David C. Reymann (8495)
Kade N. Olsen (17775)
PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, UT 84111
(801) 257-7939
dreymann@parrbrown.com
kolsen@parrbrown.com

Steven P. Lehotsky*
Scott A. Keller*
Jeremy Evan Maltz*
LEHOTSKY KELLER COHN LLP
200 Massachusetts Avenue, NW
Washington, DC 20001
(512) 693-8350
steve@lkcfirm.com
scott@lkcfirm.com
jeremy@lkcfirm.com

Todd Disher*
Joshua P. Morrow*
Alexis Swartz*
LEHOTSKY KELLER COHN LLP
408 W. 11th Street, 5th Floor
Austin, TX 78701
(512) 693-8350
todd@lkcfirm.com
josh@lkcfirm.com
alexis@lkcfirm.com

*(admitted pro hac vice)

Attorneys for Plaintiff NetChoice, LLC

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

NETCHOICE, LLC, **Plaintiff,** **v.** **SEAN D. REYES, in his official capacity as Attorney General of Utah,** **KATHERINE HASS, in her official capacity as Director of the Division of Consumer Protection of the Utah Department of Commerce,** **Defendants.**	**PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** **Case No. 2:23-cv-00911-RJS-CMR** **Judge Robert J. Shelby** **Magistrate Judge Cecilia M. Romero**

Table of Contents

Table of Authorities

Page(s)

Statutes

Other Authorities

The Utah Minor Protection in Social Media Act ("Act") unconstitutionally restricts how minors can communicate and listen to protected speech on a content-, speaker-, and viewpoint-based subset of websites.[1] It also unconstitutionally burdens adults' access to protected speech.

Defendants concede the Act regulates protected political, religious, and plain social speech. ECF 58 at 10. Yet Defendants lack persuasive responses to binding precedent, which invalidates the Act's requirements (1) for parental consent before minors can speak beyond state-limited networks, §§ 13-71-202(1)(a)-(b), 13-71-204(1); (2) limiting how websites can display and disseminate speech, § 13-71-202(5); and (3) for websites to engage in "age assurance" before permitting anyone to access and engage in protected speech, § 13-71-201.

Instead, Defendants repeatedly appeal to the State's authority to regulate *non-expressive products* like carcinogenic tobacco and alcohol and *conduct* like gambling. *See* ECF 58 at 1, 7-8, 10, 16, 27, 29, 37, 40-41, 59-60. But the Constitution provides *speech* special protection. The Supreme Court just held governments cannot "regulate ['social media' websites] free of the First Amendment's restraints." *Moody v. NetChoice, LLC*, 2024 WL 3237685, at *9 (U.S. July 1, 2024).

Defendants' Opposition also fails to engage with 47 U.S.C. § 230's ("§ 230") preemption of the Act's restriction on minors' ability to speak beyond state-limited networks—and its prohibition on autoplay, seamless pagination, and certain notifications on minors' accounts. And the Opposition fails to clarify the Act's unconstitutionally vague central coverage definition of regulated "social media compan[ies]," § 13-71-101(13), the scope of prohibitions on seamless pagination and notifications on minors' accounts, and the regulation of data collection and usage from

[1] This Reply adopts all shorthand conventions from NetChoice's Motion. ECF 52. All pincites to docket entries are to internal document pagination.

minors, §§ 13-71-202(1)(c), 13-71-204(2). This Court should grant NetChoice's Motion. ECF 52.

Argument

I. NetChoice is likely to succeed on the merits of its challenge to Utah's 2024 Minor Protection in Social Media Act.

A. The entire Act violates the First Amendment.

1. The entire Act's burdens and restrictions on speech trigger strict scrutiny, because the Act's central coverage definition of "social media company" is content-, speaker-, and viewpoint-based.

The Act's central coverage definition of "social media company" is content-, speaker-, and viewpoint-based—triggering strict scrutiny. ECF 52 at 16-18.

First, the Act's definition of "social media company" is content-based because it regulates only websites that "allow users to interact *socially*." § 13-71-101(14)(a)(iii) (emphasis added); *see* ECF 52 at 17. The Act thus excludes websites based on the "topic discussed," such as business or professional interaction. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Another court recently concluded that a central coverage definition in a similar law that "treats or classifies" websites "differently based upon the nature of the material that is disseminated"—including "social interaction" versus other topics—is content-based. *NetChoice, LLC v. Fitch*, 2024 WL 3276409, at *9 (S.D. Miss. July 1, 2024). Defendants insist that the Act's reference to "social" interaction simply refers to "human beings interacting with each other." ECF 58 at 23. But that reads "social" out of the Act's definition. If *any* interaction suffices, there was no reason for the Legislature to have added the qualifier "socially." Utah courts "interpret[] statutes to give meaning to all parts." *LKL Assocs., Inc. v. Farley*, 94 P.3d 279, 281 (Utah 2004).

Defendants also suggest that the Act "describes structure, not subject matter." ECF 58 at 22. That *may* describe other parts of the Act's coverage definition, but not the "interact socially"

requirement. § 13-71-101(14)(a)(iii). Defendants cannot maintain the distinction between structure and content in their own briefing. For example, Defendants contend (ECF 58 at 50) the Act has a similar scope to that given to the term "social networking" by *United States v. Comer*, 5 F.4th 535, 543 (4th Cir. 2021). Specifically, that court construed "social networking" to exclude, *e.g.*, "a news website." *Id.* That is a content-based category. *Reed*, 576 U.S. at 163.

At a minimum, the Act treats unfavorably websites that facilitate interaction with a social "function or purpose." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022); *see Fitch*, 2024 WL 3276409, at *9. "[S]ubtle" distinctions drawn on such a basis are no less content-based than "obvious" distinctions. *Reed*, 576 U.S. at 163. What matters is whether the distinction is based on "the communicative content" of the speech. *Id.* at 164. In *Reed*, that included "directional" communication. *Id.* Here, it is "*social*[]" communication. § 13-71-101(14)(a)(iii). So, the Act is not "agnostic as to content." *Reagan*, 596 U.S. at 69; *contra* ECF 58 at 24. NetChoice does not need to demonstrate the "State has expressed disagreement through enactment of the Act." ECF 58 at 21. Rather, NetChoice must demonstrate that the Act "applies to particular speech because of the topic discussed." *Reagan*, 596 U.S. at 69. The coverage provision does just that.

