UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

NETCHOICE, LLC **PLAINTIFF**

v. **CASE NO. 5:23-cv-05105-TLB**

TIM GRIFFIN, in his official capacity as Attorney General of Arkansas **DEFENDANT**

BRIEF IN SUPPORT OF
AMENDED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Last year, this Court preliminary enjoined Arkansas from enforcing its "Social Media Safety Act" ("Act 689") after concluding that it likely violates the First Amendment and the Due Process Clause. Arkansas did not appeal that decision. Instead, it sought discovery to try to undermine the Court's conclusions at that preliminary stage of the case. The Court explained that discovery was largely unnecessary because there is no real dispute over the key facts that make the Act so problematic. The state did not claim that discovery would somehow alter the Court's conclusion that the Act burdens a breathtaking amount of First Amendment activity. Nor did it suggest that discovery would make the law any less content-, speaker-, or viewpoint-based. After all, content, speaker, and viewpoint distinctions are obvious from the law's face. No amount of factual development, moreover, would solve the law's vagueness concerns. The Act fails to provide any serious guidance about which companies are subject to its requirements, and there is nothing the state could do in discovery to change that reality.

The Court nevertheless permitted the state, "out of an abundance of caution," to conduct "limited discovery" into whether Act 689 is a narrowly tailored means of addressing the state's asserted interest in "protecting children from sexual predators" on the Internet. But far from helping the state's case, discovery has only confirmed that the law is not remotely tailored. Act 689 is vastly overinclusive because it burdens an unfathomable amount of First Amendment activity—restricting minors (and adults) from accessing services like Facebook and X even if all they want to do is watch church services or share pictures of their latest travels. And it is vastly underinclusive because it includes a parade of exceptions for (among other things) gaming platforms and direct messaging services that the state's own evidence suggests are more prone to abuse than some of the online services the law covers. Arkansas has never come to grips, moreover, with the mountain of precedent refuting its position. The state has no answer for

Packingham v. North Carolina, 582 U.S. 98 (2017), which struck down a state law that prohibited convicted sex offenders from accessing social media as a violation of the First Amendment. *Id.* at 107. If restricting a limited group of convicted sex offenders from accessing social media is not a narrowly tailored means of protecting children on the Internet, it is hard to see how restricting the entire universe of minors from accessing social media is a narrowly tailored way to achieve the state's goals. Nor does the state have any answer to *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), which held that an effort to protect minors from purportedly harmful content is "underinclusive" when the state is "perfectly willing" to allow minors to access the same content "so long as one parent" approves. *Id.* at 802. Indeed, since the Court issued its preliminary injunction opinion last year, Arkansas' defense of Act 689 has only gotten more difficult, as another district court concluded a few months ago that a similar parental consent law in Ohio likely violates both the First Amendment and the Due Process Clause. *See NetChoice, LLC v. Yost*, 2024 WL 555904 (S.D. Ohio Feb. 12, 2024).

At bottom, Arkansas seeks to impose its own judgments about what is appropriate for minors. But case after case makes clear that decisions about what content minors should see are "for the individual to make, not for the Government to decree." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). The state does not possess "a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794-95. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). Because Act 689 is just as unconstitutional now as it was ten months ago, the Court should grant summary judgment to NetChoice and permanently enjoin the state from enforcing it.

BACKGROUND

I. Factual Background

A. Adults and Minors Alike Engage in First Amendment Activity on Online Services Covered by the Act.

NetChoice is an Internet trade association whose members operate a variety of online services, including Facebook, Instagram, Nextdoor, Pinterest, Snapchat, and X. Ex. A, Decl. of Carl Szabo ¶4 ("Szabo Decl.") (citing Home, NetChoice, https://netchoice.org). Those online services "allow[] users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham*, 582 U.S. at 107. "[U]sers employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id.* at 105 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). "On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos." *Id.* at 104. On Instagram, users can share photos of everyday moments and express themselves with short, fun videos. *See* Exhibit B, Davis Decl. ¶8. On "Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 582 U.S. at 104-05. On Pinterest, users can discover ideas for recipes, style, home decor, and more. *See* Exhibit A, Szabo Decl. ¶9. On Snapchat, users can communicate with friends and family in fun and casual ways. *See* Exhibit C, Boyle Decl. ¶¶3-4. And on Nextdoor, users can connect with neighbors, share local news, and borrow tools. *See* Exhibit D, Harriman Decl. ¶15.

Like adults, minors use these websites to engage in a wide array of expressive activity on a wide range of topics. *See* Szabo Decl. ¶6. Minors use online services to read the news, connect with friends, explore new interests, and follow their favorite sports teams and their dream colleges. *Id.* Some use online services to showcase their creative talents to others, including their artwork,

photography, writing, or other forms of creative expression. *Id.* Others use online services to raise awareness about social causes and to participate in public discussion on the hottest topics of the day. *Id.* Still others use online services to build communities and connect with others who share similar interests or experiences. *Id.* These services are ubiquitous: Ninety percent of teens have used social media, seventy-five percent report having at least one active profile, and more than half report visiting a social media site at least once a day. *See* Social Media and Teens, American Academy of Child & Adolescent Psychiatry (updated Mar. 2018), https://archive.ph/LOY12.

B. Parents Have Many Ways to Control What Their Children See on the Internet.

People inevitably have different opinions about what material is appropriate for minors. In a Nation that values the First Amendment, the preferred response to that diversity of opinion is to leave it to parents to decide what material or technology is appropriate for their children, including by using market-driven tools that make it easier for them to restrict access to what they consider harmful. The movie, music, and video game industries, for example, have developed sophisticated ratings systems to assist parents. The same is true of the Internet. The tech industry has developed sophisticated filtering tools and technologies, often in response to consumer demand, that enable parents to restrict which services their children use, how much time they spend on them, and what content they can view. Parents who wish to limit their children's access to online services such as Facebook, YouTube, and TikTok have many options at their disposal.

Network-level restrictions. Cell carriers and broadband providers provide parents with tools to block certain apps and sites from their kids' devices, ensure that they are texting and chatting with trusted contacts, and restrict screen time during certain hours of the day. *See, e.g.*, Ex. 2 (AT&T parental controls); Ex. 3 (Comcast parental controls); Ex. 12 (T-Mobile Family Controls); Ex. 13 (Verizon Smart Family controls). Most wireless routers (the devices that provide wireless Internet throughout a home) contain parental control settings as well. *See* Ex. 11. Parents

can use those settings to block specific websites and applications (including Facebook, X, TikTok, etc.) if they find them inappropriate for their children. *See* Ex. 10 (Netgear Circle® Smart Parental Controls). In addition, these settings empower parents to limit the time that their children spend on the Internet by turning off their home Internet at specific times during the day, pausing Internet access for a particular device or user, or limiting how long a child can spend on a particular website or online service. *Id.* Parents can also set individualized content filters for their children and monitor the websites they visit and the services they use. *Id*.

