No. 25A97

In the Supreme Court of the United States

NETCHOICE, LLC,
Applicant,

v.

LYNN FITCH, ATTORNEY GENERAL OF MISSISSIPPI,
Respondent.

RESPONSE IN OPPOSITION TO THE APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

This Court should deny NetChoice's application to vacate the Fifth Circuit's order staying an injunction blocking Mississippi's law targeting predators on social-media platforms. The Fifth Circuit had two compelling, independent merits grounds for issuing the stay—one of which NetChoice's application ignores entirely. First, the injunction defies the Fifth Circuit's prior published decision in this very case. Second, the injunction rests on a deeply flawed First Amendment ruling that conflicts with this Court's decision in *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025), which rejected a challenge to a law similarly protecting children online.

Enacted after a sextortion scheme on Instagram led a 16-year-old to take his own life, Mississippi's Walker Montgomery Protecting Children Online Act, H.B. 1126 (2024), imposes modest duties on interactive online platforms that are especially attractive to predators. The Act requires covered platforms to take "commercially reasonable" actions to verify a user's age, obtain parental consent for child users, and adopt a strategy to mitigate the harms to children inflicted on those platforms—sex trafficking, physical violence, incitement to suicide, and more. §§ 4(1), 4(2), 6. The Act requires what any responsible covered platform would already do: make "commercially reasonable" efforts to protect minors—not perfect or cost-prohibitive efforts, but efforts of reasonable care based on a platform's resources.

Applicant NetChoice—a trade group that represents tech giants—brought a pre-enforcement facial challenge claiming that the Act's age-verification, parental-consent, and strategy provisions violate the First Amendment.

A year ago, the district court agreed. It ruled that the Act likely facially violates the First Amendment and issued a preliminary injunction barring its enforcement in all applications against NetChoice members—relief that benefited 8 platforms.

In *NetChoice, LLC v. Fitch*, 134 F.4th 799 (5th Cir. 2025), the Fifth Circuit vacated that injunction and remanded with directions to apply this Court's decision

in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). *Moody* reaffirmed that facial claims are "hard to win," emphasized that courts must undertake a rigorous "inquiry" to assess whether a plaintiff has "carr[ied]" the demanding "burden" that governs those claims, and vacated two lower-court decisions that, in addressing facial claims against social-media laws, failed to "perform[ ]" the required "facial analysis." *Id.* at 723, 744, 726. In line with *Moody*, the Fifth Circuit ruled in *Fitch* that because NetChoice seeks facial relief, it faces a steep climb: NetChoice must—based on a "factual" presentation—show the "'commercially reasonable efforts'" the Act requires of each covered platform and thus each platform's "unique regulatory burden," establish for each platform which of those burdens (if any) "violate the First Amendment," and show (in light of all the Act's possible "applications") that invalid applications "substantially outweigh" valid applications. 134 F.4th at 809. NetChoice did not make that showing and the district court did not "resolve" that facial "inquiry," so, the Fifth Circuit ruled, the injunction "cannot ... stand." *Ibid.*

NetChoice did not seek rehearing en banc or petition for certiorari in *Fitch*. Yet on remand, NetChoice refused to do what the Fifth Circuit directed. Rather than develop the factual record or make the application-by-application showing that *Fitch* ordered, NetChoice amended its complaint to add as-applied claims, filed a preliminary-injunction motion recycling its prior arguments and prior factual submissions, and urged the district court to grant the same relief as before.

The district court ruled for NetChoice and granted the same facial relief it granted before. It again credited NetChoice's First Amendment claim and blocked the Act in all applications to the same platforms that benefited from the first injunction. App.17a-38a. The court did not perform the facial analysis—or demand the factual showing—that the Fifth Circuit ordered in *Fitch*. The court thought it could reinstate its prior relief because NetChoice had added as-applied claims. App.35a.

After receiving full stay briefing, the Fifth Circuit granted the State's motion to stay the injunction pending appeal. NetChoice asks this Court to vacate that stay.

This Court should deny the application. NetChoice satisfies none of the vacatur criteria. It has not shown that the stay order is demonstrably wrong, that this Court would likely review a Fifth Circuit decision rejecting the injunction, or that the equities support its extraordinary request.

First, the State will likely win on appeal, so NetChoice cannot show that the stay order is demonstrably wrong. The Fifth Circuit has two compelling, alternative, and independent merits grounds for reversing the injunction.

One: The injunction defies the Fifth Circuit's mandate in the State's successful first appeal in this case. A litigant that wins in the appellate process "should not be required to go through that entire process again to obtain execution of the judgment" it won on appeal. *DHS v. D.V.D.*, 606 U.S. —, 2025 WL 1832186, at *1 (July 3, 2025). The Fifth Circuit accordingly requires district courts to follow its mandates. In *Fitch* the Fifth Circuit vacated an injunction that blocked the Act in all applications to NetChoice members and directed the district court to hold NetChoice to the burden that facial relief requires. The district court then—at NetChoice's urging—reinstated that injunction. Although the court said it was ruling on NetChoice's "as-applied" claims, the injunction is every bit the facial injunction that the Fifth Circuit vacated—it grants the same relief—and was issued without doing what the Fifth Circuit required. The mandate rule forbids that. So the Fifth Circuit was right to stay the injunction. In a legal system that depends on lower courts and litigants obeying the orders of appellate courts, it is hard to imagine the Fifth Circuit doing otherwise. Remarkably, the application does not even mention the mandate-rule basis for rejecting the injunction—the State's lead argument for a stay in the Fifth Circuit—

or dispute that the rule alone justifies reversing the injunction and thus justifies the stay order. The application should be denied on this ground alone.

Two: Even putting aside the mandate rule, the Fifth Circuit will likely reject NetChoice's First Amendment claim—the only merits basis for the injunction. That is especially clear after *Free Speech Coalition*, which rejected a First Amendment challenge to a law requiring pornographic websites to verify visitors' ages. *FSC* ruled that States may regulate websites to protect children from harms that the State has power to regulate (there, online material that is obscene for minors), that such a requirement does not directly regulate fully protected speech and so triggers only intermediate scrutiny, and that Texas's law satisfied that standard. 145 S. Ct. at 2306-19. The Act here likewise regulates certain websites to protect children from online harms that the State has power to regulate (here, harms that predators inflict on children), does not directly regulate fully protected speech, and advances the State's interest in protecting children while imposing at most "modest burden[s]" on speech (*id.* at 2317)—requiring only "commercially reasonable" efforts to verify age, obtain parental consent, and mitigate harm. So the Act comports with the First Amendment. In ruling otherwise, the district court failed to apply the "deferential" review that *FSC* mandates for laws that do not directly regulate protected speech. *Id.* at 2316. NetChoice claims that the Act triggers strict scrutiny. But *FSC* rejected strict scrutiny for a law that matches the Act in all ways that matter. Indeed, the case for lower scrutiny is stronger here than in *FSC*: the law in *FSC* "target[ed] speech" (material "obscene for minors") that is protected for adults, *id.* at 2314; the Act here targets conduct—like sexual abuse and child trafficking—that is protected for no one.