Second, the Act is speaker-based because it applies to some Internet speakers but not others. ECF 52 at 17-18. The Act regulates only websites that "display[] content that is primarily generated by account holders." § 13-71-101(14)(a)(i). It does not regulate websites—such as news websites—that "primarily" display content "generated . . . by the" website itself. *Id.*

Defendants nominally resist the idea that the Act "discriminat[es] on the basis of the identity of the speaker." ECF 58 at 25. But they abandon that effort in describing how the Act functions. In Defendants' words, the Act applies to "social media platforms" but not "others." *Id.*; *see id.* at

27 (the Act targets "content generated by users" and exempts content generated by "streaming services"). It applies to websites "where interactive, immersive, *social interaction* is the whole point," *id.* at 25—that is, to particular websites. Websites that choose to present speech they author about, say news or sports, are not covered. But otherwise similar websites that engage in "expressive activity" by "compiling and curating others' speech" (*Moody*, 2024 WL 3237685, at *11) are heavily regulated. This is facially a speaker-based distinction. And Defendants erroneously suggest that the Act's speaker classifications present no risks of content-control. ECF 58 at 25. By Defendants' own telling, the Act's speaker-based restrictions are linked to the content-based burdens they place on "social[]" interaction. *See supra* pp.2-3.

Defendants' analogy to the law in *Turner Broadcast Systems, Inc. v. FCC*, 512 U.S. 622, 658 (1994), illustrates the Act's flaws. ECF 58 at 26. In *Turner*, "Congress . . . required cable operators to provide carriage to broadcast stations, but [did] not impose[] like burdens on analogous video delivery systems." 512 U.S. at 659. The Court concluded this was one of the rare, permissible speaker-based distinctions "justified by special characteristics of the cable medium: the ['physical'] bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Contrary to Defendants' assertion, the law in *Turner* was not "speaker-neutral." ECF 58 at 26. Rather, its speaker-based distinctions were justified by the physical infrastructure of the cable industry, not its content. *Turner*, 512 U.S. at 661. There are no such "special justifications" here or on the Internet, as the Supreme Court subsequently clarified. *See Reno v. ACLU*, 521 U.S. 844, 868-69 (1997). In all events, unlike the law in *Turner*, this Act also contains facially *content*-based distinctions. *Cf.* 512 U.S. at 643-44; *Moody*, 2024 WL 3237685, at *16 n.10 (distinguishing *Turner*); *Fitch*, 2024 WL 3276409, at *9 (same).

The Act is also speaker-based because it disfavors minors' speech relative to adults' speech. ECF 52 at 18. Defendants do not deny this discrimination, but suggest it is permissible because "[c]hildren are different." ECF 58 at 27. Even if it were a permissible justification for speech regulation (it is not, *see Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011)), it is a tailoring argument that fails for the reasons discussed below at p.13. It is not an argument for applying less than heightened scrutiny.

Third, the Act's central coverage definition is viewpoint-based because it favors the viewpoints of websites over the viewpoints of account holders. *See* § 13-71-101(14)(a)(i) (regulating websites that "primarily" "display[]" content "generated by account holders" but not those that primarily display content generated by websites). Defendants brush aside this argument as mere "re-packaging" of the argument that the Act is content-based. ECF 58 at 27. But viewpoint discrimination is a "form of content discrimination." *Reed*, 576 U.S. at 168 (citation omitted).

2. The Act's central coverage definition of "social media company" renders the entire Act unconstitutional under any form of heightened First Amendment scrutiny.

Defendants have not carried their burden to prove that the Act satisfies strict scrutiny. ECF 58 at 18-24. Even assuming the Act were content-, speaker-, and viewpoint-neutral, it does not satisfy intermediate scrutiny. *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

a. The State lacks a legitimate governmental interest in regulating protected speech.

Defendants have failed to provide a sufficient governmental interest to regulate protected speech. "[O]verly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012).

i. Defendants suggest that the State can regulate minors' use of covered websites because

their rights might apply differently to the Internet. *See* ECF 58 at 5, 11 n.24. Defendants urge the Court, in applying "constitutional principles," to "be mindful that social media coupled with portable supercomputers is something new; teenagers face a world unlike anything before." *Id.* at 9. But "the basic principles of freedom of speech and the press . . . do not vary when a new and different medium for communication appears." *Brown*, 564 U.S. at 790 (cleaned up). That principle is just as true for covered websites as it was of the video games in *Brown*. The First Amendment "does not go on leave when social media are involved." *Moody*, 2024 WL 3237685, at *6.

ii. Defendants claim that teenage mental health issues are "caused by" use of "social media" websites or certain supposedly "highly addictive [design] elements." ECF 58 at 4, 13. But Defendants fail to show "proof" of a "direct causal link" between social media websites—let alone particular design "elements"—and "harm to minors," as is their burden. *Brown*, 564 U.S. at 799.

To begin, not all the cited evidence is negative, as should be expected given the valuable speech available on the websites. The Surgeon General's Report highlights the potential "benefits of social media use among children and adolescents," including facilitating (1) "positive community and connection with others who share identities, abilities and interests"; (2) "access to important information"; (3) "a space for self-expression"; and (4) the opportunity to "form and maintain friendships online and develop social connections." ECF 58-4 at 6. "[B]uffering effects against stress that online social support from peers may provide can be especially important for youth who are often marginalized, including racial, ethnic, and sexual and gender minorities." *Id.*

Otherwise, "[n]early all of the research" in Defendants' Opposition "is based on correlation, not evidence of causation." *Brown*, 564 U.S. at 800 (citation omitted); *see* ECF 58 at 12 (referring to "[c]orrelation studies" and noting that "[s]ocial media use" "is correlated" with

various outcomes). The same is true of Dr. Jean Twenge's declaration. ECF 58-2 ¶¶ 30-32 ("may be linked"; "[c]orrelation studies"; "long been correlated"). The Surgeon General's Report, for example, notes that "robust independent safety analyses on the impact of social media on youth have not yet been conducted," "[m]ore research is needed to fully understand the impact of social media," and "[m]ost prior research to date has been correlational." ECF 58-4 at 4, 11. Likewise, as explained by one study cited by Defendants, "negative effects of high school social media use on mental health" were not "observed" in youth who had certain "personality and parental characteristics," suggesting "other potential relationships . . . could explain mental health outcomes and social media use."[2] Other sources discuss only a single "social media" website. *See, e.g.*, ECF 58-2 ¶¶ 36, 47, 50-51. Such authorities can hardly prove causality for all "social media." Some of Defendants' other sources are even further afield—analyzing general "technology use" and use of "digital media." *Id.* ¶¶ 21, 31.

