No. 25A97

In the Supreme Court of the United States

NETCHOICE,

Applicant,

v.

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

Respondent.

To the Honorable Samuel A. Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit

Brief of *Amicus Curiae* Center for Individual Rights in Support of NetChoice's Emergency Application for Vacatur

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The Center for Individual Rights (CIR) is a national public interest law firm dedicated to defending individual rights essential to a free and flourishing society. Founded in 1989, CIR has a record of landmark victories in this Court and many others, setting precedents that restore and protect fundamental individual rights threatened by government actions. CIR has a vital interest in preserving the guarantees of freedom of expression secured by this Court's First Amendment precedents. CIR has represented clients in a wide variety of First Amendment cases, *e.g.*, *Friedrichs* v. *California Teachers Ass'n*, 578 U.S. 1 (2016); *Rosenberger* v. *Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Sypniewski* v. *Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), and has also participated as *amicus curiae* in cases implicating significant First Amendment issues, *e.g.*, *Elonis* v. *United States*, 575 U.S. 723 (2015); *Morse* v. *Frederick*, 551 U.S. 393 (2007).

SUMMARY OF ARGUMENT

Mississippi's House Bill 1126 (2024) (HB 1126, or the Act) restricts access to fully protected speech on social media websites by forcing users to verify their age and by requiring minors to obtain parental consent to access the sites. That effort is barred by the First Amendment.

First, the Act eviscerates the right to speak and listen anonymously online and would have a chilling effect on online speech. The First Amendment right to speak

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[*] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or its counsel made a monetary contribution to this brief's preparation.

and listen anonymously has deep roots in our Nation's history and tradition. That right is no less important today in cyberspace. But the Act's age-verification and parental-consent provisions would force individuals to disclose personally identifiable information as a condition to accessing social media websites—to identify themselves at least to the websites, if not the world. And the mere threat that such information could be leaked or stolen will, in turn, lead many prospective users to forgo social media altogether. For yet other users who lack government identification, the Act amounts to a de facto ban from covered social media websites. None of this accords with the First Amendment.

Second, the Act imposes a presumptively unconstitutional, content-based restriction on speech. The Act facially applies only to certain traditional social media websites, and it expressly exempts other social media websites *based on content*—exempting, for instance, those that primarily focus on sports, online video games, or news. The Act's justifications are equally content-based: Its express purpose is to suppress "content" that Mississippi deems "harmful" to minors. App. 102a-103a. Under this Court's precedents, including *Free Speech Coalition, Inc.* v. *Paxton*, 145 S.Ct. 2291 (2025), the Act therefore must pass strict scrutiny. No exception to that demanding test applies here. Nor can the State show that the Act is the most narrowly tailored means of advancing any compelling governmental interest.

ARGUMENT

I. The Act Violates Speakers' Right To Remain Anonymous And Chills Speech Online.

Social media websites are home to a "staggering amount" of protected speech, *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 719 (2024), and for many, are the "principal sources for * * * exploring the vast realms of human thought and knowledge," *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017). The First Amendment protects the right to speak and listen anonymously when engaging with others, including online. But HB 1126 effectively requires users to identify themselves on covered social media websites: Covered sites must require users to verify their age before they may access the sites and may not allow minors to use the sites without parental consent. § 4. Those age-verification and parental-consent requirements eviscerate the right to speak and listen anonymously on social media, undercut user privacy, and threaten to chill speech online.

A. The Act Violates The Right To Speak Anonymously.

This Court has long recognized that some speech must occur "either anonymously or not all." *Talley* v. *California*, 362 U.S. 60, 64 (1960). And it has repeatedly sought to protect the "honorable tradition of advocacy and dissent" that flows from a speaker's (or listener's) right to "remain anonymous." *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 342, 357 (1995). The Act's age-verification and parental-consent requirements flout that tradition, "all but kill[ing] anonymous speech online." Mot. 27 (quoting *NetChoice, LLC* v. *Carr*, 2025 WL 1768621, at *15 (N.D. Ga. June 26, 2025)).