Second, NetChoice has not shown that this Court would likely review a Fifth Circuit reversal of the injunction. Whatever the certworthiness of any First Amendment issue in this case, the Fifth Circuit has an alternative, independent

ground for rejecting the injunction: it defies that court's mandate. NetChoice does not claim that a Fifth Circuit decision reversing on that ground would be certworthy: it does not dispute that appellate courts are entitled to enforce their mandates, claim that a Fifth Circuit decision rejecting the injunction under the mandate rule would conflict with any decision of this Court, or contend that such a decision would implicate a circuit conflict. That dooms the application. Imagine a cert petition seeking review of a lower-court judgment that rests on an alternative, independent, case-specific, splitless, uncertworthy holding that the petition nowhere mentions or challenges: this Court would deny review. That is this case.

Third, the equities favor the stay. The injunction blocks an important state law that protects children from predators. NetChoice makes bold claims about what will occur with the stay in place, but nothing it says holds up. For over a year, the Act has been in effect for most covered platforms—all those that are not NetChoice members and so did not benefit from either injunction. Throughout that time NetChoice has claimed (as it does again here) that the Act will upend Mississippians' experience in accessing online content, force platforms to censor speech, and impose costs that will force some platforms to shut down. A year on—and despite a recent return to the district court where it could have presented evidence—NetChoice has not identified anyone with a complaint about accessing any platform, one instance of a platform censoring speech, or any platform that has shut down or had any difficulty complying with the Act. No Mississippian has sued to challenge the Act; no covered platform, among the many not represented by NetChoice, has either. NetChoice's claims are without basis. And again, NetChoice urged the district court to defy the Fifth Circuit's mandate. Equity should not condone that tactic. This Court should not either.

The application should be denied.

STATEMENT

Factual Background. The internet provides a forum for inflicting life-altering harms on children—sex trafficking, sexual abuse, physical violence, grooming, targeted harassment, and more. Sophisticated online platforms host this conduct. And some of those platforms offer features—like the ability to interact with minors and learn extensive information about them—that enable predators to destroy children's lives. *See* Social Media and Youth Mental Health: The U.S. Surgeon General's Advisory 9 (2023), https://bit.ly/471Daz1 (describing minor-targeting "predatory behaviors and interactions" on "social media platforms").

Recognizing these harms, the State of Mississippi acted last year to address them. The Legislature was especially moved by the case of Walker Montgomery, a 16-year-old Mississippian who in 2022 fell prey to sextortion on Instagram. After a predator "catfished" Walker and "demanded money to keep from outing him," the Starkville Academy sophomore took his own life. *Starkville father speaks out on 'sextortion' and his son's suicide*, Mississippi Clarion Ledger (Feb. 22, 2023). Spurred by Walker's plight and by the harms that proliferate online, the Legislature passed and the Governor signed the Walker Montgomery Protecting Children Online Act, H.B. 1126 (2024) (App.102a-14a). The Act took effect July 1, 2024. § 10.

The Act "applies only to" online platforms that "[c]onnect[ ] users in a manner that allows users to socially interact with other users," "[a]llow[ ] a user to create a" profile that others may see, and "[a]llow[ ] a user to create or post content" that others can see. § 3(1)(a)-(c); *see* § 2(a)-(b). The Act thus regulates the social-media platforms that let predators interact with children and feed those predators information that can be used to exploit those children. The Act reaffirms this targeted aim by carving out platforms that, in the Legislature's judgment, do not present the same dangers, including those that mainly provide "access to news, sports, commerce, [or] online video games" and only "incidental[ly]" offer "interactive" ("chat") functions. § 3(2)(c).

The Act imposes on covered platforms three duties to address harms to children. *First*, platforms must register—and make "commercially reasonable efforts to verify"—the age of those who create an account with the platform. § 4(1). *Second*, platforms must secure, through a "commercially reasonable" method, "express consent from a parent or guardian" before allowing a known minor to hold an account. § 4(2). The Act lists several "[a]cceptable methods" of consent, including filling out a form, making a phone call, or responding to an email, § 4(2)(a)-(e), and adds a catchall for "[a]ny other commercially reasonable method" "in light of available technology," § 4(2)(f). *Third*, platforms must make "commercially reasonable efforts" to adopt a strategy to address certain harms. § 6(1). A covered platform "shall make commercially reasonable efforts to develop and implement a strategy to prevent or mitigate [a] known minor's exposure to harmful material and other content that promotes or facilitates" listed "harms to minors." § 6(1). Those harms are: "self-harm, eating disorders, substance use disorders, and suicidal behaviors"; "[p]atterns of use that indicate or encourage substance abuse or use of illegal drugs"; "[s]talking, physical violence, online bullying, or harassment"; "[g]rooming, trafficking, child pornography, or other sexual exploitation or abuse"; "[i]ncitement of violence"; or "[a]ny other illegal activity." § 6(1)(a)-(f). "Nothing" in this strategy provision "require[s]" a platform "to prevent or preclude": (a) "[a]ny minor" from "searching for" or "requesting" content; or (b) the platform or those on it "from providing resources for the prevention or mitigation of the" listed harms. § 6(2).

The Act also limits the use and collection of minors' sensitive information. § 5. The Act provides for enforcement by an affected minor's parents, § 7(2), and by the Attorney General, § 8. State law allows, for knowing and willful violations, civil monetary penalties and criminal liability. Miss. Code Ann. §§ 75-24-19, -20.

Procedural Background. In June 2024, NetChoice filed this lawsuit challenging sections 1-8 of the Act. It claims that the Act's age-verification, parental-consent, and strategy provisions violate the First Amendment, that the Act is unconstitutionally vague, and that the strategy provision is preempted by 47 U.S.C. § 230. Complaint ¶¶ 60-156 (D. Ct. Dkt. 1). NetChoice raised only "facial" claims. *Id.* ¶ 58. It alleged that, "[b]ased on the Act's definitions," the Act covers and regulates the following NetChoice members: Google (which operates YouTube), Meta (which operates Facebook and Instagram), X (formerly Twitter), Snap Inc. (which operates Snapchat), Pinterest, Nextdoor, and Dreamwidth. *Id.* ¶ 13. NetChoice moved for a preliminary injunction. D. Ct. Dkts. 3, 4. It submitted declarations from its then-general counsel and officials with YouTube, Nextdoor, and Dreamwidth describing covered members' content-moderation policies. Szabo Dec. ¶¶ 11-19 (D. Ct. Dkt. 3-2) (addressing 8 member platforms); Veitch Dec. ¶¶ 16-28 (App.174a-83a) (YouTube); Pai Dec. ¶¶ 5-15 (App.194a-97a) (Nextdoor); Paolucci Dec. ¶¶ 16-21 (App.214a-18a) (Dreamwidth). The declarations claim that complying with the Act would be hard, costly, and damaging. Szabo Dec. ¶¶ 28-33; Veitch Dec. ¶¶ 29-42 (App.183a-88a); Pai Dec. ¶¶ 20-33 (App.198a-203a); Paolucci Dec. ¶¶ 9-15, 22-26, 33-37 (App.211a-14a, 218a-21a, 224a-27a). One member (Dreamwidth) claims that the costs of complying with the Act may force it to shut down. Paolucci Dec. ¶¶ 34, 35, 37 (App.225a-27a).

On July 1, 2024, the district court granted a preliminary injunction barring the Act's enforcement against "NetChoice ... and its members." App.97a-98a. The injunction thus benefited the 8 member platforms listed above. The court held that NetChoice will likely win on its facial First Amendment and facial vagueness claims. App.74a-93a. On the First Amendment claim, the court ruled that strict scrutiny applies because the Act regulates the content of speech and that the Act likely fails that standard. App.74a-90a. On the vagueness claim, the court ruled that the Act's

coverage definition—which asks how a platform "[p]rimarily functions" and whether it allows users to "socially interact"—is "overly indefinite." App.90a, 92a, 93a; *see* App.90a-93a. The court did not reach the preemption claim. App.96a n.7. Although the court ruled that the Act is likely facially invalid, it did not assess the challenged provisions application by application or compare valid to invalid applications.

