" examples of prior restraints. *Id.* Justice Kennedy explained in *Alexander* that "[w]e have not confined the application of the prior restraint doctrine to its simpler forms, outright licensing or censorship before speech takes place." 509 U.S. at 569 (Kennedy, J., dissenting). Beyond those "classic form[s] of prior restraint," the Court has "extended prior restraint protection with some latitude, toward the end of declaring certain governmental actions to fall within the presumption of invalidity." *Id*. at 569-70 (Kennedy, J., dissenting); *accord Novak v. City of Parma*, 932 F.3d 421, 433 (6th Cir. 2019) (stating the classic forms present only "a sufficient condition for prior restraint, not a necessary one"). In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 (1980), for example, the Court invalidated a statute permitting the government to prohibit future exhibition of films without prior adjudication of the films' First Amendment protection. And in *Bantam Books*, 372 U.S. at 70, the Court found a prior restraint even where a state commission had no enforcement powers and only the authority to "warn" booksellers against carrying certain "unsuitable" titles.

Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights," and bear a "heavy presumption" of invalidity subject to a more stringent standard than even strict scrutiny. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976) (citation omitted); *see also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102

(1979).[4] The State does not contend either the age verification or content-sharing provisions could possibly satisfy that standard, which requires showing the provisions supply the *only* means to address a "direct, immediate, and irreparable" interest of the highest magnitude. *N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring); *id.* at 726-27 (Brennan, J., concurring) (same). Instead, the State denies that either provision imposes a prior restraint at all, arguing they only impose liability on social networks, not Plaintiffs, and only "for past behavior" (*i.e.*, "liability for non-compliance with the law"). Opp. 23-24.

The State's reading misunderstands the nature of prior restraints, and specifically the Supreme Court's decision in *Bantam Books*. *See* Mot. 9. The Court there held that prior restraints are not limited to formal government orders enjoining speech, but include "system[s] of informal censorship" that present the "threat of invoking legal sanctions" against third parties to prevent another's speech. 372 U.S. at 67, 71 (risk that *booksellers* could be civilly liable for disseminating plaintiff publisher's books imposed a prior restraint on the *publisher*). The Tenth Circuit has read *Bantam Books* to hold that "an unconstitutional prior restraint may take a variety of forms." *Camfield v. City of Okla. City*, 248 F.3d 1214, 1226 n.4 (10th Cir. 2001) (citation omitted). And the Supreme Court this Term reaffirmed *Bantam*'s central holding that threatening civil liability "against a third party 'to achieve the suppression' of disfavored speech violates the First

[4] Although the Tenth Circuit has not addressed the question,"the outcomes of prior restraint cases, and the language in those cases employed to condemn prior restraints, suggest a coloration even more rigorous than strict scrutiny." Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1, 6-7 (2023); *see also* Al-Amyn Sumar, *Prior Restraints and Digital Surveillance*, 20 YALE J. L. & TECH. 74, 91 (2018) ("The best reading of these cases is that prior restraints must endure something more than traditional strict scrutiny").

Amendment." *NRA of Am. v. Vullo* 602 U.S. 175, 180-81, 188-91 (2024); *see also, e.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235-36 (7th Cir. 2015) (Posner, J.) (invalidating informal prior restraint executed through threats to third-parties).

That is precisely how the age-verification and content-sharing provisions operate: they threaten social media services with civil penalties if they allow users to engage in communications the Act forbids. "Threatening penalties for future speech goes by the name of 'prior restraint.'" *Backpage.com*, 807 F.3d at 235 (citation omitted). And the social networks Plaintiffs use have testified that this threat of liability will require them to enforce the State's censorship against users like Plaintiffs going forward. *See NetChoice, LLC v. Reyes*, No. 2:23-cv-00911, Dkt. 52-3 (D. Utah) (Davis Decl. ¶ 56) (users who refuse to age-verify "will not be able to use Facebook or Instagram to make social connections; showcase their creative talents; gather information … ; or engage in any number of other potential uses of these services"); *id.* Dkt. 52-2 (Veitch Decl. ¶ 50) (under the content-sharing provisions "teenagers' [YouTube] content—videos and comments included—may not be visible to *anyone* without parental consent"). In this case, Plaintiffs have testified that being forced to preclear the Act's age-verification requirement would deter them from engaging in speech through this medium. *See* Zoulek Decl. ¶ 12; Cooper Decl. ¶ 18; Snow Decl. ¶ 8.

It makes no difference to the prior restraint analysis (*cf.* Opp. 10, 32, 36) that Plaintiffs might still have recourse to exercise their First Amendment rights "in some other place." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (prohibiting performance was prior restraint despite alternative venues); *see also Bantam Books*, 372 U.S. at 66-67, 70 (law was invalid prior restraint even though publishers could distribute titles through

other means). This kind of collateral censorship that indirectly "suppress[es] speech … through private intermediaries" before it can occur is a prior restraint and presumptively unconstitutional. *Vullo*, 602 U.S. at 198.[5]

2. All of the challenged provisions are content-based and subject to strict scrutiny.

In addition, *all* of the challenged provisions are content based and subject to strict scrutiny because they seek to shield minors from engaging in protected speech based on its asserted mental health effects, and because they single out access to social networks based on the content just these providers are perceived to disseminate. *See* Mot. 15-17.

The State has no substantive response to these black-letter rules, or the cases applying them to enjoin materially identical restrictions. It does not deny that "laws that require parental consent for children to access constitutionally protected, non-obscene content, are subject to strict scrutiny." *Yost*, 2024 WL 555904, at *12 (citing *Brown*, 564 U.S. at 795 n.3). Nor does it dispute that the Act's coverage formula renders it facially content-based by preventing minors from speaking through certain media "based upon the primary purpose or subject matter of their service." *Fitch*, 2024 WL 3276409, at *9 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015)). Instead, the State contends the challenged provisions are "agnostic as to content" since they are "not aimed at any speech in particular," Opp. 1, 26-27, but rather seek to protect minors from the risks of "prolonged and unregulated" expression, Utah Code §13-71-102(6).