1. The First Amendment right to speak anonymously is deeply rooted in history and tradition. The tradition is older than the Nation itself. "The obnoxious press licensing law of England, which was also enforced on the Colonies[,] was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government." *Talley*, 362 U.S. at 64. And "[t]he old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers." *Id.* at 64-65. Across the Atlantic, anonymous pamphlets in the pre-Revolutionary days—like Thomas Paine's *Common Sense* and the *Letters of Junius*—were "weapons in the defense of liberty" and inspired many to join the cause of independence. *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938); see *Powell* v. *McCormack*, 395 U.S. 486, 531 n.60 (1969) ("The writings of the pamphleteer 'Junius' were widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause."). So too did the case of John Peter Zenger, which "set the Colonies afire" when the "jury refus[ed] to convict" the publisher who was charged with seditious libel after he refused to divulge the names of his anonymous authors. *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring).

That tradition carried through to the Founding era. The practice of unidentified speech is perhaps "most famously embodied in the *Federalist Papers*," penned by Alexander Hamilton, James Madison, and John Jay under the pseudonym "Publius" to support ratification of the Constitution. *McIntyre*, 514 U.S. at 343 n.6. And their detractors also published responses under assumed names. *Ibid.* This history would

have been known to the Founding generation and informed the adoption of the First Amendment. As "originally understood," therefore, the First Amendment "include[d] the right to speak without being known." *Novak* v. *City of Parma*, 932 F.3d 421, 434 (6th Cir. 2019) (Thapar, J.).

Honoring the First Amendment's original meaning, this Court has repeatedly reaffirmed the First Amendment right to speak anonymously. See, *e.g.*, *Talley*, 362 U.S. at 61 (First Amendment barred ordinance that required identification of the authors and publishers of handbills); *McIntyre*, 514 U.S. at 336, 357 (First Amendment barred law that "prohibit[ed] the distribution of anonymous campaign literature"); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 200 (1999) (First Amendment barred law requiring individuals circulating petitions to wear badges identifying themselves); *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150, 166-168 (2002) (First Amendment barred ordinance requiring registration for door-to-door advocacy, as it "dramatic[ally] depart[ed] from our national heritage and constitutional tradition" to require anonymity-destroying registration). Time and again, the Court has emphasized that the "honorable tradition" of anonymous advocacy "protect[s] unpopular individuals from retaliation—and their ideas from suppression." *McIntyre*, 514 U.S. at 357.

Because "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them," the right to speak anonymously entails the right to *listen* anonymously. *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965) (Brennan, J., concurring) (holding unconstitutional a

law requiring addressee to specifically request receipt of mail identified as communist propaganda); see *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (holding that the First Amendment protects the "right to receive information and ideas, regardless of their social worth"). The First Amendment aims to ensure "that all persons have access to places where they can speak *and listen*, and then, after reflection, speak and listen once more." *Packingham*, 582 U.S. at 105 (emphasis added).

Anonymity in digital spaces today serves interests no less vital. For instance, online anonymity safeguards whistleblowers and activists from retaliation and can encourage them to expose wrongdoing. See Wilkie, *Virtual Whistle-blowing: Employees Bypass Internal Channels to Expose Wrongdoing*, SHRM (July 16, 2013), tinyurl.com/5n8uyxu7 (video posted on pseudonymous YouTube account exposing unsanitary conditions at buffet). Anonymity can also encourage the unfiltered exchange of ideas and information online among scholars, researchers, and entrepreneurs, without concern for effects on professional reputation. Cf. Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, https://bitcoin.org/bitcoin.pdf (pseudonymous paper that spawned the bitcoin industry). Anonymity further protects against online harassment, reducing the risk of identity theft or doxxing online. See Clark & Young, *Hidden Voices, Public Consequences*, Harvard Crimson (Oct. 17, 2023), tinyurl.com/yzy9wdny ("Since the beginning of the Israel-Hamas war, Harvard students have been using the anonymous social media app Sidechat to discuss the issue from many points of view. Many of these students may be reluctant to speak out publicly for fear of doxxing."). And anonymity enables citizens to *receive* information

online without fear of retribution. Cf. Baker, *Another Door Closes: Authoritarians Expand Restrictions on Virtual Private Networks*, Freedom House (Nov. 21, 2024), tinyurl.com/3kda9pk8 (explaining that authoritarian "regimes are increasingly restricting" VPNs "[b]ecause [they] allow access to suppressed websites and can bolster user privacy").