Device-level restrictions. Additional parental controls are available at the device level. Parents can decide whether to let their children use computers, tablets, and smartphones in the first place. And those who choose to let their kids use such devices have many ways to control what they see and do. Apple, for example, provides parents with tools to limit how long their children can spend on their iPhones, iPads, and MacBooks. *See* Ex. 1 (Parental controls for iPhone, iPad, and iPod Touch). It also provides them with tools to control what applications (*e.g.*, Facebook, X, and TikTok) their children can use, set age-related restrictions for those applications, filter online content, and control privacy settings. *Id.* Google and Microsoft offer similar parental controls for their devices. *See* Ex. 4; Ex. 6. In addition, many third-party applications allow parents to control and monitor their children's use of Internet-connected devices and online services. *See* Ex. 8.

Browser-level restrictions. Parental controls on Internet browsers offer another layer of protection. Google Chrome, Microsoft Edge, and Mozilla Firefox all offer parents tools to control which websites their children can access. *See, e.g.*, Ex. 9 (describing controls on Mozilla Firefox). Microsoft offers "Kids Mode," which allows children to access only a pre-approved list of websites. *See* Ex. 7. Google has a similar feature. *See* Ex. 5. It also provides parents with "activity reports," allowing them to see what apps and websites their children are accessing the most. *Id.*

Application-level restrictions. NetChoice members themselves have expended significant resources to ensure that their services are appropriate for adults and teens alike. For starters, many services operated by NetChoice members, including Facebook, Instagram, Snapchat, Nextdoor, and Pinterest, require users in the United States to be at least 13 years old before they can create an account. *See* Davis Decl. ¶27; Boyle Decl. ¶5; Harriman Decl. ¶13; Ex. 14 at 1. Meta trains its content reviewers to flag Facebook and Instagram accounts that appear to be used by people who are under 13, and it removes those accounts unless the user can prove that they meet the minimum age requirement. Davis Decl. ¶27; *see also* Boyle Decl. ¶5 (Snap similarly takes action to terminate accounts of individuals under 13). NetChoice members also encourage teenagers who are old enough to create an account to use private settings. Snapchat, for example, defaults all minor users to private settings. Boyle Decl. ¶6. Facebook, Instagram, and Pinterest likewise default teenagers under age 16 to private settings when they join and encourage them to choose more private settings through prompts and suggestions. *See* Davis Decl. ¶31; Ex. 17 at 2. NetChoice members also empower parents to monitor their teens' online activities. *See* Szabo Decl. ¶7. Parents can use Facebook's and Instagram's "supervision tools" to see how much time their teens spend on these services, set time limits or scheduled breaks, and view which accounts their teens follow or "friend" and which accounts follow or "friend" their teens. Davis Decl. ¶28. Through Snapchat's "family center," parents can keep track of who their teens are friends with and who they communicate with. Boyle Decl. ¶7.

NetChoice members expend significant resources curating the publication of content that users share. *See, e.g.*, Davis Decl. ¶¶33-40; Harriman Decl. ¶9. Members restrict violent and sexual content, bullying, and harassment. *See* Szabo Decl. ¶7; Davis Decl. ¶¶33-35; Boyle Decl. ¶6. Several use "age gating" to keep minors from seeing certain content visible to adults, or

younger teens from seeing content visible to older teens. Szabo Decl. ¶7; Davis Decl. ¶32. NetChoice members implement their policies through algorithms, automated editing tools, and human review. *See* Davis Decl. ¶¶27, 36. If a member decides that a piece of content violates its policies, it can remove the content, restrict it, or add a warning label or a disclaimer to accompany it. *See* Harriman Decl. ¶10. Members may (and do) suspend or ban accounts that violate their policies. *See* Davis Decl. ¶27. NetChoice members also provide users with tools to curate the content they wish to see. *See* Szabo Decl. ¶7. Users can generally choose who they follow and who can follow them. *See* Davis Decl. ¶¶7-8; Ex. 14 at 3-4. Some members provide users with tools to identify content they wish to avoid. Facebook users, for example, can control the content that Facebook recommends to them by hiding a post or opting to see fewer posts from a specific person or group. Davis Decl. ¶41. Instagram users can use a "not interested" button or keyword filters (for example, "fitness" or "recipes" or "fashion") to filter out content they do not wish to see. *Id.*

NetChoice members take numerous steps to keep teens safe on their services, including by implementing policies to combat child sex exploitation. For example, members devote significant resources to identifying illegal images and videos of child sexual abuse and reporting them to the relevant authorities. *See, e.g.*, Boyle Dec. ¶6 (Snap); Ex. 15 (Pinterest). In addition, Snapchat permits messages only between people who are already friends on the platform or who are already contacts in each other's phones and does not recommend minors as friend connections for others unless the person is already in their phone contacts or they share multiple mutual friends. Boyle Decl. ¶6. Instagram encourages teens via prompts and safety notices to be cautious in conversations with adults, even those to whom they are connected. Davis Decl. ¶30. Instagram also informs young people when an adult who has been exhibiting potentially suspicious behavior

tries to interact with them. *Id.* If an adult is sending a large number of friend or message requests to people under age 18, for example, or if the adult has recently been blocked by people under age 18, Instagram alerts the recipients and gives them an option to end the conversation and block, report, or restrict the adult. *Id.*

II. Procedural Background

A. Arkansas Enacts Act 689.

Notwithstanding the long line of cases striking down government efforts to decree what constitutionally protected speech is appropriate for minors, and the wealth of tools available to help parents restrict their children's Internet access, Arkansas has taken it upon itself to decree what is appropriate for minors on the Internet. In April 2023, the state enacted Act 689, a law that dramatically hinders minors from accessing "social media platforms," significantly curtailing their ability to engage in core First Amendment activities on some of the most popular online services. In particular, Act 689 requires "social media companies" to verify the age of everyone who attempts to create an account and access their services, and prohibits minors from creating new accounts on "social media platforms" without first obtaining parental consent. That said, Act 689 conspicuously does not apply to *all* online services, or even all services that many think of as "social media platforms." The law instead draws a host of vague and nonsensical distinctions based on content, speaker, and viewpoint, imposing its onerous requirements on a handful of online services that Arkansas views as associated with speech that it disfavors while exempting many other services associated with speech that it favors.