At bottom, the relationship between "social media" and teens' mental health is far from certain: "Reviews of the existing studies on social media use and adolescents' mental health have found the bulk of them to be 'weak,' 'inconsistent,' 'inconclusive,' 'a bag of mixed findings' and 'weighed down by a lack of quality' and 'conflicting evidence.'" Claire Cain Miller, *Everyone Says Social Media is Bad for Teens. Proving It Is Another Thing*, The New York Times (June 17, 2023), https://tinyurl.com/2dufsukk. This kind of inconclusive evidence is not enough to satisfy heightened First Amendment scrutiny of restrictions on protected speech. *Brown*, 564 U.S. at 799.

iii. Defendants also claim that, unlike in *Brown* where the governmental interest "was to

[2] Jonathan Rothwell, *How Parenting and Self-Control Mediate the Link Between Social Media Use and Youth Mental Health*, Institute for Family Studies (Oct. 11, 2023), https://perma.cc/XXS3-VGLB (cited by Defendants at ECF 58 at 13 and ECF 58-2 ¶ 33(d)).

shield minors from harmful content (violence), the government interest" supporting the Act's parental-consent requirement to speak beyond state-limited networks, "is to shield minors' personal information from strangers." ECF 58 at 41. But the Act only implicates "personal information" that minors choose to share with others—that is, *speech*. *Id.* Minors' ability to speak on topics ranging from art to politics cannot be so easily restricted. *See Brown*, 564 U.S. at 795 & n.3.

iv. Defendants claim the State must assist parents, noting that "50% of US parents use any kind of [parental] controls" and "16% of [US] parents use blocking or filtering controls to restrict their teen[']s use of his or her cell phone." ECF 58 at 17. Half of parents using these tools belies the idea that "the Act's restrictions meet a substantial need of parents who wish to restrict their children's access . . . *but cannot do so*." *Brown*, 564 U.S. at 803 (emphasis added). "Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest." *Id.*

b. The Act is not properly tailored under any form of heightened First Amendment scrutiny.

The Act "is either underinclusive or overinclusive, or both." *NetChoice, LLC v. Yost*, 2024 WL 555904, at *13 (S.D. Ohio Feb. 12, 2024); *Fitch*, 2024 WL 3276409, at *11-14 (same). "[T]he overbreadth in achieving one goal is not cured by the underbreadth in achieving the other." *Brown*, 564 U.S. at 805.

i. The State has a variety of less-restrictive alternatives. For instance, there are tools that allow *parents* to address their children's online activity, including tools offered by covered websites. *See* ECF 52 at 7-8, 21-22; ECF 52-1 ¶ 9.

Defendants' conclusory assertions that these controls are "ineffective" are unpersuasive. ECF 58 at 5, 17, 35-36. They primarily rely on Tony Allen's declaration, containing the same assertions that Allen provided in *Griffin*, supporting Arkansas's age-verification and parental-

consent law. *See id.*; *see* Ex. 1 ¶¶ 83-85. Those arguments were insufficient there, and are equally insufficient here. *See NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *21 (W.D. Ark. Aug. 31, 2023). In general, Allen contends that (1) not all parents *know* about parental tools; and (2) not all parents *use* these tools. ECF 58-3 ¶ 38.

But the State could have used its considerable resources to promote parental awareness, rather than restricting speech. *See* ECF 52 at 21. "[T]here are a number of supervisory technologies available for parents to monitor their children that the State could publicize." *Fitch*, 2024 WL 3276409, at *12. It is "no response" that such steps could require parents "to take action" and "may be inconvenient." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 824 (2000). If parents choose not to use available tools, governments cannot dictate "what [it] thinks parents *ought* to want." *Brown*, 564 U.S. at 804. Allen's real problem seems to be with parents' choices, as he states: "Children can be very persuasive, and parents might release the controls to allow them to access various content." ECF 58-3 ¶ 38. Parents *choosing* to allow their children to access speech neither renders parental controls ineffective nor gives the State power to restrict protected speech.

Defendants also say that minors can "circumvent parental controls." ECF 58 at 17; *see id.* at 33; ECF 58-3 ¶¶ 39-40. Even if this conclusory statement were true, it is not a license to permit broad-based, state-authorized restrictions on protected speech. Less-restrictive alternatives exist and need not be "perfect." *Ashcroft v. ACLU*, 542 U.S. 656, 668-69 (2004); *Playboy*, 529 U.S. at 824 ("may not go perfectly every time"). Defendants offer no evidence of the relative efficacy of government-imposed requirements versus voluntary parental tools. If minors can circumvent parental tools, as Defendants assert, they may well be able to circumvent the Act's requirements.

Because the State had less-restrictive means of promoting private parental controls, the fact

that the State could have enacted even more burdensome restrictions on speech is immaterial. *See* ECF 58 at 34-35.[3] The State hardly deserves credit for requiring parental consent for minors to speak to an audience of their choosing, as compared to requiring parental consent "to create social media accounts." *Id.* at 34 (discussing parental-consent laws enjoined in Arkansas and Ohio). Likewise, the fact that Utah took a *different* regulatory approach from California does not mean that it took a *narrower* approach. *Id.* at 34-35. For example, Utah's age-*assurance* requirement is at least as burdensome as California's enjoined age-*estimation* requirement. *See* ECF 52 at 33. So the Act *does* impose a "burden on minors['] *access* to content," contrary to Defendants' assertions. ECF 58 at 35. Defendants' comparisons to laws regulating *conduct* (*id.* at 33-34) fare no better as they provide no constitutional justification for the State's restrictions on minors' *speech*.

ii. The Act is "wildly underinclusive." *Brown*, 564 U.S. at 802. It regulates commonplace means of publishing speech to address issues that could be attributed to Internet use in general—yet the Act only regulates certain disfavored websites. *See* ECF 52 at 22.

Defendants respond that "[i]t is the combination of the addictive design features with social media's user-generated and user-to-user interface that entraps youth in a world they cannot escape from, which is not (presently) true of other entertainment services." ECF 58 at 28. There are multiple problems with this argument. First, it relies on the same flawed premises about the causal relationship between "social media" and harms to minors addressed above. *See supra* pp.5-7. Second, this argument fails to account for websites the Act regulates—and declines to regulate. For example, Defendants contend that the Act will help mitigate the amount of time that minors spend

[3] In fact, the State *did* enact more burdensome requirements, and placed them in a law enforced by private plaintiffs (Utah House Bill 464). *See* ECF 51 ¶ 39.

"on screens." *See* ECF 58 at 4, 11, 15. Similarly, Defendants say it is a problem that teenagers receive a lot of notifications or visit websites that "cause [] content to run together" using autoplay and seamless pagination. *See id.* at 17, 30. But the Act does *nothing* to reduce "screentime" or prevent autoplay, seamless pagination, or notifications from websites like Disney+, Duolingo, Hulu, news sites, gaming sites, messaging services, and myriad other online services. Put another way, the Act fails to regulate the "elements" Defendants claim are harmful to minors' mental health, *id.* at 4, when they appear on other websites. The Act thus "leav[e]s out and fail[s] to regulate significant influences bearing on the [State's] interest." *Griffin*, 2023 WL 5660155, at *16 (cleaned up). That is "enough to defeat" the Act. *Brown*, 564 U.S. at 802.

Moreover, Defendants posit that the Act appropriately "focuses on . . . the privacy of children's personal information." ECF 58 at 33. None of the challenged provisions are designed to do that, however. *See, e.g.*, *infra* p.17. In any event, Defendants provide no justification why the purported protection of data minors provide to websites, *e.g.*, § 13-71-202(1), should be limited only to covered websites. The State could have enacted comprehensive legislation like other States that does not restrict or burden access to speech. *See, e.g.*, Cal. Civ. Code §§ 1798.100-.199.