2. The Act breaks sharply with the Nation's tradition and this Court's precedents protecting anonymous speech. To implement the age-verification requirement, covered websites must collect personal information from all users regardless of their age. And to implement the parental-consent requirement, covered websites must confirm that it is in fact a parent offering consent to his or her child's access to social media, requiring disclosure of yet more personal information. In other words, the Act's requirements can be fulfilled only by *identifying* the users of each website and forcing them to submit government identification. Cf. App. 200a.

By requiring all users of social media sites to supply such personally identifiable information, the Act threatens the right to anonymity online. And although the Act does not prevent social media sites from allowing users to post anonymously once age-verified, that does not cure the fundamental problem. After all, one risk posed by a data breach or hack is that a user's posts could unwillingly become associated with them. Cf. Robison & Ortner, *Anonymous speech is as American as apple pie*, FIRE (Nov. 20, 2023), tinyurl.com/mryyrzb9 (detailing leak of "the identities of donors to California's anti-gay marriage ballot measure Proposition 8 * * * from the California Secretary of State's office" in 2009, resulting in "people who had given as little as

$100 to the cause" being "hounded, attacked, or even fired"). That risk alone threatens users' First Amendment free speech interests. See pp. 9-10, *infra*.

B. The Act Undermines User Privacy And Chills Speech Online.

Worse still, the Act will seriously chill speech and access to speech by both minors and adults on social media websites. For both groups, the risks posed by required disclosure of personally identifiable information will likely curb their willingness to speak freely online or to access speech posted by others. See App. 198a-200a. And for adults who do not possess a government identification, the Act will effectively ban them from using social media altogether.

1. To effectuate the age-verification requirement, covered websites must force users to submit personally identifiable information to verify the user's age. See App. 227a. Doing so will severely chill speech.

First, the age-verification requirement is likely to deter users from joining or continuing to use social media sites. For starters, the mere inconvenience of verifying one's age may lead many potential users to decline to join covered websites. Cf. App. 200a (noting that it is "cumbersome to provide a photo of a government ID"); App. 201a ("added layer of friction" of third-party verification "could lead to additional user frustration"). And for minors who must rely on a parent's approval to access the sites, parental inertia alone may leave those minors unable to access broad swaths of fully protected speech on covered websites—sites those parents may otherwise have no problem with their child viewing. That result deprives the minors of their First Amendment rights but serves no governmental interest.

For other users, the verification requirement may "discourag[e] [them] from accessing [the regulated] sites" because they find the requirement too personally invasive. *NetChoice, LLC* v. *Griffin*, 2025 WL 978607, at *8 (W.D. Ark. Mar. 31, 2025) (first alteration added) (quoting *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 856 (1997)). Prospective users may forgo social media out of fear that their personal information could be exposed in a data breach or hack. See App. 199a-200a (cataloging user responses to requests for age verification); *Americans for Prosperity Foundation* v. *Bonta*, 594 U.S. 595, 616 (2021) (explaining that requiring "disclosure of * * * identities to the State * * * creates an unnecessary risk of chilling in violation of the First Amendment" (internal quotation marks omitted)). No service can *entirely* eliminate such risks. See *Storm* v. *Paytime, Inc.*, 90 F. Supp. 3d 359, 360 (M.D. Pa. 2015) ("There are only two types of companies left in the United States, according to data security experts: 'those that have been hacked and those that don't know they've been hacked.'"). It was recently reported, for example, that one third-party age-verification service had left users' social media login credentials "exposed online for more than a year." Kelley, *Hack of Age Verification Company Shows Privacy Danger of Social Media Laws*, Electronic Frontier Foundation (June 26, 2024), tinyurl.com/mpafapmw. Other age-verification services have also experienced data breaches. *E.g.*, *Equifax Data Breach Settlement*, FTC (Nov. 2024), tinyurl.com/5n99j5rf; *AG Healey Secures $16 Million From Multistate Settlements With Experian and T-Mobile Over Data Breaches*, Massachusetts Office of the Attorney General Press Release (Nov. 7, 2022), tinyurl.com/ynp9m2bf.