Disclaiming intent to censor any particular subject matter or viewpoint, however,

[5] "Collateral censorship occurs when one private party *A* has the power to control speech by another private party *B*, the government threatens to hold *A* liable based on what *B* says, and *A* then censors *B*'s speech to avoid liability." Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999).

does not expand the State's power to restrict speech or lighten its burden of proof. Laws that "defin[e] regulated speech by its function or purpose," as the Act does in Utah Code § 13-71-101(14), are "content based on [their] face [and] subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 163-65 (citation omitted); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (Mot. 16). Regulations like the Act, designed to shield an audience's psychological wellbeing from "the direct impact of speech," are likewise content-based—not time, place, or manner restrictions akin to abating the nuisance of a loudspeaker or protecting neighborhood aesthetics from gaudy signage. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (Mot. 16) (rejecting this contention); *see also Playboy*, 529 U.S. at 811-12 (citing same); *cf.* Opp. 2, 11, 26-27. And even more important, the Act *prevents minors from speaking to others*, making the restrictions on expression all the more oppressive.

The State's bald proclamations of content neutrality are no help. A "neutral" law barring minors from entering libraries to prevent overindulgent reading, for example, would be "agnostic as to content" but subject to strict scrutiny. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest"). So would a law prohibiting an adult from speaking to a minor at a mall (or a minor from addressing an adult) for any purpose without parental consent. *See Brown*, 564 U.S. at 795 n.3 (government lacks "power to prevent children from hearing or saying anything *without their parents' prior consent*"). Strict scrutiny applies to such blanket prohibitions on certain speech. *Cf. Vill.*

of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (strict scrutiny applied to blanket restriction on charitable solicitations, regardless of subject matter).

Neither of the State's lead authorities are to the contrary. Its main case, *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1285 (11th Cir. 2008) (Opp. 27-28, 36), preceded *Brown* by three years and holds only that parental consent may be required for a student to opt out of the Pledge of Allegiance. This narrow holding, confined to the school context, has no possible bearing on either the universal age verification mandate or content presentation restrictions that apply regardless of parental consent. And even if *Frazier* remains good law after *Brown*, it cannot be divorced from its classroom setting, where "schools at times stand … in the place of parents" and thus have more discretion to restrict student speech. *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 187 (2021); *see also Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 982 (10th Cir. 2017) (reviewing minors' reduced First Amendment protections at school). If not altogether overruled by *Brown*, *Frazier* has no application to parental consent requirements for speech outside school.[6]

Nor does the Fifth Circuit's radical decision in *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024), *cert. granted*, No. 23-1122 (2024), support a less searching standard for the State's age verification mandate. *Cf.* Opp. 30-31. That case involves a Texas law requiring an online service to age verify users if it publishes adult material that is obscene as to minors. 95 F.4th at 267. Though that law is less speech-intrusive than Utah's—as the Texas law only screens minors from constitutionally

[6] *Frazier* also is an outlier that splits from the Third Circuit's earlier decision invalidating a materially identical regime in *Circle Schools v. Pappert*, 381 F.3d 172, 174, 179-81 (3d Cir. 2004).

unprotected obscenity—the Supreme Court has repeatedly held that even this kind of age verification mandate is subject to strict scrutiny because of the chilling effect it imposes on adults. *See Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004); *Reno*, 521 U.S. at 882; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *see also* Mot. 10-11.

Defying this precedent, the Fifth Circuit upheld the Texas law under rational basis review, claiming "startling omissions" in the Supreme Court's jurisprudence rendered those decisions nonbinding. 95 F.4th at 274, 286-87. No court has endorsed the Fifth Circuit's departure, and an Indiana federal court has already declined to repeat its errors. *See Free Speech Coal., Inc. v. Rokita*, 2024 WL 3228197, at *8, *11, *18 (S.D. Ind. June 28, 2024) (enjoining age verification law under strict scrutiny "as directed by the Supreme Court," and rejecting the Fifth Circuit's decision as departing from precedent "despite no intervening change" in the law).[7] This Court should decline as well. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) (district court must follow binding precedent notwithstanding sister circuits).[8]

* * *

The State ultimately rests its case for more deferential First Amendment review on

[7] The State notes that the Supreme Court declined to grant an emergency stay of the Fifth Circuit's decision in *Paxton*, intimating that this has some bearing on the Court's view of the merits. Opp. 30-31. It doesn't. *See United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett and Kavanaugh, JJ., concurring in denial of application to vacate stay) (Court's emergency stay decisions do not express a view on the merits). If anything is indicative, it is the Court's acceptance of *certiorari*, just days after expressing significant doubts about the Fifth Circuit's judgment in cases involving the First Amendment's application to online media. *See Moody*, 144 S. Ct. at 2399, 2403, 2409.

[8] Rational basis review is inapplicable, in any event, as the State admits the challenged provisions restrict speech and laws restricting speech are not presumed valid but must be proven constitutional by the government. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012); *ACORN v. Mun. of Golden, Colo.*, 744 F.2d 739, 746 (10th Cir. 1984).

an argument the Supreme Court expressly rejected in *Brown*—that lesser scrutiny applies when the state seeks to protect minors from asserted psychological harms caused by exposure to interactive media. 564 U.S. at 792, 794-95, 795 n.3. *See* Opp. 37. In *Brown*, the State of California contended it could "create a wholly new category of content-based regulation" for a new type of expressive media "directed at children," *id.* at 794; claimed this media "present[ed] special problems" for fragile adolescent psychology "because [it was] interactive," *id.* at 798; and implied that states could simply "weigh[] the value of [this] particular category of speech against its social costs and then punish[] [it] if it fails the test." *Id.* at 792 (citation omitted). The Supreme Court dismissed these contentions as "startling," "dangerous," "unprecedented," and "mistaken." *Id.* at 792, 794.

"[W]hatever the challenges of applying the Constitution to ever-advancing technology," the *Brown* Court explained, "'the basic principles'" of the First Amendment "'do not vary.'" *Id.* at 790 (citation omitted); *accord Moody*, 144 S.Ct. at 2403 (quoting same). States may thus not "revise the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs" of unregulated expression. *Brown*, 564 U.S. at 792 (citation omitted). And that includes protections preserving young people's liberty to share and access information freely through interactive media technologies. *Id.* at 794-95.