Definition of "social media company." Act 689 defines "social media company" as a company that offers "an online forum" in which individuals may "establish an account … for the primary purpose of interacting socially with other[s]"; "create posts or content"; "[v]iew [others'] posts or content"; and "establish[] mutual connections through request and acceptance." Act 689

at §1401(7)(A). But the Act includes multiple exceptions to the definition of "social media company" that are arbitrary; content-, speaker-, and viewpoint-based; and do not map onto any sensible concerns. In particular, the Act exempts from its definition of "social media company" (i) a "[m]edia company that exclusively offers subscription content in which users follow or subscribe unilaterally and whose platforms' primary purpose is not social interaction"; (ii) a "[m]edia company that exclusively offers interacting gaming, virtual gaming, or an online service, that allows the creation and uploading of content for the purpose of interacting gaming, entertainment, or associated entertainment, and the communication related to that content"; (iii) a company that offers an enumerated service, such as "cloud storage" or "enterprise collaboration tools for kindergarten through grade twelve (K-12) schools," and derives less than 25% of its revenue "from operating a social media platform, including games and advertising"; and (iv) a "[c]ompany that provides career development opportunities, including professional networking, job skills, learning certifications, and job posting and application services." *Id.* §1401(7)(B)(i), (iii)-(v). The Act then creates an exception-to-an-exception, stating that a "[s]ocial media company that allows a user to generate short video clips of dancing, voice overs, or other acts of entertainment in which the primary purpose is not educational or informative, does not meet the [first] exclusion." *Id.* §1401(7)(B)(ii).

Definition of "social media platform." Act 689's definition of "social media platform" is similarly riddled with arbitrary exceptions based on content, speaker, and viewpoint. The Act defines "[s]ocial media platform" as "a public or semipublic internet-based service or application," a "substantial function" of which "is to connect users in order to allow users to interact socially with each other within the service or application." *Id.* §1401(8)(A). But the term excludes any "online service," "website," or "application if [its] predominant or exclusive function" is (i) email;

(ii) private, direct messaging; (iii) streaming of media content licensed by someone other than "a user or account holder"; (iv) "[n]ews, sports, entertainment, or other content that is preselected by the provider and not user generated"; (v) "[o]nline shopping or e-commerce"; (vi) "[b]usiness-to-business software that is not accessible to the general public"; (vii) "[c]loud storage"; (viii) "[s]hared document collaboration"; (ix) "[p]roviding access to or interacting with data visualization platforms, libraries, or hubs"; (x) "[t]o permit comments on a digital news website, if the news content is posted only by the provider of the … website"; (xi) "obtaining technical support for [a] social media company's social media platform, products, or services"; (xii) "[a]cademic or scholarly research"; and (xiii) certain other types of research. *Id.* §1401(8)(B).

The Act's burdensome requirements. Act 689 imposes onerous obligations on disfavored "social media companies," thus burdening the First Amendment rights of adults, minors, and companies to speak, listen, and associate without government interference. The Act specifies that "a social media company shall not permit an Arkansas user who is a minor to be an account holder"—i.e., an "individual who creates an account or a profile" "on the social media company's social media platform"—"unless the minor has the express consent of a parent or legal guardian." *Id.* §§1401(1), 1402(a). "A social media company shall verify the age of an account holder," and "[i]f the account holder is a minor, the social media company shall confirm that a minor has [parental] consent … to become a new account holder, at the time an Arkansas user opens the account." *Id.* §1402(b)(1)-(2). In addition, "[a] social media company shall use a third party vendor to perform reasonable age verification before allowing access to the social media company's social media platform." *Id.* §1402(c)(1). The Act specifies that "[r]easonable age verification methods" include providing a "digitized identification card," "[g]overnment-issued identification," or "[a]ny commercially reasonable age verification method." *Id.* §1402(c)(2).

A "social media company" that violates those restrictions faces civil and criminal liability. The Act authorizes the Arkansas Attorney General to bring civil enforcement actions and makes a willful and knowing violation of the Act as a Class A criminal misdemeanor. *Id.* §1403(b)(2) (citing Ark. Code Ann. §4-88-103). In addition, an individual may sue to recover "[d]amages resulting from a minor accessing a social media platform without his or her parent's or custodian's consent," or "[a] penalty of [$2,500] per violation," as well as court costs and attorney's fees. *Id.* §1403(c)(1).

B. The Court Preliminarily Enjoins the State From Enforcing Act 689.

Shortly after Arkansas enacted Act 689, NetChoice filed this lawsuit challenging the Act and moved for a preliminary injunction. Dkt.2, 17. The Court held an evidentiary hearing at which it heard argument and received evidence, including testimony from state's expert witness. In a 50-page opinion, the Court held that (1) NetChoice has standing to challenge Act 689; (2) there is no prudential bar to NetChoice invoking the First Amendment rights of Arkansans; (3) "Act 689 is unconstitutionally vague because it fails to adequately define which entities are subject to its requirements"; (4) Act 689 likely violates the First Amendment because it "is not narrowly tailored" to achieve the state's asserted interest in protecting minors; (5) "NetChoice members are likely to suffer irreparable harm if the Act goes into effect"; and (6) "[t]he balance of the equities and public interest decidedly favor NetChoice." PI Opinion at 25, 32, 48-49. Accordingly, the Court preliminarily enjoined the state from enforcing Act 689 pending final disposition of the case. *Id.* at 50.

The state chose not to appeal the Court's decision. Instead, it sought discovery to assist it in opposing NetChoice's eventual motion for summary judgment. The Court denied most of the state's discovery requests, agreeing that "expansive discovery is inappropriate." Dkt.64 ("Discovery Order") at 8. After all, much of what makes Act 689 so problematic is undisputed.

The state did not claim that discovery would somehow change the Court's conclusion that the Act burdens First Amendment activity. Nor did it suggest that discovery would make the law any less content-, speaker-, or viewpoint-based. No amount of factual development, moreover, would solve the law's vagueness concerns. Nevertheless, the Court permitted the state to conduct "limited discovery" into whether Act 689 is a narrowly tailored means of addressing the state's asserted interest in "protecting children from sexual predators" on the Internet. *Id.* at 5. The Court observed that it was "skeptical of the State's argument" on that score, but it chose to allow that limited discovery "out of an abundance of caution." *Id.* at 5-7.

ARGUMENT

This Court determined last year that Act 689 likely violates the U.S. Constitution. The state insisted that discovery would undermine that conclusion. But far from helping the state's case, discovery has only confirmed what NetChoice has been saying all along: Act 689 is a blatant violation of the First Amendment and the Due Process Clause. The Court should grant NetChoice's motion for summary judgment, declare Act 689 unconstitutional, and permanently enjoin the state from enforcing it.

