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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' RESPONSE TO ORDER FOR SUPPLEMENTAL BRIEFING (ECF 56 & 59)

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

Judge Robert J. Shelby

Magistrate Judge Cecilia M. Romero

SUPPLEMENTAL BRIEF

Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) does not affect Plaintiffs' analysis of the challenged provisions presented in the Amended Complaint or in their motion for a preliminary injunction. Unlike in *Moody*, the challenged provisions in this case inescapably and predominantly regulate speech. To the extent the Act overall or these particular provisions have any "legitimate sweep," it is largely confined to exceptional circumstances where the restricted speech just happens to be constitutionally unprotected—a narrow slice of the total and overwhelming volume of human communication that the challenged provisions regulate. By indiscriminately banning speech without regard to the "well-defined and narrowly limited classes of speech" for which regulation may be permissible, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (citation omitted), the Act is facially invalid under *Moody*.

This brief addresses both of the Court's questions in turn.

A. *Moody* does not change the nature of the facial First Amendment challenge presented in this case.

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); Reply 25-27 (same). "[I]n this singular context, even a law with 'a plainly legitimate sweep' may be struck down in its entirety." *Moody*, 144 S. Ct. at 2397.

This "less demanding" standard for facial invalidity in the First Amendment context "provides breathing room for free expression." *Id.* (citation omitted). It requires a federal court to strike down a regulation even with *some* legitimate applications where its "unconstitutional applications substantially outweigh its constitutional ones." *Id.* What

matters are "the principal things regulated." *Id.* at 2398; *cf. Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) ("proper focus" is what "the law actually authorizes"). When the substantial effect of a challenged law is to restrict protected speech, it is facially invalid. *See, e.g.*, *Stevens*, 559 U.S. at 482; *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("this case provides a textbook example of why we permit facial challenges to statutes that burden expression").

The Court in *Moody* confirmed the existing analytic framework for considering First Amendment facial overbreadth challenges.

First, a reviewing court must assess a law's "scope," including "[w]hat activities, by what actors, [it] prohibit[s] or otherwise regulate[s]." 144 S. Ct. at 2398. Noting the "ever-growing number of apps, services, functionalities, and methods for communication and connection," the Court focused on whether the law in substantial part regulates editorial activities or content. *Id.* In *Moody*, however, the parties and the lower courts gave this relatively short shrift, focusing almost entirely on a couple of services' two most popular features (*e.g.*, "Facebook's News Feed and YouTube's homepage"), to the exclusion of features or services that might lack an editorial component. *Id.* at 2397-98.[1]

Here, Plaintiffs challenge provisions of the Utah law that affect their ability to access and convey information using social media, including with whom they may

[1] Although the Court in *Moody* agreed that the Texas and Florida laws' applications to features like Facebook's News Feed and YouTube's homepage violate the First Amendment by interfering with the covered platforms' protected editorial choices, *id.* at 2397, 2409, it nevertheless remanded for further analysis because it was not clear whether every covered platform and all of their covered features exercised editorial control over user-generated content. *Id.* at 2398-99 (*e.g.*, whether and how the law might apply to Facebook's direct messaging features or to Gmail).

communicate.[2] Unlike in *Moody*, there is no question here that the provisions implicate speech protected by the First Amendment, which "bars the government from dictating what we see or read or speak or hear." *Ashcroft*, 535 U.S. at 245.

Second, a reviewing court must then "decide which of the laws' applications violate the First Amendment, and to measure them against the rest." *Moody*, 144 S. Ct. at 2398. This involves focusing on the provisions of the law that regulate speech, which in *Moody* were the "content-moderation" and "individualized explanation" provisions of the two state laws. *Id.* But the Court in *Moody* could not perform this analysis and remanded for further proceedings because neither the Fifth nor Eleventh Circuits looked beyond what the parties agreed were the "heartland applications" of the respective laws and instead assumed that those claimed heartland applications were in fact "the principal things regulated." *Id.* at 2398-99.

There is no such problem here. The overwhelming share of applications—including the "heartland applications"—of the challenged provisions violate the First Amendment for the reasons set forth in the FAC and demonstrated through the preliminary injunction briefing. This Court can and should conclude that those unconstitutional applications are the challenged provisions' "principal" applications, *id.* at 2398, and thus certainly "substantial" compared to whatever "plainly legitimate sweep" they might have. *Id.* at 2397 (citation omitted).

[2] Plaintiffs have moved to enjoin Utah Code § 13-71-201 (Age Assurance), § 13-71-202(1)(a), (b), (d), (e) and § 13-71-202(5) (Requirements for Utah Minor Account Holders), § 13-71-204(1) (Parental Consent – Data Privacy for Utah Minor Accounts), as well as related portions of § 13-71-101 (Definitions) and § 13-71-301 (Enforcement Powers). Plaintiffs have not moved to enjoin § 13-71-204 (Supervisory Tools).

B. The challenged provisions regulate speech, and their potentially legitimate applications comprise a tiny fraction of their overall sweep.

"The primary purpose of a social media platform is to engage in speech." *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *16 (W.D. Ark. Aug. 31, 2023). In this case—unlike *Moody*—there is no dispute as to "[w]hat activities, by what actors" the challenged provisions "prohibit or otherwise regulate," *Moody*, 144 S. Ct. at 2398.