Defendants erroneously contend that the State can regulate covered websites because they are "interactive." ECF 58 at 10-11, 25-26, 42. Interactivity just means that the websites *enable two-way* speech. The Supreme Court has rejected a similar argument. *Brown*, 564 U.S. at 798 ("California claims that video games present special problems because they are interactive." (cleaned up)). And *Moody* applied full First Amendment protection to websites that work in exactly this way—that "allow users to upload content . . . to share with others" and those "viewing the content" to "react to it, comment on it, or share it themselves." 2024 WL 3237685, at *6.

iii. The Act is overinclusive: It "sweeps too broadly" and "chill[s] more constitutionally protected speech than is necessary." *Griffin*, 2023 WL 5660155, at *16 (cleaned up); *see* ECF 52 at 22-24. It would also "discard [] beneficial aspects" of access to covered websites. *NetChoice, LLC v. Bonta*, 692 F. Supp. 3d 924, 956 (N.D. Cal. 2023). It is therefore a "blunt instrument" to address the government's asserted interest in "reducing social media's [purported] harm to children." *Yost*, 2024 WL 555904, at *12. Defendants do not address most of these flaws, and their limited responses are unpersuasive.

Regulatory scope. The Act's regulatory scope is overbroad. ECF 52 at 24. Defendants ignore this argument, but their other responses underscore the Act's tailoring problems.

Defendants justify the Act with repeated references to a handful of "social media" websites.[4] But the Act extends more broadly. Similarly, the Act's definition of regulated "social media service[s]," § 13-71-101(14), does not regulate *only* websites that use autoplay, seamless pagination, and notifications. Those are the means of disseminating speech that Defendants repeatedly cite as purportedly harmful (although the Act permits non-covered websites to continue to employ them). *See, e.g.*, ECF 58 at 16, 28, 30-31, 60.[5] Websites like NetChoice member Dreamwidth, however, do not use such means of displaying speech—to say nothing of many more covered websites. Yet the Act covers Dreamwidth. ECF 52-5 ¶ 7. Similarly, Defendants blanketly assert that "social media companies . . . are data mining companies." ECF 58 at 40. Again, that could hardly describe Dreamwidth or countless other forums covered by the Act. *See* ECF 52-5 ¶ 3.

[4] *See, e.g.*, ECF 58 at 3, 6, 15-17. Defendants reference TikTok a few times, but TikTok is no longer a NetChoice member. *See* NetChoice, About Us, https://perma.cc/BA7C-4WKT.

[5] Defendants take issue with NetChoice's use of the term "seamless pagination." ECF 58 at 54 n.77. For consistency with its previous filings, NetChoice will continue to use the term.

Effect on minors' rights. The Act's restrictions on minors' rights are overbroad. ECF 52 at 23. Defendants do not dispute that the Act regulates minors' access to, and ability to engage in, protected speech. Likewise, Defendants do not contest that the Act disregards minors' "differing ages and levels of maturity." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 396 (1988); *Fitch*, 2024 WL 3276409, at *12 (similar). These defects alone render the Act overinclusive.

Defendants contend that "a State . . . can adopt more stringent controls on communicative materials available to youths than on those available to adults." ECF 58 at 1 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)); *see id.* at 27, 36. That is true for *obscenity for minors*. Beyond that limited category largely focused on pornography, however, "minors are entitled to a significant measure of First Amendment protection" and "[s]peech 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." *Brown*, 564 U.S. at 794-95 (cleaned up; quoting *Erznoznik*, 422 U.S. at 212-13). Here, almost all the speech regulated by the Act is wholly protected speech—including for minors.

Consequently, Defendants mistakenly equate *unprotected* speech for minors (like obscenity for minors) with speech that Defendants deem "harmful to minors" because of its purported effect on minors. *See, e.g.*, ECF 58 at 36-37.[6] But that would create an exception engulfing the rule that minors have broad First Amendment protections. That is why the Supreme Court has already rejected this "unprecedented and mistaken" approach of "creat[ing] a wholly new category of . . . regulation that is permissible only for speech directed at children." *Brown*, 564 U.S. at 794.

[6] What Defendants call speech "harmful to minors" is *not* what Utah defines as "harmful to minors"—the State's definition of obscenity for minors. *See* § 76-10-1201(5). Instead, Defendants mean speech that is not obscene for minors that purportedly causes mental-health and other harms.

Effect on adults' rights. Defendants dismiss the burdens on adults' rights. ECF 58 at 28-29. Defendants say that it does not matter that some websites "are not currently able to turn off the restricted features for minors without also doing it for adults." *Id.* at 29. Defendants liken this to the costs that the car and tobacco industries face to comply with regulations. *Id.* Yet regulations of *speech* "must" be "carefully tailored" and "narrowly drawn" to avoid "deny[ing] adults their free speech rights." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989); *see Reno,* 521 U.S. at 874. The same is true of age assurance, discussed below at pp.21-24. *See Fitch*, 2024 WL 3276409, at *12 (burdening "adults' First Amendment rights" "alone" is "overinclusive").

B. Multiple substantive provisions of the Act independently violate the First Amendment.

1. The Act's restrictions on websites' and minors' ability to share expression absent parental consent violate the First Amendment (§§ 13-71-202(1)(a)-(b), 13-71-204(1)).

The Act's parental-consent requirements for minors to engage in speech beyond state-limited networks violates the First Amendment. §§ 13-71-202(1)(a)-(b), 13-71-204(1). Governmental restrictions on accessing "social media" and similar websites "prevent the user from engaging in the legitimate exercise of First Amendment rights" and trigger heightened First Amendment scrutiny. *Packingham*, 582 U.S. at 108.

a. Minors have a "constitutional right to speak or be spoken to without their parents' consent." *Brown*, 564 U.S. at 795 n.3. That includes the right to speak to friends, family, and the general public (who Defendants call "strangers") without *governmental* interference. The Act infringes that right. *See* ECF 52 at 26-30. In fact, Defendants seem to recognize that parental-consent requirements burden minors' speech rights by contrasting the Act here with other enjoined laws requiring parental consent to access websites. *See* ECF 58 at 34. But Defendants contend the Act's

parental-consent requirements are permissible because the State can prohibit minors from speaking "to strangers" without parental consent. *Id.* at 29-30, 40.

"That is unprecedented and mistaken." *Brown*, 564 U.S. at 794. Under this theory, States could prevent minors from speaking at town halls or participating in public debates (speaking to audiences full of strangers), calling in to radio stations (broadcasting to audiences of strangers), performing in public venues (in front of strangers), or playing video games like Minecraft online (with strangers) without parental consent. The Supreme Court has rejected this. *E.g.*, *id.* at 795 n.3.

b. Like the law rejected in *Brown*, the Act does not "enforce *parental* authority over children's speech"; it "impose[s] *governmental* authority, subject only to a parental veto." *Id.* So it is not a legitimate way to further parents' rights to "direct the upbringing and education of children under their control." ECF 58 at 41 (citation omitted). That does not mean that parents lack a role in their minor children's speech. *Contra* ECF 58 at 35 n.64. NetChoice has explained the ways that it and its members encourage parental control and oversight. *See* ECF 52 at 7-8. But governments lack "the power to prevent children from hearing or saying anything without their parents' prior consent." *Brown*, 564 U.S. at 795 n.3.

