

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NETCHOICE,

Plaintiff-Appellee,

v.

TIM GRIFFIN, in his official capacity as
Attorney General of Arkansas, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Arkansas,
No. 5:25-cv-5140 (Hon. Timothy L. Brooks)

PLAINTIFF-APPELLEE'S CONSOLIDATED RESPONSE BRIEF

ERIN E. MURPHY

Counsel of Record

JAMES Y. XI

JOSEPH J. DEMOTT

BARRETT L. ANDERSON

CLEMENT & MURPHY, PLLC

706 Duke Street

Alexandria, VA 22314

(202) 742-8900

erin.murphy@clementmurphy.com

Counsel for Plaintiff-Appellee

NetChoice

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This lawsuit challenges two Arkansas laws restricting constitutionally protected speech on “social media platforms”—defined as online services that “facilitate” users’ “interaction, expression, or communication.” Act 901 prohibits such services from using any “design, algorithm, or feature” that they “should have known” would cause a single Arkansan—adult or minor—to “[p]urchase a controlled substance,” “[d]evelop an eating disorder,” attempt suicide, or become “addict[ed]” to social media. Act 900 similarly restricts broad swathes of speech: It subjects “social media platforms” to “strict liability” if their practices “evoke any addiction or compulsive behaviors” in an Arkansas minor, among other requirements and prohibitions. In two lengthy and well-reasoned opinions, the district court held that Acts 900 and 901 are likely facially unconstitutional and preliminarily enjoined their enforcement.

Arkansas appealed both decisions, and this Court has consolidated these appeals with No. 25-1889, which involves NetChoice’s successful challenge to an Arkansas statute requiring “social media platforms” to verify the age of each individual seeking to create an account and secure parental consent for minor users. Arkansas has requested 30 minutes for oral argument in these three consolidated appeals. Given the importance of the issues presented, NetChoice agrees that oral argument is appropriate and likewise requests 30 minutes.

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1(a), NetChoice certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

These consolidated appeals involve Arkansas’ latest effort to suppress disfavored speech on “social media”: a pair of laws known as Act 900 and Act 901. Each law expressly targets constitutionally protected speech—namely, “user-to-user, user-to-group, or user-to-public interaction, expression, or communication.” Ark. Code §§4-88-1401(11)(A)(i), 1501(a)(5). And each law restricts such “expression” by imposing a raft of content- and speaker-based restrictions on companies that disseminate it over the Internet (i.e., “social media platforms”). Plaintiff-Appellee NetChoice filed a lawsuit challenging both laws on behalf of its members, and the district court issued a pair of lengthy and well-reasoned decisions preliminarily enjoining Arkansas from enforcing each law. This Court should affirm.

The main operative provision of Act 901 prohibits a “social media platform” from “us[ing] a design, algorithm, or feature” that it “knows, or should have known through the exercise of reasonable care, causes a user to: (1) Purchase a controlled substance; (2) Develop an eating disorder; (3) Commit or attempt to commit suicide; or (4) Develop or sustain an addiction to the social media platform.” *Id.* §4-88-1502(a)(1)-(4). To be clear, NetChoice members do not condone speech that promotes or glorifies illicit drug use, eating disorders, or self-harm, and they already enforce their own prohibitions against it. But Act 901’s vague prohibitions sweep far more broadly than NetChoice members’ existing rules, and far more broadly than

any category of speech not protected by the First Amendment. And by tethering liability to how speech may impact any of a service’s millions of Arkansas users, the statute leaves services with little choice but to suppress any speech that might have a harmful impact on *any* user, even if it would be innocuous—or beneficial—to most users.

Because each provision of Act 901 contains “an obvious subject-matter distinction” based on the “function” or effect of regulated speech, they are all “subject to strict scrutiny.” *City of Austin v. Reagan Nat’l Advert. of Austin*, 596 U.S. 61, 74 (2022). And Act 901 flunks any form of heightened scrutiny, as its nebulous prohibitions are not remotely tailored to any constitutionally permissible state interest. The Act is radically overinclusive: It restricts any speech that could have an enumerated harmful effect on *any* user, even if the speech does not harm any other user. And its vague effects-based prohibitions threaten liability for all manner of protected speech. YouTube could face liability for disseminating clips of the movie “Pineapple Express”; Instagram could face liability for motivational exercise videos; X could face liability if a user posts a song containing themes about suicide or depression; and The New York Times could be liable for offering a vast archive of “engaging word and logic games”—including features that enable users to interact with friends—and encouraging “everyone” to “enjoy playing every day,” 26-1096.App.105, R.Doc.25-1 at 6; *see* 26-1096.App.108, R.Doc.25-2. At the same

time, the Act is radically underinclusive, as it restricts services that disseminate user-generated speech yet allows the same types of content in other settings. For example, it does not regulate purveyors of movies, television, or video games, so long as they offer only provider-generated content. Act 901 thus leaves Hulu free to offer “Pineapple Express” and HBO Max free to use content-recommendation algorithms, while seemingly prohibiting YouTube and Facebook from doing the same. That is the antithesis of narrow tailoring.

Act 900 suffers from similar defects. Besides amending Arkansas’ “Social Media Safety Act” (the constitutionality of which is before this Court in No. 25-1889), Act 900 prohibits “social media platforms” from engaging “in practices to evoke any addiction or compulsive behaviors” in Arkansas minors under the age of 16. Ark. Code §§4-88-1402(d)(1), (3), 1401(9). That is a breathtaking restriction on protected speech. Given the risk of massive liability if a factfinder determines that some aspect of the service caused a single Arkansas minor to exhibit “addiction,” §§1402(d)(1) and (3) appear to prohibit covered services from curating and disseminating third-party content in precisely the ways that have made them so useful and popular. That is not only a fatal First Amendment defect but a glaring vagueness problem, as “[b]usinesses of ordinary intelligence cannot reliably determine what compliance requires” when it turns on the reactions of unknown users. 26-1962.App.935, R.Doc.69 at 15.

Act 900’s other operative provisions forbid “social media platform[s]” from sending notifications to minors between 10:00 p.m. and 6:00 a.m., subject to a parental override, and require “platform[s]” to provide minors, by default, with “the most protective level of control for privacy and safety offered” by the service. Ark. Code §4-88-1402(d)(2). Both requirements burden speech and, even ignoring their content-based exceptions, fail intermediate scrutiny too because they do virtually nothing to advance Arkansas’ asserted interests in protecting minors’ health and preventing exploitation of minors given how easily they can be overridden. 26-1962.App.935-37, R.Doc.69 at 15-17.

Lacking any plausible argument that Acts 900 and 901 can survive heightened scrutiny, Arkansas spends the bulk of its briefing trying to evade the First Amendment. Its primary argument is that these statutes are so broad and vague that they are impervious to a facial challenge under *Moody v. NetChoice*, 603 U.S. 707 (2024), because it would be “nearly impossible” for a court to exhaustively catalog “every conceivable application” of either law or for a plaintiff to assemble a record that would allow a court to do so. *E.g.*, 26-1096.AG.Br.9-10, 21. In other words, Arkansas thinks it should be rewarded for imposing restrictions so sweeping that no one can tell exactly how much protected speech they suppress. But *Moody* neither demands the impossible nor converts radical overbreadth into a defense against facial invalidation. Nor could it have embraced that exceedingly perverse approach

without overturning scores of cases concluding that such overbreadth is precisely what makes a law facially unconstitutional.

In reality, *Moody* simply requires courts to determine what a law principally regulates and whether it does so consistent with the First Amendment. That is precisely what the district court did: It carefully considered “the full range of activities the laws cover,” even attempting to come up with potential applications to non-expressive conduct after Arkansas failed to identify any (despite being directly asked). 26-1096.App.675, R.Doc.47 at 24. The court then determined that most (and sometimes all) applications of each provision burden protected speech, performed the First Amendment analysis, and concluded that each provision “prohibits a substantial amount of protected speech relative to” any “legitimate sweep.” 26-1096.App.676, R.Doc.47 at 25. The district court was correct every step of the way. This Court should affirm.

STATEMENT OF ISSUES

1. Whether the district court correctly held that NetChoice is likely to succeed on its facial First Amendment claims.

Brown v. Ent. Merchs. Ass’n, 564 U.S. 786 (2011); *Packingham v. North Carolina*, 582 U.S. 98 (2017); *Moody v. NetChoice*, 603 U.S. 707 (2024).

2. Whether the district court correctly held that NetChoice is likely to succeed on its vagueness claims.

Baggett v. Bullitt, 377 U.S. 360 (1964); *United States v. Williams*, 553 U.S. 285 (2008); *Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012).

3. Whether the district court acted within its discretion in preliminarily enjoining enforcement of Act 900 and Act 901 against NetChoice members.

Lowry ex rel. Crow v. Watson Chapel Sch. Dist., 540 F.3d 752 (8th Cir. 2008); *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007).

STATEMENT OF THE CASE

A. Factual and Legal Background

1. Arkansans use NetChoice members' online services to engage in all manner of constitutionally protected speech.

NetChoice is a trade association whose members operate many online services, including Facebook, Instagram, Threads, Snapchat, YouTube, Nextdoor, Pinterest, Reddit, Discord, and X. 26-1962.App.159.¶5, R.Doc.52-4 at 2; 26-1962.App.108-09.¶¶2-3, R.Doc.52-2 at 2-3. These services “allow[] users to gain access to information and communicate with one another about it on any subject that might come to mind.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). “On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos.” *Id.* at 104. On Instagram, users can share pictures and videos about their travels, interests, and daily lives. 26-1096.App.236-37.¶¶5-6, R.Doc.26 at 3-4. Nextdoor aims to facilitate constructive neighborhood connections and conversations. 26-1096.App.265-66.¶¶3-4, R.Doc.27 at 2-3.

Pinterest is a visual discovery engine for recipes, home and style inspiration, and more. 26-1096.App.236-37.¶6, R.Doc.26 at 3-4. And Snapchat is a camera and communications service that allows users to communicate using text, audio and video calls, photos, and short videos. 26-1096.App.236-37.¶6, R.Doc.26 at 3-4.

These services allow adults and teens to sign up for an account, create and share content, and view others' content. 26-1096.App.243-57.¶¶13-20, R.Doc.26 at 10-24; 26-1096.App.270.¶17.b, R.Doc.27 at 7; 26-1096.App.276.¶¶7-8, R.Doc.28 at 3. Arkansas teens use “social media” to, e.g., read the news, connect with friends, explore new interests, and showcase their creative talents. 26-1096.App.278-81, R.Doc.28 at 5-8. While teens “cannot vote for the lawmakers that represent them, [they] can use social media to make their voices heard on issues that affect them.” *NetChoice v. Griffin*, 2025 WL 978607, at *13 (W.D. Ark. Mar. 31, 2025). Teens also use NetChoice members' services to build communities and connect with others who share similar interests or experiences. 26-1096.App.34, R.Doc.2 at 12. In short, Arkansans use social media “to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’” *Packingham*, 582 U.S. at 105.

2. NetChoice members have developed detailed policies prohibiting harmful content and tools that enable parents to control their teens' use of covered services.

NetChoice members including (but not limited to) Meta, Snap, YouTube, Nextdoor, Pinterest, Reddit, Discord, and X curate the content on their services to

ensure that it is appropriate for adults and teens alike. 26-1096.App.237-42.¶¶8-10, R.Doc.26 at 4-9. For example, Facebook and Instagram prohibit content that “speaks positively about, encourages the use of, or provides instructions to use or make” illicit drugs, as well as advertisements promoting their sale or use. 26-1096.App.112, R.Doc.25-3 at 4; 26-1096.App.137, R.Doc.25-4 at 2. YouTube prohibits “[c]ontent promoting or glorifying suicide, self-harm, or eating disorders,” including “[i]nstructions on how to die by suicide, engage in self-harm, or engage in eating disorders (including how to conceal them).” 26-1096.App.178, R.Doc.25-9 at 4. “Using Discord to glorify or promote suicide or self-harm,” including “disordered eating patterns,” “is not allowed under any circumstance.” 26-1096.App.183, R.Doc.25-10 at 3. And Nextdoor offers resources for combating suicide and self-harm. 26-1096.App.186, R.Doc.25-11 at 2.

NetChoice members also recognize that certain content may be suitable for adults but not minors. They therefore “age gate” some content, which makes it visible only to adults or, in some instances, adults and older teens. 26-1962.App.164-67.¶12, R.Doc.52-4 at 7-10. For example, Facebook and Instagram restrict potentially sensitive content about recovery from self harm or eating disorders. 26-1096.App.159-60, R.Doc.25-7 at 4-5. YouTube similarly restricts sexually suggestive content, violent or graphic content, vulgar language, and

depictions of dangerous activities. 26-1096.App.188-89, R.Doc.25-12 at 2-3. Discord does the same. 26-1096.App.191-93, R.Doc.25-13 at 2-4.

NetChoice members expend considerable resources developing their content-moderation policies and implementing those expressive choices using algorithms, automated editing tools, and human review. 26-1096.App.657-58, R.Doc.47 at 6-7. Meta spends billions of dollars each year on safety and security, much of which goes toward removing harmful content. 26-1096.App.199, R.Doc.25-14 at 5; 26-1096.App.288, 293-301.¶¶32, 40-53, R.Doc.28 at 15-16, 20-28. Google likewise devotes massive resources to content moderation, removing tens of millions of YouTube videos and terminating millions of YouTube channels each year for policy violations. 26-1096.App.202-07, R.Doc.25-15 at 2-7.

NetChoice members also give users the ability to customize the content they see and the users with whom they interact. Facebook, Instagram, Snapchat, YouTube, Nextdoor, Pinterest, Discord, and X have all adopted privacy and safety settings that affect the content they disseminate to users. 26-1962.App.195-96.¶56, R.Doc.52-4 at 38-39. These settings limit what content the service will recommend or notify the user about, the users with whom a user may communicate, and how broadly a user's posts will be disseminated. 26-1962.App.196.¶56, R.Doc.52-4 at 39. Users can also turn off notifications or enable "sleep mode," which mutes notifications overnight. 26-1962.App.120.¶35, R.Doc.52-2 at 13; 26-

1962.App.125-26.¶45, R.Doc.52-2 at 18-19. And NetChoice members offer tools that give parents visibility into and control over their teens’ use of their services, including their teens’ privacy and safety settings and when they can receive notifications. 26-1962.App.162-64.¶11, R.Doc.52-4 at 5-7.

B. Procedural History

1. Arkansas’ “Social Media Safety Act” of 2023 imposes content-based restrictions on speech that have been held unconstitutional and permanently enjoined.

In April 2023, Arkansas enacted the Social Media Safety Act, Act 689 of 2023, which severely restricted minors’ access to several of the most popular “social media platforms.” As originally enacted, the statute singled out a handful of large companies—including Meta, Nextdoor Holdings, and X Corp.—based on the content of the speech they disseminate, required these companies to verify the age of everyone attempting to create an account, and required them to prohibit minors (originally defined as individuals under 18) from creating an account without proof of parental consent.¹

NetChoice challenged Act 689 on behalf of its members, and the district court preliminarily enjoined its enforcement. Arkansas chose not to appeal the preliminary injunction, and the case proceeded to discovery and summary judgment. In March

¹ The Social Media Safety Act as amended is reproduced in the statutory addendum.

2025, the district court granted NetChoice summary judgment on both its First Amendment claim and its vagueness claim, holding the statute “unconstitutional in all conceivable applications.” *Griffin*, 2025 WL 978607, at *14.

Less than a month later, the Arkansas legislature amended the statute. But rather than revising or repealing the age-verification and parental-consent requirements that had just been held unconstitutional, the amendments not only left those requirements in place, but significantly broadened the universe of services to which they apply. 26-1962.App.98-103, R.Doc.52-1 at 1-6. Although the state has appealed, the district court’s permanent injunction continues to prevent Arkansas from enforcing its age-verification and parental-consent regime against NetChoice members, and the parties’ dispute over the constitutionality of that regime (as amended) has been fully briefed in No. 25-1889.