I. Act 689 Violates The First Amendment.

A. Act 689 Triggers Heightened Scrutiny Several Times Over.

1. Act 689 restricts a breathtaking amount of core First Amendment activity.

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more" without government interference. *Packingham*, 582 U.S. at 104. That includes the Internet generally and online services like those provided by NetChoice members specifically. Online services like Facebook and X offer "relatively unlimited, low-cost capacity for communication of all kinds."

Id. (quoting *Reno*, 521 U.S. at 870). And "users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought,'" including everything from "debat[ing] religion and politics with their friends and neighbors" on Facebook to "petition[ing] their elected representatives" on X. *Id.* at 104-05.

It is thus no surprise that the Supreme Court has held that the First Amendment limits the government's ability to restrict people's access to online services, even when the government's aim is to protect minors. In *Packingham*, for example, the Court held that a North Carolina law that barred convicted sex offenders from accessing "social media" websites violated the First Amendment. The state tried to justify the law on the ground that it served its interest in keeping sex offenders away from vulnerable minors. 582 U.S. at 106. While the Court acknowledged the importance of that interest, it nevertheless concluded that the law was unconstitutional. *Id.* at 107-08. By barring sex offenders from accessing "social networking" websites altogether, the state had "enact[ed] a prohibition unprecedented in the scope of First Amendment speech it burdens." *Id.* at 107. Such websites, the Court explained, are for many the principal sources for knowing current events, speaking, listening, and "otherwise exploring the vast realms of human thought and knowledge." *Id.* at 107. For the government to "foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 108.

Just as the First Amendment constrains the government's authority to restrict adults' access to online services like Facebook, Pinterest, and Nextdoor, it constrains the government's authority to restrict minors' access to those services as well. *See* PI Opinion at 40-41. The Supreme Court has repeatedly held that "minors are entitled to a significant measure of First Amendment protection," *Erznoznik*, 422 U.S. at 212-13, and "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate," *Tinker v. Des Moines Indep. Cmty. Sch.*

Dist., 393 U.S. 503, 511 (1969). As a general rule, "the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik*, 422 U.S. at 214. While "a State possesses legitimate power to protect children from harm," "that does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794-95.

Accordingly, courts have routinely struck down government efforts to protect minors from the purportedly harmful effects of new forms of media by restricting First Amendment rights. In *Brown*, for example, the Supreme Court held that a California law that prohibited the sale of violent video games to minors without parental consent violated the First Amendment. 564 U.S. at 804-05. And in *Erznoznik*, the Court held the First Amendment prohibited a local ordinance barring the display of movies containing nudity at drive-in theaters. 422 U.S. at 217-18; *accord Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689-91 (1968) (invalidating ordinance restricting dissemination of films that are "not suitable for young persons"); *Joseph Burstyn*, 343 U.S. at 501-02 (invalidating law authorizing denial of license to show films deemed "sacrilegious"). The Eighth Circuit has likewise recognized and applied these same principles. *See Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 956 (8th Cir. 2003) (invalidating ordinance prohibiting the sale of violent video games to minors without parental consent); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992) (invalidating law prohibiting sale of videos depicting violence to minors); *see also Shipley, Inc. v. Long*, 454 F.Supp.2d 819, 831 (E.D. Ark. 2004) (invalidating law restricting materials deemed "harmful to minors"). And another district court recently held that a similar parental consent law in Ohio likely violates the First Amendment. *See NetChoice, LLC v. Yost*, 2024 WL 555904, at *13 (S.D. Ohio Feb. 12, 2024).

Just like the laws in those cases, Act 689 plainly restricts vast quantities of expression that enjoy First Amendment protection. By restricting *all* access to *any* use of online services like Facebook, X, and Nextdoor, Arkansas has "prevent[ed] the user from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 582 U.S. at 108. In fact, Act 689 is even more obviously problematic than the laws invalidated in those cases. Some of those cases at least involved an attempt (albeit an unsuccessful one) to "adjust the boundaries of an existing category of unprotected speech" (like obscenity) "to ensure that a definition designed for adults is not uncritically applied to children." *Brown*, 564 U.S. at 794. But Act 689 does not endeavor to confine its restrictions to speech that even arguably approaches any constitutional line. It instead restricts the ability of minors to create accounts and access *any* content on websites like Facebook and X even if all they want to do is to attend church services, watch the launch of a presidential campaign, or communicate with friends or family. Arkansas has thus restricted wide swathes of protected First Amendment activity based on a concern that minors *may* encounter harmful material on those services. If California had restricted access to *all* video games based on a concern that *some* video games may be addictive or violent, that would have made the First Amendment violation even more glaring. *See Packingham*, 582 U.S. at 108-09.

Making matters worse, by requiring *all* users to verify their age before creating an account, Act 689 burdens the right of *adults* to access those websites too. *See* PI Opinion at 39-40. The Supreme Court has repeatedly struck down even laws that restrict access to speech that is *not* constitutionally protected as to minors on the ground that those efforts were insufficiently tailored to avoid unduly restricting the First Amendment rights of adults. In *Ashcroft v. ACLU*, 542 U.S. 656 (2004), for example, the Court concluded that a statute requiring Internet users to "identify themselves or provide their credit card information" before accessing certain sexually explicit

websites impermissibly burdened the right of adults to "gain access to speech they have a right to see." *Id.* at 667. Likewise, in *Reno*, the Court held that a federal statute that required age verification via credit card to access "indecent" or "patently offensive" material on the Internet violated the First Amendment even assuming such content was unprotected as to minors because it "would completely bar adults who do not have a credit card and lack the resources to obtain one" from accessing protected speech. 521 U.S. at 849. And in *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000), the Court held that a federal statute restricting sexual programming on cable television violated the First Amendment because alternatives like voluntary blocking would impose less of burden on the rights of adults. *Id.* at 807; *see also, e.g., Sable*, 492 U.S. at 131 (striking down a ban on pre-recorded "dial-a-porn" messages, in an effort to prevent minors from accessing them, as too restrictive of adults' First Amendment rights). Here, too, Act 689 burdens adult speech by requiring *all* Arkansas users to verify their age via digitized identification before creating an account. Act 689 at §1402(c)(2). As the Supreme Court has recognized, such identification requirements "discourage users from accessing" online services, and they "completely bar" adults who do not possess identification. *Reno*, 521 U.S. at 856; *cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198-99 (2008) (requiring voters to present identification before voting imposes burdens, particularly where "economic or other personal limitations" may prevent potential voters from obtaining identification); *see also* Harriman Decl. ¶¶16-29.