Defendants erroneously rely on *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008). ECF 58 at 41. That is a case, decided before *Brown*, about *student* speech rights in school. Government traditionally has greater authority to regulate public-school students' speech in those circumstances. *See Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 187 (2021). And *Frazier*'s reasoning was abrogated by the Supreme Court's decision in *Brown*. 564 U.S at 395 n.3.

c. Defendants' distinctions of *Brown* are insufficient. For example, Defendants contend that *Brown* only concerned content-based laws. ECF 58 at 40-41. But the Act here *is* content-based

(and speaker- and viewpoint-based). *See supra* pp.2-5. Nothing *Brown* says about protecting minors' rights to engage in speech is limited to content-based laws. Defendants essentially assert that the Act is better because it restricts any public speech—not just minors' ability to "view[] . . . fantasy violence" in video games, as in *Brown*. ECF 58 at 40. A law banning *all* video games for minors without parental consent would also have been unconstitutional.

Similarly, Defendants are wrong to suggest that the State's interest here is different than the State's interest in *Brown*. Both States chose impermissible means of addressing purported "harm to minors" from protected speech. *Brown*, 564 U.S. at 799. At any rate, the Act's parental-consent requirements are not properly tailored to further Defendants' asserted interest in protecting minors' "personal information from strangers." ECF 58 at 41. This requirement is substantially overbroad: The Act regulates minors' ability to engage in *all* protected speech, which sweeps much further than necessary to address concerns about minors sharing things like "financial information." *Id.* It is also underinclusive because the parental-consent requirement does nothing to stop minors: (1) *without* parental consent from sharing information the State deems inappropriate on other websites (or other media) or *within* the State-approved network;[7] and (2) *with* parental consent from sharing information outside of that network. Plus, the Act does not prevent minors from sharing their expression with "strangers." ECF 58 at 41. Minors without parental consent can speak to strangers if they are "directly connected to . . . an account directly connected to the minor account holder's account"—*i.e.*, friends of friends. § 13-71-101(3).

Brown also rejected many of Defendants' arguments. For example, California

[7] For the same reason, this parental-consent requirement is ineffective as a means to "restrict[] strangers' access to children's spaces." ECF 58 at 30. In any event, covered websites are not like "schools," *id.*; they facilitate and disseminate protected speech.

unsuccessfully argued that restrictions on minors' access to protected speech are akin to restrictions for using tobacco, gambling, and watching pornography. *See* Pet. Br. at 22-23, *Brown v. Ent. Merchs. Ass'n*, 2010 WL 2787546 (U.S. July 12, 2010) ("In California . . . minors generally cannot . . . purchase tobacco, . . . [or] play bingo for money. . . . [S]tates may restrict their access to sexually explicit, harmful material."). Briefing in *Brown* also raised concerns about minors' developmental capacity, but such concerns did not overcome minors' First Amendment rights. *Compare id.* at 8 ("the parts of the brain involved in behavior control continue to mature through late adolescence"), *with* ECF 58 at 39 ("brains are not fully developed"), 42 ("undeveloped brain").

d. Defendants do not meaningfully address the "biggest challenge" of complying with parental-consent requirements: "establishing . . . the parental relationship" for purposes of confirming parental consent. *Griffin*, 2023 WL 5660155, at *4. It may be that the *government* can easily verify parental consent with the tools at its disposal. *See* ECF 58 at 42 (listing parental-consent requirements for government-issued licenses). But the undisputed facts in this case and from *Griffin* show that *private websites* will have difficulty doing so. *Griffin*, 2023 WL 5660155, at *4; ECF 52-5 ¶¶ 17-19. The fact that the Division will promulgate rules *after* the Act takes effect is no comfort to members, who require guidance *before* the Act takes effect. ECF 52-2 ¶ 49.[8]

2. The Act's prohibitions on notifying minor users and publishing speech in certain ways to minors violate the First Amendment (§ 13-71-202(5)).

The Act's prohibitions on autoplay, seamless pagination, and certain notifications on minors' accounts violate the First Amendment. § 13-71-202(5); *see* ECF 52 at 30-32. Defendants do not dispute that, in general, websites have the right to choose how to disseminate and display

[8] "By statute, rules regarding the Act may not be promulgated until October 1, 2024, when the Act goes into effect." ECF 58-7 ¶ 5.

speech to their users—nor could they. *Moody*, 2024 WL 3237685, at *5. Instead, Defendants contend that these means of disseminating speech are akin to unsolicited loudspeakers in residential neighborhoods. That analogy is misguided, and Defendants' other arguments lack merit.

a. Defendants' arguments that social media websites cannot choose *how* to disseminate speech reads precedent too narrowly and would grant government startling power over private dissemination of speech. Under Defendants' reading, protected editorial discretion is purely about "size [or] content of private publications." ECF 58 at 30. Thus, the State would be able to regulate how newspapers organize articles, what font they may use, and whether they may use pictures—methods designed to make newspapers easier or more interesting to navigate and read.

But the First Amendment protects private publishers' right to choose whether *and how* to disseminate speech. As the Supreme Court just held, websites "engage[] in expression" when they "make choices about what third-party speech to display *and how to display it*." *Moody*, 2024 WL 3237685, at *5 (emphasis added). And "editorial discretion in the selection and presentation of content" is "speech activity." *Id.* In other words, States cannot "prevent[] [a website] from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities." *Id.* "[L]aws curtailing their editorial choices must meet the First Amendment's requirements." *Id.*

The Act violates those principles just as readily as it would if it regulated other "publishers and editors." *Id.* For example, the Act's prohibition on seamless pagination is akin to telling (disfavored) newspapers how many columns their pages can include or forbidding (disfavored) streaming services from encouraging "binge watching" by autoplaying subsequent episodes of a show. Similarly, the Act's prohibition on autoplay is akin to barring (disfavored) radio stations

from offering unbroken music "marathons." As these examples indicate, disseminating speech is often an exercise in trying to attract, engage, and keep an audience. That is not a license for the State to step in and regulate the presentation of speech on the theory that editorial choices "mak[e] it difficult for children to escape." ECF 58 at 31.

