

**United States Court of Appeals
For the Eighth Circuit**

NETCHOICE, LLC,
Plaintiff-Appellee,

v.

TIM GRIFFIN, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF ARKANSAS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:23-cv-5105 (Hon. Timothy L. Brooks)

Defendant-Appellant's Reply Brief

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TABLE OF CONTENTS

Table of Contentsi

Table of Authorities.....ii

Argument..... 1

 I. NetChoice Lacks Standing For Its First Amendment Claim 1

 II. The Social Media Safety Act Is Consistent With The First
 Amendment..... 5

 A. At most, intermediate scrutiny applies.....5

 1. The Act regulates conduct, not speech5

 2. Even if the Act burdens or regulates expressive conduct,
 it is a content- and viewpoint-neutral regulation..... 10

 3. NetChoice’s arguments about strict scrutiny fail 14

 B. The Act survives any level of scrutiny..... 16

 C. NetChoice has not carried its burden to prove its facial
 challenge..... 23

 III. The Social Media Safety Act Does Not Violate the Due Process
 Clause..... 25

 IV. The District Court Issued an Overbroad Judgment Exceeding
 Its Authority 28

Conclusion..... 31

Certificate of Compliance 33

Certificate of Service..... 33

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Advantage Media, L.L.C. v. City of Eden Prairie</i> , 456 F.3d 793 (8th Cir. 2006)	29
<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986).....	8
<i>Ariz. Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011)	2
<i>Boechler, P.C. v. Comm’r of Internal Rev.</i> , 596 U.S. 199 (2022)	29
<i>Brandt v. Griffin</i> , 147 F.4th 867 (8th Cir. 2025).....	8, 14
<i>CCIA v. Uthmeier</i> , No. 25-11881, 2025 WL 3458571 (11th Cir. Nov. 25, 2025).....	10, 12, 13, 19
<i>City of Austin v. Reagan Nat’l Advert. of Austin, LLC</i> , 596 U.S. 61 (2022)	14
<i>Clark v. Johnson Reg’l Med. Ctr.</i> , 362 S.W.3d 311 (Ark. 2010).....	26
<i>Council of Ins. Agents & Brokers v. Juarbe-Jimenez</i> , 443 F.3d 103 (1st Cir. 2006)	4
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	16, 24
<i>Free Speech Coalition, Inc. v. Paxton</i> , 606 U.S. 461 (2025)	9, 10, 17, 22, 24
<i>Gold Cross Ambulance & Transfer v. City of Kansas City</i> , 705 F.2d 1005 (8th Cir. 1983).....	4

<i>Hershey v. Jasinski</i> , 86 F.4th 1224 (8th Cir. 2023).....	10, 12, 13, 28
<i>Indigo Room, Inc. v. City of Fort Myers</i> , 710 F.3d 1294 (11th Cir. 2013).....	9
<i>Interactive Digital Software Ass’n v. St. Louis County</i> , 329 F.3d 954 (8th Cir. 2003)	17, 19
<i>Jarboe v. Shelter Ins. Co.</i> , 819 S.W.2d 9 (Ark. 1991)	25, 28
<i>Josephine Havlak Photographer, Inc. v. Village of Twin Oaks</i> , 864 F.3d 905 (8th Cir. 2017)	10
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004)	1
<i>Labrador v. Poe</i> , 144 S. Ct. 921 (2024)	28
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	29
<i>M.H. v. Omegle.com LLC</i> , 122 F.4th 1266 (11th Cir. 2024).....	13
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990).....	16, 17
<i>Members of City Council of City of Los Angeles v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984)	13
<i>Milligan v. City of Red Oak</i> , 230 F.3d 355 (8th Cir. 2000).....	6
<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024).....	1, 11, 13, 18, 23, 24
<i>N.J. Bankers Ass’n v. Att’y Gen. N.J.</i> , 49 F.4th 849 (3d Cir. 2022)	3

<i>NetChoice, L.L.C. v. Fitch</i> , 134 F.4th 799 (5th Cir. 2025)	3, 23
<i>NetChoice, L.L.C. v. Paxton</i> , 121 F.4th 494 (5th Cir. 2024)	3, 23
<i>NetChoice, LLC v. Bonta</i> , 152 F.4th 1002 (9th Cir. 2025)	2, 23
<i>Packingham v. North Carolina</i> , 582 U.S. 98 (2017)	8, 15
<i>Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.</i> , 280 F.3d 278 (3d Cir. 2002)	3, 4
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015)	11
<i>Rumsfeld v. F. for Acad. & Institutional Rts., Inc.</i> , 547 U.S. 47 (2006)	5
<i>Sable Commc'ns of Cal., Inc. v. FCC</i> , 492 U.S. 115 (1989)	17
<i>Sec'y of State of Maryland v. Joseph H. Munson Co.</i> , 467 U.S. 947 (1984).....	2-3
<i>Serv. Emps. Int'l Union, Loc. 5 v. City of Houston</i> , 595 F.3d 588 (5th Cir. 2010).....	29
<i>Sisney v. Kaemingk</i> , 15 F.4th 1181 (8th Cir. 2021)	2
<i>Smithfield Foods, Inc. v. Miller</i> , 367 F.3d 1061 (8th Cir. 2004).....	22
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011)	8, 15, 16
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	2