The paternalism permeating the State's defense is simply incompatible "with the premise of individual dignity and choice upon which our political system rests," and in particular the aspiration "that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971). All "social interactions are fraught" with risk for minors, Opp. 37, whether they take place

online, at a political rally, or at the park after school. *Brown*, 564 U.S. at 795 n.3. But to "shield children right up to the age of 18" from the rough and tumble of a free society "would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.).

Government can thus no more compel "parental involvement in the decision[s]" teenagers make about what ideas to share, and with whom to share them, in these traditional settings, Opp. 37, than they can on the internet. *Cf. Mahanoy Area Sch. Dist.*, 594 U.S. at 189-94 (government cannot punish student for vulgar off-campus Snapchat post criticizing cheerleading team). And it certainly cannot do so categorically for *all minors* based on an unsubstantiated hunch that *some minors* may possess "undeveloped brain[s]" and "probably won't appreciate the potential consequences" of their liberty. Opp. 37.

"[E]ven with the purest of motives," the government "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988). These are choices—what media to consume, with whom to speak—that our democracy entrusts to the people, including young people, themselves. *See First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 791, 791 n.31 (1978). And courts must exercise special vigilance—strict scrutiny—when a regulation seeks to "restrict what the people may hear," or what media they may engage, for what the government perceives to be their own good. *Id.*

3. All of the challenged provisions fail strict or even intermediate scrutiny.

The State makes no effort to show the challenged provisions satisfy strict scrutiny, so Plaintiffs are likely to succeed on the merits of their First Amendment claim if the

Court—as it should—applies that standard. *See Citizens for Responsible Gov't PAC v. Davidson*, 236 F.3d 1174, 1199 (10th Cir. 2000) (invalidating speech restriction where Colorado made no attempt to satisfy applicable strict scrutiny); Mot. 17-20 (applying *Brown*, 564 U.S. at 799-805).

The State has also failed to carry its burden to show the challenged provisions survive intermediate scrutiny. The State's analysis omits several critical elements of the intermediate scrutiny standard, asserting "the correct legal test" is solely whether the challenged provisions "leave[] open ample alternative channels of communication." Opp. 10, 36. It then concludes the challenged provisions pass muster because minors may communicate by phone and email, *id.* 36, despite admitting in the very next sentence that "[s]ocial media is different than other forms of media" precisely because it allows users "[to] interact[], in real time, with other human beings" in incomparable ways. *Id.* 37. *But see McCraw v. City of Okla. City*, 973 F.3d 1057, 1061, 1079-80 (10th Cir. 2020) (Mot. 21) (explaining that such a distinction renders a proposed alternative inadequate).

When the intermediate scrutiny test is properly articulated, the State's failure to satisfy it is clear. That standard requires the State to prove that each challenged regulation (1) serves a "real" and "not merely conjectural" government interest "'unrelated to the suppression of free expression,'" and (2) "will in fact" serve that interest in "a direct and material way" (3) 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) (Mot. 20); *see Brewer v. City of Albuquerque*, 18 F.4th 1205, 1221 (10th Cir. 2021) (Mot. 20) (same). If these elements are proven, the government *must also* show that its regulation (4) leaves open "ample alternative channels for

communication" as part of the overall tailoring requirement. *See McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (citation omitted) (Mot. 21).

The Act's challenged provisions satisfy none of these elements.

a. Conjectural and censorial government interests

The putative government interests advanced in the Opposition are conjectural and directly related to the suppression of expression. *See Turner*, 512 U.S. at 662, 664.

Preventing minors from choosing to share their "personal lives" with "strangers"—the State's justification for the content-sharing restrictions—is predicated on naked speculation. *See* Opp. 35. The State simply assumes that allowing young adults like M.C. to freely disclose their beliefs, interests, preferences, "and just about every other aspect of their lives" to new acquaintances through social networks—as they might at the mall or any other unsupervised environment—would necessarily place them in unspecified danger. *Id.* 34-35. The government may not restrict expression just because it *might* provoke *some* subsequent harm. *See Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (attempt to restrict speech based on the "unsupported presumption" that its utterance would "necessarily" invite harm failed intermediate scrutiny). And restricting speech because of its supposedly harmful effects is *directly* related to the suppression of speech. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (speech restriction intended to protect minors failed intermediate scrutiny since the "attempt to regulate directly the communicative impact" of the suppressed speech was not "unrelated to expression").

The State's asserted interest in preventing minors from engaging in *too much speech* through social networks—what the State calls preventing "harmful social media addiction," and its justification for the content-presentation restrictions—is also conjectural and directly related to the suppression of speech. *See* Opp. 32. The State sprinkles its brief

with 29 references to "addiction," even though youth social media addiction is not a recognized medical condition. *See* Am. Psych. Ass'n, *The Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2022). There are "no consistent or measurable associations between well-being and the roll-out of social media" to minors, nor any "evidence of drastic changes associated with digital technology use." Candace L. Odgers, *The great rewiring: is social media really behind an epidemic of teenage mental illness?*, 628 NATURE 29-30 (2024) (Sieff Decl. Ex. 1) (reviewing research including "the largest long-term study of adolescent brain development in the United States"); *see also, e.g.*, Candace L. Odgers and Michaeline R. Jensen, *Annual Research Review: Adolescent mental health in the digital age: facts, fears, and future directions*, 61:3 J. OF CHILD PSYCH. AND PSYCHIATRY 336-348 (2020) (Sieff Decl. Ex. 2) (finding that "most of the attention given to adolescents' digital technology usage and mental health has focused on negative effects and has been based on weak correlational data," and that "large-scale preregistered studies have reported a lack of sizeable or practically meaningful associations between adolescents' digital technology usage and well-being").