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 media). *See* Utah Code §§ 13-71-201(1), 13-71-101(2); *accord* Opp. 20, 28. Because a social networking service is a medium for communication, the only possible application of that provision is to restrict speech. *See Packingham v. North Carolina*, 582 U.S. 98, 108 (2017) (restricting access to social media regulates speech). Attempts to require online services to age verify their users have thus always drawn and consistently failed First Amendment facial review. *See Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004); *Reno v. ACLU*, 521 U.S. 844, 882 (1997); *ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999); *ACLU v. Mukasey*, 534 F.3d 181, 192-93 (3d Cir. 2008); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003).

The ***content-sharing restrictions*** bar minors from communicating with owners of unconnected accounts, unless they first obtain state-ordered clearance through parental consent. *See* Utah Code § 13-71-202(1)(a), (b), (d), and (e); *accord* Opp. 8, 20, 35. Any application of these provisions necessarily restricts speech because they prevent minors from speaking freely. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 794-95, 795 n.3 (2011) (minors have a First Amendment right to engage in protected speech without state-ordered parental consent). The government can no more restrict minors from engaging in

communications with "strangers" online than it can enact a blanket ban on persons with whom a citizen may converse on the street. *Ashcroft*, 535 U.S. at 252 (government lacks authority "to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes"). *Cf. Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) (First Amendment prohibited blanket restriction on charitable solicitations).

The ***content-presentation provisions*** ban minors from accessing and disseminating speech through autoplay functions, continuous feeds, and push notifications, even with parental consent. *See* Utah Code § 13-71-202(5). These provisions likewise restrict only speech because they ban *how* speech may be presented to minors, *see Moody*, 144 S. Ct. at 2393 ("choices about … how to display" content is protected speech) (emphasis added), as well as the types of interactive media minors may engage with, *see Brown*, 564 U.S. at 794-95. The State's contention that this restriction serves to protect minors from becoming too engrossed in social media (*e.g.*, Opp. 29) only underscores the law's focus on restricting access to modes of expression. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) (First Amendment protects "catchy" and "persuasive" speech); Reply 18-19.

This Court's recent decision dismissing the Section 230 preemption claim in *NetChoice, LLC v. Reyes*, 2024 WL 3510919 (D. Utah July 22, 2024) has no bearing on this First Amendment analysis. The dispositive question there was "whether the Act's prohibitions on autoplay, seamless pagination, and notifications treat NetChoice members as the publisher or speaker of the third-party content they disseminate" for purposes of determining Section 230 preemption. *Id*. at *5. It was not whether such editorial choices about how to present information are protected by the First Amendment, which is the issue

in this case. Just as a publisher's decision about how best to display content to attract a reader's attention in the physical world is protected by the First Amendment, *Bursey v. United States*, 466 F.2d 1059, 1087 (9th Cir. 1972), it is protected in the digital world as well. *Moody*, 144 S. Ct. at 2402 ("An entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity.") (cleaned up).

The Act is facially invalid no matter whether the Court applies *Moody's* numerator and denominator to the Act as a whole or to individual provisions.

As to the Act as a whole, the vast majority of the Act's provisions regulate speech, and its unconstitutional applications substantially outweigh whatever may be the law's legitimate sweep. Whether any of the unchallenged provisions—such as Section 13-71-203, which requires "supervisory tools"—might be salvaged by the Act's severability clause (Utah Code § 13-71-401) is a separate question governed by state law. *See* Mot. 25. But for purposes of determining whether a speech-restricting law is facially invalid, the dispositive question is whether the unconstitutional applications are "substantial" compared to the law's "legitimate sweep." *Moody*, 144 S. Ct. at 2397. For this Act, the overwhelming impact is to unconstitutionally restrict protected speech.

Alternatively, focusing on the "principal provisions" of the law that regulate speech, it is clear that (i) the challenged provisions' directly regulate speech; and (ii) their only potentially legitimate applications concern the rare instances where they just happen to prevent or restrict constitutionally unprotected and thus legitimately regulable speech. But these "narrowly limited classes of speech"—such as defamation, true threats, incitement, or obscenity—comprise only a tiny fraction of the total volume of speech communicated through social media. *Brown*, 564 U.S. at 790-91 (citing *Stevens*, 559 U.S.

at 460). The idea that "protected speech may be banned as a means to ban unprotected speech … turns the First Amendment upside down." *Ashcroft*, 535 U.S. at 255.

"[C]ontent on the Internet is as diverse as human thought." *Reno*, 521 U.S. at 852 (citation omitted). Just as a stopped clock that is right twice a day is still broken, the fact that the challenged provisions' may occasionally prevent minors from viewing or sharing unprotected content does not render the law permissible: These applications are substantially outweighed by the restrictions on social media's "vast amounts of constitutionally protected speech." *Griffin*, 2023 WL 5660155, at *16; *see also* Opp. 11 (claiming challenged provisions should survive scrutiny as regulations of protected speech, but not that they regulate only unprotected speech).

* * *

The State may not "torch a large segment of the internet" to protect children from a small subset of online expression. *Reno*, 521 U.S. at 882; *see also* Mot. 14-15; Reply 14-16, 22-27. 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—and *Moody* supports this Court considering and granting Plaintiffs' motion for a preliminary injunction or further relief in this case.

Dated: July 26, 2024

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