<i>TikTok Inc. v. Garland</i> , 604 U.S. 56 (2025)	21
<i>Trump v. CASA, Inc.</i> , 606 U.S. 831 (2025)	30, 31
<i>United States v. Bobal</i> , 981 F.3d 971 (11th Cir. 2020)	8
<i>United States v. Cooper</i> , 990 F.3d 576 (8th Cir. 2021)	6
<i>United States v. Hirani</i> , 824 F.3d 741 (8th Cir. 2016)	6
<i>United States v. Playboy Ent. Grp., Inc.</i> , 529 U.S. 803 (2000).....	15
<i>Virginia v. American Booksellers Association, Inc.</i> , 484 U.S. 383 (1988)	2, 3
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	26
<i>Ways v. City of Lincoln</i> , 274 F.3d 514 (8th Cir. 2001)	2
Statutes	
Ark. Code Ann. § 1-2-117	29
Ark. Code Ann. § 1-2-205	29
Ark. Code Ann. § 4-88-1401	9-10, 25-26, 28
Ark. Code Ann. § 4-88-1402	5, 19, 26, 28
Ark. Code Ann. § 4-88-1403	11

Other Authorities

Get Your Library Card, Library of Congress,
<https://www.loc.gov/research-centers/use-the-library/research-at-the-library/get-your-library-card/> 7

Public Information on Facebook, Facebook
<https://www.facebook.com/help/203805466323736> 21

Watch Facebook Live Video Broadcasts, WikiHow,
<https://www.wikihow.com/Watch-Facebook-Live-Video-Broadcasts>; 21

YouTube,
https://www.youtube.com/results?search_query=February+8%2C+2026+church+service..... 21

ARGUMENT

I. NETCHOICE LACKS STANDING FOR ITS FIRST AMENDMENT CLAIM.

Although NetChoice based its First Amendment claim on the “rights of users, not platforms,” Add. 17; App. 369; R. Doc. 77, at 17, NetChoice failed to satisfy the “limited” third-party standing exception, Appellant Br. 20 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)). NetChoice lacks a close relationship with its members’ users, much less potential future accountholders, and doesn’t show its members’ users are hindered from protecting their own interests. *Id.* at 19-24. Instead of disputing this, NetChoice insists it wasn’t required to make such a showing. That’s wrong.

First, NetChoice claims it *also* asserted its members’ First Amendment rights. Having tellingly cited only the complaint and preliminary-injunction hearing and reply brief, Appellee Br. 45, NetChoice (1) doesn’t mention its fact statement and summary-judgment brief focused on users’ rights, *see generally* R. Doc. 67; R. Doc. 68; *see also* R. Doc. 72, at 1 (“NetChoice never asserts its members’ own [free-speech] rights”), and (2) overlooks the express finding that its claim “is based on the First Amendment rights of users, not platforms,” which allowed NetChoice to avoid “additional factual development,” Add. 17; App. 369; R. Doc. 77, at 17; *see Moody v. NetChoice, LLC*, 603 U.S. 707, 747 (2024) (Barrett, J., concurring) (analysis

“is bound to be fact intensive” and “will surely vary from function to function and platform to platform”); *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1014 (9th Cir. 2025) (no “associational standing without more information about members’ algorithms and feeds”); *see also Sisney v. Kaemingk*, 15 F.4th 1181, 1194 (8th Cir. 2021) (“subject-matter jurisdiction” is lacking for “overbreadth challenge” unless “a favorable decision would likely redress the plaintiff’s injury by lifting the restriction on his speech”). So cases where plaintiffs showed their speech was burdened are inapposite—especially cases without third-party standing arguments that pre-date *Kowalski*’s clarification. *See Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir. 2001).

Second, NetChoice argues third-party standing requirements don’t apply in the First Amendment context based on *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), and cases that don’t address standing. But “drive-by jurisdictional rulings ... have no precedential effect,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998), *see Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011), and *American Booksellers* never said third-party standing requirements don’t apply. Indeed, *American Booksellers* quotes *Secretary of State of Maryland v. Joseph H. Munson Co.*, another First Amendment case, recognizing the third-party inquiry asks if “obstacles prevent a party from asserting rights on behalf of itself”

and if third-party plaintiffs can “properly frame the issues ... with the necessary adversarial zeal,” 467 U.S. 947, 956 (1984).

In any event, *American Booksellers* is distinguishable. There potential book buyers faced hindrances, so the Court didn’t consider potential conflicts, and the case involved two bookstore-plaintiffs, not just an association-plaintiff. 484 U.S. at 388 n.3. In contrast, NetChoice cannot show a hindrance; this case involves the “hybrid-type of third-party derivative standing” because NetChoice is the only plaintiff, *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 294 (3d Cir. 2002) (Nygaard, J., dissenting); and conflicts exist between NetChoice’s members and potential future users—especially children. Appellant Br. 20-24.

Moreover, while third-party standing requirements may be relaxed in this context, courts don’t jettison them altogether. *See N.J. Bankers Ass’n v. Att’y Gen. N.J.*, 49 F.4th 849, 860 (3d Cir. 2022). Indeed, though the Fifth Circuit didn’t apply third-party standing requirements in *NetChoice, LLC v. Fitch*, it relied heavily on *its* precedents’ “footing” to conclude prudential considerations are “relax[ed],” 134 F.4th 799, 806-07 (5th Cir. 2025). And rather than saying prudential considerations weren’t implicated, it concluded NetChoice “satisfie[d] the prudential standing requirement” in *that* case, *id.* at 807, providing no basis for this Court to ignore existing conflicts that preclude NetChoice from being an “effective proponent[.]” of third-

party rights, *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1016 (8th Cir. 1983). So even if third-party standing requirements are relaxed, NetChoice has not met them.

Third, NetChoice characterizes the conflicts as suggestions that “some users may support the Act’s restrictions.” Appellee Br. 48. But that’s a mischaracterization because NetChoice cannot rebut the actual conflicts Arkansas identified. Appellant Br. 21-22.

Finally, NetChoice argues it can combine associational and third-party standing because four circuits have allowed it. But this Court has never ruled on the issue, only the Third Circuit seems to have considered arguments raised here, and Judge Nygaard’s dissent got it right. In any event, NetChoice overlooks that courts recognized such hybrid standing where the “organization’s members establish third-party standing,” *Green Spring*, 280 F.3d at 293, see *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103, 108 (1st Cir. 2006) (similar)—a showing not made here.