Although the State's expert, Dr. Twenge, claims a causal relationship between use of social networks and youth well-being, this is limited to a highly selective and limited review of the social science data. In fact, "there is no evidence establishing a cause-and-effect relationship," and a broader review of the research suggests "other factors within the US actually provide better explanations for youth mental health trends than does social media." *See* Ferguson Decl. ¶ 9. Among other things, the Twenge Declaration "ignores that mental health data for less-technology adopting older generations is actually worse than for teens" and that "these trends in youth mental health are not observed for other

high-technology adopting countries in Europe or the Anglophone sphere," and that "other factors within the U.S. actually provide better explanations for youth mental health trends than does social media use." *Id.* ¶¶ 9-32 (reviewing data revealing these causal defects); *see also id.* ¶¶ 33-41 (even finding inconsistent evidence of correlation). [9]

The State's effort to avoid heightened scrutiny by claiming it seeks only to reduce the amount of time minors devote to social networks (Opp. 26) betrays that its asserted interest is related to the suppression of protected expression. Restricting speech because it is *too engaging* is *directly* related to the suppression of expression. *See Turner*, 512 U.S. at 664. Like the interactive features of video games that California sought to regulate in *Brown*, the Act's content presentation restrictions ban the use of features like autoplay, push notifications, and continuous scroll "distinctive to the medium" *precisely because* they draw users in, "communicate ideas," and generally make content more immersive, available, and interesting. 564 U.S. at 790, 798; *see also Ent. Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006) (interactive features enable digital media to "enhance the expressive elements" of communication "even more than other media"). But the fact the State decided a medium for expression is "catchy" or "too persuasive does not

[9] Contrary to Dr. Twenge's conclusions, the largest independent study ever conducted, published by Oxford University, examined the spread of Facebook across 72 countries over twelve years and—using wellbeing data from over a million people—found no evidence the social networking platform is linked to psychological harm. *See* Matti Vuorre and Andrew K. Przybylski, *Estimating the association between Facebook adoption and well-being in 72 countries*, ROYAL SOCIETY OPEN SCIENCE (July 14, 2023) (Sieff Decl. Ex. 3). Plaintiffs' own testimony also demonstrates that online social networks often have positive effects on teens mental health. *See* Zoulek Decl. ¶ 19 ("In a state like Utah, where it is already challenging for teens to access mental health resources, removing full access to a primary tool like social networks that they can use for information and connection would have many negative consequences."). This experience is supported by research. *See* Ferguson Decl. ¶¶ 42-45.

permit it to quiet the speech" that medium carries, no more than it could suppress page-turner novels, Taylor Swift albums, or binge-worthy television. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011). Where a challenged regulation's purpose is related to the suppression of expression, the regulation is invalid regardless of what level of scrutiny applies. *See Moody*, 144 S. Ct. at 2407.

The State asks this Court to give it "the benefit of the doubt" in favor of "leaving the law in place and allowing duly elected officials to act in the interest of the children they seek to protect in the context of this new and emerging technology." Opp. 11. But that is not how the First Amendment works. As the Supreme Court reaffirmed in *Brown*, even where the State purportedly acts to protect children the government "bears the risk of uncertainty," and "ambiguous proof will not suffice." 564 U.S. at 799-800 (citing *Playboy Ent. Grp.*, 529 U.S. at 816-17). Even with intermediate scrutiny, the State must demonstrate the recited harms are real and non-speculative. *Brewer*, 18 F.4th at 1227-28, 1230, 1244 (ordinance "predicated solely on theoretical safety concerns" failed scrutiny).

The "fact that science is evolving is all the more reason to provide robust First Amendment protections." *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023) (applying intermediate scrutiny). Far from deferring to legislative judgments, the Supreme Court has cautioned that the "forces and directions of the Internet are so new, so protean, and so far reaching" that courts must "exercise extreme caution" before authorizing the government to limit it. *Packingham*, 582 U.S. at 105.

b. No proof the challenged provisions will improve teen health or privacy.

Neither the State nor its expert submit any evidence addressing this element. While Dr. Twenge offers testimony to support her scientifically flawed conclusion, *supra*, that

"[e]xcessive social media use is the cause of the teenage mental health crisis," Twenge Decl. ¶¶ 30-47, even if that were proven, she never attempts to demonstrate how *any of the challenged restrictions* would "'in fact alleviate'" that crisis "in a direct and material way." *Brewer*, 18 F.4th at 1235 (citation omitted). *See* Ferguson Decl. ¶¶ 49-51.

The only studies Dr. Twenge cites find that limiting *the total time spent* on social media correlates to positive mental health outcomes in *some* teens. Twenge Decl. ¶¶ 48-53. But these studies rely on generalized claims about "social media" and "screen time" that the State attributes to the fact that "children carry supercomputers … in their pockets." Opp. 2, 5, 12-13. If that is an issue, it is one the challenged provisions do nothing to solve. *See* Ferguson Decl. ¶¶ 9, 49, 51. In fact, Dr. Twenge has elsewhere identified this as the real problem to solve. *See* Jean M. Twenge, *Have Smartphones Destroyed a Generation?* THE ATLANTIC (Sept. 2017) (Sieff Decl. Ex. 4). Her conclusions on that point have been disputed by developmental psychologists, *see, e.g.*, Candace L. Odgers, *The Panic Over Smartphones Doesn't Help Teens*, THE ATLANTIC (May 21, 2024) (Sieff Decl. Ex. 5), but even if Dr. Twenge were correct, none of the challenged provisions would do anything about the general presence of smartphones. *See* Ferguson Decl. ¶¶ 9, 49, 51.