The unique aspects of online services like Facebook and Twitter only heighten the First Amendment values at stake. While government restrictions on books, magazines, movies, and video games prohibit people from *receiving* speech, restrictions on accessing online services have the additional effect of interfering with the First Amendment rights of NetChoice members to disseminate both their own and third-party speech to their users. *See NetChoice, LLC v. Attorney*

General, 34 F.4th 1196, 1210 (11th Cir. 2022). As the Supreme Court has explained, the "dissemination of information" is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). By restricting how online services can disseminate speech to their users, Act 689 interferes with their First Amendment rights. *See Yost*, 2024 WL 555904, at *6. The law also has the effect of restricting users' ability to engage in their own speech and associate with like-minded individuals. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) ("The right of freedom of speech and press … embraces the right to distribute literature, and necessarily protects the right to receive it."). The Internet and "social media," after all, are some of the "most important places … for the exchange of views." *Packingham*, 582 U.S. at 104. "Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind." *Id.* at 107. Government restrictions on "the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture" thus unquestionably trigger First Amendment scrutiny. *Id.* at 109.

2. Act 689 restricts speech based on content, speaker, and viewpoint.

Act 689 not only restricts an unprecedented amount of First Amendment activity, but does so on the basis of content, speaker, and viewpoint, triggering strict scrutiny multiple times over. *See* PI Opinion at 38.

Content-based restrictions. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In assessing whether a regulation is content based, courts consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter." *Id.* Others "are more subtle" but "achieve[] the same result" through distinctions based on "function or purpose." *City of Austin v.*

Reagan Nat'l Advert. of Austin, LLC, 142 S.Ct. 1464, 1474 (2022). In *Reed*, for example, the Supreme Court held that distinctions between signs serving certain "noncommercial purposes," those "designed to influence the outcome of an election," and "temporary directional signs relating to a qualifying event" were content based. 576 U.S. at 159-60 (capitalization altered). Similarly, in *Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335 (2020), the Court held that a federal statutory prohibition on robocalls with an exception for calls "made solely to collect a debt owed to or guaranteed by the United States" was content-based because it "favor[ed] speech made for collecting government debt over political and other speech." *Id.* at 2346.

Act 689 is a content-based restriction on speech because it "singles out specific subject matter for differential treatment," including by using the "function or purpose" of speech as a proxy for its content. *Reed*, 576 U.S. at 169; *see also City of Austin*, 142 S.Ct. at 1472-73. The Act's definition of "social media company" targets companies that provide services with "the primary purpose of interacting socially," Act 689 at §1401(7)(A), while generally excluding a company that "exclusively offers subscription content in which users follow or subscribe unilaterally and whose platforms' primary purpose is not social interaction," *id.* §1401(7)(B)(i). The law thus treats expression for purposes of "social interaction" less favorably than expression that serves other purposes. *See also id.* §§1401(7)(B)(i), (8)(A)(ii)(a), (8)(B)(v)(c), (xiii)(2). In addition, a company offering a service that "allows a user to generate short video clips of dancing, voice overs, or other acts of entertainment" is exempt from Act 689 only if "the primary purpose" of that protected speech is "educational or informative." *Id.* §1401(7)(B)(ii).

The Act also exempts a company that "exclusively offers interacti[ve] gaming, virtual gaming, or an online service, that allows the creation and uploading of content for the purpose of interacti[ve] gaming, entertainment, or associated entertainment, and the communication related

to that content," *id.* §1401(7)(B)(iii), certain companies that offer "educational devices" or "enterprise collaboration tools for kindergarten through grade twelve (K-12) schools," *id.* §1401(7)(B)(iv), and companies that offer "career development opportunities, including professional networking, learning certifications, and job posting and application services," *id.* §1401(7)(B)(v). But it contains no comparable exceptions for companies that focus on other types of content, like political content. Thus, under Act 689, a company that permits users to share content for the purpose of gaming (like Activision Blizzard) is exempt, but a company that permits users to share content for the purpose of persuading others to vote for their preferred candidate (like X) is not. Likewise, a service that permits users to share job postings and engage in professional networking (like LinkedIn) is exempt, but one that permits users to share dance videos or engage in social networking (like Facebook, Instagram, or TikTok) is not. "That is about as content-based as it gets." *Barr*, 140 S.Ct. at 2346.

Act 689's definition of "social media platform" is also riddled with arbitrary content-based distinctions. The Act excludes a service "if the predominant or exclusive function is," among other things, disseminating content about "[n]ews, sports, [and] entertainment," "[a]cademic or scholarly research," and some "[o]ther research." Act 689 at §1401(8)(B)(iv), (xii), (xiii). The Act favors speech "focused on online shopping or e-commerce"—including "collections of goods for sale or wish lists," product "reviews," and related comments—as well as communications "[f]or the purpose of providing or obtaining technical support." *Id.* §1401(8)(B)(v), (xi); *see also id.* §1401(8)(B)(xiii)(b) (carve-out for "classified advertising service[s]"). It also exempts "a news or public interest broadcast, website video, report, or event," and a "news-gathering organization." *Id.* §1403(d)(1)-(2). Users can therefore leave product reviews on Amazon, post comments on law review articles published on SSRN, and engage in competitive banter while playing fantasy

football on ESPN. But they cannot reply to a friend's missives on X or comment on Instagram posts without first verifying their age or obtaining parental consent. Act 689 thus singles out some speech for favorable treatment based on subject matter, while subjecting other speech to unfavorable treatment based on subject matter. Indeed, the district court in *Yost* found similar carveouts for "product review websites and 'widely recognized' media outlets" content based. *Yost*, 2024 WL 555904, at *11. There is no reason for a different conclusion here.