II. THE SOCIAL MEDIA SAFETY ACT IS CONSISTENT WITH THE FIRST AMENDMENT.

A. At most, intermediate scrutiny applies.

Intermediate scrutiny, at most, applies because the Act regulates conduct and is content-neutral. NetChoice’s contrary arguments mischaracterize the Act and precedent.

1. *The Act regulates conduct, not speech.*

The challenged provisions impose age-verification and parental-consent requirements on social-media companies before allowing someone to become an account holder on their social-media platform. Ark. Code Ann. § 4-88-1402(a). Accordingly, the Act regulates conduct, not speech—it regulates what companies “must *do*,” not “what they may or may not *say*.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006). The Act’s requirements are best understood as imposing conditions on social-media companies’ ability to contract or restrictions on children’s ability to access products or locations posing serious dangers. Appellant Br. 25-31. In response, NetChoice denies the Act is like laws regulating contracting or prohibiting children from dangerous locations and fails to engage with the argument that the Act restricts access to dangerous products.

First, NetChoice claims Arkansas never argued the Act is “a restriction on contracting with children.” Appellee Br. 25. But if NetChoice is hinting forfeiture

or waiver, NetChoice forfeited that argument by not developing it and citing authority. *See United States v. Cooper*, 990 F.3d 576, 583–84 (8th Cir. 2021) (forfeiture of a waiver argument); *Milligan v. City of Red Oak*, 230 F.3d 355, 360 (8th Cir. 2000) (assertion without “any argument or legal authority” was waived). Regardless, Arkansas argued below the Act regulated contractual conduct: “how social-media companies allow minors to create an account.” R. Doc. 72, at 6. The contract argument was thus “encompassed in a more general argument previously raised,” *United States v. Hirani*, 824 F.3d 741, 751 (8th Cir. 2016), and relies on record evidence, Appellant Br. 28, so the Court can consider it.

Second, NetChoice insists the Act “expressly regulates ‘expression’” based on the social-media-company definition and argues the Act restricts social-media access regardless of any contract. Appellee Br. 25 (quoting § 4-88-1401(11)(A)(i), and citing *id.* § 4-88-1403(c)(1)). But recognizing that expression occurs on social-media platforms (as the definition does) doesn’t transform the requirement that social-media companies verify age and obtain parental consent before allowing “a minor to be an account holder” —*i.e.*, enter a contract—into a speech regulation. And contrary to NetChoice’s suggestion, § 4-88-1403(c)(1) doesn’t impose liability when social-media companies allow minors to view content on platforms without age verification or parental consent. Instead, liability is triggered under § 4-88-1403(c)(1) only when

a “covered social media company” permits “a minor to access” social media “in violation of this subchapter,” meaning when social-media companies fail to follow the age-verification and parental-consent requirements for *new* accountholders (as required by § 4-88-1402(a)-(c)) or fail to follow other requirements that are not at issue here, including not following “privacy and safety” requirements for minors in § 4-88-1402(d)(2) (2026).

Third, NetChoice suggests the Act’s regulation of contracting is impermissible targeting of conduct necessary to access speech and turns to analogies, like banning ink to prevent book publishing. Appellee Br. 25-26. But Arkansas is not targeting conduct to suppress speech, and States could ban *toxic* ink even if it would have an impact on book publishing.¹ In any event, Arkansas is not banning anything. It requires social-media companies to verify age so children don’t become accountholders (and thereby agree to things like limiting liability) without parental consent; minors can still access content on platforms available to non-accountholders. Appellant Br. 28. It is therefore unlike the content-based law in *Brown v. Entertainment Merchant Association* that directly burdened expression by, “prohibit[ing] the

¹ NetChoice’s other analogies similarly don’t help it. *See, e.g., Get Your Library Card*, Library of Congress, <https://www.loc.gov/research-centers/use-the-library/research-at-the-library/get-your-library-card/> (describing age, identification, and parental-consent requirements).

sale or rental of ‘violent video games’ to minors,” regardless of parental consent, 564 U.S. 786, 789, 794 (2011), and unlike the law in *Packingham v. North Carolina* that made it “a felony” for sex offenders “to gain access to a number of websites,” 582 U.S. 98, 101 (2017); see *United States v. Bobal*, 981 F.3d 971, 977 (11th Cir. 2020) (distinguishing “the state law in *Packingham*” that was “a ‘complete bar’”). Indeed, NetChoice doesn’t disagree that “the Act does not ‘foreclose access to social media altogether,’ since some content on Facebook and YouTube is ‘available to non-account holders,’” it simply argues that *any* burden on speech triggers First Amendment scrutiny. Appellee Br. 26 (quoting Appellant Br. 28). That’s wrong too.

Only conduct regulations that “impose a disproportionate burden” on speech trigger First Amendment scrutiny, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986), not ones imposing “incidental burdens on speech,” *Brandt v. Griffin*, 147 F.4th 867, 888 (8th Cir. 2025) (citation omitted). And *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), doesn’t show otherwise. *Sorrell* involves a speech prohibition and confirms laws “imposing incidental burdens” don’t trigger First Amendment scrutiny. *Id.* at 562, 657.

Fourth, NetChoice argues the Act is nothing like laws restricting minors’ access to bars because Arkansas wants to suppress speech (and ignores the Act’s similarity to laws barring “tattoo[s] without parental consent,” Appellant Br. 29).