In this regard, the State undermines its own argument at every turn. In attempting to defend against claims that the challenged provisions unduly restrict speech, the State proclaims its restrictions do not "ban minors from establishing direct connections with other users which they may do without parental consent," do not "preclude minors from sharing with or receiving from connected accounts any content they wish, which they may do without parental consent," and still purportedly allow young people to "expand the scope of their audience, to see and be seen by strangers, with parental consent." Opp. 8,

26. This omits or downplays those aspects of online communication the Act *does* restrict, which are precisely the limitations on speech Plaintiffs challenge.[10] What is missing is any evidence—given all the things minors are still "permitted" to do—that the challenged provisions will have any beneficial effect at all. The State may hope that, with the challenged restrictions, minors "might participate in other important and essential things, like schoolwork, sleep, exercise, and real-life social relationships," Opp. 2, but it offers no evidence that they *will* do so. *Cf. Brewer*, 18 F.4th at 1235.[11]

Bottom line, whether the issue is the general availability of smartphones, time spent elsewhere online (such as streaming media), or unregulated social network activities, the State has not met its burden to show how the challenged provisions will have any positive benefit whatsoever. That not only fails strict scrutiny, *Brown*, 564 U.S. at 802, but any level of First Amendment review. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999) (banning private casinos from advertising failed intermediate scrutiny where tribal casinos remained free to advertise); *Rubin v. Coors*

[10] The State admits that the content-sharing restrictions prevent minors "to see and be seen by strangers" without parental permission, Opp. 26, and that a plaintiff like M.C. would *not* be able to share her art "with unconnected accounts" without parental consent. *Id*. 27-28. And of course the various features the content-presentation provisions ban for minors' accounts (auto play, infinite scroll, and notifications) cannot be restored *even with parental consent*. *Id*. 9 ("requiring social media companies to remove the addictive elements from their platforms"). These restrictions, in conjunction with the predicate age verification mandate, are the basis of Plaintiffs' First Amendment injuries. *See* M.C. Decl. ¶¶ 9-12; Zoulek Decl. ¶¶ 12-16; Johnson Decl. ¶¶ 5-11.

[11] The State cites some studies suggesting that reducing the amount of time by *college students* on social networks increases general happiness. *See* Opp. 16 (citing Twenge Decl. ¶¶ 48-53). But this says nothing about the age group covered by the Act, or whether banning features such as autoplay, infinite scroll, or push notifications, or restricting how and with whom minors may communicate, would actually improve that age group's mental health. *See* Ferguson Decl. ¶¶ 30-32 (explaining that Dr. Twenge's cited studies suffer from methodological flaws and do "not provide evidence that reducing social media time improved mental health").

Brewing Co., 514 U.S. 476, 489 (1995) (same principle). The State presumes what it must prove, and its assertions the law will improve teen mental health are simply unsupported.

Nor is there record evidence showing that the challenged restrictions would actually protect minors' privacy. Though the State asserts the content-sharing restrictions would protect minors from disclosing personal information against their interest, it offers no proof. *Cf.* Opp. 34-35. And even if the content-sharing restrictions were shown to have *some* privacy-protective effect, teenagers could still share their personal information to connected accounts or to new acquaintances through uncovered media including text messaging and e-mail, *see* Utah Code § 13-71-101(14)(b), not to mention ordinary in-person encounters. A law cannot meaningfully advance the government's stated interests if it contains exceptions, like these, that "undermine and counteract" those goals. *Rubin*, 514 U.S. 489 (banning content from beer labels did not advance public health interests where content was still permitted on wine and spirit labels). If anything, requiring minors to submit to predicate age verification screens exposes them (and all social media users) to *greater* privacy incursions. *See Bonta*, 692 F. Supp. 3d at 951 (supposed online child privacy regulation failed intermediate scrutiny since its predicate age-verification requirement "counter[ed] the State's interest in increasing privacy protections for children") (citing *Rubin*, 514 U.S. at 489); *see also* Zoulek Decl. ¶ 12; Snow Decl. ¶ 8; Cooper Decl. ¶ 18 (testifying to the privacy risks of age verification).

c. Suppressing more speech than necessary.

The State asserts the age-verification requirement and content-presentation restrictions are narrowly tailored "to prevent harmful social media addiction in children" because they "leave open ample channels of communication." Opp. 32. It also seems to claim the content-sharing restrictions are narrowly tailored to some unstated end—

ostensibly privacy protection—because they allow young people "to communicate with adults without parental permission" off social networks. *Id.* 36.

These contentions miss the mark. A law is not narrowly tailored just because the government claims to leave open some other channels for communication. *See, e.g.*, *McCraw*, 973 F.3d at 1073-74 (law was not narrowly tailored even though "plaintiffs may still engage in their speech on roadsides, sidewalks, or other medians"). Restricting speech in one area of one terminal of an airport, for example, may leave open channels for communication in other areas of that airport—not to mention other areas surrounding that airport—but it is still not narrowly tailored if it shuts down more protected speech than necessary. *See Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987). More to the point, the Supreme Court has expressly held that restricting people from using social media is not narrowly tailored even where these persons may communicate through other media. *See Packingham*, 582 U.S. at 109. The government must still show that *each* of its restrictions burden no "'more speech than is necessary.'" *McCraw*, 973 F.3d at 1073 (citation omitted).

The State has not carried that burden. It admits the challenged provisions would restrict minors and even adults from accessing and engaging in protected speech, Opp. 11, 33-34, 35, yet fails to present *any* evidence showing that all the speech it restricts is necessary to achieve even the hypothetical and unproven interests it asserts. Nor does the State rebut or explain why the less restrictive alternatives Plaintiffs identified (Mot. 18-19) would not suffice. *See McCraw*, 973 F.3d at 1075-76 (intermediate scrutiny required government to rebut "several alternatives that would be less burdensome on speech but would still advance [its] asserted interest"). The State was required to try "'or adequately

explain why it did not try'" these other alternatives. *Id.* at 1076 (citation omitted). But the Opposition confirms that some of those alternatives have essentially *not* been tried. *See* Opp. 19 (failing to explain why raising awareness of existing tools would not address its concerns while admitting that only 16% of parents use them).

It is not enough for the State to assert (Opp. 19) that protective tools require consumers "to take action, or may be inconvenient, or may not go perfectly every time." *Playboy*, 529 U.S. at 824 (this assertion failed strict scrutiny). The State cannot presume that "parents, given full information, will fail to act," *id.* at 824, and it seems like many of the problems the State posits—*e.g.*, too much time online, lack of sleep, etc.—could be addressed by public information campaigns urging parents not to let their children take their phones to their bedrooms at night, or teaching social media literacy in schools. *Compare* A-4169/S-588 (N.J. 2023) (mandating social media literacy instruction for K-12 students). And in fact M.C.'s school offered such a class on responsible use of social networks, which she found informative. M.C. Decl. ¶ 13.