The same day, this Court decided *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). *Moody* vacated two decisions (including a Fifth Circuit decision in *NetChoice, LLC v. Paxton*) because, in addressing facial claims against social-media laws, the lower courts failed to "perform[ ]" the required "facial analysis." *Id.* at 726. *Moody* emphasized that facial claims are "hard to win" and that courts must undertake a rigorous "inquiry" to assess whether a plaintiff has "carr[ied]" the demanding "burden" that governs those claims. *Id.* at 723, 744. First, a court must "assess the state law['s] scope" by "determin[ing]" the law's "full set of applications." *Id.* at 724, 718. Second, the court must "decide which of the law['s] applications" violate the Constitution and "compare" the law's "constitutionally impermissible and permissible" applications. *Id.* at 725, 726. A facial First Amendment claim can succeed "only if the law's unconstitutional applications substantially outweigh its constitutional ones." *Id.* at 724. A plaintiff must make the required showings for each challenged provision. *See id.* at 724-26, 727 n.3. And a court must hold the plaintiff to this burden rather than "disregard the requisite inquiry." *Id.* at 744.

The State appealed from the preliminary-injunction order. After the appeal was briefed, the Fifth Circuit decided *NetChoice, LLC v. Paxton*, 121 F.4th 494 (5th Cir. 2024), on remand from *Moody*. In *Paxton*, as here, a district court granted facial First Amendment injunctive relief against a state law regulating social-media platforms. The Fifth Circuit vacated the injunction. This Court vacated that decision because (as noted) the Fifth Circuit did not "properly consider[ ] the facial nature of

NetChoice's challenge." *Moody*, 603 U.S. at 717. On remand, the Fifth Circuit ruled in *Paxton* that NetChoice had not met its "heavy burden" "to develop a factual record" to support its facial claim and remanded for "thorough discovery." 121 F.4th at 497, 500. *Paxton* explained that in a "First Amendment facial challenge" a court must "determine every hypothetical application of the challenged law" and faulted NetChoice for not developing a factual record to allow that determination. *Id.* at 498; *see id.* at 498-99. Then, for "every hypothetical application," the court must determine—based on "factual development" by NetChoice—"whether there is an intrusion on" First Amendment rights. *Id.* at 498, 499; *see id.* at 499-500.

On April 17, 2025, the Fifth Circuit vacated the preliminary-injunction order in this case and remanded for the district court to perform the analysis required by *Moody* and *Paxton*. *NetChoice, LLC v. Fitch*, 134 F.4th 799, 807-09 (5th Cir. 2025). The Fifth Circuit ruled that the district court did "not determin[e] the full scope of actors regulated by the Act and the activities it regulates," as *Moody* requires. *Id.* at 809. On actors: The district court "did not determine" whether the Act applies to (for example) "Uber, Google Maps, DraftKings, Microsoft Teams, Reddit, Pinterest, or X," "among many other[ ]" actors. *Id.* at 808, 809. On activities: The district court "did not determine the 'commercially reasonable efforts,' as used in the Act, or the Act's requirements for each [covered platform], requirements likely to be different with each [covered platform] facing a unique regulatory burden." *Id.* at 809. This activities inquiry, the Fifth Circuit ruled, requires a factual assessment of each covered platform for each challenged provision. "Some" platforms "may not need to devote additional resources to prevent known minors from holding an account without express parental consent, verify the age of anyone seeking to create an account, or implement a strategy to mitigate minors' exposure to certain content." *Ibid.* "For other" platforms, "these requirements may reach beyond their resources." *Ibid.* But

"[w]ithout a factual analysis determining the commercially reasonable effort demanded of each" covered platform, the district court "could not 'decide which of the law['s] applications violate the First Amendment'" or "determine whether 'the law's unconstitutional applications substantially outweigh its constitutional ones.'" *Ibid.* (quoting *Moody*, 603 U.S. at 725, then *Paxton*, 121 F.4th at 498). Because the district court "did not" "determine" as a "factual" matter "to whom the Act applies" or "the activities it regulates" and "then weigh violative applications of the Act against non-violative applications," the Fifth Circuit held, the district court's injunction "cannot now stand." *Ibid.* NetChoice did not petition for rehearing en banc or certiorari.

On remand, NetChoice filed an amended complaint that largely mirrors its original complaint. The new complaint brings the same claims, Amended Complaint ¶¶ 93-215 (App.139a-60a), and adds allegations that "the Act is unconstitutional as applied to NetChoice members and their services regulated by the Act," *id.* ¶ 3 (App.118a); *see id.* ¶¶ 86-87, 129 (App.138a, 145a). NetChoice identifies the same covered members as in the original complaint except it has added Reddit (a new member) and lists YouTube rather than Google as a member. *Id.* ¶ 15 (App.120a). NetChoice alleges that at "minimum" "the Act is invalid to the extent it regulates 'social media' websites, including as applied to Plaintiff's members' regulated services identified in ¶ 14." *Id.* ¶ 87 (App.138a). The amended complaint does not—in paragraph 14 or anywhere else—describe those services.

NetChoice again moved for an injunction. Mot. (D. Ct. Dkt. 49); Mem. (D. Ct. Dkt. 50). In doing so, it relied on the three member declarations filed with its first injunction motion, Mot. 3, and a declaration from its current general counsel, Bartlett Cleland (App.230a-57a). The 26.5-page Cleland declaration largely repeats the 23.5-page declaration by Carl Szabo (NetChoice's previous general counsel) filed with the first injunction motion. The Cleland declaration adds bullet points describing how

"users employ ... covered websites to communicate" (Cleland Dec. ¶ 7 (App.232a-33a)), allegations about Reddit's content-moderation policy (*id.* ¶¶ 12-20 (App.238a-48a)), and more allegations on why the Act covers some members and not others (*compare id.* ¶¶ 28-41 (App.250a-53a) *with* Szabo Dec. ¶¶ 25-27). NetChoice admitted that, based on "the Act's definitions," it knows whether the Act covers each of its 40 members: 8 are covered and 32 are not. Cleland Dec. ¶¶ 30, 40, 41 (App.251a, 252a-53a) (addressing 39 members); Mem. 22 (addressing Google).

Despite the Fifth Circuit's decision in *Fitch*, nothing in NetChoice's new complaint, new briefing, or declarations (new or old) says what any platform must in fact do under each challenged provision or what would constitute "'commercially reasonable'" actions to verify age, obtain parental consent, or adopt a harm-mitigation strategy for any platform. *Fitch*, 134 F.4th at 809 (quoting the Act).

Yet on June 18, the district court again granted a preliminary injunction blocking the Act, in all applications, for covered NetChoice members: YouTube, Meta, X, Snap, Pinterest, Nextdoor, Dreamwidth, and Reddit. App.38a; *see* App.4a-38a.

First, the court held that NetChoice will likely win on its "as-applied" First Amendment claims. App.33a. The court ruled that the Act is a content-based regulation of speech that likely fails both strict scrutiny (App.17a-30a) and intermediate scrutiny (App.30a-33a). The court said that it did not need "to address [NetChoice's] facial challenge under the framework announced in *Moody*" because on remand NetChoice added an "as-applied challenge." App.35a; *see* App.35a-36a.