NetChoice tries distinguishing cases involving bars because those laws were “justified by an interest unrelated to the suppression of speech.” Appellee Br. 27. That begs the question. Arkansas doesn’t target social-media platforms because they facilitate expression—indeed, NetChoice tellingly cites only one prong of a multi-prong definition when other prongs illustrate Arkansas’s concerns that social-media platforms are digital locations that pose unique dangers to children (*e.g.*, exploitation, addiction, and mental-health risks).² NetChoice also conflates potential effects with what the law directly regulates. Just as laws regulating children’s admittance into bars without parental consent, even to attend political events, do “not regulate speech,” *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1300 (11th Cir. 2013), so too regulating children’s admittance into dangerous digital environments without parental consent doesn’t regulate speech.

Fifth, NetChoice conflates whether the Act *burdens* speech or expressive conduct with whether it *regulates* speech. Even if the Act “incidentally infringes upon protected expression,” *id.*, that does not alter its nature as a conduct regulation. Becoming an accountholder isn’t inherently expressive, Appellant Br. 26, so the Act regulates conduct and, even if the Act regulates expressive conduct, it’s only subject to intermediate scrutiny, *id.* at 31-37. *Free Speech Coalition, Inc. v. Paxton*, 606 U.S.

² See Ark. Code Ann. § 4-88-1401(11)(A)(ii)-(v); Appellant Br. 2-7.

461 (2025), is not to the contrary. That law didn't regulate contracting, only content access. And *Paxton* demonstrates that, even if the Act regulates expressive conduct, intermediate scrutiny applies. *Id.* at 478, 483.

2. Even if the Act burdens or regulates expressive conduct, it is a content- and viewpoint-neutral regulation.

Even if the Act regulates protected speech or expressive conduct, intermediate scrutiny applies. The Act is content-neutral and “draws lines that are not a surrogate for content discrimination,” Appellant Br. 37, as *CCIA v. Uthmeier*, No. 25-11881, 2025 WL 3458571 (11th Cir. Nov. 25, 2025), and *Hershey v. Jasinski*, 86 F.4th 1224 (8th Cir. 2023), demonstrate. Rather than engaging with these arguments, NetChoice insists the Act is content-based because of a few “carveouts” and claims it “openly discriminate[s] based on speaker” in “content-based way[s].” Appellee Br. 29-33. Both points are wrong.

First, the exclusions don't make the Act content-based. Excluding entities, such as email providers, not-for-profits, and schools, from the social-media-platform definition doesn't make the Act content-based. *See* Ark. Code Ann. § 4-88-1401(11)(B). Those exclusions operate “regardless of ‘topic or subject matter.’” *Hershey*, 86 F.4th at 1233 (citation omitted); *see Josephine Havlak Photographer, Inc. v. Village of Twin Oaks*, 864 F.3d 905, 909, 914-15 (8th Cir. 2017) (prohibition on non-permitted commercial activity that applies to commercial photographers but not

non-commercial photographers is not content-based). Because they don't regulate based on "communicative content" and apply regardless of "the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), they necessarily don't discriminate based on subject matter, much less "overt[ly]." Appellee Br. 30 (emphasis added). And any topic can be discussed through services provided by email providers and other excluded entities, so the exclusions also don't reflect a purportedly "obvious" subject-matter preference. *Id.*

The liability exclusions don't make the Act content-based either; they reinforce the Act's scope, which is clear from the definitions. The Act doesn't require social-media companies to age-gate content it makes publicly available (such as news or public-interest broadcast or website videos, Ark. Code Ann. § 4-88-1403(d)(1)) or any particular accountholder-restricted content, but simply requires them to verify ages and, where necessary, parental consent before allowing someone to become an accountholder, *id.* § 4-88-1402(a)-(c). And cloud service providers and news-gathering organizations are not social-media companies, so their express exclusion underscores that the Act is limited to social-media platforms that, among other things, facilitate user-to-user interaction, assign unique online profiles with personally identifiable information, and pose unique "dangers not seen earlier" that are not posed by traditional media. *See Moody*, 603 U.S. at 733. Accordingly, even with the

definitional and liability exclusions, the Act regulates based on “*form* of expression, not a *subject matter*,” CCIA, 2025 WL 3458571, at *4, or “where [the expression] [i]s printed,” not “what a publication says,” *Hershey*, 86 F.4th at 1233 (emphases omitted).

Second, the alleged speaker-based distinctions aren’t content-based. NetChoice doesn’t dispute the Act “applies neutrally to speakers that *use* the platforms.” Appellee Br. 32 (quoting Appellant Br. 36). Yet NetChoice contends the Act is speaker discriminatory because it “discriminates *among ‘platforms’* based on the speech they disseminate.” *Id.* But that argument assumes all platforms engage in their own expressive conduct, eliding NetChoice’s choice to rely on members’ users’ First Amendment rights (to avoid offering evidence about platforms’ algorithms and whether they are engaging in their own speech). *See supra* 1-2.

Regardless, even if the Act draws speaker-based lines, it’s not content-based and doesn’t trigger strict scrutiny. Appellant Br. 33-37. In arguing otherwise, NetChoice insists the carveouts have everything to do with the “communicative content” of the expression of business-to-business software, news-gathering organizations, schools, and non-profits (and their users). Appellee Br. 33. But it cites no evidence supporting that assertion, and all topics and subject matters can be addressed by such entities and by users who use their services. Moreover, all

viewpoints can be expressed, so NetChoice’s passing viewpoint-discrimination accusation is baseless.

Although NetChoice takes issue with differential treatment between social media and traditional media and news-gathering organizations, Appellee Br. 31-32, that’s not a content-based difference. It’s instead based on the form of or location of the expression, *see CCIA*, 2025 WL 3458571, at *4; *Hershey*, 86 F.4th at 1233; *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and the dangers attendant to social media, *see Moody*, 603 U.S. at 716, 733 (“novel services” provided by social-media platforms create “unprecedented dangers”: “dangers not seen earlier”); *M.H. v. Omegle.com LLC*, 122 F.4th 1266, 1268 (11th Cir. 2024) (“grave risks to children”); Appellant Br. 2-7. Platforms with virtually unrestricted interactivity and addictive features are significantly different than a restricted comment section on *The Washington Post*’s website (and NetChoice doesn’t show that website would otherwise meet the social-media-platform definition).