Second, the age-verification requirement will likely chill speech even for users willing to submit to age verification or minors whose parents do not object to their accessing covered websites. As this Court has acknowledged, some speech must occur "either anonymously or not at all." *Talley*, 362 U.S. at 64. Thus, once forced to "forgo the anonymity" they otherwise would have enjoyed, users may not want to post or interact with content as freely as they otherwise would have. *American Booksellers Foundation* v. *Dean*, 342 F.3d 96, 99 (2d Cir. 2003); see pp. 6-7, *supra* (discussing benefits of online anonymity). Nor, as explained above, is that concern likely to be alleviated by a site's willingness to permit users to employ a pseudonym, because a user's posts could become associated with them in the event of a data breach or hack.

2. The Act also will likely constitute a de facto ban for adult users who lack government-issued identification and thus may be unable to submit identification to verify their age. And unlike some similar state statutes, the Act does not expressly identify alternative mechanisms that social media sites can employ to verify a user's age. See, *e.g.*, *Griffin*, 2025 WL 978607, at *1 (describing Arkansas law that requires "age verification to be performed * * * [with] government identification *or biometric information*" (emphasis added)). Even if other "commercially reasonable" means were available for social media services to verify a user's age, the Act's threat of substantial civil or criminal penalties for noncompliance give covered websites every reason to require more—not less—robust identification from prospective users. HB 1126, §§ 4(1), 8; see App. 227a. In the end, the Act will bar users who are unable to meet those requirements from engaging on social media altogether.

II. The Act Imposes A Presumptively Unconstitutional Content-Based Restriction On Speech And Fails Strict Scrutiny.

Beyond chilling speech, the Act *directly* restricts the ability of minors and burdens the ability of adults both to speak and to access broad swaths of fully protected online speech. It plainly violates the First Amendment.

A. The Act Is Content-Based Both On Its Face And In Its Justification.

Whatever the differences between "[n]ew communications media" and "old ones," "settled principles about freedom of expression" make this case straightforward. *Moody*, 603 U.S. at 733. The First Amendment prohibits the Government from burdening "expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). To enforce that basic prohibition, this Court has held that laws "target[ing] speech based on its communicative content" are "presumptively unconstitutional." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015); see *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 766 (2018).

The Act erects a textbook content-based barrier to speech. "A law can regulate the content of protected speech * * * either 'on its face' or in its justification." *Free Speech Coalition, Inc.* v. *Paxton*, 145 S. Ct. 2291, 2309 (2025). HB 1126 does both. It applies only to some interactive websites but not others based on their content, like websites that focus on "news," "sports," or "online video games." § 3(1)-(2). And Mississippi justifies its law in avowedly content-based terms, seeking to protect minors from speech *the State* deems "harmful." App. 103a. HB 1126 is therefore presumptively unconstitutional.

1. By subjecting only certain traditional social media companies to its requirements, HB 1126 imposes textbook content- and speaker-based burdens on speech: The law applies to particular speakers and particular "speech *because of* the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163 (emphasis added).

First, the Act aims directly at "post[ing]" and curation of "content." § 3(1). HB 1126's requirements apply only to "digital services" that "allow[] users to socially interact with other users." *Ibid.* The covered services encompass traditional social media services that facilitate the sharing of "content" between users: By definition, these services enable users "to create a * * * profile" and to "post content that can be viewed by other users of the digital service." *Ibid.* The Act thus squarely regulates communication—the very thing the First Amendment most directly protects. See *Moody*, 603 U.S. at 740; *Packingham*, 582 U.S. at 107. Indeed, the Act's age-verification and parental-consent requirements restrict minors' access to entire social media platforms, which cover a "staggering amount" of fully protected speech and "billions of posts or videos." *Moody*, 603 U.S. at 719, 734. The Act impedes minors' ability to "connect with neighbors and share local news" on Nextdoor, to "advocate for the causes they care about" through photos and videos on Instagram, and to hear from local government officials on their official Facebook pages. Mot. 6. And it requires adults to verify their age online—a "cumbersome" task, App. 200a—before they engage in paradigmatic First Amendment activity, such as sharing creative writing on Dreamwidth.