2. Undeterred, Arkansas enacts Acts 900 and 901, which impose even more sweeping content-based restrictions on speech.

Not content with expanding the reach of requirements that had just been held unconstitutional, the Arkansas legislature also imposed two new sweeping sets of restrictions on “social media platforms” in April 2025. *See* 26-1096.App.306-09, R.Doc.36-1 at 1-4; 26-1962.App.98-106, R.Doc.52-1 at 1-9. Like the original Social Media Safety Act, those laws define the universe of regulated “social media platforms” by reference to First Amendment activity: They apply exclusively to online services that are “designed to facilitate user-to-user, user-to-group, or user-to-

public interaction, expression, or communication.” Ark. Code §§4-88-1501(a)(5); 1401(11)(A). They also contain numerous content- and speaker-based carveouts—e.g., for “a news-gathering organization” or “a news or public interest broadcast,” *id.* §4-88-1403(d)(1)-(2); “a not-for-profit organization, a public or private school, business to business software,” *id.* §4-88-1401(5)(B), (11)(B); and “safety or privacy-related alerts,” *id.* §4-88-1402(d)(2)(A).

One set of restrictions, Act 901, was slated to take effect on August 5, 2025. Act 901 prohibits a “social media platform” from using “a design, algorithm, or feature that [it] knows, or should have known through the exercise of reasonable care, causes a user to (1) Purchase a controlled substance; (2) Develop an eating disorder; (3) Commit or attempt to commit suicide; or (4) Develop or sustain an addiction to the social media platform.” *Id.* §4-88-1502(a). These prohibitions apply to speech created by and disseminated to minors and adults alike. Act 901 also creates a cause of action against a “social media platform” for a parent whose child engages in an act of self-harm if the platform “hosted, promoted, shared, or otherwise facilitated the immediate connection” between the minor and “online content promoting, or otherwise advancing, self-harm or suicide.” *Id.* §4-88-1503(b)(1). Appellants appear to have both civil and criminal enforcement authority over these prohibitions. *Id.* §§4-88-103, 104, 1501(a).

The other set of new restrictions, found in Act 900, was slated to take effect eight-and-a-half months later. *See* 26-1962.App.106, R.Doc.52-1 at 9. First, Act 900 requires a “social media platform” to “ensure” that it “does not engage in practices to evoke any addiction or compulsive behaviors in an Arkansas user who is a minor, including without limitation through notifications, recommended content, artificial sense of accomplishment, or engagement with online bots that appear human.” Ark. Code §4-88-1402(d)(1). Each covered service must “[c]onduct an audit” every three months to ensure that it is complying with this amorphous prohibition. *Id.* §4-88-1402(d)(3). Second, “social media platform[s]” must “[e]nsure that, by default,” “[n]otifications to an Arkansas user who is a minor, other than safety or privacy-related alerts, are ceased between the hours of 10:00 p.m. ... and 6:00 a.m. ... and allow a parent or guardian to modify this setting.” *Id.* §4-88-1402(d)(2). Third, platforms must default minor users to the “most protective level of control for privacy and safety offered by the covered social media platform.” *Id.* §4-88-1402(d)(2)(B). Finally, platforms must “[d]evelop an easily accessible online dashboard” to allow parents to monitor and control their children’s use of the platform. *Id.* §4-88-1402(d)(4). A violation of these prohibitions “is a strict liability civil offense,” and knowing and willful violations may also be criminally prosecuted. *Id.* §4-88-1403(b).

3. The district court preliminarily enjoins Act 901.

NetChoice promptly sued to challenge all these restrictions and, because it was slated to take effect more quickly, sought a preliminary injunction against Act 901, both on its face and as applied to NetChoice members' constitutionally protected expressive activity of curating and disseminating speech. The district court granted that relief, holding that Act 901 violates the First Amendment on its face and is unconstitutionally vague. *See* 26-1096.App.660-79, R.Doc.47 at 9-28. It did not reach NetChoice's as-applied claim.

Applying *Moody v. NetChoice*, 603 U.S. 707 (2024), the court began its First Amendment analysis by considering “[w]hat activities, by what actors,” Act 901 regulates. 26-1096.App.661, R.Doc.47 at 10. It concluded that Act 901 applies to “social media platforms as commonly understood,” including Facebook, Instagram, YouTube, Snapchat, Reddit, Pinterest, Nextdoor, and X. 26-1096.App.653, 661, R.Doc.47 at 2, 10. The court also concluded that, by prohibiting any “design, algorithm, or feature” that “causes” a single Arkansan to engage in one of the enumerated behaviors, the Act “regulates pretty much everything a social media platform does.” 26-1096.App.662, R.Doc.47 at 11.

Next—as *Moody* directs—the court assessed “which of the laws’ applications violate the First Amendment” and “measure[d] them against the rest.” 26-1096.App.663, R.Doc.47 at 12. Although Arkansas “failed to identify any”

applications of the law that it thought were constitutional despite repeated invitations, the court tried to imagine potential applications involving “non-expressive conduct.” 26-1096.App.663-64, R.Doc.47 at 12-13. But the court concluded that the bulk of Act 901’s applications “forc[e] a platform to suppress user speech,” thus “burden[ing] both the platform’s and the user’s speech.” 26-1096.App.663-64, R.Doc.47 at 12-13.

Turning to the level of First Amendment scrutiny, the court concluded that the provisions regarding controlled substances, eating disorders, and self-harm (§§1502(a)(1)-(3) and 1503) are subject to strict scrutiny because they “impose content-based restrictions on platforms’ editorial discretion and on users’ speech.” 26-1096.App.664-65, R.Doc.47 at 13-14. The court then concluded that none of them could pass strict scrutiny, as none is narrowly tailored to serve Arkansas’ asserted interest in protecting Arkansans from harmful behaviors. 26-1096.App.667-71, R.Doc.47 at 16-20. As for the prohibition on features that cause “social media addiction” (§1502(a)(4)), the court found it unnecessary to decide whether that provision is content based because it fails even intermediate scrutiny. 26-1096.App.671, R.Doc.47 at 20. As the court explained, §1502(a)(4) is insufficiently tailored to Arkansas’ asserted interest in “protecting Arkansans from social media addiction” because it forces services “to restrict as to *all* users—minor or adult—anything that could have a forbidden effect [here, addiction] on *any*

user[.]” 26-1096.App.674-75, R.Doc.47 at 23-24. Because the court concluded that the unconstitutional applications far outweigh any potentially constitutional ones, it held that NetChoice is likely to succeed on its facial First Amendment challenge to §§1502(a)(1)-(4). 26-1096.App.676, R.Doc.47 at 25.

The court also concluded that §§1502(a)(1)-(4) are likely void for vagueness. As the court explained, these provisions are subject to “a more stringent vagueness test” because they “interfere[] with the right of free speech” and “permit[] criminal penalties.” 26-1096.App.677, R.Doc.47 at 26. And the Supreme Court has “consistently struck down laws that restrict otherwise protected speech based solely on its impact on the feelings and conduct of others”—including an ordinance that prohibited three or more persons from assembling on a sidewalk and “conduct[ing] themselves in a manner annoying to persons passing by.” 26-1096.App.677-78, R.Doc.47 at 26-27 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)). The court concluded that Act 901 likewise “fails to specify a standard of conduct to which platforms can conform” since it makes a violation “entirely depend[ent] upon the sensitivities of some unspecified user.” 26-1096.App.678, R.Doc.47 at 27.

4. The district court preliminarily enjoins Act 900.

As the effective date for Act 900 approached, NetChoice moved to preliminarily enjoin its enforcement both facially and as applied. R.Doc.48. The

district court granted a preliminary injunction, concluding that Act 900 is also likely unconstitutional. 26-1962.App.921, R.Doc.69 at 1.

First, the court concluded that Act 900’s prohibition on “engag[ing] in practices to evoke any addiction or compulsive behaviors in an Arkansas user who is a minor,” and its related requirement to conduct quarterly audits to weed out any such practices, are “likely void for vagueness.” 26-1962.App.933, R.Doc.69 at 13. Like Act 901’s ban on “features” that could foreseeably “cause” at least one Arkansas user to become “addicted” to social media, these provisions make it impossible to predict what “practices” could give rise to liability because a “violation entirely depends upon the sensitivities of some unspecified user.” 26-1962.App.933, R.Doc.69 at 13. Making matters worse, Act 900 imposes liability not only for “addiction to the platform itself,” but also for “addiction” to *any activity*—and does so “on a strict liability basis.” 26-1962.App.934, R.Doc.69 at 14. Because “[b]usinesses of ordinary intelligence cannot reliably determine what compliance requires,” the court held that NetChoice is likely to succeed on its challenge to §§1402(d)(1) and (d)(3). 26-1962.App.935, R.Doc.69 at 15.

Turning to the restriction on sending minors notifications between 10:00 p.m. and 6:00 a.m. (§1402(d)(2)(A)), the court recognized that this provision is “content-based” because it has a carveout for “safety or privacy-related alerts,” but it assumed that this carveout is “severable.” 26-1962.App.935, R.Doc.69 at 15. Even without

the carveout, however, the court concluded that §1402(d)(2)(A) is likely unconstitutional. As the court explained, §1402(d)(2)(A) “burdens platforms’ speech by silencing them for a third of the day.” 26-1962.App.937, R.Doc.69 at 17. And it is “so underinclusive as to be functionally useless” as a means of furthering Arkansas’ asserted interest in “ensuring minors get enough sleep,” especially since parents may override the default ban on nighttime notifications. 26-1962.App.936, R.Doc.69 at 16. On top of that, parents already have ample means of “prevent[ing] their children’s sleep from being disrupted by late-night notifications”—including “taking devices away at night.” 26-1962.App.935-36, R.Doc.69 at 15-16.

For similar reasons, the court held that NetChoice is likely to succeed on its challenge to §1402(d)(2)(B)’s requirement that each “social media platform” set minors’ privacy and safety settings, by default, to “the most protective level” it offers. The court concluded that this provision implicates the First Amendment in all conceivable applications because it restricts the users with whom minors may communicate and the speech in which minors may engage. 26-1962.App.937-39, R.Doc.69 at 17-19. And because §1402(d)(2)(B) leaves minors “free to depart from the protective default,” the court concluded that it does not meaningfully advance

Arkansas’ asserted interests in aiding parental authority and protecting minors from sexual exploitation. 26-1962.App.939-40, R.Doc.69 at 19-20.²

Arkansas appealed both preliminary-injunction orders, and this Court consolidated the two appeals and directed that they be argued with Arkansas’ related appeal in No. 25-1889. *See* Order, No. 26-1962 (May 18, 2026); Order, No. 25-1889 (May 27, 2026).

SUMMARY OF ARGUMENT

The district court correctly concluded that NetChoice is likely to succeed on its First Amendment and vagueness challenges to the sweeping speech restrictions that Acts 900 and 901 impose, and the court acted well within its discretion in preliminarily enjoining their enforcement. Arkansas’ efforts to refute that conclusion rewrite its laws, flout decades of settled precedent, and would perversely convert radical overbreadth into a defense against facial invalidation of sweeping restrictions on protected speech.

Each challenged provision principally regulates speech protected by the First Amendment. Acts 900 and 901 apply only to services “designed to facilitate” user “interaction, expression, or communication,” Ark. Code §§4-88-1401(11)(A)(i),

² The district court also held that §1402(d)(4)’s requirement to develop an “online dashboard” for parents of minor users is likely unconstitutional. 26-1962.App.940-41, R.Doc.69 at 20-21. Arkansas declined to appeal that holding. 26-1962.AG.Br.11 n.7.

1501(a)(5)(A), so they burden the First Amendment twice over: They prevent users from engaging in and receiving speech, and they burden covered services’ editorial judgments about what content to curate and disseminate. Sections 1502(a)(1)-(3) require services to suppress a nebulous universe of protected speech involving drug use, eating disorders, and suicide, while §§1502(a)(4), 1402(d)(1), and 1402(d)(3) target all sorts of speech, including engaging content, algorithms that promote such content, notifications about such content, and social-feedback features (e.g., “likes”). Section 1402(d)(2)(A) prohibits services from sending notifications—which are literally speech—for eight hours per day, and §1402(d)(2)(B) restricts speech by mandating stricter default settings governing to whom it can be disseminated. The district court thus correctly concluded that each provision principally regulates protected speech.

All of the challenged statutory provisions trigger strict scrutiny because they reflect content- and speaker-based discrimination. Sections 1502(a)(1)-(3) and 1503 overtly suppress certain content—namely, anything that could cause a single Arkansas user (adult or minor) to buy drugs, develop an eating disorder, or attempt suicide. 26-1096.AG.Br.43. The statutes’ addiction-related provisions are also content-based because they suppress speech based on whether the recipient finds it engaging. Section 1402(d)(2)(A) is facially content-based because it exempts “safety or privacy-related alerts.” And the entire regime is infected by content and

speaker discrimination, as the statutory definition of “social media platform” singles out services that facilitate user-generated speech, and §§1401(5)(B), (11)(B), and 1403(d) contain additional content- and speaker-based carveouts.

None of the challenged provisions can withstand any level of heightened scrutiny. Arkansas has no constitutionally permissible interest in preventing “addiction” to protected speech, as that interest is inescapably “[r]elated to the suppression of free speech.” *Moody*, 603 U.S. at 740. To conclude otherwise would allow the state to restrict any medium it deems too absorbing, from novels to video games to television series to religious practice. And to the extent any challenged provision furthers a permissible government interest, none is remotely tailored. They are all wildly underinclusive, as they leave identical content untouched when conveyed through books, movies, television, or online services that focus on provider-generated speech. That alone raises serious doubts that Arkansas is actually motivated by the interests it asserts, rather than disfavoring particular speakers and viewpoints.

Each provision is also radically overbroad. By restricting the dissemination of speech to a multitude of willing recipients whenever it could foreseeably cause *a single one of them* to do something harmful, §§1502(a), 1503, 1402(d)(1), and 1402(d)(3) “force platforms to censor potentially sensitive, but protected, speech as to all users for the benefit of some subset of particularly susceptible users.” 26-

1096.App.668, R.Doc.47 at 17. And because it is impossible to know, *ex ante*, what effect a given statement, image, or video could have on an unidentified recipient, services will have no choice but to broadly restrict anything that could possibly be linked to the enumerated harms. As for §§1402(d)(2)(A) and (B), Arkansas has not demonstrated that a piecemeal restriction on nighttime notifications from a subset of online services, or an easily changed default for privacy-and-safety settings, will meaningfully advance its asserted interests in protecting minors’ health and reinforcing parental authority. In short, these are ill-conceived blunderbuss laws, not serious efforts to avoid restricting more constitutionally protected speech than necessary.

It is little surprise, then, that the state spends most of its brief trying to change the subject, insisting that the district court failed to conduct the analysis that *Moody* requires for a facial First Amendment challenge. In fact, the court expressly and assiduously followed *Moody* at every turn. *Moody* instructs courts to consider what activities, by what actors, a law covers and then weigh the unconstitutional applications against any constitutional ones. That is precisely what the district court did—even though the state failed to identify anything that might fit into the latter category even after the district court expressly asked it to. And the court correctly concluded that each provision “prohibits a substantial amount of protected speech relative to” any “legitimate sweep.” 26-1096.App.676, R.Doc.47 at 25. Arkansas’

repeated assertions that the court did not perform or “even attempt[] the necessary analysis,” *e.g.*, 26-1096.AG.Br.21, are thus pure fiction. And Arkansas’ seeming view that statutes cannot be held facially invalid unless and until a challenger exhaustively catalogs “every conceivable application,” 26-1096.AG.Br.9-10, 21, would perversely shield the broadest and vaguest restrictions on speech from invalidation. As cases like *Packingham v. North Carolina*, 582 U.S. 98 (2017), and *United States v. Stevens*, 559 U.S. 460 (2010), confirm, that would turn First Amendment law on its head: That kind of radical overbreadth is what dooms a law, not what saves it.