On strict scrutiny: The court ruled that the Act's coverage definition "render[s] the Act content-based, and therefore subject to strict scrutiny." App.22a; *see* App.17a-23a. The Act covers platforms that allow users to "socially interact," but excludes platforms that "[p]rimarily function[ ]" to provide users with access to "news, sports, commerce, [or] online video games." § 3(1)(a), (2)(c)(i). According to the district court,

this coverage definition draws a "content-based distinction" based on "the message a speaker conveys" ("i.e., news and sports versus social interaction") or the speech's "function or purpose" ("i.e., providing news and sports as opposed to facilitating social interaction"). App.20a-21a. The court ruled that the Act likely fails strict scrutiny because it "is likely not narrowly tailored" to protecting minors online. App.25a; *see* App.23a-30a. The court "accept[ed] as true the Attorney General's position that safeguarding the physical and psychological wellbeing of minors online is a compelling interest." App.24a. But the court ruled that for covered NetChoice platforms the Act is likely "overinclusive or underinclusive, or both, for achieving" that interest. App.30a. The Act is likely overinclusive, the court said, because: the age-verification provision aims to protect minors yet it applies to all users and so "burdens the First Amendment rights of adults" (App.27a); the parental-consent provision requires all minors to obtain consent even though not all parents will "care whether" their children create accounts (App.28a); and the strategy provision could, by spurring overly broad content-blocking, prevent all users from accessing "valuable content" (App.27a-28a). The Act is likely underinclusive, the court said, because the parental-consent provision "requires only one parent or guardian's consent" and does not "require verifying" the parental or guardian relationship (App.29a) and the strategy provision permits minors to view "otherwise-prohibited content ... simply because they initiated it by 'searching for' or 'requesting' it" (App.30a).

On intermediate scrutiny: The court again "accept[ed] as true the Attorney General's position that safeguarding the physical and psychological wellbeing of minors online is an important governmental interest." App.31a. But the court said that "it does not appear that the chosen method for advancing this interest can be said to be unrelated to the suppression of speech" for covered NetChoice members. App.31a. And even if the Act were "unrelated to suppression of speech," the court

ruled, the Act "burdens substantially more speech than is necessary for the State to accomplish its goals" "for the reasons ... already discussed." App.31. On that last point: The court said that the Act "precludes minors under 18 years old from accessing all content on social media websites, absent affirmative parental consent, regardless of whether the content concerns or negatively affects minors' physical and psychological wellbeing." App.31a-32a. And the strategy provision "seem[s] to require prevention of exposure" to protected speech, including literature, art, and cultural works that minors are entitled to access. App.32a. The court added that "uncertainty about how broadly the Act extends" and how it will be enforced "may spur members to engage in over-inclusive [content] moderation." App.32a.

The court did not reach the other claims. (As noted, on remand NetChoice admitted that it knows whether the Act covers each of its members, which rendered untenable its claim that the coverage definition is facially vague. And NetChoice's preemption claim is foreclosed by *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 284-86 (5th Cir. 2024), *aff'd*, 145 S. Ct. 2291 (2025). Stay Reply 9-10 (CA5 Dkt. 22).)

Second, the court ruled that the other injunctive factors favor relief. App.33a-35a. On irreparable harm, the court said that the Act will cause a "loss" of "First Amendment freedoms" and put members at risk of unrecoverable compliance costs—which, according to NetChoice member Dreamwidth, "may threaten the very existence of its business." App.33a-34a (citing Paolucci Dec. p. 20 (App.226a)). And after observing that "[i]njunctions protecting First Amendment freedoms are always in the public interest," the court ruled that, given its First Amendment merits ruling, an injunction "is in the public interest" here. App.34a.

On June 27, this Court decided *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025), which rejected a First Amendment challenge to a Texas law requiring commercial pornographic websites to verify visitors' ages. *FSC* ruled that States may

require age verification to protect children from the harms stemming from material that is obscene for them, *id.* at 2306-09, that such a requirement does not directly regulate protected speech and so faces only intermediate scrutiny, *id.* at 2309-17, and that Texas's law satisfied that standard, *id.* at 2317-19.

On July 2, the State moved the Fifth Circuit to stay the injunction pending appeal. The State made two merits arguments for why the Fifth Circuit would likely reverse the injunction: (1) it defies the mandate in *Fitch*; and (2) it rests on a flawed First Amendment ruling that cannot stand under *Free Speech Coalition*. Stay Mot. 13-20 (App.276a-83a). In opposing a stay, NetChoice made no argument disputing that the district court reinstated the injunction that *Fitch* vacated.

On July 17, after receiving full stay briefing, a Fifth Circuit panel granted the State's stay motion. CA5 Dkt. 25-1. NetChoice's application for vacatur followed.

REASONS FOR DENYING THE APPLICATION

Vacatur of an appellate stay is extraordinary relief. To get that relief, a party must meet a much higher standard than the one NetChoice cites. *See* App'n 13 (quoting the standard "to *issue* a stay," *Ohio v. EPA*, 603 U.S. 279, 291 (2024) (emphasis added)). NetChoice must show that the Fifth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay," that this Court "very likely would ... review[ ]" a Fifth Circuit decision reversing the injunction, and that NetChoice "may be seriously and irreparably injured by the stay." *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); *see Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay, joined by Thomas and Alito, JJ.) ("We may not vacate a stay entered by a court of appeals unless that court clearly and demonstrably erred in its application of accepted standards.") (cleaned up); *Valentine v. Collier*, 141 S. Ct. 57, 59 (2020) (Sotomayor, J., dissenting

from denial of application to vacate stay, joined by Kagan, J.) ("demonstrably wrong"). NetChoice cannot make that showing. The Fifth Circuit was right to grant a stay because it has multiple compelling grounds for reversing the injunction, NetChoice has not shown that this Court would likely review a Fifth Circuit decision reversing, and all other factors weigh against vacatur. The application should be denied.

I. The Fifth Circuit Was Right To Stay The District Court's Injunction Blocking Mississippi's Law Targeting Predators On Social-Media Platforms.

The Fifth Circuit was not "demonstrably wrong in its application of accepted standards" in issuing the stay. *PACCAR*, 424 U.S. at 1304 (Rehnquist, J.). Quite the contrary: There are two compelling, alternative merits grounds for rejecting the injunction, so the Fifth Circuit was right to issue a stay.

A. The Injunction Defies The Fifth Circuit's Mandate In The State's Successful First Appeal In This Case.

1. A litigant that has prevailed in the appellate process "should not be required to go through that entire process again to obtain execution of the judgment" it won on appeal. *DHS v. D.V.D.*, 606 U.S. —, 2025 WL 1832186, at *1 (July 3, 2025). The Fifth Circuit accordingly applies a strict mandate rule. The rule is simple: "a district court must comply with a mandate issued by an appellate court." *M.D. v. Abbott*, 977 F.3d 479, 482 (5th Cir. 2020). The injunction defies that rule. That defiance alone justifies reversing the injunction and thus justifies the stay order.

