No. 25A97

IN THE
Supreme Court of the United States

NETCHOICE, LLC,
Applicant,

v.

LYNN FITCH, IN HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF MISSISSIPPI,
Respondent.

On Application to the Honorable Samuel A. Alito, Jr.,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Fifth Circuit

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF NETCHOICE'S EMERGENCY APPLICATION FOR VACATUR

CORBIN K. BARTHOLD
Counsel of Record
BERIN SZÓKA
TECHFREEDOM
1500 K Street NW, Floor 2
Washington, D.C. 20005
(771) 200-4997
cbarthold@techfreedom.org
Counsel for Amicus Curiae

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom opposes government interference with online speech. That is precisely why TechFreedom opposes laws that mandate online age verification. As TechFreedom's experts have explained in extensive expert commentary, online age-verification laws sacrifice privacy, free speech, and parental authority on the altar of good intentions. See, e.g., Corbin K. Barthold, *Age-Verification Laws Are a Verified Mistake*, Law & Liberty (Jan. 9, 2025), tinyurl.com/2avh8w48.

SUMMARY OF ARGUMENT

In *Packingham v. North Carolina*, 582 U.S. 98 (2017), this Court confirmed that adults have a broad First Amendment right to access social media. In *Brown v. Entertainment Merchants Assoc.*, 564 U.S. 786 (2011), the Court confirmed that minors have a broad First Amendment right to access new media. This Court's recent ruling in *Free Speech Coalition v. Paxton*, 23-1122 (U.S., June 27, 2025), does not undermine either of those decisions.

And yet: The Fifth Circuit, in a one-sentence order, allowed the age-verification and parental-consent requirements in Mississippi's H.B. 1126 to be immediately

* No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission.

enforceable pending appeal. The most plausible explanation for why the Fifth Circuit did this is that it mistook *Free Speech Coalition* as a green light to ignore *Packingham* and *Brown*. This was clear error. *Free Speech Coalition* addresses age-gating only of content obscene to minors. The decision has nothing to say about H.B. 1126, a law that tries to age-gate the vast quantities of fully protected speech that appear on social media. (This brief focuses on the biggest First Amendment flaws with H.B. 1126's age-verification and parental-consent rules. Those rules are flawed for yet other reasons, and the statute contains other equally flawed rules.)

H.B. 1126's age-verification and parental-consent requirements impose broad bans and burdens on the speech rights of adults and minors alike. Allowing H.B. 1126 to take full effect, by way of the Fifth Circuit's grave misapplication of this Court's precedents, would result in sweeping censorship. Only immediate action from this Court can prevent that injustice. The Emergency Application should be granted.

ARGUMENT

I. To Reach Its Unexplained Result, the Fifth Circuit Had to Ignore *Packingham v. North Carolina* (2017), Ignore *Brown v. Entertainment Merchants Assoc.* (2011), and Misapply *Free Speech Coalition v. Paxton* (2025).

Packingham involved a North Carolina law that made it a crime for a registered sex offender "to access a commercial social networking Web site." 582 U.S. 98, 101. The Court held that this law violated the First Amendment.

In the modern world, the Court explained, among "the most important places . . . for the exchange of views" are the "vast democratic forums of the Internet"—and of "social media in particular." *Id.* at 103 (cleaned up). Social media "can provide

perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id*. at 105. And everyone—"even convicted criminals"—can benefit from "access to the world of ideas" that exists online. *Id*. To "foreclose access to social media altogether," therefore, is "to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id*. The Court concluded that, even under intermediate scrutiny (which the Court assumed, without deciding, applied), the North Carolina law impermissibly burdened adult sex offenders' right to send and receive speech.

At issue in *Brown* was a California law that restricted the sale or rental of violent video games to minors. While it did "not mean to demean or disparage the concerns" behind the state's effort to protect children, the Court readily struck down the law as a violation of the First Amendment. 564 U.S. 786, 802.

At the heart of California's statute was an assumption that minors are second-class citizens under the First Amendment. But this, the Court held, is incorrect. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id*. at 793 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975)). Although a state may protect minors from material that is *obscene as to them*, the Court observed, "that does not" mean the state has "a free-floating power to restrict ideas to which children may be exposed." *Id*. at 794-95. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young

from ideas or images that a legislative body thinks unsuitable to them." *Id.* at 795. This remains true even if the speech is interactive ("the player [of a video game] participates in the violent action on screen") or disgusting (there exists, in the game, "a racial or ethnic motive for [the] violence"). *Id.* at 799. Nor may the censorship be laundered through a parental-consent mandate (which is really just a government mandate "subject only to parental veto"). *Id.* at 795 n.3. And so the Court concluded that California's law was subject to, yet miserably failed, strict scrutiny.

Free Speech Coalition involved a Texas law that requires age verification on any commercial website more than one-third of which is speech obscene to minors. The Court upheld this law under intermediate scrutiny.

Free Speech Coalition addressed precisely the category of speech—material obscene to minors—that *Brown* noted is amenable to special treatment. Minors have no right to view such material *at all*. And such material, *Free Speech Coalition* concluded, is "only partially" protected for adults. No. 23-1122 (slip op. 30). This means that, in the context of an age-verification law, the Court's analysis will fundamentally differ depending on whether the speech at issue is simply what's found on social media (with its "vast democratic forums" that minors have a "significant" interest in seeing) or is instead what's found on pornographic websites (with their content that minors have no right, and adults, henceforth, only a "partial" right, to see).