Moreover, assertions underlying NetChoice’s speaker-discrimination argument are false and contradictory. For example, NetChoice claims the Act restricts “access to websites that disseminate user-generated content while exempting those that offer only provider-generated content.” Appellee Br. 32. Yet elsewhere

NetChoice claims that *The Washington Post* allows user comments, conceding so-called “traditional outlets” don’t offer *only* provider-generated content. *Id.* It likewise acknowledges that entities, subject to age-verification and parental-consent restrictions and those that aren’t, can post the *same* video, Appellee Br. 31, proving the Act “is agnostic as to content.” *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022). NetChoice’s assertions also ignore that the Act doesn’t restrict blogs or countless other websites that aren’t social-media platforms and have non-institutional content. And while NetChoice refers to the “Act’s exemption for ‘a news or public interest broadcast, website, video, or event,’” Appellee Br. 33, it doesn’t develop any argument regarding why that exemption is speaker-based and cannot show it’s content-based, *see supra* 6, 10-12.

3. NetChoice’s arguments about strict scrutiny fail.

Rather than beginning its discussion with preliminary questions that apply, such as whether a challenged law “regulates speech, conduct, or both,” *Brandt*, 147 F.4th at 888, NetChoice starts by describing various cases and gesturing towards “principles” they purportedly contain. Appellee Br. 19-22. If NetChoice means *Packingham*, *Brown*, and other cases require one to conclude that the Act restricts too much speech and is therefore subject to strict scrutiny, it’s wrong.

Take *Packingham*. It’s distinguishable because that law was a direct regulation (indeed, a complete ban) on a subset of users’ social-media access. *See supra* 8; Appellant Br. 28, 45. Regardless, *Packingham* applied intermediate scrutiny—even though it characterized the law as “a prohibition unprecedented in the scope of First Amendment speech it burdens.” 582 U.S. at 107.

Brown likewise doesn’t help NetChoice. *See supra* 7-8, Appellant Br. 39. For starters, what NetChoice calls a holding about a child’s “right to speak or be spoken to without their parents’ consent” is dicta. 564 U.S. at 795 n.3. That’s because the challenged law was a complete prohibition on renting or selling violent video games to minors—regardless of parents’ permission. *Id.* at 789. Regardless, the Supreme Court never said minors’ right to receive (or express) speech without their parents’ consent (against parents’ wishes) was unlimited, nor can that possibly be true regarding young children, especially given “parents have traditionally had the power to control what their children hear and say.” *Id.* at 795 n.3. Further, *Brown* was a content-based restriction on speech, triggering strict scrutiny, *id.* at 799,³ and a direct attempt to prohibit children’s exposure to “ideas or images” (violent video games) regardless of parents’ views, *id.* at 794-95. Here, the Act is not a content-based

³ *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000), also involved “a content-based speech restriction.”

restriction, much less one on speech, and is not a complete prohibition. *See supra* 5-12. The Act empowers parents, letting them decide whether their children can be accountholders, rather than prohibiting all children from becoming accountholders.

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), also doesn't help NetChoice. *Erznoznik* recognizes as “well settled” that States “can adopt more stringent controls on communicative materials available to youths than on those available to adults.” *Id.* at 212. And *Erznoznik* takes no issue with prohibitions on youths being “admitted” to “R[-rated]” movies unless they are “accompanied by a parent or guardian.” *Id.* at 206 n.1.

B. The Act survives any level of scrutiny.

Although the Act is subject to, at most, intermediate scrutiny, it survives any level. Not only does Arkansas have a compelling interest in protecting “the physical and psychological well-being of a minor,” *Maryland v. Craig*, 497 U.S. 836, 852-53 (1990), but the district court also correctly found, as “well supported by the record, that unfettered social media access can and does harm minors,” Add. 26; App. 378; R. Doc. 77, at 26. And Arkansas has a compelling interest in empowering parents so they can better protect their children and in “reinforc[ing] parental decisionmaking.” *Brown*, 564 U.S. at 815 (Alito, J., concurring). The Act advances these compelling interests in a narrowly tailored way. Appellant Br. 37-46.

NetChoice doesn't dispute the factual finding that unfettered social-media access harms minors—for good reason, Appellant Br. 2-7— forfeiting any challenge to it. *See supra* 6. Instead, NetChoice claims (1) protecting children and empowering parents aren't compelling interests and (2) the Act isn't appropriately tailored to those interests. Neither argument carries the day.

1. Despite myriad cases recognizing that protecting children is a compelling interest, Appellant Br. 38-39, NetChoice claims that Arkansas stated its concerns “at far too high a level of generality to pass First Amendment muster.” Appellee Br. 35. Unsurprisingly, it cites no authority supporting that proposition. And citing discussions in *Paxton* and *Brown* about what triggers First Amendment review and a discussion in *Ernoznik* about tailoring doesn't disprove Arkansas's compelling interest in protecting children from harms posed by social media, including “psychological and physical” harm. *Craig*, 497 U.S. at 852-53; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).⁴

⁴ If NetChoice is arguing speech can never be directly regulated to advance a compelling interest, that's also wrong. *See Sable Commc'ns*, 492 U.S. at 126 (government can “regulate the content of constitutionally protected speech in order to promote a compelling interest”). Indeed, the government “may constitutionally restrict” protected speech when there's “empirical support for its belief” that the speech “cause[s] psychological harm to minors.” *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003). And here NetChoice didn't challenge the finding that “unfettered social media access can and does harm

NetChoice also fails in its attempt to recast Arkansas’s interest as protecting children from user-generated content and being related to suppressing protected speech. For one, NetChoice ignores Arkansas’s aim of protecting children from sexual exploitation, abuse, trafficking, and privacy risks that occurs with unrestricted social-media use, Appellant Br. 5-7, 40. For another, NetChoice speculates that psychological harm stems from user-generated content alone, but social-media use itself increases poor mental health outcomes, depression, anxiety. Appellant Br. 3-4. NetChoice’s presumption that harm is solely caused by user-generated content is not persuasive, especially when social-media platforms pose “unprecedented dangers.” *Moody*, 603 U.S. at 716; *see supra* 13.