In *NetChoice, LLC v. Fitch*, 134 F.4th 799 (5th Cir. 2025), the Fifth Circuit vacated an injunction blocking the Act's enforcement in all applications to NetChoice members and directed the district court to hold NetChoice to the burden that facial relief requires. *Id.* at 807-09. The Fifth Circuit gave the district court clear instructions on how to assess NetChoice's request for facial relief and directed the court to apply this Court's decision in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024),

and the Fifth Circuit's decision (on remand from *Moody*) in *NetChoice, LLC v. Paxton*, 121 F.4th 494 (5th Cir. 2024). 134 F.4th at 807-09. To grant facial relief, *Fitch* declared, the district court must "determine" "the 'commercially reasonable efforts'" and "the Act's requirements" for each covered platform. *Id.* at 809. That determination requires a "factual analysis"—and thus a "factual" presentation by NetChoice. *Ibid.* Without that presentation on each platform's "unique regulatory burden," "the district court could not 'decide'" which of the Act's "applications" (if any) "'violate the First Amendment.'" *Ibid.* (quoting *Moody*, 603 U.S. at 725).

On remand, NetChoice refused to make a "factual" showing of what "commercially reasonable" efforts the Act requires of any member on age verification, parental consent, or harm mitigation and whether requiring those efforts would impose a "burden" on any member that would "violate the First Amendment." 134 F.4th at 809. NetChoice instead recycled its prior factual submissions and arguments. *See supra* pp. 8, 11-12. In its injunction brief, NetChoice made only a 1/3-page argument for "as applied" relief. Mem. 24-25. Even there, it asked for the same facial relief that *Fitch* vacated—not relief against particular applications to particular members based on a showing that those applications are invalid. *See ibid.*

Yet the district court reinstated the injunction that *Fitch* vacated: it blocked the Act in all applications to covered NetChoice members. App.37a-38a. The court (like NetChoice) ignored most of *Fitch* (*see* App.10a, 13a, 35a), expressly declined to apply *Moody* (App.35a-36a), and cited *Paxton* once without applying it (App.10a). Although the court said that it was ruling on NetChoice's "as-applied" claims rather than its facial claims, App.35a, the injunction is every bit the facial injunction that *Fitch* vacated: it blocks the Act *in all applications* to covered NetChoice members.

Violations of the mandate rule come no clearer than that. A district court may not reinstate an order vacated by an appellate court without heeding the appellate

court's "specific instruction[s]." *M.D.*, 977 F.3d at 482. In issuing the first injunction, the district court did not perform the "inquiry" that facial relief requires. *Moody*, 603 U.S. at 744. Doing so a second time—after *Moody*, *Paxton*, and *Fitch* made the inquiry triply clear—demanded swift relief. As the State told the Fifth Circuit, Mississippi should not have to endure another year of appellate proceedings to get out from under an injunction that the Fifth Circuit already rejected. Stay Mot. 14 (App.277a).

A Fifth Circuit stay was warranted on this ground alone. Indeed, in a legal system that depends on lower courts and litigants obeying the orders of appellate courts, it is hard to imagine the Fifth Circuit doing otherwise. Allowing NetChoice—a sophisticated, high-profile litigant that regularly appears in the Fifth Circuit—to get away with defying an appellate mandate would be profoundly damaging.

Nowhere in its 40-page application does NetChoice even mention the mandate-rule basis for rejecting the injunction—even though it was the State's lead argument for a stay in the Fifth Circuit. Stay Mot. 13-14 (App.276a-77a). Nor does NetChoice dispute that the rule alone justifies reversing the injunction and thus alone justifies the stay. The application should be denied on this ground alone: an applicant cannot show that a stay is "demonstrably wrong" when the applicant ignores a fully sufficient basis for that stay. *PACCAR*, 424 U.S. at 1304 (Rehnquist, J.).

2. In the Fifth Circuit, NetChoice made no argument disputing that the district court reinstated the injunction that *Fitch* vacated. But it claimed that the district court ruled properly because NetChoice "add[ed] as-applied claims" and "provide[d] more information about whether the Act applies to" other platforms. Stay Opp. 17, 18 (CA5 Dkt. 15-1) (cleaned up). Neither point withstands scrutiny.

First, although NetChoice added "as-applied claims," the district court granted the same *facial* relief that *Fitch* vacated—an injunction blocking the Act in *all applications* to *all* covered members—without determining what those applications

are. That is the "facial" relief the Fifth Circuit rejected. 134 F.4th at 803, 807-09. Indeed, that is the facial relief granted in *Paxton* that this Court addressed in *Moody*. *See NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1117 (W.D. Tex. 2021) (blocking law's enforcement "against Plaintiffs and their members").

Second, in seeking that facial relief NetChoice did not provide the information that *Fitch* required—and in issuing that relief the district court did not do what *Fitch* ordered. *Fitch* ordered the district court to "determine" "the 'commercially reasonable efforts'" and "the Act's requirements" for each covered platform. 134 F.4th at 809. The district court could not rule that the Act violates the First Amendment without knowing what the Act requires each platform to do and how (if at all) those actions will affect speech rights on that platform. *See ibid.* Consider: How could a court grant relief benefiting Instagram on the age-verification provision when Instagram *already* verifies age and NetChoice has not shown how that provision would burden speech? *See* Instagram, Confirming your age on Instagram, https://bit.ly/4keM2H0. How could a court grant relief benefiting Nextdoor on the parental-consent provision when NetChoice has not shown a burden on speech from requiring parents (of Nextdoor's relatively few minor users, Pai Dec. ¶¶ 16-19 (App.197a-98a)) to make a phone call or respond to an email, § 4(2)? How could a court grant relief benefiting *any* NetChoice member on the strategy provision when NetChoice has not shown whether it would be "commercially reasonable," § 6(1)—and a violation of speech rights—for *any* member to adopt (among countless possible harm-mitigation strategies) a strategy of alerting (or connecting) minors to support groups for victims of sex trafficking and other listed harms, a strategy of assisting organizations that treat children harmed online, or a strategy of helping to identify and locate online predators so that victims can hold them accountable? NetChoice provided none of this information. Instead, on remand it added more information on why 8 of its members

are covered and the rest are not. *Supra* p. 12. But (aside from new member Reddit) the district court already knew which NetChoice platforms the Act covers—NetChoice named them the day it filed this case. Complaint ¶ 13 (D. Ct. Dkt. 1). What that court did not know—and still does not know, because NetChoice refused to make the "factual" showing that *Fitch* required, 134 F.4th at 809—is what would constitute "commercially reasonable" actions to verify age, obtain parental consent, or adopt a harm-mitigation strategy for any NetChoice member. In opposing a stay below, NetChoice continued to resist the need to make that showing (as it does again here). Stay Opp. 18-19; App'n 20, 25-26. Yet that is the showing the Fifth Circuit required in *Fitch*—a decision from which NetChoice did not seek further review. NetChoice's view—embraced by the district court—defies the Fifth Circuit's mandate.

NetChoice also claimed below that requiring this factual showing would lead to "absurdities." Stay Opp. 19-20. All it pointed to was a hypothetical law "requiring websites to use 'commercially reasonable' measures to avoid publishing speech critical of politicians." *Id.* at 19; *cf.* App'n 25. But that law *directly regulates protected speech* based on its *political content*—an easy First Amendment case. The Act here is nothing like that: it targets predatory conduct, not protected speech. *See infra* Part I-B. NetChoice also said that *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025), shows that "courts can rule on the constitutionality of state laws requiring 'commercially reasonable method[s]' without an exhaustive inventory of what is 'commercially reasonable' for every website." Stay Opp. 19; *cf.* App'n 25-26. But *FSC rejected* a facial claim. 145 S. Ct. at 2301, 2308 n.7. Because a plaintiff can win such a claim only if it carries a heavy "burden," *Moody*, 603 U.S. at 744, *rejecting* a facial claim without "an exhaustive inventory" can be easy. *Crediting* such a claim requires much more and is much harder. *Supra* pp. 9-11.