Because the State "has not shown that it seriously undertook to address" its interest with "less intrusive tools readily available to it," the challenged provisions are not narrowly tailored. *McCullen*, 573 U.S. at 494.[12]

[12] The State's citation to *Lorillard Tobacco* is puzzling. *See* Opp. 32. As noted above, that case *struck down* Massachusetts regulations seeking to restrict tobacco product advertisements to minors. 533 U.S. at 556-66 (striking regulation prohibiting such advertising within 1,000 feet of a school or playground); *id.* at 566-67 (striking regulation restricting indoor, point-of-sale advertising from smokeless tobacco and cigars). The one provision that survived review "require[d] tobacco retailers to place tobacco products behind counters and require[d] customers to have contact with a salesperson before they are able to handle a tobacco product." *Id.* at 567-69. Although the State cites that holding to contend that "[a]ge assurance regulations have passed heightened constitutional scrutiny" and narrow tailoring, Opp. 32, the Supreme Court only upheld the product

d. No adequate alternatives.

Even if the State had met its burden on these elements, the challenged provisions would fail because they do not leave open adequate alternatives. The State disagrees, asserting that minors may still communicate without restriction by phone and email. Opp. 36. But the State submits no evidence that these media are *adequate* alternatives; fails to rebut testimony explaining that they are not, *see* Christensen Decl. ¶ 11; Johnson Decl. ¶¶ 4, 6; Zoulek Decl. ¶ 19; and admits that "[s]ocial media is different than other forms of media" in material ways. Opp. 37. This, too, is fatal to the State's defense. *See McCraw*, 973 F.3d at 1061, 1079-80 (citing *McCullen*, 573 U.S. at 490).

4. The challenged provisions are each facially overbroad.

Moody affirmed that a challenged regulation is overbroad and facially invalid under the First Amendment if it "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." 144 S. Ct. at 2397 (citation omitted); *accord* Mot. 11-12 (same).

This "less demanding" standard for facial invalidity "provides breathing room for free expression." *Moody*, 144 S. Ct. at 2397. It requires a federal court to strike down a regulation with *some* legitimate applications where its "unconstitutional applications substantially outweigh its constitutional ones." *Id.* What matters are "the principal things regulated." *Id.* at 2398. Courts must only consider a regulation's range of "realistic"

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placement provision because cigarettes are carcinogenic goods—not speech or media—and Massachusetts could permissibly "regulate the placement of tobacco products for reasons unrelated to the communication of ideas." 533 U.S. at 569. That is not the case here. Because the conclusion that the regulation was narrowly tailored turned on its focus on the tobacco product and not any aspect of advertising—*i.e.*, it would have been OK to "place empty tobacco packaging on open display" unattended, 533 U.S. at 570—it is of no moment to the State's attempt to age-gate speech. *Compare Bonta*, 692 F. Supp. 3d at 950-52; *Griffin*, 2023 WL 5660155, at *16-21; *Yost*, 2024 WL 555904, at *12-13; *Fitch*, 2024 WL 3276409, at *1; *Rokita*, 2024 WL 3228197, at *14-18.

applications, and determine whether its unconstitutional applications are "substantially disproportionate to [its] lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023); *see also United States v. Williams*, 553 U.S. 285, 301 (2008) (refusing to consider "implausible" applications in facial analysis). When the substantial effect of a challenged regulation is to restrict protected speech, the regulation is facially invalid. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 482 (2010) (invalidating law prohibiting depictions of harm to animals even if a version "limited" to some depictions "would be constitutional").

This is not a case like *Moody* where some applications of the challenged provisions might be valid because it is conceivable they *could* primarily apply to non-expressive conduct as opposed to protected speech. *Cf. Moody*, 144 S. Ct. at 2398-99. To the contrary, and as the State readily concedes, Opp. 9, 11, 20, application of the challenged provisions here necessarily regulates speech by restricting Utahns' rights to access and use social networks.

Consider each of them. First, the age-verification mandate requires all Utahns to hand over personal identifying information *before* they can engage in speech (*i.e.*, access and use social networks). *See* Utah Code §§ 13-71-201(1), 13-71-101(2). Because a social networking service is a medium for communication, the *only* possible application of that provision is to restrict speech. *See Packingham*, 582 U.S. at 108 (restricting access to social networks regulates speech). And Plaintiffs have testified they would forego access to social networks if this provision took effect, even if it were enforced through the private platforms. *See* Zoulek Decl. ¶ 12; Cooper Decl. ¶ 18; Snow Decl. ¶ 8. Second, the content-sharing restrictions bar minors from communicating with unconnected accounts without first obtaining state-ordered parental consent. Utah Code § 13-71-202(1)(a), (b), (d), and

(e). Any application of these provisions also restricts speech. *See Brown*, 564 U.S. at 794-95 & 795 n.3 (minors have a right to engage in speech without state-ordered parental consent). And third, the content-presentation provisions restrict speech because they not only ban how speech may be presented to minors, *see Moody*, 144 S. Ct. at 2393 ("choices about what third-party speech to display *and how to display it*" are protected speech) (emphasis added), but restrict the types of interactive media with which minors may engage, *see Brown*, 564 U.S. at 794-95 (citations omitted).

The only even potentially legitimate applications of the challenged provisions thus concern instances where they *just happen* to prevent or restrict some type of unprotected and thus legitimately regulable speech—such as defamation, true threats, incitement, or obscenity. *See Stevens*, 559 U.S. at 460. Such hypothetically valid applications comprise only a small slice of the total volume of anodyne and fully protected speech transmitted through social networks (and in particular through these restricted features). *See Brown*, 564 U.S. at 790-91 (recognizing that these exceptions represent "well-defined and narrowly limited classes of speech") (citation omitted). The State may not "torch a large segment of the internet" to protect minors from such a small subset of the expression that is communicated through these platforms. *Reno*, 521 U.S. at 882; *see* Mot. 14-15.