The district court also correctly concluded that NetChoice is likely to succeed on its vagueness claims (which renders Arkansas’ *Moody* complaints largely beside the point). Because Acts 900 and 901 impose criminal penalties and implicate speech, they must satisfy an especially stringent vagueness test. They could not satisfy even a less stringent one. It is impossible for regulated websites to predict, *ex ante*, which “design[s], algorithm[s], or feature[s]” are prohibited, because liability under §1502(a) turns on “the sensitivities of some unspecified user” and hindsight. 26-1096.App.678, R.Doc.47 at 27. And §1402(d)(1) and (3) are even worse: They impose strict liability, which forces regulated services to steer even further away from the forbidden subject matter, and they extend to unspecified

“practices” that “evoke any addiction or compulsive behaviors” in *any* activity, no matter how innocuous.

Finally, the district court acted well within its discretion in preliminarily enjoining the state from enforcing Acts 900 and 901. Because NetChoice is likely to succeed on its First Amendment claims, it has necessarily shown irreparable harm, as the loss of First Amendment freedoms always constitutes irreparable injury. NetChoice members also face unrecoverable compliance costs and an untenable choice between massive liability and sweeping restrictions on speech. Because Arkansas has no legitimate interest in enforcing unconstitutional statutes, the balance of equities and the public interest—which merge here—favor maintaining the status quo. The Court should therefore affirm both preliminary injunctions in their entirety—or, at the very least, as applied to NetChoice members’ constitutionally protected expressive activity of curating and disseminating speech.

STANDARD OF REVIEW

In reviewing a district court’s grant of a preliminary injunction, conclusions of law are reviewed *de novo*; findings of fact are reviewed for clear error; and the application of the law to the facts is reviewed for abuse of discretion. *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342-43 (8th Cir. 2024). “The district court has broad discretion when ruling on preliminary injunctions.” *Id.*

ARGUMENT

I. NetChoice Is Likely To Succeed On Both Of Its First Amendment Claims.

A. All Challenged Provisions of Act 900 and Act 901 Implicate the First Amendment in All or Most of Their Applications.

1. As the district court explained, “[t]he first step in the proper facial analysis is to assess the state laws’ scope”—i.e., “[w]hat activities, by what actors, do the laws prohibit or otherwise regulate?” 26-1096.App.661, R.Doc.47 at 10 (quoting *Moody*, 603 U.S. at 724); *accord* 26-1962.App.930, R.Doc.69 at 10. The ultimate goal is to determine “the principal things regulated” by a law, *Moody*, 603 U.S. at 726, as that will dictate whether its principal applications (which necessarily weigh most heavily in the balance) are constitutional. And the district court correctly concluded that the challenged provisions of Acts 900 and 901 principally—if not exclusively—restrict constitutionally protected speech.

The Supreme Court has squarely held that a “social media” service’s presentation of “a curated and ‘edited compilation of [third party] speech’ is itself protected speech.” *Moody*, 603 U.S. at 744; *see Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011). When the government “alters the content” of that “expressive product”—e.g., by compelling or suppressing certain expression—“the government confronts the First Amendment.” *Moody*, 603 U.S. at 731-32. The Supreme Court has also held that “social media users employ” services such as “Facebook,” “LinkedIn,” and “Twitter” (now X) “to engage in a wide array of protected First

Amendment activity.” *Packingham*, 582 U.S. at 104-05. Imposing liability on these services for disseminating protected speech thus abridges users’ First Amendment rights, too. 26-1096.App.664, R.Doc.47 at 13 & n.9.

Under these settled principles, Acts 900 and 901 plainly implicate the First Amendment in all or most of their applications. Both statutes define a “[s]ocial media platform” as an online service that “[i]s designed to facilitate” user “interaction, expression, or communication.” Ark. Code §§4-88-1401(11)(A)(i), 1501(a)(5). There are thus no difficult questions here about whether the statutes might sweep in some services that disseminate speech only incidentally; they are expressly confined to *only* services engaged in the very activities that *Moody* held are protected by the First Amendment. Moreover, unlike the laws at issue in *Moody*, Acts 900 and 901 do not “force a platform to carry user speech it would rather remove.” 26-1096.App.663, R.Doc.47 at 12; *see Moody*, 603 U.S. at 720-21, 740-43. They instead “restrict[] the dissemination or promotion of user speech” that services *would otherwise disseminate*. 26-1096.App.663, R.Doc.47 at 12. That burdens the First Amendment rights of users who wish to have their speech disseminated and/or to receive that speech on top of the burden on the rights of the services that wish to disseminate it. Acts 900 and 901 thus burden First Amendment rights across the board.

The district court’s thorough, provision-by-provision analysis confirms as much. To begin, Act 901 prohibits a “social media platform” from using “any design, algorithm, or feature” that could “cause[]” a user to: “(1) Purchase a controlled substance; (2) Develop an eating disorder; or (3) Commit or attempt to commit suicide.” Ark. Code §4-88-1502(a)(1)-(3). As the court explained, the whole point of these provisions is to “forc[e]” services to “change what speech they disseminate or how they prioritize that speech.” 26-1096.App.663-64, R.Doc.47 at 12-13. They therefore principally—in fact, exclusively—restrict both service and user speech. Indeed, because they impose liability based on how an unidentified user responds to speech, the only way to even attempt to avoid liability would be to suppress virtually any speech with *any* potential connection to drug use, eating disorders, and self-harm—which sweeps far more broadly than NetChoice members’ existing policies. Section 1502(a)(1) could require YouTube to suppress music videos of Afroman’s “Because I Got High,” or clips of “Pineapple Express.” Section 1502(a)(2) could prohibit services from using any “algorithm” that ends up “prioritiz[ing] videos” featuring “thinner users,” the latest health trend, or workout videos. 26-1096.App.665, R.Doc.47 at 14. Sections 1502(a)(3) and 1503 could expose a service to liability for employing a “search feature” that allows a user to access information about the world’s tallest bridges, or music videos for Nirvana or My Chemical Romance songs, so long as a jury determines (with the benefit of

hindsight) that a service should have known that the feature might be used to access content related to a suicide attempt. 26-1096.App.666, R.Doc.47 at 15. Those are obvious restrictions on protected speech.

The statutes’ “addiction”-related provisions likewise burden both “platforms’ editorial discretion” and “users’ speech” across the board—in fact, they are even broader and vaguer. 26-1096.App.663-64, R.Doc.47 at 12-13. Act 901’s prohibition on using any “design, algorithm, or feature” that could “cause[]” any user to “[d]evelop or sustain an addiction to the social media platform,” Ark. Code §4-88-1502(a)(4), imposes liability based on the content of the curated compilation of speech a service disseminates. *See* 26-1096.App.673-75, R.Doc.47 at 22-24. Section 1502(a)(4) also puts services at risk of liability for allowing users to follow, share, and “like” other users’ expression—an obvious burden on users’ speech. *See* 26-1096.App.673-75, R.Doc.47 at 22-24. The same goes for Act 900’s prohibition on “engag[ing] in practices to evoke any addiction or compulsive behaviors in an Arkansas user who is a minor” and the related audit requirement. Ark. Code §4-88-1402(d)(1), (3). Section 1402(d)(1) expressly restricts inherently expressive “practices” such as “notifications” and “recommended content,” *id.*, raising the specter that Snapchat could face liability for notifying a teen each time a friend sends her a message, or that YouTube could be held liable for recommending too many soccer videos to a high-school soccer player. Sections 1402(d)(1), 1502(a)(1)-(4),

and 1503 thus plainly burden both “platforms’ editorial discretion” and “users’ speech.” 26-1096.App.663-64, R.Doc.47 at 12-13; *see* 26-1962.App.933, R.Doc.69 at 13.

The other challenged provisions also principally—in fact, exclusively—burden protected speech, albeit in slightly different ways. Section 1402(d)(2)(A)’s ban on sending “[n]otifications to an Arkansas user who is a minor” between 10:00 p.m. and 6:00 a.m. “burdens platforms’ speech by silencing them for a third of the day.” 26-1962.App.937, R.Doc.69 at 17. It also burdens user speech by restricting when it can be disseminated. Section 1402(d)(2)(B)’s regulation of “[p]rivacy and safety settings” for Arkansas minors similarly “implicates platforms’ speech” and users’ speech by altering “who can see an account holder’s posts and whose posts an account holder can see.” 26-1962.App.937-38, R.Doc.69 at 17-18. In sum, each challenged provision of Act 900 and Act 901 principally restricts protected speech.

2. Arkansas’ efforts to resist that conclusion are unavailing. Arkansas first contends that Act 901 does not implicate the First Amendment at all because it is “directed at conduct”—i.e., the implementation of designs, algorithms, and features—not speech. 26-1096.AG.Br.14. But “[t]he First Amendment is no word game”; “speech does not become conduct just because the State may call it that.” *Chiles v. Salazar*, 607 U.S. 627, 645 (2026). And Arkansas fails to grapple with *Moody*’s holding that NetChoice members use designs, algorithms, and features to

“create a distinctive expressive offering”—i.e., engage in protected speech. 603 U.S. at 734-38. Arkansas likewise ignores that Acts 900 and 901 exclusively regulate services that facilitate “interaction, expression, or communication.” Ark. Code §§4-88-1401(11)(A)(i), 1501(a)(5). Because both laws single out services engaged in the very activities that *Moody* held constitutionally protected, and restrict users’ speech and access to speech in the process, they principally burden First Amendment activity.

In fact, when the district court asked Arkansas to identify “two or three examples” of applications that do *not* implicate speech during the preliminary-injunction hearing on Act 901, 26-1096.App.632, R.Doc.45 at 64:8-9, Arkansas “failed to identify any.” 26-1096.App.663, R.Doc.47 at 12. And though Arkansas now tries to belatedly remedy that deficiency by identifying “potential applications” of Acts 900 and 901 that purportedly “regulate non-expressive conduct,” 26-1096.AG.Br.14; *see* 26-1096.AG.Br.39-42; 26-1962.AG.Br.37-38, many of its proffered examples *do* implicate the First Amendment. For example, “appearance-altering filters” facilitate user expression by transforming pictures into new artistic forms of expression. *See Hoffman v. Cap. Cities/ABC*, 255 F.3d 1180, 1183, 1189 (9th Cir. 2001) (holding that filtered images are protected speech). Auto-play, infinite scroll, and pull-to-refresh directly implicate a service’s editorial discretion to choose “which third-party content those feeds will display, or how the display will

be ordered and organized.” *Moody*, 603 U.S. at 740. In fact, auto-play, infinite scroll, and the like are not meaningfully different from ESPN’s decision to automatically play the next football game, or Disney+’s decision to automatically play the next episode of Bluey. A state law that prohibited ESPN or Disney+ from showing the next game or episode unless and until someone requests it would plainly implicate the First Amendment. So too here.

Trying another tack, Arkansas argues that Acts 900 and 901 do not “implicate the First Amendment at all” to the extent they regulate “non-expressive algorithms.” 26-1096.AG.Br.43; *see* 26-1096.AG.Br.26-30. That argument relies almost entirely on a proposition advanced by the concurring opinions in *Moody* that the majority declined to embrace. *See* 26-1096.AG.Br.27-28, 30. It also assumes that there is some meaningful volume of entirely “non-expressive algorithms”—a contention that neither common sense nor the record here supports, since virtually every service incorporates into its algorithms an array of deliberate choices about what kinds of content to favor and restrict in cultivating a particular expressive community. *See, e.g.*, 26-1096.App.34, 41-42, R.Doc.2 at 12, 19-20; 26-1096.App.198, R.Doc.25-14 at 4; 26-1096.App.202-07, R.Doc.25-15 at 2-7; 26-1096.App.238-42.¶¶9-10, R.Doc.26 at 5-9; 26-1096.App.278.¶13, R.Doc.28 at 5; 26-1096.App.295-96.¶¶44-45, R.Doc.28 at 22-23.

But even setting all that aside, Arkansas’ argument ignores the more fundamental problem that the laws challenged here differ from the laws challenged in *Moody* in a critical respect: They restrict services’ ability to disseminate speech that they would otherwise disseminate, and that their users *want* to share and receive. *See* 26-1096.App.663, R.Doc.47 at 12. These laws thus implicate the First Amendment rights of *users* in all their applications, even if they may theoretically restrict some algorithms or activities “that do not involve *the platform’s* editorial discretion.” 26-1096.App.663, R.Doc.47 at 12 (emphasis added). After all, no one disputes that the First Amendment protects the rights of the third-party speakers and recipients of speech that a disseminator of speech serves.

Unable to credibly deny that Acts 900 and 901 burden speech, Arkansas attempts to minimize the burdens as “incidental.” 26-1096.AG.Br.15. But “burdens on speech” are “incidental” only when a law is “directed at” “nonexpressive conduct” and the effect on speech is an unintended consequence. *Sorrell*, 564 U.S. at 567. And there is nothing unintended about the burdens that Acts 900 and 901 impose on speech. The whole point of the laws is to restrict how services and their users engage in “interaction, expression, or communication,” Ark. Code §§4-88-1401(11)(A)(i), 1501(a)(5), in an avowed effort to suppress speech that Arkansas considers harmful. *See, e.g.*, 26-1096.App.213-15, R.Doc.25-17 at 1-3 (Governor of Arkansas asserting that Acts 900 and 901 will “protect kids” from being

“subjected to toxic material”). The state thus has things exactly backward: Any burdens these laws may impose on non-expressive conduct are incidental to their overt regulation of speech. In all events, as Arkansas concedes, even incidental burdens on speech trigger First Amendment scrutiny. 26-1096.AG.Br.15. There is thus no escaping the conclusion that these laws trigger First Amendment scrutiny across the board.

B. The Challenged Provisions Draw Content- and Speaker-Based Distinctions That Trigger Strict Scrutiny.

1. Because Acts 900 and 901 restrict protected speech, they are subject to at least intermediate scrutiny. *Packingham*, 582 U.S. at 105; *Free Speech Coal. v. Paxton (FSC)*, 606 U.S. 461, 495 (2025). That itself is a “tough standard to meet.” *Miller v. Ziegler*, 109 F.4th 1045, 1049 (8th Cir. 2024). But because both statutes are rife with content- and speaker-based discrimination, they trigger strict scrutiny—“the most demanding test known to constitutional law.” *FSC*, 606 U.S. at 484; *see* 25-1889.NetChoice.Br.29-30.

As the district court recognized, §§1502(a)(1)-(3) and 1503 are content-based, as they necessarily restrict speech that involves certain topics—namely, “controlled substance[s],” “eating disorder[s],” and “suicide.” That those provisions are tied to how the speech impacts the user reinforces that conclusion, as “a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a ‘function or purpose’ proxy that achieves the

same result.” *City of Austin*, 596 U.S. at 74; *see also Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004) (states “may not censor [private parties’] speech because of the potential responses of its recipients”). Indeed, Arkansas ultimately acknowledges that §§1502(a)(1)-(3) and 1503 discriminate based not just on content, but on viewpoint as well, as they forbid “social media platforms” from “push[ing] content *promoting*” disfavored subjects. 26-1096.AG.Br.43 (emphasis added). The court thus correctly held that they “impose content-based restrictions on speech.” 26-1096.App.665, R.Doc.47 at 14.