The Fifth Circuit was right to issue a mandate-reinforcing stay. The application should be denied on this ground alone.

B. The Injunction Rests On A Profoundly Flawed First Amendment Ruling.

The Fifth Circuit has a further basis for reversing the injunction: The Act comports with the First Amendment. As *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025), confirms, the Act triggers at most intermediate scrutiny and it satisfies that standard. NetChoice's contrary arguments fail.

1. The Act Triggers At Most Intermediate Scrutiny.

a. When a law exercises a State's "traditional power" to protect minors and has "only an incidental effect on protected speech," it is subject to "intermediate scrutiny" at most. *FSC*, 145 S. Ct. at 2306; *see id.* at 2306-09. Both points are true for the Act.

First, States have "traditional power" to protect minors from predators and the harms that they inflict—including by adopting age-verification, parental-content, and harm-mitigation requirements. 145 S. Ct. at 2309. States may (for example) bar people from sexually abusing, physically assaulting, selling drugs to, sextorting, or harassing minors. States also may require businesses to pay for (or otherwise mitigate) the harms that they impose on minors (and others). This power to protect minors "necessarily includes the power" "to employ the ordinary and appropriate means of" achieving that end. *Id.* at 2306, 2307. Requiring age verification and parental consent are common ways for States to protect minors. *See*, *e.g.*, *id.* at 2307 (examples for age); Ala. Code § 22-17A-2(a) (requiring parental consent before tattooing or body-piercing a minor); Vt. Stat. Ann. tit. 26, § 4102(c) (same for tattoos); Haw. Code R. § 11-17-7(b) (same). Requiring businesses to mitigate the harms they cause is also a common way to protect minors (and others) from harm or make them whole. States do this through tort law, property regulations, and licensing regimes.

So the Act's age-verification, parental-consent, and harm-mitigation requirements (§§ 4(1), 4(2), 6) are within the State's power.

Second, the Act "does not directly regulate ... protected speech." 145 S. Ct. at 2309. "On its face," the Act regulates predatory conduct online. *Ibid.* To address that conduct, the Act requires covered platforms to make "commercially reasonable" efforts to verify age, obtain parental consent, and adopt a harm-mitigation strategy. §§ 4(1), 4(2), 6. And the Act "can easily be justified without reference to the protected content" of any "regulated speech." 145 S. Ct. at 2309 (cleaned up). The Act's "apparent purpose" (*ibid.*) is to protect minors from predatory harms that occur on the interactive social-media platforms that let predators interact with children and feed those predators information about those children that can be used to exploit them. None of the Act's provisions intrude on anyone's "expressive choices." *Moody*, 603 U.S. at 740. Even if the age-verification and parental-consent provisions "burden" a "right to access speech" on covered platforms, any burden is "only incidental to" the Act's regulation of predatory conduct. 145 S. Ct. at 2309. And although the strategy provision requires platforms to address harms, there is "no First Amendment right" for a business to "avoid" addressing the harms it imposes on minors. *Ibid.*

FSC confirms that intermediate scrutiny applies here. And *FSC* is of a piece with this Court's other decisions applying intermediate scrutiny. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court ruled that intermediate scrutiny applied to an ordinance that barred adult movie theaters from locating in residential and other sensitive areas. *Id.* at 43, 47-50. Although that ordinance regulated theaters based on the films (the speech) they offered, the ordinance "aimed not at the content of the films" but at the negative "secondary effects" of adult theaters "on the surrounding community." *Id.* at 47 (emphases omitted). As *Renton* explained, in reasoning that *FSC* echoes, States have the power to combat those effects—to

"prevent crime, protect the city's retail trade, maintain property values," preserve "the quality of urban life," and pursue other valid ends—and laws pursuing those ends do not trigger strict scrutiny where, as here, they do not "aim[ ] at the *content*" of speech. *Id.* at 47-48. And in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court applied intermediate scrutiny to a city's regulation of sound volume in a city park. *Id.* at 784, 791-93. The regulation "serve[d] purposes unrelated to the content of expression"—it "control[led] noise levels" and ensured sound quality at local concerts—and so triggered only intermediate scrutiny "even if it ha[d] an incidental effect on some speakers or messages." *Id.* at 791, 792. In protecting children from predators, the Act here also serves purposes "unrelated to the content of expression" and has at most "an incidental effect" on speech. *Id.* at 791.

Because "[a]ny burden" the Act imposes on protected speech is "only incidental to" the Act's "regulation of activity that is not protected by the First Amendment"—sexual abuse, trafficking, physical violence, sextortion, and more—intermediate scrutiny (at most) is "the appropriate standard." *FSC*, 145 S. Ct. at 2309.

b. Although NetChoice calls the district court's opinion "detailed," "thorough," and "careful," App'n 1, 12, 14, it devotes less than a page to defending that court's reasons for applying strict scrutiny, App'n 36. Those reasons do not hold up. That court ruled that the Act's coverage definition "render[s] the Act content-based" and thus "subject to strict scrutiny." App.22a; *see* App.17a-23a. The Act covers platforms that (among other things) allow users to "socially interact," but excludes platforms that "[p]rimarily function[ ]" to provide users with access to "news, sports, commerce, [or] online video games." § 3(1)(a), (2)(c)(i). So (according to the district court) the Act draws a "content-based distinction" based on "the message a speaker conveys" ("i.e., news and sports versus social interaction") or the speech's "function or purpose" ("i.e., providing news and sports as opposed to facilitating social interaction"). App.20a-21a.

The district court erred. First, the Act does not "direct[ly] target[ ]" "fully protected speech"—or "outright ban[ ]" access to speech—so strict scrutiny does not apply. *FSC*, 145 S. Ct. at 2310, 2313. Indeed, if a content-based coverage definition automatically triggered strict scrutiny, *FSC* would have applied strict scrutiny. *But see id.* at 2315 (H.B. 1181's "*content-based restriction* does not require strict scrutiny") (emphasis added). Second, and independently, the coverage definition is not content-based. Coverage turns on where *harmful conduct* toward minors online is most likely: the interactive social-media platforms that allow predators to interact with and harm children—something the Legislature thought less likely on (for example) LinkedIn and certain news sites. § 3(2)(c)-(d). Coverage does not turn on the ideas discussed, the messages conveyed, or who speaks. In *Moody*'s companion case, NetChoice argued that a similar coverage definition rendered a Texas law's operative provisions content-based. Brief for Petitioners 7, 16, 37, 46, *NetChoice, LLC v. Paxton*, No. 22-555 (S. Ct.); *see Moody*, 603 U.S. at 721 n.2. This Court did not credit that argument—even though, if it had, the case would have been much easier: the Court could have just ruled that Texas's law triggered strict scrutiny in all applications. *But see Moody*, 603 U.S. at 740 (not deciding "whether to apply strict or intermediate scrutiny").