Second, the Act's "exception[s]" confirm its content-based status. *Barr* v. *American Ass'n of Political Consultants*, 591 U.S. 610, 621 (2020) (plurality); see *Police*

Department of Chicago v. *Mosley*, 408 U.S. 92, 95 (1972) (noting that "[t]he central problem" with effort to exempt labor picketing from a prohibition on picketing near public schools was "that it describes permissible picketing in terms of its subject matter"). The Act does not apply to *all* communication on social media. It expressly excludes certain websites based on subject matter—namely, those that "primarily function[]" to offer users access to "news, sports, commerce, online video games," or "career development opportunities, including * * * [p]rofessional networking." § 3(2). So traditional social media services like Facebook and Instagram are covered, but certain topic-focused social media services like Discord (video games) and LinkedIn (career development) apparently are not. The Act thus "singles out specific subject matter for differential treatment." *Reed*, 576 U.S. at 169. That is "as content based as it gets." *CCIA* v. *Paxton*, 747 F. Supp. 3d 1011, 1036 (W.D. Tex. 2024) (enjoining similar Texas social media law).

Third, the Act's distinction between traditional social media and certain topic-focused websites also reflects speaker-based discrimination. "This Court's precedents are deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others." *National Institute of Family & Life Advocates*, 585 U.S. at 777-778 (internal quotation marks and alteration omitted). Speaker-based laws raise the specter that "the State has left unburdened those speakers whose messages are in accord with its own views," *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 580 (2011)—and they likewise "demand strict scrutiny," *Reed*, 576 U.S. at 170. See also

Citizens United v. *FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

HB 1126 raises precisely that concern. As this Court recognized in *Moody*, when NetChoice's members "compil[e] and curat[e] others' speech," they are "engaging in expressive activity." 603 U.S. at 731. The result of each service's editorial judgments is "a distinctive expressive product." *Id.* at 732. Mississippi may prefer social media services focused on sports or news to those that simply "convey the lion's share of posts submitted to them," *id.* at 738, but the First Amendment does not permit the State to impose that preference on private parties by burdening the speech (and speakers) it disfavors. See *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the * * * perspective of the speaker is the rationale for the restriction.").

2. The Act is also content-based "in its justification." *Free Speech Coalition*, 145 S. Ct. at 2309. The Act's express "purpose" pertains to suppression of speech: It aims to reduce minors' "access" to "online harmful material." App. 102a. The Act extends far beyond unprotected speech that is obscene to minors and limits access to broad swaths of constitutionally protected speech. But States do not function as parents. Except in limited categories of historically unprotected speech, like obscenity, States do not have the roving power to determine what speech is harmful to minors or to restrict it accordingly. See *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 795 (2011) (invalidating state law that "restrict[ed] children's access" to violent video games through a parental-consent provision).

States may not suppress speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213-214 (1975); cf. *Morse* v. *Frederick*, 551 U.S. 393, 405, 409 (2007) (acknowledging concern that "outside the school context," punishing student speech promoting illegal drug use may effectuate unconstitutional "viewpoint discrimination"). Preventing harm to minors is a laudable goal, but the State's "legitimate power to protect children from harm * * * does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794. Minors have a First Amendment right to access speech that does not fall into one of the "well-defined and narrowly limited" classes historically unprotected by the First Amendment, including obscenity, defamation, fraud, or incitement. *Id.* at 804.

The Act's justifications ignore those bedrock principles. Based on an apparent "ad hoc balancing of relative social costs and benefits," *United States* v. *Stevens*, 559 U.S. 460, 470 (2010), HB 1126's age-verification and parental-consent regimes restrict access to *entire* social media services. The Act impermissibly shifts the burden to speakers and readers to justify their right to access the wide range of fully protected expressive and political speech available online. But the State lacks any "free-floating" power to impose such burdens—a power that this Court has repeatedly decried as "startling and dangerous." *Ibid.*; accord *United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (same). "[T]he First Amendment stands against" it. *Alvarez*, 567 U.S. at 722.

3. Because the Act "imposes a restriction on the content of protected speech," it is invalid unless Mississippi "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 564 U.S. at 799. This Court has declined to apply strict scrutiny to content-based regulations only in narrow circumstances not present here.

a. In *Free Speech Coalition*, 145 S. Ct. 2291, the Court applied intermediate scrutiny to a content-based Texas law that directly restricted wholly unprotected speech as to minors and only incidentally burdened what the Court deemed "partially protected" speech as to adults. *Id.* at 2315. HB 1126's age-verification and parental-consent provisions, in contrast, both directly regulate and incidentally burden *fully* protected speech.