Although the district court found it unnecessary to decide the issue, the addiction-related provisions of §1502(a)(4) and §1402(d)(1) are also content-based. Whatever “addiction or compulsive behaviors” may mean (and the statutes leave it anyone’s guess), one cannot determine whether speech prompted such behavior without examining its content and its connection to that behavior. After all, it is exceedingly unlikely that minors will “compulsively” use a service that recommends the content of a dictionary from cover to cover, or sends incessant notifications about deals on groceries. Users engage most with services that supply the content that they find most engaging. Commanding services to ensure that no user “[d]evelop[s] or sustain[s] an addiction to the” service, Ark. Code §4-88-1502(a)(4)—or engages in “addiction or compulsive behaviors” even *off* the service, *id.* §4-88-1402(d)(1), (3)—will inevitably force services to alter the content of their “distinctive

compilations of expression” to make it less engaging and/or restrict how much they disseminate certain types of content. Requiring services to “alter the content of their speech” is a “content-based regulation of speech.” *Nat’l Inst. of Fam. and Life Advoc. v. Becerra*, 585 U.S. 755, 766 (2018).

On top of that, both laws draw content-based distinctions as to the services they regulate, as both cover only services that facilitate *user*-generated expression, excluding those that exclusively offer *provider*-generated content. *See* Ark. Code §§4-88-1401(11), 1501(a)(5). “This privileges institutional content creators—movie and TV studios, mainstream media outlets, and traditional journalists—over the Soundcloud artist, the TikTok chef, and the citizen journalist.” *Griffin*, 2025 WL 978607, at *9. As explained in NetChoice’s prior briefing, that speaker-based distinction reflects a content preference since it “necessarily ‘distort[s] the market for ideas.’” 25-1889.NetChoice.Br.31-32; *accord NetChoice v. Jones*, 822 F.Supp.3d 656, 673 (E.D. Va. 2026). Act 900’s restrictions on practices that “evoke ... addiction,” nighttime notifications, and privacy and safety settings are also subject to content-based carveouts for “news-gathering organization[s],” “school[s],” “news,” and others, and the nighttime-notifications provision exempts “safety or privacy-related alerts” as well. *See* Ark. Code §§4-88-1401(11)(B), 1402(d)(2)(A), 1403(d)(2). The statute thus permits The New York Times to send a minor notifications about breaking news after 10:00 p.m., but forbids Snapchat from

sending notifications about a friend’s vacation photos. That is about as content based as it gets.

2. Arkansas’ efforts to portray Acts 900 and 901 as “content-neutral” fall flat. *See* 26-1096.AG.Br.14-17; 26-1962.AG.Br.23-24, 38-39. Arkansas concedes that the statutes are “speaker-based,” but it insists that this discrimination does not reflect “a content preference.” 26-1096.AG.Br.16. Wrong again. People use “social media platforms” precisely because they are an outlet for content and viewpoints that are not typically reflected in other media. Of course, services that facilitate user-generated speech may contain *some* of the same content as services that offer only provider-generated speech. But certain content and viewpoints are far more likely to proliferate on the former than the latter.

For example, ESPN and Reddit both include content about sports. But while ESPN publishes news about sports, Reddit offers all sorts of other content and viewpoints about the topic—everything from memes to parodies to unfiltered discussion among fans praising their favorite teams, trash-talking opposing teams, and reacting to the latest highlight. “Social media” is popular in large part because it provides a forum for those less-filtered discussions and a broader array of content and viewpoints than are typically reflected in more traditional sources of information. And the entire statutory scheme reflects Arkansas’ judgment that less-filtered user-generated speech is less valuable than speech generated by traditional

media outlets. Indeed, the legislature went out of its way to specify that Act 900 does not apply to “news or public interest broadcast[s],” “news-gathering organization[s],” “not-for-profit organization[s],” and “public or private school[s].” Ark. Code §§4-88-1401(5)(B), (11)(B), 1403(d)(1), (2). Arkansas’ briefs simply ignore those overtly content-based carveouts.

Even setting all that aside, §§1502(a)(1)-(3) are anything but “agnostic as to content.” *Contra* 26-1096.AG.Br.16. A statute is decidedly not “content neutral” when (as here) it is “concerned with undesirable effects that arise from ... [l]isteners’ reactions to speech.” *Survivors Network of Those Abused by Priests v. Joyce*, 779 F.3d 785, 791 (8th Cir. 2015). Indeed, Arkansas has expressly conceded that these provisions (along with §1503) prohibit “pushing certain types of content.” 26-1096.App.667, R.Doc.47 at 16; *see also*, *e.g.*, 26-1096.AG.Br.44. That is the definition of a content-based (indeed, viewpoint-based) prohibition.

Arkansas fares no better in arguing that the addiction-related provisions are content-neutral. The state claims that these provisions forbid “designs, algorithms, or features” that cause “addiction,” “irrespective of whatever kinds of content may (or may not) happen to be implicated.” 26-1096.AG.Br.15-16. But, as with §§1502(a)(1)-(3), a statute is not “content neutral” if liability turns on “[l]isteners’ reactions to speech.” *Survivors Network*, 779 F.3d at 791. Arkansas elsewhere concedes as much, asserting that NetChoice members’ services are “addictive”

because they use algorithms that give “user[s] precisely the content that will keep them engaged.” 26-1096.AG.Br.35. Sections 1502(a)(4), 1402(d)(1), and 1402(d)(3) thus compel services to change the content of their expressive offerings to make them less engaging. That is decidedly not a content-neutral restriction.

As for the nighttime-notifications provision, Arkansas attempts to defend its carveout for “safety or privacy-related” alerts on the theory that it “turns on the *purpose* of the alert rather than the *substance* of the underlying communication.” 26-1962.AG.Br.23 n.9. But “a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a ‘function or purpose’ proxy that achieves the same result.” *City of Austin*, 596 U.S. at 74. And, again, Arkansas simply ignores that both the nighttime-notifications provision and the privacy-and-safety provision are subject to carveouts for news, educational content, and work-related content. *See supra* pp.35-36.

In sum, every operative provision of Acts 900 and 901 triggers strict scrutiny.

C. None of the Challenged Provisions Can Survive Any Level of Heightened Scrutiny.

No provision of Act 900 or Act 901 can survive any level of heightened scrutiny—let alone strict scrutiny, which is “fatal in fact absent truly extraordinary circumstances.” *FSC*, 606 U.S. at 484-85. Strict scrutiny requires Arkansas to show that the Act is “the least restrictive means of achieving a compelling state interest.” *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Intermediate scrutiny requires

Arkansas to show that the Act is “narrowly tailored to serve a significant governmental interest” that is “unrelated to the suppression of free speech.” *Packingham*, 582 U.S. at 105-06; *see FSC*, 606 U.S. at 495-96. Arkansas failed to do either.

1. Arkansas lacks a legitimate interest in suppressing what it deems “addiction” to constitutionally protected speech.

While Arkansas has a legitimate interest in discouraging drug use, eating disorders, and suicide, it has no constitutionally permissible interest in preventing what it perceives as “addiction” to “social media” services. If the state’s aim is to prevent what it considers too much use of services that facilitate “interaction, expression, or communication,” Ark. Code §§4-88-1501(a)(5)(A); 1401(11)(A), that interest is “very much related to the suppression of free expression.” *Moody*, 603 U.S. at 740. Just as Arkansas may not restrict access to Disney+ because some shows contain “catchy jingles” that stick in listeners’ heads, *Sorrell*, 564 U.S. at 578, Arkansas cannot restrict access to “social media” because it is worried that “algorithms” give users “precisely the content that will keep them engaged.” 26-1096.AG.Br.35. “That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.” *Sorrell*, 564 U.S. at 577-78. Burdening protected speech because people find it especially interesting is especially inconsistent with the First Amendment.

Indeed, if Arkansas could restrict access to mediums of expression that it deems too engaging, then it is hard to see why that power would be limited to “social media.” Arkansas could seemingly prohibit citizens from playing alluring video games on Xbox Live, watching “binge-worthy” shows on HBO Max, or listening to captivating podcasts on Spotify, on the theory that users cannot stop themselves from wanting to play, watch, or hear more. But “First Amendment protections do not disappear simply because expression is impactful.” *Angelilli v. Activision Blizzard*, 781 F.Supp.3d 692, 701 (N.D. Ill. 2025). Moreover, under Arkansas’ logic, a state could prohibit minors from attending church or reading religious tracts so long as it believed (as plenty of people do) that certain religions or religious practices can be “addictive,” “compulsive,” or “otherwise harmful.” Eugene Volokh, *Addiction to Constitutionally Protected Activity: Speech, Press, and Religion*, 75 Emory L.J. 1175, 1179-90, 1197-1209 (2026). That cannot possibly be right. To the extent Arkansas bills Acts 900 and 901 as means of preventing “social media addiction[],” 26-1096.AG.Br.40, that interest is inextricably intertwined with the suppression of protected speech.

2. Assuming Acts 900 and 901 further any legitimate state interest, they are not narrowly tailored to do so.

Even assuming that Acts 900 and 901 further constitutionally permissible interests, none of the challenged provisions is narrowly tailored to advance the interests the state asserts. For one thing, all the provisions are grossly

underinclusive, as they all “restrict[] a medium of speech in the name of a particular interest but leave[] unfettered other modes of expression that implicate the same interest.” *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1100 (8th Cir. 2013). Under strict scrutiny, the fact that a law “is wildly underinclusive when judged against [the state’s] asserted justification ... is alone enough to defeat it.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 801-02 (2011). And while some degree of underinclusiveness may be tolerable under intermediate scrutiny, the state still must show “good reason” for it—which Arkansas does not—as underinclusiveness raises “doubts about whether the government [i]s in fact pursuing the interest it invoke[s]” and whether that interest is as important as it claims. *TikTok Inc. v. Garland*, 604 U.S. 56, 76 (2025) (per curiam); *see NIFLA*, 585 U.S. at 774-75. On top of that, each challenged provision “burden[s] substantially more speech than necessary to further” any of the interests the state asserts, even though the state has less restrictive means at its disposal. *FSC*, 606 U.S. at 471. The provisions thus flunk strict—and even intermediate—scrutiny across the board.

Sections 1502(a)(1)-(3) and 1503. Act 901 is nowhere close to narrowly tailored to Arkansas’ asserted interests in curbing drug use, eating disorders, and self-harm. Imposing nebulous, front-end restrictions on the dissemination of protected speech to millions of recipients, based on what the speech may ultimately “cause[]” *a single recipient* to do, is breathtakingly overbroad. *See Butler v. Michigan*, 352

U.S. 380, 384 (1957) (government cannot “reduce the adult population” to “reading only what is fit for children”). Virtually any positive statement about a “controlled substance” could inspire some listener to purchase it, so the only realistic way to comply with §1502(a)(1) would be to restrict any such content (and viewpoints).³ Because it is next to impossible to know *ex ante* what statements, images, or videos might “cause” a single user to develop an eating disorder or attempt suicide, any attempt to comply with §§1502(a)(2), 1502(a)(3), and 1503 would also require broad suppression of protected content (and viewpoints)—be it photos on a supermodel’s Instagram account, Facebook posts celebrating hitting a weight-loss goal or physical-fitness milestone, or songs with themes about depression or suicide.

Moreover, all those restrictions are “substantially underinclusive because they do not restrict ‘identical content that is communicated through other media.’” 26-1096.App.670, R.Doc.47 at 19. Under Act 901, services that offer only *provider*-generated content (e.g., Hulu and Disney+) remain free to show movies that depict and even glorify illicit drug use, but “social media platforms” may face liability for disseminating the same content. *Id.* HBO Max “can glorify thin bodies and cast

³ Making matters worse, “‘controlled substances’ are not limited to illicit drugs” under Arkansas law. 26-1096.App.668, R.Doc.47 at 17 n.13. The statute thus needlessly restricts content (e.g., advertisements) related to entirely lawful prescription drugs, such as tramadol and pseudoephedrine. 26-1096.App.271-72.¶19, R.Doc.27 at 8-9.

exclusively thin actresses”—and use algorithms to recommend such content to users who have shown an interest in viewing it—“but Instagram may be liable if it promotes those actresses’ posts.” *Id.* And “13 Reasons Why, a TV show which graphically depicts a suicide, can remain on Netflix, but YouTube could be liable for showing a user clips of the same.” 26-1096.App.670, R.Doc.47 at 19. That “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Brown*, 564 U.S. at 802.

The blunderbuss nature of these provisions is all the more indefensible because Arkansas has many ways to advance its asserted interests without resorting to content- and speaker-based restrictions on speech. Most notably, it can penalize primary conduct instead of protected speech. Indeed, Arkansas already has criminal prohibitions on illicit sales of controlled substances, *see, e.g.*, Ark. Code §§5-64-420 to 422, 426, 430, 438, and “encouraging the suicide of another person,” *id.* §5-10-107. These prohibitions are far more direct and effective means of preventing drug abuse and peer-induced self-harm than penalizing “social media platforms” for third-party speech or their own expressive choices about how to disseminate it.

Sections 1502(a)(4) and 1402(d)(1), (3). Even if suppressing “addictive” speech is a valid governmental interest, *but see supra* pp.39-40, the addiction-related provisions suppress large quantities of speech that do not implicate that interest.

Section 1502(a)(4)’s prohibition on presenting speech in a manner that “causes a user” to “[d]evelop or sustain an addiction to [a] social media platform” effectively mandates that services significantly alter or eliminate the very methods of presenting and organizing speech that have made their services so useful and popular. Indeed, the Arkansas Attorney General has already taken the position that the algorithm-based recommendations used by Facebook, Instagram, and YouTube are “addictive” writ large. *See* 26-1096.AG.Br.35, R.Doc.24 at 18 n.5 (collecting representations). If Arkansas prohibited book publishers from utilizing cliffhangers because too many people wanted to read the next chapter, or forced movie producers to use less realistic visual effects because they are too enthralling, that would obviously violate the First Amendment. So too here.

The speech restrictions Act 901 imposes are also radically disproportionate to the concerns the state identifies, as the law restricts dissemination of speech to *all* Arkansas users whenever it might cause “addiction” in even a single Arkansas user. As the district court explained, the practical effect of that prohibition is to “force platforms to censor potentially sensitive, but protected, speech as to all users for the benefit of some subset of particularly susceptible users.” 26-1096.App.668, R.Doc.47 at 17. That would force “social media platforms” to fundamentally reshape their services, eliminating everything from customized feeds to push notifications to social-feedback features (e.g., “likes”) and more. *See* 26-

1962.App.196-98.¶¶57-62, R.Doc.52-4 at 39-41. “[D]enying all users access to ‘a distinctive expressive product’ they wish to receive because of the threat of addiction in any subset of users, no matter how small,” is the antithesis of narrow tailoring. 26-1096.App.675, R.Doc.47 at 24.

The same defects plague Act 900’s prohibition on “engag[ing] in practices to evoke any addiction or compulsive behaviors” in an Arkansas minor. Ark. Code §4-88-1402(d)(1), (3). In fact, Act 900 is even less narrowly tailored since §§1402(d)(1) and (3) impose *strict liability* for “practices [that] ‘evoke’ ‘addiction’ to even off-platform activities.” 26-1962.App.934, R.Doc.69 at 14. So, YouTube could be held strictly liable for using algorithms that recommend professional tennis highlights to high-school tennis players if a factfinder determines that the algorithm caused a single teen to compulsively play tennis. By restricting expression vis-à-vis *all* Arkansans (under a strict-liability standard, no less) based on “the sensitivities of some unspecified [minor] user,” 26-1962.App.933, R.Doc.69 at 13, these provisions are breathtakingly overinclusive. Even when it comes to *unprotected speech* (e.g., true threats, obscenity, defamation, or incitement), “the First Amendment precludes punishment, whether civil or criminal, unless the speaker’s words were ‘intended’ (not just likely) to produce” an unlawful result. *Counterman v. Colorado*, 600 U.S. 66, 76 (2023) (requiring recklessness for true threats); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (requiring intent to produce imminent disorder for

incitement); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring public figures to prove “actual malice” for defamation). If the First Amendment precludes strict liability for *unprotected* speech, it precludes strict liability for *protected* speech *a fortiori*.