NetChoice suggests that the coverage definition is content-based because it covers websites that (among other things) allow users to "socially interact" (§ 3(1)) and thus "excludes websites that allow users to interact 'professionally.'" App'n 36. That is wrong. The phrase *socially interact* means communication between two or more "users on [a] digital service." § 3(1)(a). The word *socially* does not distinguish non-professional from professional interactions. § 3(1)(a). Rather, the word distinguishes interactions *between users* (covered) from interactions *with content* (not covered). "[A]ll literature" (for example) "is interactive." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 798 (2011). The phrase *socially interact* ensures that

the Act does not cover mere interactions with content. This is reinforced by the Act's structure, which shows that the Act's focus is on platforms with a dominant "interactive" feature. § 3(1), (2)(c)(ii). NetChoice suggests that excluding websites "that do not allow interaction" presents a First Amendment problem. App'n 36. It cites no support for that view. And the Act focuses on interactive platforms because of the predatory harms that they present to minors—harms the State may regulate. *See FSC*, 145 S. Ct. at 2318 (crediting as "reasonable" Texas's decision to "exclud[e]" from coverage websites that do not present the same dangers as covered websites).

c. NetChoice makes several arguments—not adopted by the district court—for why strict scrutiny applies. App'n 18-21, 24-27, 28-33, 36. Each fails.

First, NetChoice claims that the age-verification provision triggers strict scrutiny because it "directly targets" "fully protected speech." App'n 26 (cleaned up); *see* App'n 24-27. But the Act directly targets what NetChoice concedes is "unlawful conduct" (App'n 34)—like sexual abuse, harassment, and trafficking. Sexually abusing, harassing, and trafficking children are not "fully protected speech." App'n 26-27. The Act does not directly target "creative writing" on Dreamwidth, "petitioning ... elected representatives" on X, or "shar[ing] vacation photos" on Facebook, App'n 6: the Act leaves people free to do all those things however they wish. And again, even if age verification imposes a "burden" on the "right to access speech," App'n 24-25, the burden is at most "incidental" and the provision does not "direct[ly] target[ ]" "fully protected speech," so strict scrutiny does not apply. *FSC*, 145 S. Ct. at 2309, 2310.

NetChoice suggests that *FSC*'s analysis is limited to "pornography"—material that is "protected for adults but unprotected for minors." App'n 26; *see* App'n 21 (same for parental-consent provision). But, as *Renton* and *Ward* show, *FSC* applied bedrock, "basic principles of freedom of speech" (145 S. Ct. 2308) to a law that matches the Act in all ways that matter: both laws address access to platforms that host both protected

speech and unprotected speech or conduct—and both laws target what is unprotected. Indeed, the case for lower scrutiny is stronger here than in *FSC*: the law in *FSC* "target[ed] speech" (material "obscene for minors") that is protected for adults, *id.* at 2314; the Act here targets conduct—like sexual abuse and child trafficking—that is protected for no one. And any district-court decisions that apply strict scrutiny in like circumstances, *see* App'n 25, conflict with *FSC* and precedents it follows.

NetChoice also says that the age-verification requirement "is akin to stationing government-mandated clerks at every bookstore and theater to check identification before citizens can access books, movies, or even join conversations." App'n 24. Nonsense. A better analogy would be the age-verification requirements that States routinely impose on tattoo parlors and bars. *See FSC*, 145 S. Ct. at 2307 (listing obtaining alcohol and a tattoo among things for which "many States" "require[ ] proof of age"); *supra* p. 21. Tattoos send expressive messages; bars host conversations protected by the First Amendment. Yet requiring proof of age before getting a tattoo or entering a bar does not trigger strict scrutiny. *See* 145 S. Ct. at 2307. The same is true for requiring commercially reasonable age verification before participating in interactive forums that present life-ending dangers from child predators.

Last, NetChoice claims that "just requiring users to self-report their birthdates deters users from accessing the websites." App'n 25; *cf.* App'n 27. But its cited declaration supports only the view that some prefer not to provide that information—not that such a requirement deters access. *See* Pai Dec. ¶¶ 20-21, 23a (App.198a-99a). In fact, the declaration focuses on one platform's clumsy effort to *obtain and verify government IDs*. *Id.* ¶¶ 23b-26 (App.199a-201a). The Act does not require providing government IDs or even a birthdate—and age can be verified without them. *See infra* p. 33 (describing age verification using a video selfie, hand gestures, or voice).

Second, NetChoice claims that the parental-consent provision triggers strict scrutiny under *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). App'n 18-21. *Brown* does not help NetChoice. *Brown* struck down a law that barred selling or renting video games (speech) to minors because of the games' violent content. 564 U.S. at 789, 799-805. That law thus directly targeted and regulated lawful, protected speech. *Id.* at 790-99. *That* is why the Court applied strict scrutiny—because the law "impose[d] a restriction on the content of protected speech." *Id.* at 799. The parental-consent provision here does not target or regulate protected speech. Far from targeting "ideas or images," *id.* at 795, it targets illegal and unprotected conduct that States can regulate. *Brown* does not bar that. These points dispose of district-court cases embracing NetChoice's flawed use of *Brown*. *See* App'n 19.

NetChoice says that the parental-consent provision "is akin to the government requiring bookstores, theaters, and video game arcades ... to verify parental consent before allowing minors to engage in protected speech activities." App'n 19. That is not so. Again, a better analogy is to the common parental-consent requirements for tattoos or body piercings—both expressive activities. *Supra* p. 21. Even that analogy does not do the Act justice, because the case for parental consent is stronger for the predatory harms that proliferate online. If an online predator traffics a minor, the damage will be far greater than that from an improvident tattoo.

Third, NetChoice claims that the strategy provision triggers strict scrutiny because it is "a prior restraint" (App'n 28-30) or "restrict[s]" platforms' expressive choices about the speech they host (App'n 30-33). That is wrong. That provision requires platforms to "make commercially reasonable efforts to develop and implement a strategy to prevent or mitigate" a known minor's "exposure to harmful material and other content that promotes or facilitates" certain "harms to minors." § 6(1). Nothing in that text requires (or "coerc[es]") platforms to "monitor," "censor,"

"block," not "publish[ ]," or "restrict" speech. App'n 28, 29, 30, 31, 32, 33. That text does not require platforms to alter their "content moderation" policies. App'n 32-33. The provision allows (for example) a strategy of alerting or connecting minors to resources (like support groups) for persons victimized by sex trafficking, sexual abuse, harassment, and other listed harms. Or a platform could have a strategy of helping organizations that treat children harmed online. Or a platform could have a strategy of helping to identify and locate online predators so that victims can hold them accountable. Or a platform could have a strategy of repairing its website's flaws when those flaws are shown to enable predators. These strategies could "prevent" or "mitigate" minors' exposure to listed harms without restricting or regulating any speech. *Contra* App'n 29-30. NetChoice questions why "the Act would seemingly permit the purported harms to happen and then require only mitigation." App'n 29. The Act does not "permit" the harms to happen. It takes measures, including on age verification and parental consent, to stop them—measures that NetChoice has for a year tried to block in every application. But the Act recognizes that some harms will occur and gives platforms the option to mitigate harms after they have occurred.