Moreover, NetChoice mistakenly claims that Arkansas’s addiction argument is new. Below, Arkansas argued addiction and didn’t mince words: “[S]ocial-media companies invite minors onto their addictive platforms, fattening their purses at the expense of minors’ health.” R. Doc. 72, at 17; *see id.* (“manipulative design techniques embedded in their products to promote addictive and compulsive use by young people” (citation omitted)).

NetChoice also mistakenly claims that protecting children from addiction

minors.” Add. 26; App. 378; R. Doc. 77, at 26.

isn't a compelling interest and is related to speech suppression. Contrary to NetChoice's mischaracterization, Arkansas is not attempting to prevent children from being addicted to "especially appealing" user-generated speech. Appellee Br. 36. That's demonstrated by the Act itself. The age-verification and parental consent requirements apply to becoming an accountholder, Ark. Code Ann. § 4-88-1402(a), demonstrating addiction concerns are related to platforms' addictive features. Appellant Br. 3-4. Arkansas has "a compelling interest in protecting minors in general," including from "the potentially addictive features built into some social media platforms" to which "they are particularly susceptible." *CCIA*, 2025 WL 3458571, at *6.

NetChoice's also misguidedly disputes Arkansas's compelling interest in empowering parents. Its arguments depend on characterizing the Act as silencing protected speech. But that's not what the Act does, distinguishing it from *Brown*. See *supra* 15. *Interactive Digital* is similarly distinguishable because it involved a prohibition on anyone making violent video games available to minors and sought to suppress that constitutionally protected speech. 329 U.S. at 956, 959-60. In contrast, the Act doesn't seek to suppress protected speech and isn't content-based, as explained.

2. NetChoice’s arguments that the Act is not narrowly tailored fare no better. Perplexingly, NetChoice claims the Act doesn’t advance parental-empowerment interests because it infringes on First Amendment rights of children whose parents think social-media use is a good thing. But those children will become accountholders with parental consent. Far from being overbroad, the Act is narrowly tailored to empowering parents, and out-of-context quotes from *Brown* don’t show otherwise.

The Act is also narrowly tailored to Arkansas’s interest in protecting children. Although NetChoice claims the Act is overbroad because it “cover[s] a host of services,” it doesn’t explain why it thinks listed entities’ websites can meet the definition of “social media platform” (again citing only one subpart of the multi-element definition). Appellee Br. 38. It doesn’t describe what the entities are, why it believes they pose no harm to children, or cite anything to support its speculation.

Next, NetChoice claims the Act is overbroad because Arkansas could just aggregate particular content that Arkansas deems harmful. But such an approach would not advance Arkansas’s compelling interests as effectively because it wrongly assumes that harm to children stems from particular content alone. *See supra* 18-19. And while NetChoice asserts the Act will prevent children from expressive activity like “attend[ing] church services,” Appellee Br. 38-39, it ignores that (1) there are alternative avenues for children to engage in those expressive activities and

(2) children can do at least some of those things on platforms without having an account.⁵ NetChoice’s reliance on *Packingham* is also unavailing as it is readily distinguishable. *See supra* 15.

NetChoice then pivots to underinclusivity, arguing the Act should have extended to more websites and imposed restrictions on social-media usage of children who obtain parental consent. But NetChoice ignores that social media poses unique sets of harms, *see supra* 13, so the Act’s tailoring makes sense. And NetChoice ignores arguments that Arkansas did “need not address all aspects of a problem in one fell swoop,” Appellant Br. 43-44 (quoting *TikTok Inc. v. Garland*, 604 U.S. 56, 76 (2025)), that the Act helps protect children who open accounts with parental consent because parents can review contractual terms, watch for signs that social-media accounts are harming their children, and know to monitor accounts, *id.* at 40, and that the amended Act puts additional protections in place for children with accounts, *id.* at n.14.

⁵ *See Public Information on Facebook*, Facebook <https://www.facebook.com/help/203805466323736> (“Public information can be seen by anyone, including ... people off Facebook”); *How to Watch Facebook Live Video Broadcasts*, WikiHow, <https://www.wikihow.com/Watch-Facebook-Live-Video-Broadcasts>; YouTube, https://www.youtube.com/results?search_query=February+8%2C+2026+church+service (showing videos of church services).

Finally, NetChoice claims Arkansas had a less-restrictive alternative—do nothing except encourage parents to use parental controls. Yet as explained, parental controls are ineffective. *Id.* at 41-42, 45-46. NetChoice encourages the Court to ignore that ineffectiveness because Arkansas purportedly didn't introduce any evidence below. But the district court acknowledged that Arkansas's expert attested that many parents don't know how to use parental-control features and that children know how to circumvent them. Add. 12; App. 364; R. Doc. 77, at 12. Regardless, this Court can credit the Supreme Court's conclusion (citing studies) that internet and smartphone use is ubiquitous among teens (with 95% having access to a smartphone). *Paxton*, 606 U.S. at 490-91. That shows NetChoice's suggestion that concerns can be solved by parents refusing to give children internet-connected devices, when children can just borrow a friend's, is fanciful. Regardless, because the Act has been amended, if the Court decides not to consider cited sources—which confirm common sense and evidence in the district-court record—and cannot “resolve this important constitutional question on the current record,” it “must remand the case to the district court for further consideration.” *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1064 (8th Cir. 2004).