Sections 1502(a)(4), 1402(d)(1), and 1402(d)(3) are also suspiciously underinclusive. Hulu, Disney+, and HBO Max need not worry whether their algorithm-driven content recommendations will cause any Arkansan to develop or sustain an “addiction” to watching movies, gambling on sports, or binging all ten seasons of *Friends*. Nor do video game sellers or purveyors of on-demand pornography face liability if their users become hooked—so long as they refrain from offering user-generated content. Arkansas’ inexplicable failure to regulate the many types of “non-social” media that “affect[] its stated interest[s] in a comparable way” raises serious doubts that it is pursuing the interests it invokes rather than trying to suppress disfavored speech. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015) (emphasis altered).

Section 1402(d)(2)(A) and (B). Act 900’s restrictions on nighttime notifications and privacy-and-safety settings are likewise underinclusive and overinclusive when measured against Arkansas’ asserted interests. Indeed, the nighttime-notifications provision is “so underinclusive as to be functionally useless” as a way to ensure that minors get enough sleep. 26-1962.App.936, R.Doc.69 at 16.

Section 1402(d)(2)(A) prohibits notifications from only “social media platform[s].” Walmart, Disney+, Spotify, Apple, and ESPN thus remain free to send notifications to minors at all hours of the night. *See* 26-1096.App.661-62, R.Doc.47 at 10-11. And Arkansas is “perfectly willing” to allow minors to receive nighttime notifications from covered services as well “so long as one parent ... says it’s OK.” *Brown*, 564 U.S. at 802. “That is not how one addresses a serious social problem.” *Id.*

Section 1402(d)(2)(A) also manages to be overbroad as to the subset of notifications it does cover. Because Act 900’s strict-liability regime covers all “‘Arkansas users’—account holders and platform visitors alike”—covered services could “have to silence notifications between 10:00 p.m. and 6:00 a.m. for everyone in Arkansas unless they have become an age-verified adult account holder.” 26-1962.App.936, R.Doc.69 at 16. That is a grossly overbroad means of attempting to protect Arkansas minors’ health or ensure that they get adequate sleep. Moreover, even assuming that the provision covers only account holders (and that it is feasible to determine which account holders are minors), §1402(d)(2)(A) is still substantially overinclusive because it covers all minors—including those who go to bed after 10:00 p.m. or get up before 6:00 a.m., who silence notifications when they go to bed, or who have customized which notifications they receive to minimize the risk of unwarranted sleep interruptions. Under any plausible interpretation, §1402(d)(2)(A)

will prohibit some innocuous or even beneficial speech, such as a late-night or early-morning notification about the next day's carpool arrangements or a change of location for an extracurricular activity taking place before school.

Because §1402(d)(2)(A) requires covered services to “allow a parent or guardian to modify” a minor user’s notification settings, Arkansas claims that it advances its purported interest in “reinforc[ing] parental decisionmaking.” 26-1962.AG.Br.30. But §1402(d)(2)(A) does not just empower parents to make decisions about their minor children’s notification settings; it requires services to impose a default speech restriction even for minors with parents who do not “*care* whether they” receive nighttime notifications. *Brown*, 564 U.S. at 804. And the Supreme Court has expressed “doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove ... is a proper governmental means of aiding parental authority.” *Id.* at 802. The state’s argument thus succeeds only in showing that it has a far more narrowly tailored means of advancing parental control at its disposal: Let parents determine when their minors can receive notifications. And, of course, parents already have “a readily available, free, no-tech solution” to prevent children from receiving *any* nighttime notifications: “taking devices away at night.” 26-1962.App.936, R.Doc.69 at 16.

As for §1402(d)(2)(B)’s restriction on privacy-and-safety settings, it is a radically under- and overinclusive means of “protecting minors from exploitation

and abuse.” 26-1962.AG.Br.38-39. Although the provision requires covered services to impose the most protective level of privacy-and-safety controls on minors “by default,” “anyone—parent or child—can opt for less restrictive settings.” 26-1962.App.938, R.Doc.69 at 18; *cf.* Ark. Code §4-88-1402(d)(2)(A) (adjacent sub-provision specifying that nighttime-notification default may be overridden only by a parent). Section 1402(d)(2)(B) thus “do[es] not appear likely to serve the state’s asserted interest at all.” 26-1962.App.940, R.Doc.69 at 20. Again, “[t]hat is not how one addresses” the kind of “serious social problem” that could justify the extreme measure of content-based restrictions on protected speech. *Brown*, 564 U.S. at 802.

Moreover, §1402(d)(2)(B) regulates privacy-and-safety settings on an exceedingly broad universe of “covered social media platform[s]” that includes many services that “are unlikely to be the site of sexual exploitation,” such as NetChoice members “Nextdoor and Pinterest.” 26-1962.App.939, R.Doc.69 at 19. Restricting *all* privacy-and-safety settings for *all* minors across a vast array of services is a grossly overinclusive means of attempting to further Arkansas’ asserted interest. *See, e.g., Packingham*, 582 U.S. at 114 (Alito, J., concurring).

In sum, each challenged provision of Acts 900 and 901 is seriously overinclusive and underinclusive as a way to advance Arkansas’ asserted interests. The district court thus correctly concluded that none can survive either form of heightened scrutiny.

3. Arkansas' contrary arguments lack merit.

Arkansas' contrary arguments not only advance exceedingly strained interpretations of the statutory text, but largely ignore the tailoring problems the district court catalogued.

1. Arkansas suggests that “platforms could avoid liability under the self-harm provisions by pushing self-harm-encouraging content only to users unlikely to engage in such conduct.” 26-1096.AG.Br.44. It similarly asserts that services could comply with the prohibition on “addictive” designs, algorithms, and features by determining which of their users in Arkansas are “addiction-prone” and “only deploying addictive features with respect to [other] users.” 26-1096.AG.Br.35-36. The state never advanced these arguments below, so they are forfeited. They are also refuted by the text of §1502(a), which flatly prohibits the use of any “design, algorithm, or feature” that runs afoul of the amorphous standards it creates. Ark. Code §4-88-1502(a). Confirming as much, Arkansas repeatedly told the district court that Act 901 prohibits “addictive” features as to *all* users, rather than requiring user-by-user customization. *See, e.g.*, R.Doc.36 at 13, 17, 19-20, 23, 30; 26-1096.App.611-23, R.Doc.45 at 43:7-55:22.

Even if Arkansas could rewrite §1502(a), it would still fail heightened scrutiny (as would the related liability §1503 creates). For one thing, because the statute leaves it anyone's guess what speech it prohibits, services would be forced to

suppress far more protected speech than could reasonably be necessary to advance the state's interests even vis-à-vis users who may be more prone to harmful behavior. Moreover, Arkansas' suggestion that a service could restrict certain content or features only as to that subset of users is pure fantasy, as there is no feasible way for services with millions of Arkansas users to determine *ex ante* which ones are at greater risk of purchasing a controlled substance, developing an eating disorder, trying to harm themselves, or developing an "addiction" to "social media." *Cf. Watters v. TSR, Inc.*, 904 F.2d 378, 381-83 (6th Cir. 1990). So even under Arkansas' reading, §1502(a) would chill vast swathes of protected speech.

The state insists that "there is a perfect one-to-one ratio between the problems §1502(a) addresses and the conduct it proscribes" because a service cannot be held liable unless one of its features "*actually* 'cause[s] a user'" to buy drugs, develop an eating disorder, attempt suicide, or "become addicted to social media." 26-1096.AG.Br.18-19. But even assuming that is the only circumstance in which Arkansas would enforce the statute, the state ignores that the only way to avoid the threat of liability under the Act is by suppressing speech vis-à-vis *every* user on the front end. Any attempt to comply with §1502(a) thus would necessarily require restricting even speech that is not very likely to cause anyone to engage in one of the enumerated harmful activities. Arkansas likewise has no explanation for the statute's glaring underinclusiveness. Though it breezily asserts that "social media platforms"

necessitate “special treatment,” 26-1096.AG.Br.45, Arkansas does not and cannot deny that provider-generated speech “promoting suicide, drug use, or eating disorders,” and unregulated services’ efforts to “keep [users] engaged,” implicate the same asserted governmental interests, 26-1096.AG.Br.35, 43.

2. Arkansas’ efforts to defend §§1402(d)(1) and (3) require an equally tortured construction of the statute—i.e., reading a “*mens rea* requirement[]” into the phrase “does not engage in practices to evoke any addiction or compulsive behaviors,” notwithstanding the statute’s express command that violations of these provisions “are a strict liability civil offense,” Ark. Code §4-88-1403(b)(1)(C). *See* 26-1962.AG.Br.49-54. The district court correctly rejected the state’s invitation “to rewrite [the statute] by ignoring the strict liability provision” and “inserting a specific intent requirement that appears nowhere in the text.” 26-1962.App.934, R.Doc.69 at 14; *see infra* p.76. After all, “[i]t is not the function of the courts to amend statutes under the guise of ‘statutory interpretation.’” *Fedorenko v. United States*, 449 U.S. 490, 513 n.35 (1981).

At any rate, reading a specific-intent requirement into §§1402(d)(1) and (3) would not save those provisions either, as they still would not be “narrowly tailored to serve a significant governmental interest,” *Packingham*, 582 U.S. at 105-06—let alone “the least restrictive means of achieving a compelling state interest,” *Coakley*, 573 U.S. at 478. Even under the state’s interpretation, it would remain hopelessly

unclear what speech those provisions cover, and utterly infeasible for services to try to tailor their “design[s], algorithm[s], or feature[s]” to each individual user based on some guess about that user’s susceptibility to “addiction or compulsive behaviors.” So the only way to even attempt to comply would be to broadly suppress any speech that might contribute to such behavior, including notifications and content-recommendation algorithms that give users “precisely the content” they want. 26-1096.AG.Br.35. After all, Arkansas has repeatedly argued that “social media platforms *are intentionally designed* ‘to maximize the amount of time users spend on them,’” 26-1096.AG.Br.2 (emphasis added); *see, e.g.*, 26-1962.AG.Br.3-4—a claim to which it would point if it needed to establish a *mens rea*.

3. Turning to the nighttime-notifications provision, Arkansas does not argue that §1402(d)(2)(A) could withstand strict scrutiny—though that is what its blatantly content-based carveouts require. *See supra* pp.37-38. And even as to intermediate scrutiny, the state’s arguments ignore the problem that the combination of those carveouts and the parental-override clause leaves the provision “so underinclusive as to be functionally useless.” 26-1962.App.936, R.Doc.69 at 16. That readily distinguishes *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (cited at 26-1962.AG.Br.22, 25), which upheld a content-neutral prohibition on unsolicited robocalls during nighttime hours as a means of “protecting the well-being, tranquility, and privacy of the home.” *Id.* at 1554. Section 1402(d)(2)(A) not only

is not content-neutral, but does not meaningfully advance any of those interests since it applies only to notifications from voluntarily downloaded applications that teens and parents alike already have many ways to silence (and may not want to silence at all). 26-1962.App.936-37, R.Doc.69 at 16-17.

Lacking any persuasive response, Arkansas tries to change the subject, arguing at length that the district court “flouted the party-presentation rule” by observing that §1402(d)(2)(A) restricts notifications “to not just accountholders, but non-accountholders as well.” 26-1962.AG.Br.25-28. The court was well within its rights to make sure it understood how the statute operates before ruling on a preliminary injunction, even if that entailed answering questions that were not specifically raised in the briefs. *See, e.g., United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (“The party presentation principle is supple, not ironclad.”).⁴ And Arkansas’ complaint is largely beside the point, as the court separately concluded that the “parental override option” renders §1402(d)(2)(A) “functionally useless” as a means of protecting minors’ health, and that §1402(d)(2)(A) cannot be justified as aiding parental authority because Arkansas “provided no evidence that parents lack

⁴ Tellingly, Arkansas sees no party-presentation issue in the district court’s attempt to come up with “likely constitutional applications” of Act 901, even though Arkansas “failed to identify any” in its briefing or even at the preliminary injunction hearing. 26-1096.App.663, R.Doc.47 at 12; 26-1096.App.631-34, R.Doc.45 at 63-66.

the tools to assert their authority in this domain.” 26-1962.App.936-37, R.Doc.69 at 16-17.

4. Arkansas’ attacks on the district court’s analysis of §1402(d)(2)(B)’s privacy-and-safety-setting regulations are equally unavailing. The state once again complains about party presentation, this time because the court recognized that §1402(d)(2)(B) allows “anyone—parent or child—[to] opt for less restrictive settings.” 26-1962.App.938, R.Doc.69 at 18. Arkansas complains that these arguments did not feature sufficiently prominently in the parties’ briefing. *See* 26-1962.AG.Br.44-45. But, again, courts are not limited to points made *in haec verba* in the briefing, and there was nothing remotely improper about the court ensuring that it understood how the statute works during a hearing on whether its enforcement should be preliminarily enjoined. Arkansas’ efforts to refute the court’s reading of §1402(d)(2)(B) fare no better, as they insert requirements into the text that do not exist and stretch the constitutional-avoidance canon well beyond its breaking point. *See* 26-1962.AG.Br.45-47.

Despite its lengthy efforts to fault the district court for considering arguments that (according to the state) were not sufficiently pressed, Arkansas turns around and faults the court for *not* considering an argument the state never pressed. As the court correctly explained, §1402(d)(2)(B) is overinclusive because, like the law invalidated in *Packingham*, it regulates a broad range of “social media platform[s]”

even though many “are unlikely to be the site of sexual exploitation.” 26-1962.App.939, R.Doc.69 at 19. Arkansas tries to attack that finding by offering three news articles discussing alleged misuse of Nextdoor and Pinterest. 26-1962.AG.Br.40-41 & nn.14-16. But those articles were never presented to the court and are not part of the record at all, so the court could not have abused its discretion by failing to consider them. At any rate, they provide no basis to question the court’s conclusion that any such incidents are rare (notably, Arkansas cites nothing within the past three years). Nor do they alter the reality that §1402(d)(2)(B) will force covered services to restrict a substantial amount of speech that has nothing to do with sexual exploitation.

Unable to deny that §1402(d)(2)(B) covers services with little or no connection to child exploitation, Arkansas argues that it still survives heightened scrutiny because the burden it imposes on those services is comparatively light. 26-1962.AG.Br.43. Even taking that claim at face value, it is irrelevant: “Narrow tailoring turns on whether a law sweeps more broadly than necessary, not on whether its yoke is heavy or light.” *Sisters for Life v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 407 (6th Cir. 2022); *see Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615-17 (2021). The district court correctly recognized as much, concluding that “while the burdens imposed by [§1402(d)(2)(B)] may be slight,” it is still seriously

overinclusive because many of its applications “do not appear likely to serve the State’s asserted interest at all.” 26-1962.App.940, R.Doc.69 at 20.

Arkansas is right about this much: Whether a law is adequately tailored “depends on the relation it bears to the overall problem the government seeks to correct.” 26-1962.AG.Br.42. But that principle does not aid Arkansas, because the privacy-and-safety default burdens much speech that has nothing to do with exploitation of minors yet does virtually nothing to prevent such exploitation given how easy it is to change the default settings. Arkansas accordingly fails to show that any of the challenged provisions is likely to survive heightened scrutiny.

D. The District Court Faithfully Applied *Moody* in All Respects.

Perhaps recognizing that it faces a steep uphill climb on the merits, Arkansas spends much of its briefing arguing that the district court improperly analyzed NetChoice’s facial First Amendment challenge, that the record is insufficiently developed to support a facial challenge, and that Acts 900 and 901 have enough constitutional applications to save them from facial invalidation. *See* 26-1096.AG.Br.12-13, 19-32, 36-42; 26-1962.AG.Br.10, 18-21, 26-27, 34-38, 44. None of these arguments has merit (and most are of little relevance to the court’s vagueness rulings).