Because each of the challenged provisions by nature restricts and chills substantially more speech than the State may legitimately regulate, they are each facially invalid under the First Amendment. *See also* Pls.' Supp. Br. (filed concurrently herewith).

B. The Act Violates the Commerce Clause.

The State does not meaningfully contest that the challenged provisions violate the Commerce Clause by (i) unduly burdening Plaintiffs' ability to communicate for commercial purposes across state lines in violation of *Pike v. Bruce Church, Inc.*, 397 U.S.

137, 142 (1970) and (ii) directly regulating activities wholly outside the State by restricting how Utah legal residents may use social networks even outside the State's borders in violation of the rule applied in *Edgar v. MITE Corp.* 457 U.S. 624, 641 (1982), and sustained in *National Pork Producers Council v. Ross*, 598 U.S. 356, 376 n.1 (2023).

Instead, the State opposes Plaintiffs' motion for preliminary injunction under the Commerce Clause by moving to dismiss it. *See* Opp. 37; MTD 3-7. But Plaintiffs have not only alleged facts, they have also presented unrebutted evidence establishing their entitlement to relief and standing to bring this claim. The State's dismissal arguments misread *National Pork*, which affirmed both the heartland *Pike* cases that "seek to protect the instrumentalities" of interstate commerce, as well as the variety of extraterritoriality claim at issue here, which implicates principles of "horizontal separation of powers." 598 U.S. at 376 n.1, 379 n.2, 389 n.4. This mistake also dooms the State's prudential standing argument, which hinges on the same misreading.

The Court should deny the State's Motion to Dismiss and conclude that Plaintiffs are also likely to succeed on the merits of the Commerce Clause claim.

1. The State does not meaningfully contest that the Act violates the Commerce Clause in the two challenged respects.

The State's principal argument posits that a Commerce Clause claim fails unless it demonstrates that a challenged regulation discriminates against out-of-state commerce on its face or in its effect. *See* MTD 5. That is mistaken. Commerce Clause claims "come in three varieties," only one of which requires proof of out-of-state discrimination. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (Gorsuch, J.). The Supreme Court's decision in *National Pork* confirms that even *non-discriminatory* regulations violate the Commerce Clause if they (i) substantially and unduly burden the

instrumentalities of interstate commerce, or (ii) regulate commercial activity wholly beyond their borders. *See* 598 U.S. at 376 n.1, 379 n.2, 389 n.4. The Act does both.

The State's remaining arguments also fail.

First, the State concedes the challenged regulations would not survive the *Pike* analysis. *See* Mot. 23-24. Under *Pike*, even "non-discriminatory" burdens on interstate commerce may violate the Commerce Clause when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 141, 142. The State does not (and cannot) contest that Plaintiffs have shown that the challenged provisions would impose substantial burdens on interstate commerce by significantly restricting how they communicate commercial information through social networking platforms across state lines. *See, e.g.*, Snow Decl. ¶ 9 (testifying he sells "products through YouTube and Facebook, and will be unable to reach new customers under the Act"); M.C. Decl. ¶ 5 (testifying she uses Instagram to fundraise for her dance teacher's studio). These platforms are undisputedly instrumentalities of interstate commerce, as they provide the connective tissue through which interstate commerce flows. *See ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (Mot. 22-23). And just as the State failed to produce evidence to justify its suppression of Plaintiffs' First Amendment rights, the State has not produced evidence of any putative local benefits that might outweigh this burden. *Id.* at 1162 (invalidating internet regulation where local benefits to minors were not proven); *accord, e.g.*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (same). On that basis alone, Plaintiffs are likely to succeed on the merits of their claim. *See, e.g.*, *Alario*, 2023 WL 8270811, at *17 (Mot. 23) (plaintiffs

challenging Montana's TikTok ban were likely to succeed on the merits of their *Pike* claim for this reason).

Rather than meet *Pike*'s test, the State argues only that *National Pork* "abrogated *Pike*." MTD 4-6. Absolutely not. The Supreme Court made clear that heartland *Pike* applications to the "instrumentalities" of interstate commerce like internet services remains good law. *Nat'l Pork*, 598 U.S. at 389 n.4; *see also id.* at 403 (Roberts, C.J., concurring in part) ("six Justices of this Court affirmatively retain the longstanding *Pike* balancing test"); *id.* at 403 (Kavanaugh, J., concurring in part) (stating same). And so did the Tenth Circuit in a recent decision rejecting the same contention. *See Forever Fencing, Inc. v. Bd. of Cnty. Comm'rs of Leavenworth Cnty.*, 2024 WL 3084973, at *3 (10th Cir. June 21, 2024).

Second, the State cannot refute that the challenged provisions separately violate the Commerce Clause by regulating speech and internet communications wholly outside Utah's borders. The Commerce Clause does not permit laws that "directly regulate[] transactions which take place … wholly outside the State." *Edgar*, 457 U.S. at 641; *accord Nat'l Pork*, 598 U.S. at 376 n.1. And as the State concedes, because the Act has no geographic limitation, it restricts the communications of Utah "residents" even while they are outside the State. *See* Utah Code § 13-71-101(16); FAC ¶ 95. This means college students like Zoulek continue to be subject the Act's challenged provisions even while outside Utah, as does anyone who holds a valid Utah driver's license or spends more than six months of the year in Utah. *See id.* § 13-71-101(12) (incorporating Utah Code § 53-3-102's definition of "resident"); FAC ¶ 7; Zoulek Decl. ¶ 8 (describing relying on social networks while out of state). Nor does the State contest that determining whether a given user is a Utah resident will require service providers to collect personal information from

all social network users. *See NetChoice, LLC, supra*, Dkt. 52-5 (Paolucci Decl. ¶¶ 9-10). And because the Act applies to residents while traveling outside of Utah, the challenged provisions also regulate communications wholly *outside* of Utah involving non-residents.