C. NetChoice has not carried its burden to prove its facial challenge.

Even though the Act's scope has changed pending appeal, NetChoice argues it has proven its facial challenge even as to the amended Act. Appellee Br. 41-44. That demonstrates NetChoice doesn't understand how facial challenges work.

Rather than attempting to clear the “high bar for facial challenges,” *Moody*, 603 U.S. at 749 (Jackson, J., concurring), NetChoice thinks asserting the Act cannot be constitutionally applied in a single situation relieves it of satisfying the “rigorous standard” that applies to facial challenges, *id.* at 723 (majority). Not so. NetChoice must “develop a factual record to support [its] request for facial injunctive relief,” *NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 500 (5th Cir. 2024), so courts can “determine to whom the Act applies, the activities it regulates, and then weigh violative applications of the Act against non-violative applications,” *Fitch*, 134 F.4th at 809; *see Bonta*, 152 F.4th at 1019-21 (similar). NetChoice failed to do so regarding the amended Act given the changed scope, and it also failed to do so for the original Act. Appellant Br. 46-48.

To deflect from this failure and attempt to shift the burden to Arkansas, NetChoice argues forfeiture. But Arkansas argued that the Act, at the very least, did not violate children's First Amendment rights, R. Doc. 72, at 5, so Arkansas identified situations in which the Act could be constitutionally applied. Regardless,

NetChoice bears the burden of showing constitutional applications outweigh the constitutional ones; Arkansas doesn't have the burden of proving the inverse. Indeed, NetChoice could not have carried its burden because, while *Moody*'s two-part analysis requires "a significant factual analysis," the record below is "undeveloped" because the district court refused to allow "full discovery" despite Arkansas's objections. *Id.* at 4-5.

In any event, NetChoice's attempts to rebut the Act's clearly lawful applications are unpersuasive. It doesn't dispute—nor could it given *Paxton*—that the Act's age-verification could be constitutionally applied to "the Facebook of porn," Appellant Br. 47, and NetChoice's insinuation that even the youngest child has a First Amendment right to open a social-media account in contravention of parental wishes doesn't withstand scrutiny, *see Erznoznik*, 422 U.S. at 214 n.11 ("First Amendment rights of minors are not 'co-extensive with those of adults'" and age "is a significant factor"); Appellant Br. 27-28, 39-40. In short, NetChoice has not proven the Act's "unconstitutional applications substantially outweigh its constitutional ones," especially when it has failed to demonstrate the Act's scope. *Moody*, 603 U.S. at 724

III. THE SOCIAL MEDIA SAFETY ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Whether the Court considers the old or new definitions, the Act is not unconstitutionally vague. Appellant Br. 48-51. NetChoice forfeits any arguments regarding the Act's original definitions, simply quoting the district court's conclusion before pivoting to discuss the Act's new definitions. Appellee Br. 51; *see supra* 6. Yet NetChoice's critique of new definitions fails to prove the Act is vague, and so do its new arguments regarding unamended aspects of the Act.

As Defendant explained, "social media platform" is now defined "based on six objective characteristics and exclusions, *see* Ark. Code Ann. § 4-88-1401(11)," which "provide[s] fair notice of what entities are subject to its age-verification and parental-consent requirements and provides standards for enforcement." Appellant Br. 50. Because NetChoice cannot dispute that "social media platform" is defined objectively and provides clear guidance, it glosses over that term and its definition. Instead, it notes the Act also uses the term "social media company" and argues that term is vague. Appellee Br. 51-52. But other than claiming there's "ongoing debate about what constitutes 'social media'" in the abstract, NetChoice doesn't explain why it thinks that statutory term is vague, nor examine the term in context of the challenged age-verification and parental-consent requirements. *Id.* But statutes must be read in "context and [with] common sense" under Arkansas law. *Jarboe v.*

Shelter Ins. Co., 819 S.W.2d 9, 11 (Ark. 1991); *see Clark v. Johnson Reg'l Med. Ctr.*, 362 S.W.3d 311, 316 (Ark. 2010).

Section 4-88-1402(a) provides that a “social media company shall not permit an Arkansas user who is a minor to be an account holder on the social media company’s social media platform unless the minor” has parental consent, and subsection (c) likewise refers to a “social media company’s social media platform.” When properly construed, a “social media company” is necessarily an entity that has a social-media platform. The definition of social-media platform thus informs the meaning of “social media company,” providing fair notice and sufficient guidance. *See Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (“perfect clarity and precise guidance” not “required”). Whether companies that NetChoice mentions are social-media companies that must comport with the age-verification and parental-consent requirements turns on factual information that they would know, such as whether they “generate[] revenue primarily through user engagement,” including “advertising, user data monetization, or premium content.” Ark. Code Ann. § 4-88-1401(11)(A)(v) (2025).