Speaker-based restrictions. Making matters worse, the law arbitrarily favors speech depending on who the speaker is. Courts are deeply skeptical of laws that "distinguish[] among different speakers," as "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "Speaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" *Nat'l Inst. of Family & Life Advocs.*, 138 S.Ct. at 2378 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)). When a law "discriminate[s] among media, or among different speakers within a single medium," the First Amendment problem is even worse. Such laws present very real "dangers of suppression and manipulation" of the medium and risk "distort[ing] the market [of] ideas." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 659-60, 661 (1994); *see also Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983). And when "the basis on which [the government] differentiates between" media is "its content," the law is "particularly repugnant to First Amendment principles." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

Act 689 facially "distinguish[es] among different speakers," *Citizens United*, 558 U.S. at 340, in multiple respects. At the outset, the Act explicitly favors the speech of whoever provides the online service, *e.g.*, "[n]ews, sports, entertainment, or other content that is *preselected by the*

provider," Act 689 at §1401(8)(B)(iv) (emphasis added), over speech generated by users. *Compare id.* §1401(7)(A), (B)(ii), (8)(B)(ii)(c), (iii) (disfavoring public posting by individuals and other "user generated" content), *with id.* §1401(8)(B)(x) (favoring content "posted only by the provider of [a] digital news website"), (8)(B)(xiii)(a) (similar), *and id.* §1403(d) (carveout for "news-gathering organization[s]"). That is not even a workable distinction in practice, as the marketplace does not feature a clear dividing line between services that provide their own content and those that facilitate the sharing of user-generated content. Services that started off as content creators subsequently facilitate discussion of that content or discussions among users with a shared interest in the topic. *See, e.g.*, *World of Warcraft Forums*, Blizzard Entertainment, https://archive.ph/wip/mCc1a (last visited June 21, 2024). Similarly, services that initially focus on allowing users to share their own content may shift over time toward providing professionally generated content. *See, e.g.*, Jin Kim, *The Institutionalization of YouTube: From User-Generated Content to Professionally Generated Content*, 34 Media, Culture & Society 53-67 (2012). Implicitly recognizing that dynamic, Act 689 arbitrarily exempts services that offer their own content on favored topics like "news," "sports," or "entertainment" even if they also offer "chat, comment, or interactive functionality" that leads to the same kind of social interaction found on disfavored sites. Act 689 at §1401(8)(B)(iv).

More troubling still, the Act imposes arbitrary size and revenue requirements that have the practical effect of singling out just a handful of companies for disfavored treatment. The Act does not apply to any "social media platform that is controlled by a business entity that has generated less than one hundred million dollars … in annual gross revenue." Act 689 at §1401(8)(C). Thus, the Act restricts protected expression by large entities such as Meta Platforms, Inc. and X Corp., but not by smaller entities. The same user-generated speech that Arkansas restricts on Facebook

or X is unrestricted if it appears on "smaller platforms such as Parler, Gab, and Truth Social." *See* Jess Weatherbed, *New Arkansas Bill to Keep Minors Off Social Media Exempts Most Social Media Platforms*, The Verge (Apr. 13, 2023), https://archive.ph/KMmKe (noting that the latter three platforms "don't meet the annual gross revenue requirement of $100 million"). And a service generating $90 million in revenue could be regulated by the Act if owned by a somewhat larger enterprise, but entirely unregulated if spun off, even though the user-generated content available to minors on the service remained unaltered. It could also escape regulation if it were purchased by a much larger enterprise with more than $270 million in unrelated revenue, as the Act carves out companies with more than $100 million in revenue if they derive "less than twenty-five percent … of [their] revenue from operating a social media platform" and also offer "cloud storage services, enterprise cybersecurity services, educational devices, or enterprise collaboration tools for [K-12] schools." Act 689 at §1401(7)(iv).

Those distinctions make no sense in theory or in practice. For example, a "short video clip[] of dancing" or "other acts of entertainment" is restricted if it appears on Instagram or X, *see id.* §1401(7)(B)(ii), but not if it appears on YouTube, which generates less than 25% of Google's total revenue. *See* Emily Dreibelbis, *Arkansas Limits Social Media Access for Kids Under 18, With One Major Exception*, PCMag (Apr. 13, 2023) (citing statement by co-sponsor of Act 689 that the Act does not apply to Google), https://archive.ph/dEowc; Daniel Howley, *Alphabet Misses on Earnings Expectations as Ad Revenue Falls*, Yahoo! (Feb. 2, 2023) (noting that YouTube ad revenue makes up only about 13% of Google's total ad revenue). This is so even though those services are among the most popular with teens. The Act places no restrictions on professional networking on LinkedIn but requires adults to verify their age before engaging in professional networking on X or Facebook. Users can share gaming content on Xbox Live but cannot share

the same content on Facebook or X. That makes especially little sense because people often "cross-post"—i.e., post the same content on multiple online services. *See, e.g.*, Cincinnati Bengals, Year 4 Awaits, Instagram (June 20, 2023), https://tinyurl.com/4f2np3dj; Cincinnati Bengals, Year 4 Awaits, TikTok (June 20, 2023), https://tinyurl.com/44m7rkr4; Cincinnati Bengals, Year 4 Awaits, YouTube (June 20, 2023), https://tinyurl.com/y969z2pd. Simply put, Act 689 repeatedly draws arbitrary lines in an area that requires careful tailoring.

Viewpoint-based restrictions. On top of all that, some of the Act's distinctions discriminate among viewpoints, suppressing speech "based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019); *see, e.g.*, *Sorrell*, 564 U.S. at 565 (restrictions on speech "promot[ing] brand-name drugs" were impermissibly "aimed at a particular viewpoint"). For example, the Act treats "video clips of dancing, voice overs, or other acts of entertainment" more favorably if their "primary purpose" is "educational or informative" than if it is not. Act 689 at §1401(8)(B)(ii); *see also id.* §1401(8)(B)(xiii)(c) (favoring speech "used by and under the direction of an educational entity"). The First Amendment does not permit Arkansas to regulate private speech based on its perception of the value of the views expressed.

B. Act 689 Cannot Survive Any Level of Heightened Scrutiny, Let Alone Strict Scrutiny.

Because the government cannot suppress constitutionally protected speech "to protect the young from ideas or images that a legislative body thinks unsuitable for them," *Brown*, 564 U.S. at 795, states bold enough to attempt such regulation must overcome strict scrutiny, which is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To satisfy strict scrutiny, Arkansas must demonstrate that Act 689 is "the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S. at 478; *see also Playboy*, 529 U.S. at 827. Even intermediate scrutiny would require Arkansas to demonstrate that Act 689

is "narrowly tailored to serve a significant governmental interest." *Packingham*, 582 U.S. at 103. As this Court already recognized, Act 689 cannot survive any level of heightened scrutiny, let alone strict scrutiny. *See* PI Opinion at 41-48. Discovery has not changed that conclusion.