Free Speech Coalition involved a Texas law that imposed an age-verification requirement to access pornographic websites. The Court acknowledged that the Texas law "targets speech * * * based on its communicative content." 145 S. Ct. at 2314. Because the law merely restricted "minors from accessing speech that is obscene from their perspective," and minors have no First Amendment right to access such content, the Court reasoned that the law "does not *directly* regulate" any "protected speech." *Id.* at 2306, 2309 (emphasis added). Nonetheless, by forcing adults to submit to age verification, Texas's law imposed an "incidental burden" on the First Amendment right of adults "to access speech that is obscene only to minors." *Id.* at 2316 (internal quotation marks omitted). The Court held that intermediate scrutiny is the proper standard when a "law directly regulates *unprotected* activity (accessing

material that is obscene to minors without submitting to age verification) while only incidentally burdening protected activity." *Id.* at 2315 (emphases altered).

The Court's two principal analogies underscore the essential limits of its holding. First, the Court compared Texas's law to "prohibitions of defamation, fraud, and incitement." *Free Speech Coalition*, 145 S. Ct. at 2315 (internal quotation marks omitted). Such laws are all content-based, but when the directly regulated "speech in question is *unprotected*, States may impose restrictions based on content without triggering strict scrutiny." *Ibid.* (internal quotation marks omitted).

Second, the Court derived the applicable test by "analogy" to *United States* v. *O'Brien*, 391 U.S. 367 (1968), where the Court introduced the intermediate scrutiny standard in upholding a prohibition on burning draft cards. *Free Speech Coalition*, 145 S. Ct. at 2315 n.11. The *O'Brien* Court recognized that destruction of a draft card is conduct, not protected speech, but the Court nonetheless applied intermediate scrutiny because the prohibition imposed "an incidental burden on First Amendment expression" by foreclosing one way "to protest the draft." *Id.* at 2309. In restricting minors' constitutionally unprotected speech, Texas in *Free Speech Coalition* similarly sought to regulate "a nonspeech element" while imposing incidental burdens on adults' protected speech. *Id.* at 2316 (internal quotation marks omitted). Those features, the Court reasoned, made intermediate scrutiny the proper standard.

Here, the prerequisites to the *Free Speech Coalition* exception to strict scrutiny are plainly missing. Most importantly, HB 1126 "directly regulate[s] * * * *protected* speech." 145 S. Ct. at 2309 (emphasis added). Unlike Texas's age-verification law for

pornography, the Act restricts minors' access to entire social media platforms—again, platforms that host a "staggering amount" of fully protected speech. *Moody*, 603 U.S. at 719. Minors have a full First Amendment right to "watch documentaries on YouTube, post their artwork on Instagram," or "submit their fan fiction to Dreamwidth." Mot. 23; see *Brown*, 564 U.S. at 794 (minors "are entitled to a significant measure of First Amendment protection"); *Erznoznik*, 422 U.S. at 212 (same). They have First Amendment rights to share their views of controversial or political literature on Goodreads, to discuss films on Letterboxd, and to share their fitness activities with their friends on Strava. But HB 1126 directly burdens minors' First Amendment rights, barring them from *any* use of those services unless they first verify their age and obtain parental consent. Even adults must verify their age before they may engage in quintessential First Amendment activity like political debate on Facebook.

Under this Court's precedents, HB 1126's *direct* burdens on *minors'* rights to access fully protected speech—rather than "unprotected activity," *Free Speech Coalition*, 145 S. Ct. at 2315—compel strict scrutiny. And its *incidental* burdens on *adults'* fully protected speech cement the conclusion that strict scrutiny applies.

b. This Court has occasionally declined to apply strict scrutiny to content-based restrictions that have "a longstanding tradition in this country," *Brown*, 564 U.S. at 795, but history and tradition only place HB 1126's constitutional defects in sharper relief. Cf. *Vidal* v. *Elster*, 602 U.S. 286, 307 (2024) (declining to apply strict scrutiny based on "tradition of restricting the trademarking of names"). HB 1126 has no historical antecedent.