1. Arkansas repeatedly asserts that the district court “failed to conduct”—or “even attempt[.]”—the facial analysis outlined in *Moody*. 26-1096.AG.Br.21; *see*

26-1096.AG.Br.9-10, 20-31, 36-42; 26-1962.AG.Br.10-12, 18-21, 26-27, 34-38. That is just plain false. The district court’s analysis could not have hewed more closely to the Supreme Court’s guidance in *Moody*. The court began by explaining that “the first step in the proper facial analysis is to assess the state laws’ scope”—i.e., “[w]hat activities, by what actors, do the laws prohibit or otherwise regulate?” 26-1096.App.661, R.Doc.47 at 10 (quoting *Moody*, 603 U.S. at 724); accord 26-1962.App.930, R.Doc.69 at 10. The court correctly determined that, unlike the laws in *Moody*, Acts 900 and 901 reach only “social media platforms as commonly understood,” e.g., “Facebook and Instagram, TikTok, Reddit, Snapchat, Pinterest, [and] X.” 26-1096.App.661-62, R.Doc.47 at 10-11. Turning to which activities are regulated, the court explained how each challenged provision imposes restrictions on service and user speech alike, thus eliminating *Moody*’s concern that some substantial universe of applications may not involve any protected speech. 26-1096.App.662, R.Doc.47 at 11; accord 26-1962.App.933-35, R.Doc.69 at 13-15.

Having determined who and what the laws regulate, the court then assessed, as *Moody* instructs, “which of the laws’ applications violate the First Amendment.” 26-1096.App.663, R.Doc.47 at 12 (quoting *Moody*, 603 U.S. at 725). That, in turn, requires determining “the principal things regulated” by each provision, *Moody*, 603 U.S. at 726, as the principal applications will inevitably control the ultimate facial analysis. As the court made clear, the principal applications of §1502(a),

§1402(d)(1), and §1402(d)(3) and *all* applications of §1503 burden “platforms’ editorial discretion” and/or “users’ speech” because they “requir[e] platforms to change what speech they disseminate or how they prioritize that speech.” 26-1096.App.664, 667, R.Doc.47 at 13, 16; *see* 26-1962.App.932-35, R.Doc.69 at 12-15; *see supra* pp.27-28.

Even so, the court did not end its analysis there. As *Moody* directs, it went on to “measure” these speech-restricting applications “against the rest” of the statute’s potential applications. 26-1096.App.663, R.Doc.47 at 12. Although Arkansas “failed to identify any” applications of Act 901 that do *not* implicate the First Amendment, the court tried to come up with some itself, identifying a handful of applications of §1502(a) that it deemed “likely constitutional because they involve” what the court viewed as “non-expressive conduct.” 26-1096.App.663-64, R.Doc.47 at 12-13. Even after endeavoring to offer what the state could not, however, the court concluded that “Act 901 prohibits a substantial amount of protected speech relative to its plainly legitimate sweep,” meaning NetChoice is “likely to succeed on its facial challenge.” 26-1096.App.676, R.Doc.47 at 25.

The district court’s analysis of the other challenged provisions likewise tracks *Moody* in all respects. The court explained that the nighttime-notifications provision “regulate[s] speech” in all its applications because notifications *are literally speech*. 26-1962.App.936, R.Doc.69 at 16. And it explained that §1402(d)(2)(B) likewise

restricts speech in all applications because more stringent privacy-and-safety settings invariably “restrict platforms’ ability to disseminate minors’ speech and to disseminate speech to minors.” 26-1962.App.937-38, R.Doc.69 at 17-18. The court then explained why these provisions are also insufficiently tailored to withstand First Amendment scrutiny. *See supra* pp.15-16. *Moody* requires nothing more.

2. Arkansas asserts that NetChoice did not develop a sufficient record to allow the district court to perform the *Moody* analysis. *See* 26-1096.AG.Br.9-10, 23, 27-28. Invoking Justice Jackson’s *Moody* concurrence (to which the majority did not ascribe), the state contends that NetChoice had to “present evidence establishing that ... most algorithms employed by” covered services “are expressive.” 26-1096.AG.Br.27-28. Yet again, the state ignores the critical distinction between the laws at issue in *Moody* and the laws at issue here: Instead of suppressing speech, the laws in *Moody* forced services to disseminate third-party speech they otherwise would not disseminate. *See* 603 U.S. at 720-21. That is why *Moody* focused on whether “social media” services are creating a distinctive expressive product. And because the laws in *Moody* could arguably be read to cover services like Gmail, Venmo, and Uber, it was not clear that they principally regulated services engaged in their own expression. *Id.* at 725-26.

This case is different. For one thing, Acts 900 and 901 force covered services to *suppress* vast swathes of protected third-party speech (in a content-based manner,

no less). As the district court explained, that “burdens both the platform’s *and the user’s* speech.” 26-1096.App.663, R.Doc.47 at 12 (emphasis added). These laws thus implicate the First Amendment regardless of whether every design, practice, or algorithm they restrict is expressive activity by the service itself. *See* 26-1096.App.663, R.Doc.47 at 12; 26-1096.App.675, R.Doc.47 at 24. Moreover, while Arkansas’ definition of “social media platform” is capacious, it does not reach *all* services that “facilitate” users’ “interaction, expression, or communication”; it is limited to services that allow users to “establish a relationship with other users” and “[g]enerate[] revenue primarily through user engagement.” Ark. Code §§4-88-1401(11)(A)(i)-(v), 1501(a)(5)(D)-(E). Acts 900 and 901 thus exclude many types of services with which the *Moody* Court was concerned—e.g., Gmail, Uber, and Venmo. *See* 26-1096.App.661, R.Doc.47 at 10. So even assuming the statutes may still cover some small universe of non-expressive activities, the *principal* thing they regulate is protected speech, which is what matters most. *Cf. TikTok*, 604 U.S. at 67-68 (“statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities,” merit “First Amendment scrutiny”).

Arkansas’ complaints about the court’s analysis of the nighttime-notifications provision make even less sense. The state contends that notifications are not expressive if a service sends them automatically in response to some other event

(e.g., a like or a comment). *See* 26-1962.AG.Br.20-21. Nonsense. Notifications contain information, and “dissemination of information [is] speech within the meaning of the First Amendment.” *Sorrell*, 564 U.S. at 570. And even assuming there were some “social media platform” that exercises no discretion whatsoever over what notifications to send (an exceedingly dubious assumption since virtually all services prohibit some speech entirely), prohibiting services from conveying information to users during certain hours of the day plainly implicates the First Amendment rights of willing speakers and willing recipients. *See* 26-1962.App.151-53.¶¶31-33, R.Doc.52-3 at 11-13; 26-1962.App.186-91, 194-95.¶¶43, 51-53, R.Doc.52-4 at 29-34, 37-38.

Arkansas fares no better with its claim that the record does not contain enough information about services’ privacy and safety settings. *See* 26-1962.AG.Br.35-38. NetChoice has produced uncontroverted evidence that its members have privacy and safety settings and that the “most protective settings” on a service necessarily restrict more expressive activity than less protective settings. *See* 26-1962.App.195-97.¶¶55-57, R.Doc.52-4 at 38-40; 26-1962.App.123-24.¶43, R.Doc.52-2 at 16-17; 26-1962.App.152.¶32, R.Doc.52-3 at 12. “While these types of settings may vary in their scope and effect, they all restrict platforms’ ability to disseminate minors’ speech and to disseminate speech to minors and therefore implicate the First Amendment.” 26-1962.App.938, R.Doc.69 at 18. That is all that matters for

purposes of determining whether §1402(d)(2)(B) principally regulates protected speech.

3. Arkansas’ claim that the district court “considered only one potential application of §1502(a)(1)-(3),” 26-1096.AG.Br.43, is equally wrong and misplaced. Of course, the court focused on the provisions’ principal application—i.e., restricting the algorithm-driven dissemination of certain types of user-generated content—as that is what *Moody* instructs courts to do. *See Moody*, 603 U.S. at 726. But the court also considered numerous other applications, such as direct messaging, 26-1096.App.663, R.Doc.47 at 12, search features, 26-1096.App.665-67, R.Doc.47 at 14-16, and notification methods, 26-1096.App.663-64, R.Doc.47 at 12-13. It even tried to come up with potential applications to non-expressive conduct when the state “failed to identify any.” 26-1096.App.663, R.Doc.47 at 12. In short, the court both acknowledged and ably discharged its obligation “to consider ‘the full range of activities the laws cover, and measure the constitutional against the unconstitutional applications.’” 26-1096.App.661, R.Doc.47 at 10. And it correctly concluded that the unconstitutional applications far outweigh any constitutional ones.

Arkansas now faults the court for not addressing potentially constitutional applications of the laws to various types of speech that the state never discussed below, like obscenity, or offers to sell illegal drugs or supply suicide kits. *See, e.g.,*

26-1096.AG.Br.31, 40-42.⁵ Indeed, the state even goes so far as to claim that its laws must survive facial invalidation *precisely because* they are so impossibly broad that they probably prohibit some “‘designs, algorithms, or features’ that neither the parties nor the Court” managed to identify. 26-1096.App.662, R.Doc.47 at 11; 26-1096.AG.Br.21-22. That is rather rich when Arkansas not only “failed to identify any” potentially constitutional applications below despite being given the chance, 26-1096.App.660, R.Doc.47 at 9, but repeatedly insists that the district court was strictly bound to stick to the arguments in *NetChoice*’s briefing, 26-1962.AG.Br.13, 25-26, 44-45. It is far too late in the day for Arkansas to now claim to have unearthed a cache of constitutional applications.

At any rate, Arkansas’ belated arguments reflect fundamental misunderstandings of how both First Amendment doctrine and the test for facial invalidity work. The ultimate question in a facial First Amendment challenge is whether a law “burden[s] substantially more speech than necessary to further” whatever interest(s) the state asserts (assuming it identifies a substantial or

⁵ While *NetChoice* bears the ultimate burden of proving that the unconstitutional applications of the challenged provisions substantially outweigh the constitutional ones, Arkansas must first point to *some* constitutional applications. Arkansas did not even try to do so (even after the district court gave it multiple opportunities at the preliminary injunction hearing, 26-1096.App.615-16, 632-34, R.Doc.45 at 47-48, 64-66), and it is not *the plaintiff*’s burden to hypothesize potential constitutional applications for the state. *Cf. Stevens*, 559 U.S. at 481-82.

compelling one). *FSC*, 606 U.S. at 471. That question necessarily assumes that at least *some* of the burden a law imposes on speech is “necessary”; otherwise, there would never be any need to assess tailoring. And virtually every law will have at least *some* constitutional applications in the sense that Arkansas now suggests, precisely because not all speech is constitutionally protected. So if the bare fact that a law could be applied to unprotected speech like obscenity, or offers to sell illegal products, or inducement to engage in criminal conduct, were enough to save it from invalidation, then virtually no law would ever violate the First Amendment on its face. *Moody* itself forecloses any such argument, as it makes clear beyond all doubt that “even a law with ‘a plainly legitimate sweep’ may be struck down in its entirety” as violating the First Amendment. 603 U.S. at 723. If Arkansas passed a law banning books, it could not defend the law from facial invalidation by pointing out that some books contain unprotected speech like obscenity.

In reality, the core point of tailoring analysis is to assess whether and how far *beyond* restricting unprotected speech a law goes. Take *United States v. Stevens*, which involved a statute criminalizing “depictions of animal cruelty.” 559 U.S. 460 (2010). The government tried to save the statute from facial invalidation by arguing that it had at least some constitutional applications—namely, so-called “crush videos and depictions of animal fighting.” *Id.* at 481. The Court assumed without deciding that those applications would be constitutional. But it invalidated the statute

nonetheless, because the law on its face also covered a wide swathe of protected speech, like “hunting-related depictions in which a living animal is intentionally killed.” *Id.* at 476. If the government wanted to prohibit crush videos and depictions of animal fighting, the obviously less restrictive option was to ban those things alone. *See id.* at 474-77.

Iancu v. Brunetti, 588 U.S. 388 (2019), is much the same. There, the Court held a bar on registering “immoral” or “scandalous” trademarks facially unconstitutional. The government tried to save the statute from facial invalidation by insisting that it could constitutionally be applied to “lewd, sexually explicit, or profane marks.” *Id.* at 398. The Court rejected that effort. Even setting aside the law’s viewpoint discrimination, the law was facially overbroad because it was not limited to lewd, sexually explicit, or profane marks. *Id.* at 399. If the government wanted to bar those marks, the obviously less restrictive option was to pass a law that did only that.

So too with *Brown*. Though the universe of video games covered included at least some speech that is unprotected as to minors, *see Brown*, 564 U.S. at 857 (Breyer, J., dissenting) (describing video game with obscenity); *id.* at 818-19 (Alito, J., concurring) (same), that was beside the point. It sufficed that the statute on its face restricted access to an entire category of speech that is *not* categorically unprotected—just as it sufficed in *Erznoznik v. City of Jacksonville* that the universe

of all films containing nudity is “demonstrably overbroad” as compared to the category of *unprotected* films that are “obscene ... as to minors,” 422 U.S. 205, 213, 216 (1975). As all those cases teach, if the government’s concern is with speech that is *not* protected by the First Amendment, then it should tailor its law to restrict that alone. The government cannot leverage its ability to restrict *unprotected* speech to impose far more sweeping restrictions on protected speech.

Nothing in *Moody* remotely suggests that the Court intended to change these principles. *Moody* simply applied the long-settled rule that courts resolving a facial challenge must “explore the laws’ full range of applications—the constitutionally impermissible and permissible both—and compare the two sets.” 603 U.S. at 726. That certainly requires identifying “the principal things regulated” by a law, *id.*, as that set will weigh most heavily in the balance. A law that on its face regulates obscenity, but happens to reach some protected speech in the process, thus is likely to withstand facial invalidation. *Cf. FSC*, 606 U.S. at 481 n.7. But a law that on its face targets protected speech (or is so vague that no one knows what all it targets, *see infra* Part II) will not escape invalidation just because it happens to reach some unprotected speech in the process. That is what *Moody* meant when it reiterated that “the principal things regulated ... should have just that weight in the facial analysis.” *Moody*, 603 U.S. at 726. And *Moody* certainly did not embrace the topsy-turvy notion that a law should escape facial invalidation *precisely because* it is so vague

and sweeping that it is “nearly impossible” to identify “every conceivable application.” 26-1096.AG.Br.21, 23; 26-1962.AG.Br.20. Arkansas’ attempt to belatedly conjure up some constitutional applications of its law thus provides no basis to disturb the district court’s conclusion that it “prohibits a substantial amount of protected speech relative to” any “legitimate sweep” it may have. 26-1096.App.676, R.Doc.47 at 25.

None of the state’s cases is to the contrary. In *GLBT Youth v. Reynolds*, the district court identified constitutional and unconstitutional applications but failed to explain why the unconstitutional ones substantially outweighed the constitutional ones. 114 F.4th 660, 670 (8th Cir. 2024). Likewise, in *Fayetteville Public Library v. Crawford County*, the district court “never attempted to determine [the statute’s] ‘full set of applications, evaluate which are constitutional and which are not, and compare the one to the other.’” 183 F.4th 1020, 1035 (8th Cir. 2026). It “bypassed the required inquiry entirely.” *Id.* Those cases have no application here, as the district court assiduously identified both constitutional and unconstitutional applications of each challenged provision and explained why the latter substantially outweigh the former. And Arkansas has particularly little basis to complain about that analysis when it failed to identify *any* constitutional applications of the challenged provisions, even after the district court repeatedly asked.