Such extraterritorial regulations are barred by the principle applied in *Edgar*, 457 U.S. at 641-42 (regulated transactions took place "wholly outside" the regulating state for Commerce Clause purposes where the regulating state's only claimed nexus to the regulated transaction was the legal residency of a source of the capital involved). The State's only response is to mischaracterize Plaintiffs' claim as one asserting the per se rule *National Pork* foreclosed. But *National Pork* affirmed the Commerce Clause still bars that subset of extraterritorial state regulations—like the Act's challenged provisions—that "*directly* regulat[e] out-of-state transactions by those with *no* connection to the State." 598 U.S. at 376 n.1. That is the undisputed effect of the Act, which, like the statute in *Edgar*, directly regulates commercial activity between persons entirely outside of Utah.

2. Plaintiffs have prudential standing.

The State also challenge Plaintiffs' Commerce Clause claim by contending Plaintiffs lack prudential standing to bring it. *See* MTD 3-7.[13]

[13] While the State briefly suggests Plaintiffs lack Article III standing because they "[did] not suffer an injury of the sort that the dormant Commerce Clause seeks to protect," MTD 3, this incorrectly conflates the requirements of Article III standing with those of prudential standing. Article III standing requires only that a plaintiff show (1) an injury in fact that (2) is traceable to defendant's challenged action and (3) redressable by the relief requested. *Laufer v. Looper*, 22 F.4th 871, 876 (10th Cir. 2022) (citation omitted). In fact, the sole case the State relies on, *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 476 (5th Cir. 2013), held that petitioners *had* Article III standing despite lacking prudential standing to bring a Commerce Clause claim. *Id.* The State makes no argument as to the actual requirements of Article III standing.

At the outset, the argument rests on dubious footing. The Supreme Court has questioned a federal court's power to decline jurisdiction over an otherwise justiciable claim on "'prudential,' rather than constitutional" standing grounds, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), and thus the "continuing vitality" of prudential standing doctrines in light of a federal court's "virtually unflagging" obligation "to hear and decide cases within its jurisdiction." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (quotation omitted). In its most recent statement on the issue, the Court clarified that "the label prudential standing [is] misleading" because "the requirement at issue is in reality tied *to a particular statute*" and not any constitutional rule. *Bank of Am. Corp. v. City of Miami, Fla.*, 581 U.S. 189, 196 (2017) (emphasis added). Neither the Supreme Court nor the Tenth Circuit has ever applied a "prudential" filter to deny Commerce Clause plaintiffs who satisfy Article III their day in court.

But even assuming "prudential standing" principles were both valid and applicable to plaintiffs raising federal constitutional claims, the State's argument would fail as it rests on the same misreading of *National Pork* that doomed its arguments on the merits. Where it applies, the prudential standing doctrine merely requires a plaintiff's injuries to "'arguably fall within the zone of interests protected or regulated by the statutory provision'"—or, the State contends, constitutional rule—"'invoked in the suit.'" *Bd. of Cnty. Comm'rs of Sweetwater Cnty. v. Geringer*, 297 F.3d 1108, 1111-12 (10th Cir. 2002) (citation omitted). The inquiry "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Plaintiffs plainly meet this standard. They have shown that the challenged provisions burden how and with whom Plaintiffs may communicate across state lines,

including for commercial purposes, and subject Plaintiffs and anyone who wishes to communicate with them to the same onerous regulation even when they leave the State. *See* FAC ¶¶ 65-66 (describing the Act's "significant" restrictions on Plaintiffs' ability to access out-of-state digital content); Mot. 8-11, 22-23 (same). Plaintiffs' interests fall squarely within the protections of the Commerce Clause's prohibition against excessive and extraterritorial burdens on the instrumentalities of interstate commerce. *See Nat'l Pork*, 598 U.S. at 376 n.1, 379 n.2, 389 n.4. The State does not dispute this, and instead repeats its argument that *National Pork* abrogated these protections. *See* MTD 4-5. But that is wrong for the reasons addressed above.

The State's only other authority supports Plaintiffs. In *Cibolo Waste*, the Fifth Circuit rejected a "purely intrastate" waste management company's Commerce Clause challenge to a city permit fee for waste collection. 718 F.3d at 475. But as the State acknowledges, even *Cibolo* held that a plaintiff's claims falls within the Commerce Clause's zone of interest where it turns on how a challenged regulation "excessively burdens their out-of-state interests." *Id.* Plaintiffs have an interest in communicating with persons out-of-state. Because the challenged provisions burden their ability to do so, it meets even this standard.

III. THE REMAINING FACTORS FAVOR A PRELIMINARY INJUNCTION

The Opposition confirms that the remaining injunction factors are satisfied here.

Because the loss of constitutional rights for even a limited amount of time is always irreparable, the State does not contest that Plaintiffs would suffer irreparable harm absent an injunction if they establish a likelihood to succeed on the merits. *See Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016).

The balance of equities and the public interest also support an injunction. Citing no evidence, the State points to the alleged harms of leaving social networks unregulated. But it ignores well-established precedent that states "do[] not have an interest in enforcing a law that is likely constitutionally infirm," *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010), such that "[a] governmental interest in upholding a mandate that is likely unconstitutional does not outweigh a movant's interest in protecting his constitutional rights," *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1254 (10th Cir. 2024). For this reason, and because it is "'always in the public interest to prevent the violation of a party's constitutional rights,'" *id.* at 1254 (citation omitted), these factors favor a preliminary injunction. *See also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest.").

IV. THE STATE CONCEDES THE ACT IS NOT SEVERABLE

The State does not rebut Plaintiffs' contention that invalidation of the challenged provisions requires invalidation of the entire Act because the challenged provisions are not severable. *See* Mot. 25. This is a dispositive concession. *See Bishop v. Smith*, 760 F.3d 1070, 1094-95 (10th Cir. 2014) (failure to argue severability was waiver); *accord Awad v. Ziriax*, 670 F.3d 1111, 1132 n.16 (10th Cir. 2012). The whole Act must be enjoined.

V. CONCLUSION

Plaintiffs respectfully request an order granting their motion for preliminary injunction and denying the State's motion to dismiss.

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