Mississippi's age-verification and parental-consent requirements "impose *governmental* authority" over speech, "subject only to a parental veto." *Brown*, 564 U.S. at 795 n.3. Such laws are unprecedented. "[T]he power to prevent children from hearing or saying anything without their parents' prior consent" would entail the startling authority to prohibit "admit[ting] persons under 18 to a political rally without their parents' prior written consent" or "admit[ting] a person under 18 to church * * * without his parents' prior consent." *Ibid.* (emphasis omitted). And HB 1126's age-verification requirements are "akin to stationing government-mandated clerks at every bookstore * * * to check identification before citizens can access books * * * or even join conversations." Mot. 24. Far from "coexist[ing] with the First Amendment," *Vidal*, 602 U.S. at 307, such unprecedented restrictions are at war with our constitutional tradition. "[T]he absence of any historical warrant" thus confirms that HB 1126 is unconstitutional. *Brown*, 564 U.S. at 795 n.3.

B. The Act Fails Strict Scrutiny.

For reasons NetChoice explains, the State cannot show that HB 1126 is "narrowly tailored to serve compelling state interests." *National Institute of Family & Life Advocates*, 585 U.S. at 766. "It is rare that a regulation restricting speech because of its content will ever be permissible," *Brown*, 564 U.S. at 799, and strict scrutiny is "as a practical matter * * * fatal in fact absent truly extraordinary circumstances," *Free Speech Coalition*, 145 S. Ct. at 2306. No such circumstances are present here.

To start, the State can point to no compelling governmental interest "unrelated to the suppression of free speech." *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S.

180, 189 (1997). "However pernicious an opinion may seem, we depend for its correction not on [legal regulation] but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). But as explained above, pp. 14-15, *supra*, the "purpose" of Mississippi's law is to limit minors' exposure to "content that promotes or facilitates" various harms. App. 102a, 108a (§ 6). That is not a permissible governmental interest: Again, the State's "legitimate power to protect children" does not extend to "restrict[ing] the ideas to which children may be exposed." *Brown*, 564 U.S. at 794; see *TikTok Inc.* v. *Garland*, 145 S. Ct. 57, 73 (2025) (Gorsuch, J., concurring) (noting that "the Court rightly refrains from endorsing the government's asserted interest in preventing 'the covert manipulation of content,'" because that justification itself is content-based).

The State cannot recast its content-exposure interest as unrelated to expression by framing it as an interest "in aid of parental authority." *Brown*, 564 U.S. at 802. States may not punish third parties for conveying *protected speech* to minors merely because "their parents disapprove of that speech." *Ibid.* And in any event, parental-consent provisions "do not enforce *parental* authority over children's speech"; "they impose *governmental* authority, subject only to a parental veto." *Id.* at 795 n.3. Laws like Mississippi's thus intrude upon, rather than supplement, a parent's responsibility in monitoring the content that their children see.

Mississippi has also failed to show that HB 1126 is the least restrictive means to advancing any governmental interest. As the district court explained, HB 1126 is overinclusive because the State cannot show that "the private tools currently

available for parents to monitor children online * * * would be insufficient." App. 27a. Other courts enjoining similar state laws have reached the same conclusion: "[P]arents may rightly decide to regulate their child's use of social media—including restricting the amount of time they spend on it, the content they may access, or even those they chat with. And many tools exist to help parents with this endeavor." *Griffin*, 2025 WL 978607, at *3.

Even if the State were free to restrict any speech it deems harmful, the Act's age-verification and parental-consent provisions restrict minors from accessing social media services writ large and thus limit their access to all kinds of beneficial and protected speech online—about art, politics, and life. Such sweeping *governmental* speech regulation—precluding minors' access to "billions of posts or videos," *Moody*, 603 U.S. at 734—is not "actually necessary" to address any governmental interest. *Brown*, 564 U.S. at 799.

HB 1126's restrictions are underinclusive, too. The Act does not purport to protect minors from "harassment" on websites devoted to sports or online video games. §§ 3(1), 6(1). Although the First Amendment imposes no freestanding underinclusiveness limitation, HB 1126's broad carveouts for certain subject-matter-focused websites "raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 448 (2015).

* * *

Because HB 1126 is a textbook content-based regulation of fully protected speech, it is presumptively unconstitutional. The State cannot come close to overcoming that presumption.

CONCLUSION

The Court should grant NetChoice's emergency application to vacate the Fifth Circuit's stay of the district court's preliminary injunction of the Act.

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Respectfully submitted.

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