How does the analysis differ? *Free Speech Coalition* revealed at least two key distinctions. *First*, for content obscene to minors, age-verification laws are now

treated as akin to regulations on expressive conduct. *Id*. When content obscene to minors is at issue, the state's regulatory power "*necessarily includes* the power to require proof of age." *Id*. at 31 (emphasis added). In the context of adult content, in other words, an age-verification "statute can readily be understood as an effort to restrict minors' access" to speech unprotected as to them. *Id*. at 30. In the context of social media, by contrast, *no such assumption applies*. Age verification in that realm remains, as it always has been, a presumptively unconstitutional direct regulation of speech. See *Brown*, 564 U.S. 786.

Second, for content obscene to minors, a "burden" on speech is now qualitatively distinct, under the First Amendment, from a "ban" on speech. "When the First Amendment *partially* protects speech"—as is henceforth the case with, and only with, content obscene to minors—"the distinction between a ban and lesser burdens is" now "meaningful." No. 23-1122 (slip op. 29, n.12). *But* "for *fully protected speech*," now as ever, "the distinction between bans and burdens makes no difference to the level of [First Amendment] scrutiny." *Id*. Even after *Free Speech Coalition*, therefore, an age-verification or parental-consent requirement placed on *fully protected* social-media speech amounts to a *burden* that triggers *strict scrutiny*. (And for the reasons explained in the Emergency Application, H.B. 1126 cannot satisfy strict scrutiny. See Em.App. 21-24, 27.)

In short, *Free Speech Coalition* has nothing to say about a *social media* age-verification and parental-consent mandate, such as H.B. 1126. In fact, *Free Speech Coalition* aligns perfectly with *Brown*. Only categories of historically unprotected

speech—such as fraud, incitement, or (yes) obscenity—are outside the First Amendment. And "the obscenity exception does not," *Brown* said, "cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" 564 U.S. at 793. So unlike in *Ginsberg v. New York*, 390 U.S. 629 (1968)—a precedent, relied on heavily by *Free Speech Coalition*, involving material obscene to minors sold at brick-and-mortar stores—California's video-game law tried "to create a wholly new category" of unprotected speech (violent speech directed at children). 564 U.S. at 794. Allowing a legislature to do this—even for minors—would, *Brown* concluded, contravene "the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs." *Id*. at 792 (cleaned up). Creating a new category was improper in *Brown*, as to violence in video games, and it would be improper here, as to the content on social media. *Free Speech Coalition*—which dealt with a category of speech that *is* historically unprotected—changes nothing.

II. Unless the Fifth Circuit's Unexplained Order Is Vacated, Mississippi Will Impose a Vast Regime of Online Censorship.

Mississippi's H.B. 1126 contains age-verification and parental-consent mandates that govern speech well beyond the narrow category of content obscene to minors. H.B. 1126 § 6(1). These mandates exclude minors from speech they have a right to interact with—the government has no "free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794-95. Meanwhile, the restrictions burden adults' strong right—a right recognized even for convicted sex offenders—to access social media. To verify users' ages, a website must collect

sensitive information, forcing users (for example) to submit to face scans or upload government IDs. Providing such data is a chore, see App.198a-200a; such data can be hacked or misused; and exposure of such data can reveal an anonymous speaker's identity, see Em.App. 27. All these factors are burdens that chill speech. See App.27a (district court opinion) ("The Act requires all users (both adults and minors) to verify their ages before creating an account to access a broad range of protected speech on a broad range of covered websites. This burdens the First Amendment rights of adults . . . , which makes it seriously overinclusive.").

Unless the Fifth Circuit's order is vacated, Mississippi will immediately impose upon social media a regime of heavy censorship. Minors will be locked out of a wide array of online spaces they have a right to see and contribute to. Adults will face onerous obstacles to speaking online that bear no connection to a legitimate state end. If it goes into effect, H.B. 1126 will burden "all Mississippians' access to 'billions' of 'posts' containing fully protected speech." Em.App. 4 (quoting *Moody v. NetChoice, LLC*, 603 U.S. 707, 719, 734 (2024)). The stakes are high.

To add insult to injury, the Fifth Circuit gave no reason for its drastic order. This relaxed approach to ruling on a matter of such immense consequence is itself grounds for reimposing the district court's preliminary injunction. See Em.App. 13-14. Neither social media users, nor the websites that host them, should be left in the dark as to why their First Amendment rights count for so little. That said, it is not hard to surmise what happened. Until now, court after court has struck down laws like H.B. 1126. See Em.App. 3-4 (collecting authority). What changed—or rather,

what *supposedly* changed—was that this Court issued *Free Speech Coalition*. But as we have shown, *Free Speech Coalition* is, so far as *social media* laws go, a red herring. The precedents that matter are *Packingham* and *Brown*. Applying those precedents, this Court should vacate the Fifth Circuit's order. Doing so would amount to nothing less than rescuing free speech online.

CONCLUSION

The Emergency Application should be granted.

July 24, 2025

Respectfully submitted,

/s/ Corbin K. Barthold

CORBIN K. BARTHOLD
Counsel of Record
BERIN SZÓKA
TECHFREEDOM
1500 K Street NW, Floor 2
Washington, D.C. 20005
(771) 200-4997
cbarthold@techfreedom.org
Counsel for Amicus Curiae