At any rate, the Act *does* restrict "content." The notifications ban is especially stark because it prohibits speech outright on the basis of content. *See* ECF 52 at 30. Defendants say a "push notification is a loudspeaker – it does not add content at all." ECF 58 at 31. But notifications contain and convey information—they tell users there is speech available that may interest them, from breaking news to a new video from a favorite creator. *See id.*; ECF 52-1 ¶ 19.a; ECF 52-2 ¶ 44; ECF 52-3 ¶¶ 19, 21. And the Act regulates notifications conveying particular kinds of disfavored content: those that "prompt repeated user engagement." § 13-71-202(5)(c). Defendants identify some of the (content-based) information that these notifications might contain: "'see what's new!'; '[X person] commented on your post.'" ECF 58 at 53.

b. Defendants suggest covered websites and these means of disseminating speech should receive less protection because some covered websites are for-profit enterprises. *See id.* at 15-17; *id.* at 15 ("financially incentivized to keep eyeballs on screens"). Newspapers, film and television studios, cable channels, and media companies such as Disney are also equally "financially incentivized to keep eyeballs on screens." Publishing speech for profit is just as protected by the First Amendment: "[T]he First Amendment extends to . . . those who seek profit (such as . . . website designers)." *303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023).

c. In any event, the Act's prohibitions are not proper time, place, and manner restrictions. *Cf.* ECF 58 at 32-33. Editorial choices about how to present speech are not the "manner" of speech

that the government is allowed to regulate under this doctrine. Otherwise, governments would be allowed to regulate how online newspapers, cable news, streaming services, and other private entities publish speech as long as they can continue to offer the "same content." *Id.* at 33. That would eviscerate protections for editorial discretion, which includes "organizing and presenting" third-party speech in a compilation. *Moody*, 2024 WL 3237685, at *11.

Defendants cite no authority for anything close to such sweeping governmental authority. Rather, the "manner" of speech that government can regulate is largely limited to things like (1) amplification of sound to prevent public disruption; and (2) distance from places that might be disturbed, such as schools. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989) (amplification); *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972) (law preventing demonstrations within 100 feet of schools). That is why time, place, and manner restrictions traditionally apply to speech in public places and commons—and public forums especially. *See id.*; *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1132 (10th Cir. 2002) ("public fora"). Thus, it does not matter that the Act purportedly "leave[s] open ample alternative channels for communication of the information," as that analysis has no place here. *Ward*, 491 U.S. at 791.

Furthermore, the Act's restrictions are not "time, place, and manner regulations because they are not content neutral." *Ass'n of Community Org. v. Mun. of Golden*, 744 F.2d 739, 750 (10th Cir. 1984). That is especially true of the doubly content-based notifications ban. *See* ECF 52 at 30. Time, place, and manner restrictions also cannot be speaker-based. *See, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 55 (1983); *Ackerley Commc'ns of Ma., Inc. v. City of Somerville*, 878 F.2d 513, 520 (1st Cir. 1989).

The justifications underlying time, place, and manner restrictions are inapposite here,

where minor users (and parents) can control their individual online experiences. Users can: (1) sign up for and turn off the services; (2) decide what messages they want to see, and when; and (3) use the services without disrupting their neighbors, let alone the public. Unrebutted record evidence also demonstrates that users can control whether the services use autoplay or send them notifications. *See* ECF 52-1 ¶¶ 17.a, 18, 19.b; ECF 52-2 ¶¶ 14.a, 28, 45. By contrast, for the "loudspeakers" that Defendants invoke, unwilling listeners have no control whether and when the loudspeakers will come, what they will say, and how loud they are. *Cf.* ECF 58 at 24, 30-31, 33-34.

3. The Act's "age-assurance" requirement violates the First Amendment (§ 13-71-201).

The First Amendment prohibits the Act's requirement that all users—minors and adults—submit themselves to "age assurance" before accessing "vast quantities of constitutionally protected speech." *Griffin*, 2023 WL 5660155, at *17; § 13-71-201. Such restrictions on access to speech always trigger heightened First Amendment scrutiny. *Packingham*, 582 U.S. at 108. Defendants' Opposition does not address the precedent holding that similar burdens on online speech are unconstitutional. *See* ECF 52 at 32-34.

a. Defendants' Opposition confirms that the Act will require many "users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing" to access protected speech. *Griffin*, 2023 WL 5660155, at *17. Specifically, Defendants' Opposition explains that covered websites can comply with the Act's age-assurance requirement by engaging in (1) "age verification" or "age inference," which require providing "drivers' licenses, passports, electoral rolls, credit reports, cell phone network records, banking, [] credit card records," or "digital identity"; or (2) "age estimation," which requires users to provide "facial images, voiceprints,

or game play." ECF 58 at 20; *see* ECF 58-3 ¶¶ 12-13.[9] Those are the same methods that *Griffin* concluded "impose[] significant burdens on [] access to constitutionally protected speech" and "discourage users from accessing the regulated sites." 2023 WL 5660155, at *17 (cleaned up); *id.* at *3. The parallels between this case and *Griffin* are unsurprising: Defendants rely on the same age-assurance expert from *Griffin*, Tony Allen. *Compare id.* at *3, Ex. 1, *with* ECF 58-3.

Accordingly, the Act imposes burdens that NetChoice's undisputed evidence demonstrates will chill users' speech. *See, e.g.*, ECF 52-5 ¶¶ 8-10. They are also the same harms that courts have held impermissible even to shield minors from unprotected (for minors) pornography—let alone the protected speech on covered websites. *Ashcroft*, 542 U.S. at 667; *Reno*, 521 U.S. at 882.

b. Defendants' analogies to "age assurance" in "other contexts" are irrelevant because those contexts are not access to protected speech. ECF 58 at 38. Having to show identification to enter a bar is not analogous to an identification check before speaking on the matters of the day. *See Griffin*, 2023 WL 5660155, at *16 (rejecting same analogy). Defendants' cited cases are not to the contrary. ECF 58 at 38. For instance, *Lorillard Tobacco Co. v. Reilly* upheld a law that "prohibit[ed] self-service and other displays that would allow [minors] to obtain tobacco products without direct contact with a salesperson." 533 U.S. 525, 569-70 (2001). The State can "prevent access to tobacco products by minors." *Id.* at 570. The Court concluded this requirement was "unrelated to expression" because tobacco could be "display[ed]" as "vendors" wished, "so long as that display is only accessible to sales personnel." *Id.*[10] The Act here is all about expression.

[9] There is no explanation what this "game play" entails, and Defendants' Opposition focuses on facial images and voiceprints.

[10] *Lorillard* also held unconstitutional under the First Amendment a restriction on certain tobacco advertising within 1,000 feet of schools because of its effect on adults. 533 U.S. at 565.

c. Defendants incorrectly say that modern age-assurance methods do not raise the same concerns about chilling speech outlined in *Ashcroft* because users purportedly will not need to provide "personally identifying information." ECF 58 at 39. It is hard to see how "drivers' licenses, passports, . . . banking, [and] credit card records" are *not* personally identifying information. *Id.* at 20. Regardless, the question is whether age-assurance "would have a chilling effect," as Defendants acknowledge. *Id.*; *see Ashcroft*, 542 U.S. at 667. *Griffin* recognized that the same age-assurance methods at issue here will chill access to speech. 2023 WL 5660155, at *17; *see supra* p.22.