The state has asserted that Act 689 furthers an important interest in "protecting minors." Dkt.34 at 1-2, 13, 18-19, 21. While the state no doubt has a strong interest in protecting minors, "overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad v. Ziriax*, 670 F.3d 1111, 1129-30 (10th Cir. 2012). Strict scrutiny demands that the state "specifically identify an 'actual problem' in need of solving." *Brown*, 564 U.S. at 799. And it of course demands that a law actually endeavor to solve the proffered problem. To the extent the state attempts to justify Act 689 based on vague concerns about how much time teens spend on "social media," it flunks even that basic test. As this Court has already explained, "Act 689 does not address time spent on social media; it only deals with account creation." PI Opinion at 45. "In other words, once a minor receives parental consent to have an account, Act 689 has no bearing on how much time the minor spends online." *Id.*

Perhaps recognizing these problems, the state narrowed its focus at the preliminary injunction hearing, asserting that Act 689 furthers its interest in preventing child sexual exploitation as opposed to other "more general harms." Tr.130:10-24; *see* Tr.121:25-122:11. But as this Court recognized, Act 689 is seriously over- and under-inclusive when judged against that interest. *See* PI Opinion at 43-48. The law is overinclusive because it "simply impedes access to content writ large" on covered services—even if the content is entirely innocuous. *Id.* at 47. The state does not (and cannot) dispute that teens use services like Facebook, Pinterest, and Nextdoor for many legitimate and productive purposes that lie at the First Amendment's core. *See id.* at 13 (citing the parties' joint stipulation "that adults and minors use NetChoice members' online

services to engage in an array of expressive activity that is protected by the First Amendment" (footnote omitted)); *id.* at 13-14 ("[U]sers employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought." (quoting *Packingham*, 582 U.S. at 105)). Act 698 dramatically impinges upon those activities by precluding minors from accessing *any* content on covered services unless they obtain parental consent to create an account. *See id.* at 40-41 ("Act 689 obviously burdens minors' First Amendment Rights.").

For example, the Act precludes minors from joining a Facebook group devoted to "support of laws against corporal punishment of children, or laws in favor of greater rights for minors," without parental consent. *Brown*, 564 U.S. at 795 n.3. It precludes minors from using Nextdoor to obtain a dog-walking job, even though the state's own evidence indicates that Nextdoor had only one report of suspected child sexual exploitation in 2022. *See* PI Opinion at 44-45 (citing data from the National Center for Missing & Exploited Children ("NCMEC"), State's Hr'g Ex. 9); *accord* Harriman Decl. ¶12(b). It even precludes minors from watching and participating in a presidential candidate's launch announcement on X without parental consent. And on top of that, the Act has the practical effect of hindering adults' ability to access the same online services, even though the state has no legitimate reason to do so. *See supra* pp.22-23; *Ashcroft*, 542 U.S. at 663; *Reno*, 521 U.S. at 856-57. Act 698 thus hinders access not just to potentially harmful content, but to online services that are, "for many … the principal sources for knowing current events, checking ads for employment," and "otherwise exploring the vast realms of human thought and knowledge." PI Opinion at 39 (quoting *Packingham*, 582 U.S. at 107). That is breathtakingly overbroad measured against *any* interest the state might assert.[1]

[1] Making matters worse, it is not even clear how online services can even implement some aspects of the law. The state's own expert witness testified at the preliminary injunction hearing that he

Conversely, Act 698 is "wildly underinclusive when judged against" the state's interest in preventing child sexual exploitation. *Brown*, 564 U.S. at 802; *see* PI Opinion 47. The law regulates only a few "social media" services while excluding countless others, including YouTube, Google Hangouts, Discord, BeReel, Mastodon, Gab, Truth Social, Imgur, Brainly, DeviantArt, and Twitch—even though minors regularly use those services and may come across virtually indistinguishable material (as well as bad actors who seek to exploit children) on them. Indeed, the state's own evidence indicates that some of the services exempted from Act 698's coverage—including sites like "Kik and Kik Messenger," along with other "video chat applications" and "gaming sites"—are "ones that adult sexual predators commonly use to communicate with children." PI Opinion at 43-44 (citing State's Hr'g Ex. 6 (FBI press release); Tr. 67:16-23 (testimony of state's expert witness)). In fact, the Act exempts "the sites with the third-, fourth-, fifth-, and sixth-highest numbers of reports" of suspected child sexual exploitation in 2022, per the NCMEC data on which the state relies. PI Opinion at 44-45 (discussing State's Hr'g Ex. 9). And the state is "perfectly willing" to allow minors to access any and all content on the sites it does restrict "so long as one parent … says it's OK." *Brown*, 564 U.S. at 802. "That is not how one addresses a serious social problem." *Id.*; *accord* PI Opinion at 48 ("If the legislature's goal in passing Act 689 was to protect minors from materials or interactions that could harm them online, there is no compelling evidence that the Act will be effective in achieving those goals.").

The state's attempt to justify Act 689 as a means of protecting minors from online predators also runs headlong into *Packingham*. There, North Carolina argued that barring convicted sex

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had not "yet really seen any fully effective means" for websites to verify that the person granting permission is a parent or legal guardian of the minor, and "actually establishing that that is a parent or a legal guardian" is a "challenge with these processes." Tr. 55:17-56:3; Tr. 56:15-23; Tr.57:11-19.

offenders from accessing services like Facebook and Twitter was necessary to protect minors from such predators. 582 U.S. at 106. The Court acknowledged the importance of that interest, but it nevertheless concluded that even a law singling out convicted sexual predators was not sufficiently tailored because it prohibited sex offenders from engaging in substantial protected First Amendment activity on those services. *Id.* at 107-08. The Court noted that the state had a narrower way to protect minors: It could "prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id.* at 107. "Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict." *Id.* If barring a limited group of *convicted sex offenders* from accessing "social media" is an insufficiently tailored means of protecting minors from online predators, it is impossible to see how restricting the entire universe of potential *victims* from accessing those services is remotely tailored. *Accord* PI Opinion at 47.

Those problems are more than enough to render Act 689 unconstitutional. But on top of that, the law is patently not the "least restrictive means" to achieve the state's asserted goal of keeping minors safe online. *Cf. Playboy*, 529 U.S. at 827. As this Court observed, the law's "[a]ge-verification requirements are more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies." PI Opinion at 47-48. "Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source." *Id.* at 48 (quoting *Ashcroft*, 542 U.S. at 657). And "[u]nder a filtering regime, adults ... may gain access to speech they have a right to see without having to identify themselves[.]" *Id.* (quoting *Ashcroft*, 542 U.S. at 657). Arkansas has provided no evidence that blocking and filtering technologies cannot achieve their goal of helping parents protect their children from the

supposedly harmful effects of social media. Parents can refuse to give their children smartphones, tablets, or laptops in the first place. They can also restrict access to content on the Internet at the network level (parental controls through their service provider or on the router), the device level (parental controls on smartphones, tablets, and computers), and the application level (parental controls on web browsers like Chrome and Safari and apps like Instagram and TikTok).