In sum, the district court correctly concluded that each challenged provision is likely unconstitutional on its face. Its First Amendment rulings thus should be affirmed in their entirety. But if the Court has any concerns about potential application of any provision to other services or activities, it should at a minimum affirm the preliminary injunctions “as applied to NetChoice members’ constitutionally protected expressive activity of curating and disseminating speech.” R.Doc.24 at 20-21; R.Doc.52 at 12-13, 23.

E. NetChoice Has Prudential Standing to Bring Its First Amendment Claims.

In yet another attempt to evade the merits, Arkansas claims that NetChoice lacks “third-party standing.” 26-1096.AG.Br.32; 26-1962.AG.Br.15-18. NetChoice has already briefed this issue in No. 25-1889, which is now consolidated with the present appeals, and respectfully directs the Court to that briefing. *See* 25-1889.NetChoice.Br.44-50. But Arkansas’ most recent briefing on third-party standing invokes one intervening development: the Sixth Circuit’s splintered decision in *NetChoice v. Yost*, 180 F.4th 268 (6th Cir. 2026), which issued several months after NetChoice filed its brief in No. 25-1889.

Arkansas invokes *Yost* for the proposition that NetChoice cannot assert the interests of minors who use its members’ services, because its members’ interests are purportedly at odds with theirs. *See* 26-1962.AG.Br.16-17. As an initial matter, that

reasoning is inapplicable to Act 901, which (unlike the Ohio law at issue in *Yost*) restricts speech vis-à-vis *all* Arkansans—minors and adults alike. But even leaving that aside, both Judge Clay’s opinion and Judge Batchelder’s concurrence are (at least) doubly flawed.

As NetChoice has elsewhere explained, *see* 25-1889.NetChoice.Br.44-45, it is not purporting to *represent* users; it is simply invoking their rights as a necessary component of the substantive First Amendment inquiry into whether Acts 900 and 901 “burden substantially more speech than necessary to further” any of the interests the state asserts. *FSC*, 606 U.S. at 471; *see* 26-1096.App.663 & n.8, R.Doc.47 at 12 & n.8. Moreover, the same misalignment-of-interests argument could be made whenever a vendor advances its customer’s rights. Oklahoma undoubtedly thought beer vendors were not acting in the best interest of underage males in *Craig v. Boren*, 429 U.S. 190 (1976). And California certainly thought that the video-game sellers in *Brown* were not acting in the best interest of the minors whom the state sought to protect from violent content it deemed “too harmful to be tolerated.” 564 U.S. at 791. The Supreme Court nevertheless has consistently reaffirmed that those directly regulated by a law may vindicate the rights of third parties they are conscripted into restricting. *See June Med. Servs. v. Russo*, 591 U.S. 299, 318-19 (2020). So has this Court. *See Interactive Digit. Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 956

(8th Cir. 2003). Arkansas offers nothing of substance to explain why those decisions do not control here.

II. NetChoice Is Likely To Succeed On Both Of Its Vagueness Claims.

The district court correctly concluded that several of the challenged provisions—namely, §1502(a), §1402(d)(1), and §1402(d)(3)—are also unconstitutionally vague.

1. “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012). A law is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). “When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” *Fox*, 567 U.S. at 253-54. Laws backed by “criminal penalties” likewise must meet a heightened vagueness standard “because the consequences of imprecision” are more “severe.” *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982). The provisions at issue here thus “must meet” an especially “stringent vagueness test” because they “both permit[] criminal penalties, *see* Ark. Code Ann. §4-88-103, and interfere[] with the right of free speech.” 26-1096.App.677, R.Doc.47 at 26.

The district court concluded that §1502 is “unconstitutionally vague” because “it fails to specify a standard of conduct to which platforms can conform and its violation entirely depends upon the sensitivities of some unspecified user and a judge or jury’s determination about what the platform ‘should have known’ about those sensitivities.” 26-1096.App.678, R.Doc.47 at 27. That conclusion is correct. It is “especially problematic” that a violation of §1502 turns on whether someone’s “action evokes a particular response from a third party.” *Stahl v. City of St. Louis*, 687 F.3d 1038, 1041 (8th Cir. 2012). Because a “speaker does not know if his or her speech” violates the statute “until after” a violation occurs, these provisions will inevitably have a “chilling effect on core First Amendment speech.” *Id.* And the Act’s capacious language makes it all too easy for an expert witness to assert (and a jury to conclude), with the benefit of hindsight, that a company “should have known” that some aspect of its service could cause at least one Arkansas user to purchase a controlled substance, develop an eating disorder, etc. There is thus simply no way for persons of ordinary intelligence to know how to structure an online service to avoid liability—save getting out of the business of disseminating user-generated speech altogether.

Act 900’s “addictive practices” restrictions—§1402(d)(1) and (3)—are also defective because they impose liability for speech based on third parties’ reactions. *See Stahl*, 687 F.3d at 1041. If anything, as the district court correctly observed,

their vagueness defects are even more glaring. *See* 26-1962.App.933-34, R.Doc.69 at 13-14. For one thing, they tie liability to the “contemporary understanding of addiction, compulsory behavior, and child cognitive development,” Ark. Code §4-88-1402(d)—concepts that are hotly contested. And the statute provides no guidance as to what qualifies as “compulsive” or “compulsory behavior.” Are these lesser versions of “addiction,” such that they cover a broader category of repetitious behavior? And what does it mean to “evoke” such behaviors? Act 900 answers none of these vital questions.

Making matters worse, §§1402(d)(1) and (3) appear to prohibit covered services from engaging in any practices that trigger “addiction” or “compulsive behavior[.]” vis-à-vis *off-platform* activities. 26-1962.App.933-34, R.Doc.69 at 13-14. For example, a service could seemingly be held liable for using an algorithm that recommends college-preparation-test videos to high-school students if a factfinder determines that the algorithm caused a teen to study for the SAT “compulsively.” On top of that, violations of §1402(d)(1) and (3) are “a strict liability civil offense.” Ark. Code §4-88-1403(b)(2)(C). That exacerbates the chilling effect on protected speech, as strict liability will further incentivize speakers “to ‘steer far wider of the [vaguely defined] unlawful zone’” than they would “if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

In sum, §§1502(a), 1402(d)(1), and 1402(d)(3) expose covered services to breathtakingly broad liability for disseminating speech without any clarity about how that liability can be avoided *ex ante*, leaving services little choice but to censor massive amounts of speech, and inviting selective prosecution and arbitrary enforcement. That is exactly what the void-for-vagueness doctrine prohibits.

2. Arkansas admits that §1502 is “general,” “imprecise,” and “broad,” but claims that its outcome-based restrictions on speech nevertheless provide a sufficiently clear “standard.” 26-1096.AG.Br.49. But as this Court has made clear, the problem is not that the prohibited effects must be clear; it is that a law that turns on whether speech “evokes a particular response from a third party” is inherently and utterly unpredictable. *Stahl*, 687 F.3d at 1041. That is precisely the problem here. Even assuming judges and juries could figure out how to apply §1502(a) and §1402(d)(1) *ex post*, these provisions will inevitably chill constitutionally protected speech because they force covered services “to ‘steer far wide[] of’” whatever boundary they mean to set since no one knows how speech will impact unidentified users. *Baggett*, 377 U.S. at 372. That is decidedly not the “narrow specificity” that the realm of “First Amendment freedoms” demands. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Contra 26-1096.AG.Br.49-50, the “should have known” standard in §1502(a) does not fix the vagueness problem. The laws at issue in the cases on which

Arkansas relies did not require regulated parties “to read ... minds [or] predict the future.” *United States v. Bewig*, 354 F.3d 731, 737 (8th Cir. 2003). *Stahl*’s discussion of what “a speaker knows or should know” was not even addressing a scienter requirement; it was merely making the common-sense observation that certain speech or activities around roadways may cause a traffic problem. 687 F.3d at 1041. And neither *Bewig* nor *United States v. Nieves-Castano*, 480 F.3d 597 (1st Cir. 2007), involved First Amendment rights—an area where “rigorous adherence” to vagueness concerns “is necessary to ensure that ambiguity does not chill protected speech.” *Fox*, 567 U.S. at 253-54.

Arkansas argues that “constitutional avoidance” requires construing “should have known” as a subjective rather than an objective standard. 26-1096.AG.Br.51-52. This argument is both forfeited and unavailing. It is well understood that “‘should have known through the exercise of reasonable care’ is an objective negligence standard”—which presumably explains why Arkansas did not offer a contrary construction below. 26-1096.App.678-79, R.Doc.47 at 27-28. The constitutional avoidance canon “is not a license for the judiciary to rewrite language enacted by the legislature.” *Salinas v. United States*, 522 U.S. 52, 59-60 (1997). And even with the state’s atextual “*mens rea* requirement,” services would still be forced to err on the side of suppressing speech whenever Arkansas (or anyone else) has claimed that it could produce a prohibited outcome in any user—which Arkansas

claims as to virtually everything about most covered services. *See, e.g.*, 26-1096.AG.Br.2-5, 40-42; 26-1962.AG.Br.3-4. So, even under the state’s tortured reading, §1502(a) would still be unconstitutionally vague. *See NetChoice v. Bonta*, 170 F.4th 744, 765-66 (9th Cir. 2026) (scienter requirement “cannot mitigate vagueness” where the proscribed conduct itself is unclear).

Arkansas’ defense of §§1402(d)(1) and (3) is weaker still. Yet again, its arguments contort the statutory text beyond recognition. Under Arkansas’ reading, when the statute says that covered services must “not engage in practices to evoke any addiction or compulsive behaviors,” it really means that they must not engage in practices “*for the purpose of causing*” any addiction or compulsive behaviors. 26-1962.AG.Br.21 (emphasis added). “The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks [the Court] to add words to the law to produce what is thought to be a desirable result.” *EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768, 774 (2015). By Arkansas’ own account, “to evoke” means “to cause,” “[t]o give rise to,” or “to produce”; it does not contain a purpose requirement. *See* R.Doc.56 at 21 n.5. And the notion that “‘to’ is the operative word” here, 26-1962.AG.Br.49-50, is nonsensical. The statute does not use “to” as a “function word to indicate purpose,” 26-1962.AG.Br.49; it simply uses the infinitive “to evoke.” The district court correctly rejected Arkansas’ attempt to

rewrite the statute, explaining that a “specific intent requirement ... appears nowhere in the text.” 26-1962.App.934, R.Doc.69 at 14.

Next, Arkansas argues that §§1402(d)(1) and (3) are “properly read as only addressing efforts to addict children to social media, specifically.” 26-1962.AG.Br.56. As the district court explained, 26-1962.App.934, R.Doc.69 at 14, that reading flies in the face of the statute’s plain text, which prohibits the use of “practices” that evoke “*any* addiction or compulsive behavior[.]” Ark. Code §4-88-1402(d)(1) (emphasis added). It also ignores the presumption that a legislature acts intentionally when it “includes a term in one part of a statute but omits it in another.” *Clark Cnty. ex rel. Tucker v. AT&T Corp.*, 740 S.W.3d 598, 605 (Ark. Ct. App. 2026); accord *Poliselli v. IRS*, 598 U.S. 432, 439 (2023). Acts 900 and 901 were introduced, considered, and enacted in tandem, and Act 901 imposes liability if a service uses designs, algorithms, or features that cause a user to “[d]evelop or sustain an addiction to the social media platform.” Ark. Code §4-88-1502(a)(4) (emphasis added). Act 900 contains no such limitation. To the contrary, it sweeps in *any* “compulsive behavior,” *id.* §4-88-1402(d)(1), as well as *any* “compulsory or addiction-driven behavior,” *id.* §4-88-1402(d)(3). At any rate, §§1402(d)(1) and (3) would be every bit as unconstitutionally vague even if they applied only to undefined “addiction or compulsive behavior” vis-à-vis “social media platforms.” *See supra* pp.71-72.

Finally, Arkansas asserts that §1402(d)(3) is immune from a vagueness challenge because platforms will “know whether they are conducting audits.” 26-1962.AG.Br.58. This argument was not raised below, so it is forfeited. Indeed, Arkansas never even argued that §1402(d)(3) could be severed from §1402(d)(1)—the provision it is designed to enforce. *See* R.Doc.56 at 23, 27. It cannot now do so for the first time on appeal. Regardless, this argument fails. The vagueness problem is not that a service will not know whether it has conducted an audit. It is that a service does not know what its audit is supposed to be looking for, because §1402(d)(3) incorporates the same undefined and standardless terms that render §1402(d)(1) unconstitutionally vague. Ark. Code §4-88-1402(d)(3). The district court correctly analyzed the two provisions together—and correctly held that they are both unconstitutionally vague.

III. The District Court Was Well Within Its Discretion To Preliminarily Enjoin Enforcement Of The Challenged Provisions.

“In a First Amendment case ... the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue.” *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007). Because NetChoice has shown a likelihood of success on the merits, that is reason enough to affirm both injunctions. But the other preliminary-injunction factors favor maintaining the status quo as well.

Acts 900 and 901 will irreparably harm NetChoice members and their users because “the loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury.” *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). The Acts also present members with an untenable choice between exposing themselves to massive liability for disseminating constitutionally protected speech, or taking costly and burdensome steps that will drastically curtail access to their services—all before a court decides the merits of their claims. 26-1096.App.258-62.¶¶22-25, R.Doc.26 at 25-29; 26-1096.App.269-72.¶¶16-21, R.Doc.27 at 6-9; 26-1096.App.303-04.¶¶60-62, R.Doc.28 at 30-31. That problem is especially acute because the Acts impose severe sanctions for violations of their amorphous provisions. Even unintentional violations can give rise to significant civil liability, *see* Ark. Code §§4-88-104, 1502(a), and knowing and willful violations trigger steeper civil penalties, *id.* §4-88-1503(a), and even potential criminal sanctions, *id.* §4-88-103.

If forced to try to comply with either Act, NetChoice members would have to spend substantial resources trying to (1) figure out what Acts 900 and 901 require; (2) review their existing designs, algorithms, features, and practices to determine whether any could run afoul of either Act; and (3) either attempt to comply with Acts 900 and 901 or cease operating in Arkansas altogether. *See* 26-1096.App.260-62.¶¶24-25, R.Doc.26 at 27-29; 26-1096.App.271-72.¶¶18, 20, R.Doc.27 at 8-9; 26-1096.App.303-04.¶¶60-62, R.Doc.28 at 30-31. To the extent any of that is even feasible, it would be costly, and there is likely no way to recover those costs if the

Acts are ultimately held invalid. *See Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021). Those unrecoverable compliance costs are classic irreparable injury. *See, e.g., Entergy v. Nebraska*, 210 F.3d 887, 899 (8th Cir. 2000); *In re NTE Conn.*, 26 F.4th 980, 990-91 (D.C. Cir. 2022).

As for the balance of equities and the public interest, “[w]hen the government is the opposing party,” these two factors “merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). And they too decidedly favor NetChoice. “The balance of equities ... generally favors the constitutionally-protected freedom of expression,” as “it is always in the public interest to protect constitutional rights.” *Phelps-Roper*, 509 F.3d at 485. And because the “State has no interest in enforcing laws that are unconstitutional, ... an injunction preventing the State from enforcing [such a law] does not irreparably harm the State.” *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F.Supp.3d 1213, 1322 (E.D. Ark. 2019). Maintaining the status quo until the Acts’ glaring constitutional problems can be fully adjudicated will cause little if any harm to Arkansas. The district court thus acted well within its discretion in preliminarily enjoining these novel laws.

CONCLUSION

This Court should affirm.