These age-assurance methods will also burden websites. Defendants' contention that age assurance is "inexpensive" is not supported by the record. Defendants' declarant "cannot speak to the specific pricing offered by individual providers," and instead relied on an "estimate[]." ECF 58-3 ¶ 25. Unrebutted evidence shows that Dreamwidth lacks the resources to comply with the Act. ECF 52-5 ¶ 16. Websites of Dreamwidth's resources are more representative of the vast majority of many smaller websites that the Act regulates. *See, e.g.*, ECF 52-1 ¶ 12.

d. Defendants incorrectly rely (ECF 58 at 36-37, 39 n.65) on *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024), *cert. granted* July 2, 2024. The Fifth Circuit's decision is inapposite and incorrect. The case there concerned an age-verification requirement for "commercial pornographic websites," which disseminate speech *unprotected* for minors. *Id.* at 266. It was only because the law was limited to such speech that the court applied rational basis review: "regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review." *Id.* at 269. By contrast, this Act regulates minors' access to speech that is unquestionably *protected* for minors. The Act is thus subject to strict scrutiny even under the Fifth Circuit's analysis. In any event, the Fifth Circuit was wrong and its decision will be reviewed by the

Supreme Court. Regulations of speech for minors cannot "interfer[e] with First Amendment freedoms" of adults. *Sable*, 492 U.S. at 126 (cleaned up); *see supra* p.14. That is why lower courts have construed *Ashcroft* and *Reno* to invalidate restrictions on adults' ability to access speech. *See, e.g.*, *ACLU v. Mukasey*, 534 F.3d 181, 192-93 (3rd Cir. 2008); *PSInet v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999); *Free Speech Coal., Inc. v. Rokita*, 2024 WL 3228197, at *8 (S.D. Ind. June 28, 2024) (rejecting Fifth Circuit's analysis).

In sum, the Act is facially unconstitutional because "a substantial number, if not all, of [the law's] applications are unconstitutional judged in relation to its legitimate sweep." *Fitch*, 2024 WL 3276409, at *14; *contra* ECF 70. NetChoice has both "assess[ed] the state laws' scope" and identified "which of the laws' applications violate the First Amendment, and [] measure[d] them against the rest." *Moody*, 2024 WL 3237685, at *9. The Act regulates disfavored social media websites, imposes hurdles on people's access to those websites, and directly regulates how those websites disseminate speech. Thus, wherever the Act applies, it is unconstitutional. *Id.* Defendants have never raised any applications that pose possibly distinct First Amendment questions—instead contending the Act is permissible for reasons that are identical across websites defined by "interactive, immersive, social interaction." ECF 58 at 25.

C. Multiple substantive provisions of the Act's speech restrictions are independently preempted under 47 U.S.C. § 230.

As explained in NetChoice's Opposition to Defendants' Motion to Dismiss, § 230 provides broad protections for the dissemination of third-party speech. *See* ECF 66 at 5-7. Section 230 preempts the Act's restrictions on visibility of minors' expression and prohibitions on autoplay, seamless pagination, and notifications. *Id.* at 7-11; *see* ECF 52 at 35-37.

Congress enacted § 230 to protect all websites from both "liability" and "causes of action," *id.* § 230(e)(3), for their "exercise of [] editorial . . . functions." *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (citation omitted). Congress provided that States cannot "treat" websites "as the publisher or speaker of any information provided by" third parties. 47 U.S.C. § 230(c)(1). Courts have determined that § 230 protects the "structure and operation of [a] website" and "choices about what content can appear on the website and in what form," including "features that are part and parcel of [its] overall design and operation." *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016), *aff'd*, 881 F.3d 739 (9th Cir. 2018).

Defendants' responses in their Opposition are unpersuasive. *See* ECF 66 at 12-16. *First*, Defendants have not requested dismissal of Count VIII of NetChoice's First Amended Complaint, or otherwise specifically addressed the Act's limitations on minors' ability to speak beyond state-defined networks. *See* ECF 51 ¶¶ 174-78. Thus, this Court should preliminarily enjoin enforcement of those provisions. *John Bean Techs. Corp. v. B GSE Grp., LLC*, 480 F. Supp. 3d 1274, 1316 n.293 (D. Utah 2020) ("By never disputing that assertion, Defendants conceded that point.").

Second, "continual feed feature[s]" (*i.e.*, seamless pagination), "'autoplay,'" "notifications of third-party content," and "posting third-party" content are the kinds of publishing decisions protected under § 230—as they go to "whether, when, and to whom to publish third-party content." *In re Social Media Adolescent Addiction/Personal Injury Prods. Liability Litig.*, 2023 WL 7524912, at *13, *15 (N.D. Cal., Nov. 14, 2023); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (notifications are protected).

Third, Defendants argue that *Fields*, *Force*, and *Dyroff* are distinguishable because they did not involve "statutory privacy protections" and the Act provides no "private right of action for

third parties harmed by users publishing harmful content." ECF 58 at 57-58. But neither § 230's protections nor those cases are so limited. *See* ECF 66 at 7, 13.

D. The Act's central coverage definition of regulated "social media companies" and multiple operative provisions are unconstitutionally vague.

1. The Act is facially vague because its potential chilling effect on protected speech is real and substantial.

"To mount a facial vagueness challenge" to the Act, NetChoice need only show "that the potential chilling effect on protected expression is both real and substantial." *Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005) (citation omitted). Thus, facial "[v]agueness and overbreadth challenges are similar." *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988); *see Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (similar). Here, the Act primarily regulates protected speech, as Defendants agree. *See, e.g.*, ECF 58 at 10.

Defendants incorrectly assert that NetChoice must show that the "law is vague in *all its applications*." ECF 58 at 45 (emphasis added). This standard is for "facial challenge[s] *outside* the context of the First Amendment." *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (emphasis added). Accordingly, it does not matter that some challenged provisions might not be vague as applied to some websites in some circumstances. *Cf.* ECF 58 at 44-45. Many websites—members' included—cannot be sure whether their dissemination of speech is regulated by the Act. *See, e.g.*, ECF 52-1 ¶ 13; ECF 52-2 ¶¶ 51, 54; ECF 52-5 ¶ 21.

Likewise, NetChoice's vagueness challenge is not premature because the State may someday exercise rulemaking authority. *Contra* ECF 58 at 44. The case that Defendants cite addresses "economic regulation," not regulation of protected speech. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982). Moreover, Director Hass has not indicated any

intention to attempt to fix the vagueness in these provisions. *See* ECF 58-7. Any such regulations would not come before the Act's effective date anyway. *Id.* ¶ 5.

2. The Act's central coverage definition for a regulated "social media company" is unconstitutionally vague.

Two necessary elements of the Act's definition of regulated "social media company" are impermissibly vague under the Constitution. *See* ECF 52 at 24-25.