NetChoice’s arguments about the definition of “covered social media platforms” likewise don’t show the age-verification and parental-consent requirements are vague. “Covered social media platform” includes “a social media platform,” *id.*

§ 4-88-1401(5)(A), which has a clear definition as explained above. And while “covered social media” includes other terms, only social-media companies that have a “social media platform” as statutorily defined are subject to the age-verification and parental-consent requirements. *See id.* § 4-88-1402(a)-(c).⁶

NetChoice’s arguments that extend beyond the definitions are also unavailable. For starters, they’re forfeited. *See supra* 6. Before the district court, NetChoice only argued the definitions were vague, R. Doc. 67, at 28-31, and the district court only concluded those definitions were vague, Add. 34-40; App. 386-92; R. Doc. 77, at 34-40. Even if this Court reviews the amended law and NetChoice is allowed to advance new arguments about the new definitions, NetChoice cannot make arguments regarding the scope of obligations in § 4-88-1402(a)-(c)—which have not been amended—that NetChoice failed to make below. In any event, the age-verification and parental-consent requirements are clear: they apply at account creation to new accounts, which NetChoice acknowledged below. *See* R. Doc. 66, at 1 (describing the Act as requiring social-media companies “to verify that anyone seeking to create an account is” not a minor “or has parental consent to create an account”

⁶ Whether additional entities are subject to not-yet-effective requirements (*e.g.*, § 4-88-1402(d)(2)(B) (2026)) that aren’t at issue here doesn’t render the age-verification and parental-consent requirements vague. Regardless, arguing that practically every NetChoice member could meet the definition of “covered social media platform” doesn’t show that term is vague. Appellee Br. 53.

(citing Ark. Code Ann. § 4-88-1401 to -1404)); R. Doc. 67, at 15 (“requiring all users to verify their age *before creating an account*” (emphases modified)); PI Hr’g Tr. 89:15-91:4. And the Act clearly requires third-party vendors to perform age verification. Ark. Code Ann. §§ 4-88-1402(c); 4-88-1404. NetChoice’s unsupported suggestion that these obligations are unclear falls apart when the provisions are read in context. *See Jarboe*, 819 S.W.2d at 11.

IV. THE DISTRICT COURT ISSUED AN OVERBROAD JUDGMENT EXCEEDING ITS AUTHORITY.

Alternatively, even if some Act provisions are unconstitutional, the Court should narrow the judgment’s scope. That’s because NetChoice didn’t show each provision was unconstitutional, much less standing to challenge each provision, or that a universal injunction was necessary for complete relief. Appellant Br. 51-56. The judgment thus exceeds the district court’s authority and is overbroad. None of NetChoice’s responses show otherwise.

First, NetChoice argues—failing to even cite its operative summary-judgment briefing—that it was “clear” “it was challenging the entire Act.” Appellee Br. 54. But general allegations that the Act is unconstitutional are not the equivalent of arguing that each provision is unconstitutional, nor does it show that standing “exist[s] ‘as to each challenged provision.’” *Hershey*, 86 F.4th at 1229 (8th Cir. 2023) (citation omitted); *see Labrador v. Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring

in stay) (by issuing “sweeping relief even though” plaintiffs “failed to ‘engage’ with other provisions” “that don’t presently affect them,” “the district court clearly strayed”); *Serv. Emps. Int’l Union, Loc. 5 v. City of Houston*, 595 F.3d 588, 598 (5th Cir. 2010). And NetChoice had to show—with evidence, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)—that it had standing to challenge each provision and was entitled to the injunctive relief sought. Because NetChoice failed to carry its burden, the district court lacked authority to enjoin Defendant from enforcing the entire Act against everyone.

Second, NetChoice mischaracterizes Arkansas’s arguments as severability arguments to argue Arkansas bore the burden and forfeited its arguments. But Arkansas argued NetChoice failed to prove it was entitled to sweeping relief—in part due to its failure to prove standing to challenge each provision—and that the injunction exceeded judicial authority. So whatever the term, NetChoice had the burden to prove standing and entitlement to relief; Arkansas did not have the burden of disproof. *See Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (“Because the code’s provisions are properly considered severable, [plaintiff] must show injury, causation, and redressability with respect to each provision it challenges as overbroad.”); Ark. Code Ann. §§ 1-2-117, 1-2-205. In any event, jurisdictional arguments cannot be forfeited. *See Boechler, P.C. v. Comm’r of*

Internal Rev., 596 U.S. 199, 203 (2022) (“Jurisdictional requirements cannot be waived or forfeited”); *Trump v. CASA, Inc.*, 606 U.S. 831, 863 (2025) (Thomas, J., concurring) (“This limitation follows from both Article III and traditional equitable practice.”). And if anything, both NetChoice’s and the district court’s attempt to dismiss Defendant’s arguments as mere severability arguments underscore the need for clarification regarding the judicial role. As the district court describes it, “[s]everability’ is the idea that a Court can ‘sever’ parts of a statute from the rest and thereby invalidate only the unconstitutional parts” Add. 44; App. 400; R. Doc. 97, at 2. But courts lack the power to erase statutes—or any portion thereof—and this Court should narrow the judgment below and provide that necessary guidance. Appellant Br. 53-56.

Third, NetChoice suggests another provision in a different statutory section could potentially give the Attorney General authority to enforce all the Act’s provisions. But NetChoice’s reluctance to definitively take the position that the Attorney General has enforcement authority regarding § 4-88-1403(b)(1),(c) means it cannot prove any injury caused by those provisions would be redressable here. Appellant Br. 55-56.

Finally, although NetChoice previously contended the district court’s universal injunction was the “proper outcome” for a facially unconstitutional law, R.

Doc. 93, at 3-4; R. Doc. 96, at 2, it now urges the injunction be interpreted as only preventing enforcement of the Act against NetChoice members. But that interpretation is belied by the judgment and opinion’s plain text. *See* Add. 41; App. 393; R. Doc. 77, at 41; Add. 42; App. 394; R. Doc. 78, at 1. NetChoice’s unsupported assertion that Arkansas has no valid interest in limiting an injunction that prevents enforcement of its democratically enacted law is wrong too. Arkansas is irreparably harmed “any time” it cannot implement its “statutes enacted by representatives of its people.” *CASA*, 606 U.S. at 861 (citation omitted).

Conclusion

The Court should reverse or narrow the judgment’s scope.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,495 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Equity A, using Microsoft Word.

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I certify that on February 13, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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