Respectfully submitted,

s/Erin E. Murphy

ERIN E. MURPHY

Counsel of Record

JAMES Y. XI

JOSEPH J. DEMOTT

BARRETT L. ANDERSON

CLEMENT & MURPHY, PLLC

706 Duke Street

Alexandria, VA 22314

(202) 742-8900

erin.murphy@clementmurphy.com

Counsel for Plaintiff-Appellee NetChoice

October 9, 2026

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by this Court's order of October 6, 2026, because the textual portion of the brief (excluding the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 17,998 words as determined by the word counting feature of Microsoft Word 2016.⁶

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

3. Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic versions of this brief with the accompanying Statutory Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

October 9, 2026

s/Erin E. Murphy
Erin E. Murphy

⁶ Consistent with Arkansas' interpretation of Federal Rule of Appellate Procedure 32(f) and Circuit Rule 28A(i), this does not include the Summary of the Case and Statement Regarding Oral Argument.

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Erin E. Murphy
Erin E. Murphy

STATUTORY ADDENDUM

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* Section 1402(a)-(c) of the Arkansas Code was enacted as part of Arkansas’ Social Media Safety Act of 2023. The district court held these provisions unconstitutional in *NetChoice v. Griffin*, 2025 WL 978607 (W.D. Ark. Mar. 31, 2025), and Arkansas appealed that ruling in the first of these three consolidated appeals, No. 25-1889.

West's Arkansas Code Annotated
Title 4. Business and Commercial Law
Subtitle 7. Consumer Protection (Chapters 86 to 117)
Chapter 88. Deceptive Trade Practices (Refs & Annos)
Subchapter 14. Regulation of Social Media (Refs & Annos)

A.C.A. § 4-88-1401

§ 4-88-1401. Definitions

Effective: August 5, 2025

Currentness

As used in this subchapter:

(1) “Account holder” means an individual who primarily uses, manages, or otherwise controls an account or a profile to use a social media platform;

(2) “Arkansas user” means an individual who is a resident of the State of Arkansas and who accesses or attempts to access a social media platform while present in this state by accessing the social media platform using an Arkansas internet protocol address or otherwise known or believed to be in this state while using the social media platform, including without limitation through the use of a virtual privacy network that gives the appearance that the individual is not located in this state when he or she is in this state;

(3)(A) “Commercial entity” means a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized entity.

(B) “Commercial entity” includes a third-party vendor;

(4) “Content sharing” means the distribution or display of user-generated content or third-party content, including without limitation text, images, video, or audio, to other users or the public via a covered social media platform;

(5)(A) “Covered social media platform” means a social media platform, messaging service, or other online platform that requires an internet connection to be accessed and is used or is likely being used by a minor.

(B) “Covered social media platform” does not include an email service provider, not-for-profit organization, public or private school, business-to-business software, common carrier, or broadband internet service;

(6) “Digital user community” means a group of users who can engage with the same content by following or subscribing, or repeatedly seeking out, the same content producers, themes, or ideas;

(7) “Digitized identification card” means a data file available on a mobile device that has connectivity to the internet through a state-approved application that allows the mobile device to download the data file from the Office of Driver Services that contains all of the data elements visible on the face and back of a driver's license or identification card and displays the current status of the driver's license or identification card, including valid, expired, cancelled, suspended, revoked, active, or inactive;

(8) “Messaging service” means a service designed to facilitate one-on-one or one-on-group messages through one (1) or more of the following:

(A) Text;

(B) Images; or

(C) Videos;

(9) “Minor” means an individual under sixteen (16) years of age who is in the State of Arkansas;

(10) “Reasonable age verification” means to confirm that a person seeking to access a social media platform is at least sixteen (16) years of age;

(11)(A) “Social media platform” means a business entity or organization that operates an online platform, application, or service that:

(i) Is designed to facilitate user-to-user, user-to-group, or user-to-public interaction, expression, or communication;

(ii) Assigns, utilizes, or relies on a unique identifier, username, profile name, or image that is associated with a specific user account;

(iii) Provides mechanisms for a user to create an online profile comprised of personally identifiable information or professional information, including without limitation a user's name, username, address, date of birth, educational pedigree, professional details, interests, activities, or connections;

(iv) Employs features that allow a user to connect, follow, or establish a relationship with other users and creates a network of interactions either in real time or asynchronously, including without limitation virtual likes and dislikes;

(v) Generates revenue primarily through user engagement, including without limitation through advertising, user data monetization, or premium content; and

(vi) Is accessed by Arkansas users.

(B) “Social media platform” does not include an email service provider, a not-for-profit organization, a public or private school, business-to-business software, a common carrier, or a broadband internet service; and

(12) “User” means a person who has access to view all or some of the posts and content on a social media platform but is not an account holder.

Credits

Acts of 2023, Act 689, § 1, eff. Sept. 1, 2023; Acts of 2025, Act 900, § 1, eff. Aug. 5, 2025.

A.C.A. § 4-88-1401, AR ST § 4-88-1401

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.

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A.C.A. § 4-88-1402

§ 4-88-1402. Social media platforms--Reasonable age verification methods--Parental consent required

Effective: April 21, 2026

Currentness

- (a) 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 the express consent of a parent or legal guardian.
- (b)(1) A social media company shall verify the age of an account holder.
- (2) If an account holder is a minor, the social media company shall confirm that a minor has consent under subsection (a) of this section to become a new account holder, at the time an Arkansas user opens the account.
- (c)(1) A social media company shall use a third-party vendor to perform reasonable age verification before allowing access to the social media company's social media platform.
- (2) Reasonable age verification methods under subdivision (c)(1) of this section include providing:
- (A) A digitized identification card, including a digital copy of a driver's license under § 27-16-601 et seq.;
- (B) Government-issued identification; or
- (C) Any commercially reasonable age verification method.
- (d) A social media platform shall:
- (1) Consistent with contemporary understanding of addiction, compulsory behavior, and child cognitive development, ensure that the social media platform does not engage in practices to evoke any addiction or compulsive behaviors in an Arkansas user who is a minor, including without limitation through notifications, recommended content, artificial sense of accomplishment, or engagement with online bots that appear human;
- (2) Ensure that, by default:

(A) Notifications to an Arkansas user who is a minor, other than safety or privacy-related alerts, are ceased between the hours of 10:00 p.m. central standard time (CST) and 6:00 a.m. central standard time (CST) and allow a parent or guardian to modify this setting; and

(B) Privacy and safety settings for an Arkansas user who is a minor on a covered social media platform provide the most protective level of control for privacy and safety offered by the covered social media platform;

(3) Conduct an audit at least one (1) time per quarter to ensure that the social media platform's software, application, or other products are not causing minors to engage in compulsory or addiction-driven behavior; and

(4)(A) Develop an easily accessible online dashboard to allow a parent of a minor user to view and understand his or her child's use habits on the covered social media platform.

(B) The online dashboard under subdivision (e)(4)(A) of this section shall also provide tools for a parent to restrict his or her minor child's access to the covered social media platform, or logical portions of the covered social media platform.

Credits

Acts of 2023, Act 689, § 1, eff. Sept. 1, 2023; Acts of 2025, Act 900, § 2, eff. April 21, 2026.

A.C.A. § 4-88-1402, AR ST § 4-88-1402

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.

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Subchapter 14. Regulation of Social Media (Refs & Annos)

A.C.A. § 4-88-1403

§ 4-88-1403. Liability for social media companies

Effective: August 5, 2025

Currentness

(a)(1) A social media company that knowingly violates this subchapter is liable if the social media company fails to perform a reasonable age verification.

(2) If a social media company performs a reasonable age verification, the social media company shall not retain any identifying information of the individual after access to the social media platform has been granted.

(b)(1) As authorized under § 4-88-103, a prosecutor may initiate an enforcement action against a social media company that allegedly violates § 4-88-1402.

(2)(A) As authorized under § 4-88-104, the Attorney General may initiate an enforcement action against a social media company that allegedly commits a violation of § 4-88-1402.

(B) A parent or guardian whose minor child or legal dependent is authorized access to a social media platform may bring a civil action against the social media platform that is in violation of § 4-88-1402.

(C) A violation of this subchapter is a strict liability civil offense.

(c)(1) A covered social media platform that permits a minor to access the covered social media platform in violation of this subchapter is liable to an individual for:

(A) A penalty of ten thousand dollars (\$10,000) per violation, court costs, and reasonable attorney's fees as ordered by the court; or

(B) Damages resulting from a minor accessing a social media platform without his or her parent's or custodian's consent, including court costs and reasonable attorney's fees as ordered by the court.

(2) Each day that a covered social media platform permits a minor to access the covered social media platform in violation of this section constitutes a separate violation for purposes of subdivision (c)(1)(A) of this section.

(3) All money obtained by an individual for a fine or civil penalty imposed under this section shall be deposited into the Crimes Against Children Fund.

(4)(A) The reasonable attorney's fees under subdivision (c)(1)(A) of this section shall be no less than the value of the social media platform's total legal fees in the action.

(B) If the social media platform's legal fees are greater than the prevailing party's legal fees, the surplus will be directed to the Crimes Against Children Fund.

(d) This section does not:

(1) Apply to a news or public interest broadcast, website video, report, or event;

(2) Affect the rights of a news-gathering organization; or

(3) Apply to cloud service providers.

(e) An internet service provider, or any of its affiliates or subsidiaries, or search engines, shall not violate this subchapter solely by providing access, connection to or from a website, or other information or content on the internet, or a facility, system, or network that is not under that internet service provider's control, including transmission, downloading, intermediate storage, access software, or other service that provides access or connectivity, to the extent the internet service provider is not responsible for the creation of the content or the communication on a social media platform.

Credits

Acts of 2023, Act 689, § 1, eff. Sept. 1, 2023; Acts of 2025, Act 900, §§ 3, 4, eff. Aug. 5, 2025.

A.C.A. § 4-88-1403, AR ST § 4-88-1403

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.

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Subchapter 14. Regulation of Social Media (Refs & Annos)

A.C.A. § 4-88-1404

§ 4-88-1404. Liability for commercial entity or third-party vendor

Effective: September 1, 2023

Currentness

(a) A commercial entity or third-party vendor shall not retain any identifying information of an individual after access to the social media platform has been granted.

(b) A commercial entity that is found to have knowingly retained identifying information of an individual after access to the material is granted is liable to the individual for damages resulting from the retention of the identifying information, including court costs and reasonable attorney's fees as ordered by the court.

Credits

Acts of 2023, Act 689, § 1, eff. Sept. 1, 2023.

A.C.A. § 4-88-1404, AR ST § 4-88-1404

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.

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West's Arkansas Code Annotated

Title 4. Business and Commercial Law

Subtitle 7. Consumer Protection (Chapters 86 to 117)

Chapter 88. Deceptive Trade Practices (Refs & Annos)

Subchapter 15. Regulation of Social Media Platforms

A.C.A. § 4-88-1501

§ 4-88-1501. Definitions

Effective: August 5, 2025

Currentness

(a) As used in this subchapter:

(1)(A) “Immediate connection” means the:

(i) Final link in the chain of the content's supply;

(ii) Application on which the content is viewed; or

(iii) Service or website on which the content is viewed.

(B) “Immediate connection” does not include the:

(i) Content creator, unless the content creator hosts his, her, or its own social media platform for sharing that content and the social media platform allows for interaction with the content creator or other viewers of the content;

(ii) Physical device that displays the content;

(iii) Network provider that electronically transmits the content; or

(iv) Enterprise that stores or hosts the content, unless that enterprise is owned or operated by the social media platform;

(2) “Minor” means an individual under sixteen (16) years of age;

(3) “Promoting” means placing content on the feed, screen, account, or other digital medium of the minor that causes the minor to view the content without explicitly searching for that specific content and includes algorithmic promotion of the content based on a previous search or engagement;

(4) “Significant bodily or cognitive harm” means the impairment of physical condition or the infliction of substantial pain or substantial bruising, swelling, or visible marks associated with a trauma injury that impedes typical function of the body or brain and results from a person's attempt to end his or her own life or gravely injure himself or herself; and

(5) “Social media platform” means a business entity or organization that operates an online platform, application, or service that:

(A) Is designed to facilitate user-to-user, user-to-group, or user-to-public interaction, expression, or communication;

(B) Assigns, utilizes, or relies on a unique identifier, username, profile name, or image that is associated with a specific user account;

(C) Provides mechanisms for a user to create an online profile comprised of personally identifiable information or professional information, including without limitation a user's name, username, address, date of birth, educational pedigree, professional details, interests, activities, or connections;

(D) Employs features that allow a user to connect, follow, or establish a relationship with other users and creates a network of interactions either in real time or asynchronously, including without limitation virtual likes and dislikes;

(E) Generates revenue primarily through user engagement, including without limitation through advertising, user data monetization, or premium content; and

(F) Is accessed by Arkansas users.

Credits

Acts of 2025, Act 901, § 1, eff. Aug. 5, 2025.

A.C.A. § 4-88-1501, AR ST § 4-88-1501

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.

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Subchapter 15. Regulation of Social Media Platforms

A.C.A. § 4-88-1502

§ 4-88-1502. Prohibited activity by social media platform

Effective: August 5, 2025

Currentness

(a) A social media platform shall not use a design, algorithm, or feature that the social media platform knows, or should have known through the exercise of reasonable care, causes a user to:

- (1) Purchase a controlled substance;
- (2) Develop an eating disorder;
- (3) Commit or attempt to commit suicide; or
- (4) Develop or sustain an addiction to the social media platform.

(b) Excluding subdivision (a)(3) of this section, a social media platform does not violate this section if it demonstrates that it corrected any design, algorithm, or feature that the social media platform discovers presents more than a de minimis risk of the items listed in subsection (a) of this section within thirty (30) days of that discovery.

Credits

Acts of 2025, Act 901, § 1, eff. Aug. 5, 2025.

A.C.A. § 4-88-1502, AR ST § 4-88-1502

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.

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Subchapter 15. Regulation of Social Media Platforms

A.C.A. § 4-88-1503

§ 4-88-1503. Liability of social media platform

Effective: August 5, 2025

Currentness

(a) A social media platform that knowingly and willfully violates this section is liable under this subsection for:

(1) A civil penalty not to exceed ten thousand dollars (\$10,000) per violation; and

(2) An award of litigation costs and reasonable attorney's fees in an action brought under this subsection.

(b)(1) A parent or guardian whose minor child or legal dependent commits suicide or attempts to commit suicide that results in significant bodily or cognitive harm following exposure to online content promoting, or otherwise advancing, self-harm or suicide may bring a civil action against the social media platform that hosted, promoted, shared, or otherwise facilitated the immediate connection between the victim and the content.

(2) A court may award the following under this subsection:

(A) Affirmative relief from the effects of the content;

(B) Damages;

(C) Costs of medical treatment;

(D) Funeral expenses and related costs;

(E) Punitive damages;

(F) Litigation costs; and

(G) Reasonable attorney's fees.

(3) Reasonable attorney's fees under subdivision (b)(2)(G) of this section shall be no less than the lesser of the:

(A) Total cost of the defendant's legal fees for the lawsuit; or

(B) Reasonable legal fees for the defense, had the defendant prevailed.

(c) An action to enforce a cause of action under this section shall be commenced within four (4) years after the cause of action accrued.

(d) This section does not impose liability on a social media platform for:

(1) Displaying content that is created and hosted entirely by a third party, including without limitation an advertisement managed by a third party and shared on the social media platform; or

(2) Conduct that is protected by the:

(A) First Amendment of the United States Constitution; or

(B) Arkansas Constitution.

Credits

Acts of 2025, Act 901, § 1, eff. Aug. 5, 2025.

A.C.A. § 4-88-1503, AR ST § 4-88-1503

The constitution and statutes are current through Acts 1 to 174 (end), passed during the 2026 Fiscal Session of the 95th Arkansas General Assembly; and Acts 1 and 2 (end), passed during the 2026 First Extraordinary Session of the 95th Arkansas General Assembly. The general effective date for the 2026 Fiscal Session is July 29, 2026; the general effective date for the 2026 First Extraordinary Session is August 5, 2026. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through September 30, 2026.