First, the Act does not define what it means "to allow users to interact socially," as compared to other forms of interaction. § 13-71-101(14)(a)(iii); *see Fitch*, 2024 WL 3276409, at *15 (holding "socially interact" in coverage definition to be vague). In response, Defendants construe the term to mean essentially "any interaction." ECF 58 at 49. This renders the term "socially" meaningless. *See supra* p.2. Plus, adopting this interpretation would expand the Act's regulatory scope and its unconstitutional burdens to, *e.g.*, professional interactions on LinkedIn and workplace interactions on Slack. So Defendants' proposed "reasonable understanding," ECF 58 at 50, introduces more confusion and would chill more online speech.

Defendants' suggestion, *id.*, to adopt the understanding from *Comer* would just heighten the confusion. 5 F.4th at 542-43. That case interpreted the distinct term "social networking account," *id.* at 543, and tells this Court nothing about the Utah Legislature's choice to regulate "social" interaction. Also, covered websites would have even less guidance if this Court replaced the Legislature's vague term with a construction given to a different provision by another court.

Second, the Act does not define what it means to "*primarily*" "display[]" content "generated by account holders." § 13-71-101(14)(a)(i) (emphasis added); *see* ECF 52 at 25; *Fitch*, 2024 WL 3276409, *15 (determining same coverage requirement is vague). Defendants claim that this term includes websites on which a "majority" of the "number of posts" are user-generated "at any

given time." ECF 58 at 47-49. Defendants' interpretation means that websites could fall in and out of the Act's scope at any minute. Plus, it assumes that websites will be able to calculate the origin of sometimes billions of pieces of content. ECF 52 at 5. Consequently, websites that are close to the line may comply with the Act's restrictions on speech to avoid potential liability.

Defendants suggest this Court could sever the central coverage definition. ECF 58 at 46 n.76. Severability does not solve the problem. "Severability is an issue of state law," and "[i]n Utah, the test is whether the legislature would have passed the statute without the objectionable part." *Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000) (cleaned up). If a law "is so 'incomplete or riddled with omissions' that it lacks coherence" after severing a provision, "the entire enactment should be stricken." *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1291 (10th Cir. 2002) (cleaned up). The Act's central coverage provision defines the Act's scope, so the Court could not sever that definition without upending the Act. *See* ECF 52 at 25-26.

3. The Act's prohibition on seamless pagination, prohibition on certain notifications, and regulations of data collection and use are unconstitutionally vague.

Four of the Act's operative provisions are also unconstitutionally vague.

Notifications ban. The Act's prohibition on "push notifications prompting repeated user engagement" on minors' accounts is unconstitutionally vague. § 13-71-202(5)(c); *see* ECF 52 at 30-31. The Act does not explain when notifications unlawfully "prompt[] repeated user engagement" and when websites can lawfully use notifications. *See* ECF 52-2 ¶ 44.

Defendants offer no clarity, suggesting that *any* notification could trigger liability—which worsens the First Amendment problems. Defendants define "repeated user engagement" as any time users "look at" a website and "prompt" as sending a notification. ECF 58 at 51-52. Thus,

covered websites may be barred from sending any notification that could result in a minor *looking at* a website, such as notifications about suspicious log-ins.

Seamless pagination ban. The Act's seamless pagination ban is unconstitutionally vague as websites do not know how much content can be on a single webpage. *See* ECF 52 at 31-32. Defendants say the size of the page does not matter. ECF 58 at 54. But this ignores that webpages' content rarely fits onto a single device screen and requires *some* scrolling to see more content. The smaller the screen, the more scrolling will be necessary. Covered websites need to know *how much* scrolling is permissible; neither the Act nor Defendants provide any clarity. *See* ECF 52-2 ¶ 41.

Undefined "assurance of confidentiality" on data use. The Act's requirement that websites' terms of service are "presumed to include an assurance of confidentiality" for minor users is unconstitutionally vague, because it provides no guidance about what "confidentiality" entails, and its exceptions only heighten that confusion. § 13-71-204(2); *see* ECF 52 at 37-38.

Defendants do not clarify websites' obligations. Specifically, Defendants' proposed definition of "confidentiality" would require covered websites to treat "every person *inside* or outside the company [as] *a third party* unentitled to the information unless they meet an exception." ECF 55 at 56 (emphases added). Defendants do not square this atextual and counterintuitive interpretation with "confidentiality['s]" plain meaning: no unauthorized "disclosure only to *third parties*—not . . . disclosure to an [entity's] own [] employees." *Mellick v. Dep't of the Interior*, 2024 WL 1653507, at *5 (Fed. Cir. Apr. 17, 2024) (emphasis added).[11]

Accordingly, Defendants would replace the Act's vagueness with an unworkable standard

[11] Nor does the Act's carveout for information sharing "necessary to . . . maintain or analyze functioning of the [service]" provide guidance about permitted internal information sharing, which is critical for, *e.g.*, ensuring minors see better quality and appropriate content. § 13-71-204(4)(a).

raising additional First Amendment issues. That is equally untenable. *See State v. Thurman*, 508 P.3d 128, 134 n.29 (Utah 2022) ("[C]ourts may reject one of two plausible constructions of a statute on the ground that it would raise grave doubts as to the statute's constitutionality." (cleaned up)). For example, websites would not be able to use personal information (except age and location) to personalize the speech they display to users. *See* ECF 52-2 ¶¶ 51-52. The Act's parental-consent requirement for use of this information does not solve the problem. *See supra* pp.14-15.

Undefined restriction on data collection. The Act's requirement that covered websites "restrict any data collection" from minors "that is not required for core functioning of the [service]" is also unconstitutionally vague. § 13-71-202(1)(c); *see* ECF 52 at 38-39. Defendants say that "core functioning" is "something without which [the website] could not function." ECF 58 at 56. Neither the Act nor Defendants explain whether "functioning" permits collection of data only necessary for covered websites to *technologically* function (*e.g.*, device type) or whether it includes data necessary for websites to *editorially* function (*e.g.*, information to personalize content).

II. The remaining factors support a preliminary injunction.

NetChoice's likelihood of success on the merits of their First Amendment claim should be the "determinative factor" for preliminary injunctive relief. *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) (cleaned up). But preventing the irreparable harm of compliance costs and First Amendment injuries to NetChoice's members and their users meets the remaining requirements. ECF 52 at 39-40. Defendants have no "interest in enforcing a law that is likely constitutionally infirm." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010).

Conclusion

Plaintiff respectfully requests that the Court grant its motion for a preliminary injunction.

RESPECTFULLY SUBMITTED this 12th day of July 2024.

PARR BROWN GEE & LOVELESS, P.C.

s/David C. Reymann
David C. Reymann
Kade N. Olsen

LEHOTSKY KELLER COHN LLP
Steven P. Lehotsky
Scott A. Keller
Todd Disher
Jeremy Evan Maltz
Joshua P. Morrow
Alexis Swartz
Attorneys for Plaintiff NetChoice, LLC

Certificate of Service

I, Jeremy Evan Maltz, certify that on July 12, 2024, the foregoing was filed electronically via the Court's CM/ECF system.

s/Jeremy Evan Maltz
Jeremy Evan Maltz