To the extent Arkansas thinks those tools are insufficient because some children might skirt them or some parents might not utilize them, the Supreme Court has squarely held that "[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." *Playboy*, 529 U.S. at 824. The far less speech-restrictive path is to "publicize" the existence of those tools and to teach parents how to prevent their kids from circumventing them. *Id.* at 825. "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Id.* at 824. And to the extent the state's real concern is that parents may make an informed decision *not* to restrict their children's use of covered services, it is not for the state to restrict minors' access to protected speech in service of "what the State thinks parents *ought* to want." *Brown*, 564 U.S. at 804. The "government cannot silence protected speech by wrapping itself in the cloak of parental authority." *Interactive Digital*, 329 F.3d at 960.

In short, Act 689 burdens far too much and furthers far too little. It flunks any level of heightened scrutiny.

II. Act 689 Is Unconstitutionally Vague.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages

seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 567 U.S. at 253-54. After all, vague laws risk chilling would-be speakers by forcing them "to steer far wider of the unlawful zone" than they would "if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). For that reason, laws touching on speech must themselves speak "only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

That is equally true when it comes to government speech restrictions aimed at protecting minors, which the Supreme Court has repeatedly struck down on vagueness grounds. After all, "[i]t is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *Interstate Circuit*, 390 U.S. at 689; *see also Joseph Burstyn*, 343 U.S. at 497; *Winters v. New York*, 333 U.S. 507, 518-19 (1948); *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam); *Superior Films, Inc. v. Dep't of Educ. of Ohio*, 346 U.S. 587 (1954).

"Here, Act 689 is unconstitutionally vague because it fails to adequately define which entities are subject to its requirements." PI Opinion at 32. The Act defines "social media company" as "an online forum that a company makes available for an account holder" to "[c]reate a public profile, establish an account, or register as a user *for the primary purpose* of interacting socially with other profiles and accounts," "[u]pload or create posts or content," "[v]iew posts or content of other account holders," and "[i]nteract with other account holders or users, including without limitation establishing mutual connections through request and acceptance." Act 689 at

§1401(7)(A) (emphasis added). That definition is hopelessly vague. As this Court has explained, "the statute neither defines 'primary purpose'—a term critical to determining which entities fall within Act 689's scope—nor provides any guidelines about how to determine a forum's 'primary purpose.'" PI Opinion at 32.

That "leav[es] companies to choose between risking unpredictable and arbitrary enforcement (backed by civil penalties, attorneys' fees, and potential criminal sanctions) and trying to implement the Act's costly age-verification requirements." *Id.* For example, it is unclear whether the Act applies to Pinterest, which allows users to "interact[] socially with other profiles" or just to browse content without such interactions. *See generally* Ex. 14. It is similarly unclear whether the Act applies to Nextdoor, as some people create Nextdoor accounts to "interact[] socially" with other users, while others create accounts to stay abreast of the happenings in their neighborhood without interacting with other users. *See generally* Harriman Decl. Indeed, while the state conceded at the preliminary injunction hearing that the Act does not apply to Snapchat, the state's own expert witness opined that he thought it would apply. PI Opinion at 33-34. "Such ambiguity renders a law unconstitutional." *Id.* at 32.

"Other provisions of Act 689 are similarly vague." *Id.* The law exempts a "[m]edia company that exclusively offers subscription content in which users follow or subscribe unilaterally and whose platforms' *primary purpose* is not social interaction," but a "[s]ocial media company that allows a user to generate short video clips of dancing, voiceovers, or other acts of entertainment in which *the primary purpose* is not educational or informative does not meet" that exclusion. Act 689 at §1401(7)(B)(i)-(ii) (emphasis added). Here, too, the statute does not define the phrase "primary purpose," leaving companies to guess what it means. After all, "video clips of dancing" can be both "educational" and entertaining in a way that encourages "social

interaction." It is unclear how a company is supposed to know whether the primary purpose of user-generated content is educational or something else.

Likewise, the statute defines the phrase "social media platform" to mean an "internet-based service or application … [o]n which a *substantial function* of the service or application is to connect users in order to allow users to interact socially with each other within the service or application," and it excludes from that definition services in which "the *predominant* or exclusive function is" "[d]irect messaging consisting of messages, photos, or videos" that are "[o]nly visible to the sender and the recipient or recipients" and "[a]re not posted publicly." *Id.* §1401(8)(A)-(B) (emphasis added). Again, the statute does not define "substantial function" or "predominant … function," leaving companies to guess whether their online services are covered by the law's demands. For example, many services—including Facebook and Instagram—allow users to send direct, private messages consisting of text, photos, or videos, but also offer other features that allow users to make content that anyone can view. *See* Davis Decl. ¶¶5, 8, 29-30; Boyle Decl. ¶¶3-4. "Act 689 does not explain how platforms are to determine which function is 'predominant,' leaving those services to guess whether they are regulated." PI Opinion at 34. This is not the narrow specificity that the Constitution requires of government regulations that "impose[] possible criminal and civil penalties on companies" and "interfere[] with … constitutionally protected speech." *Id.* at 30-31.

III. NetChoice Meets All The Other Requirements For A Permanent Injunction.

"The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits." *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999). This Court has already held that NetChoice's members "are likely to suffer irreparable harm if the Act goes into effect." PI Opinion at 48. For one thing, the Act violates the First Amendment, and a "[l]oss of

First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Id.* at 49 (second alteration in original) (quoting *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996)). In addition, if this vague statute went into effect, NetChoice members would face a perilous choice between exposing themselves to massive liability for disseminating protected speech to minors or taking costly and burdensome steps that will drastically curtail access to their online services. PI Opinion at 48. These irreparable harms amply justify converting the Court's preliminary injunction into a permanent injunction.

In granting a preliminary injunction, this Court concluded that "[t]he balance of the equities and public interest decidedly favor NetChoice" given the First Amendment interests at stake. *Id.* at 49. The same is true of a permanent injunction. Arkansas "has no interest in enforcing laws that are unconstitutional ... [and] an injunction preventing the State from enforcing [the challenged statute] does not irreparably harm the State." *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F.Supp.3d 1213, 1322 (E.D. Ark. 2019) (citing *Hispanic Int. Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1249 (11th Cir. 2012)); *Brandt v. Rutledge*, 551 F.Supp.3d 882, 892 (E.D. Ark. 2021), *aff'd sub. nom., Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). Moreover, allowing the law to take effect would not serve the public interest, particularly given the dearth of evidence that its age-verification and parental-consent requirements would "be an effective approach" to "the harms [the state] has identified." PI Opinion at 49. All factors thus favor entry of a permanent injunction.

CONCLUSION

The Court should grant NetChoice's Amended Motion for Summary Judgment.

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