NetChoice argues that the strategy provision mandates blocking content because it "requires covered websites to 'prevent ... minor[s'] exposure' to" content and "forc[es] websites to censor ('prevent ... exposure to')" content. App'n 28-29 (NetChoice's ellipsis). Those arguments read the words "or mitigate" out of the Act—literally. The provision allows a platform to adopt a harm-*mitigation* strategy only. That is what *or mitigate* in "prevent or mitigate" means. § 6(1). To suggest that the strategy provision is ineffective or that the State's view is at odds with the provision's text, NetChoice also attributes to the State the view that platforms need "only 'adopt'" a strategy but (despite what the provision says) not "implement" it. App'n 28, 29. But the State uses "adopt" as a shorthand for "develop and implement." The State has

never said that the Act permits a platform not to implement the strategy it develops. NetChoice says that Texas "acknowledged" that its "substantially similar law requires 'filtering' content." App'n 29. But Texas's law expressly requires "blocking," "monitoring," and "filtering" content. *CCIA v. Paxton*, 747 F. Supp. 3d 1011, 1023, 1036-38 (W.D. Tex. 2024) (quoting statute). NetChoice also faults the State for not saying that any covered platform's "existing strategies"—described in NetChoice's declarations—comply with the Act. App'n 29. But NetChoice chose to bring a pre-enforcement facial challenge and must carry the "burden" that comes with that. *Moody*, 603 U.S. at 744. And the State cannot bless strategies based on declarations that are plagued by errors. *See infra* Part III (addressing NetChoice's declarations).

2. The Act Satisfies Intermediate Scrutiny.

a. The Act "readily satisfies" intermediate scrutiny. *FSC*, 145 S. Ct. at 2317.

The Act "undoubtedly advances an important governmental interest." 145 S. Ct. at 2317. As the district court "accept[ed]" (App.24a, 31a), States have "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Act "furthers that interest." 145 S. Ct. at 2317. The age-verification provision puts a guardrail in place before minors are exposed to predators; the parental-consent provision provides an additional guardrail by promoting parental oversight and involvement before children may be harmed by predators; and the strategy provision promotes practices that may avert or mitigate tragic harms inflicted by predators. §§ 4(1), 4(2), 6. These provisions "prevent[ ] minors from easily" being preyed upon and damaged online. 145 S. Ct. at 2317.

The Act is also "sufficiently tailored" to the State's interest. 145 S. Ct. at 2317. Requiring age verification, parental consent, and harm mitigation are common ways to protect minors or address harms that may be inflicted on them. The State's aims

"would be achieved less effectively" without these regulations (*ibid.*), which involve parents in minors' consequential activities and ameliorate (or avert) life-altering damage to minors. And these regulations "do[ ] not burden substantially more speech than is necessary" to further" these aims. *Ibid.* "[I]t cannot be said that a substantial portion of" any "burden" the Act imposes "fails to advance" the State's goals. *Id.* at 2318 (cleaned up). The Act simply "adapts" "traditional" methods of protecting minors "to the digital age." *Id.* at 2317. *FSC* just ruled that requiring "established [age-]verification methods already in use" "does not impose excessive burdens." *Id.* at 2318 & n.14. The parental-consent provision also does not impose excessive burdens. The Act *deems* parental consent to be given by any of several easy means—like a phone call or an email response—without more. § 4(2). There is no need to verify the parental relationship. App.29a ("none of the options" "require[s] verifying" that relationship). And the strategy provision is not excessively burdensome either. It requires only "commercially reasonable"—not cost-prohibitive—efforts to adopt a harm-mitigation "strategy." § 6(1). NetChoice says that its members have policies addressing online harms. App'n 7; Cleland Dec. ¶¶ 12-20 (App.238a-48a). All these "modest burden[s]" are sufficiently tied to the State's interests. 145 S. Ct. at 2317.

This Court's other decisions upholding laws under intermediate scrutiny confirm these points. Again take *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which upheld an ordinance that barred adult movie theaters from locating in sensitive areas, even though the ordinance limited protected speech by limiting where theaters could offer their films. *Id.* at 47, 50. The ordinance was "designed to serve a substantial governmental interest" unrelated to speech: to "prevent crime, protect the city's retail trade, maintain property values," and preserve "the quality of urban life." *Id.* at 48, 50. And the ordinance "allow[ed] for reasonable alternative avenues of communication" by leaving adult theaters with "a reasonable opportunity"

to operate. *Id.* at 50, 54. The Act here also "serve[s] a substantial governmental interest" unrelated to speech, *id.* at 50: protecting minors from predators online. And it leaves all involved with "reasonable alternative avenues of communication." *Ibid.* Indeed, far from cutting off avenues for covered platforms or others to communicate or access speech, the Act requires only modest steps—on age verification, parental consent, and harm mitigation—before accessing those same avenues and communicating freely on them. The Act's modest burdens do not regulate "in such a manner that a substantial portion of the burden on speech" fails "to advance" the State's legitimate "goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). If (as *Ward* held) the First Amendment permits a State to protect people from noise despite an incidental effect on speech, *id.* at 791-803, it permits a State to protect children from predators despite an incidental effect on speech.

The Act does not abridge "the freedom of speech." U.S. Const. amend. I.

b. The district court ruled that the Act likely fails intermediate scrutiny. App.30a-33a. The court erred.

The district court said that the Act uses a "method" for protecting minors that "does not appear ... to be unrelated to the suppression of speech." App.31a. That is wrong. Protecting children from predators is "unrelated to the suppression of free speech." 145 S. Ct. at 2317. Requiring age verification, parental consent, and a harm-mitigation strategy to address predatory harms to minors on online platforms also "does not directly regulate" or aim at "protected speech": it aims at protecting minors from harms that the State is entitled to regulate and prohibit. *Id.* at 2309.

The district court also said that the Act "burdens substantially more speech than is necessary for the State to accomplish its goals." App.31a; *see* App.31a-32a. But age verification and parental consent—both "traditional" and "common[ ]" in our society—are "modest burden[s]" that are not "excessive" to protecting minors from

the predatory conduct that proliferates online. 145 S. Ct. at 2317, 2318 n.14; *compare Packingham v. North Carolina*, 582 U.S. 98, 105, 108, 109 (2017) (holding that a "complete bar" that "foreclose[d] access to social media altogether" could not satisfy any form of heightened scrutiny). Indeed, some covered platforms already verify age. *E.g.*, Instagram, Confirming your age on Instagram, https://bit.ly/4keM2H0. Some platforms require far more to create an account than the phone call or email response that satisfies the Act's parental-consent provision. § 4(2); *see* Pai Dec. ¶¶ 4-5 (App.194a) (Nextdoor requires "real names and addresses" and uses mailings to verify required information). And harm-mitigation duties—like those the strategy provision imposes—are commonplace and not excessive. Tort law, property regulations, and licensing regimes routinely impose such duties. The district court claimed that the strategy provision requires platforms to "prevent[ ] ... exposure" to protected speech and that "uncertainty" about the Act's reach could cause platforms to take an overinclusive approach to blocking content. App.32a. Both claims rest on the erroneous view that the Act requires platforms to block content.

The district court suggested that "the reasons" it gave for faulting the Act under strict scrutiny also show that the Act fails intermediate scrutiny. App.31a. But those reasons concerned whether the Act is "overinclusive," "underinclusive," and the "le[ast] restrictive" means for achieving the State's interests. App.24a, 26a, 27a, 28a, 29a, 30a; *see* App.23a-30a. Those requirements do not apply under intermediate scrutiny. 145 S. Ct. at 2317-18. That defeats the court's narrow-tailoring analysis.

That same point also disposes of NetChoice's strict-scrutiny-saturated defense of the district court's narrow-tailoring analysis. NetChoice devotes most of its tailoring discussion to arguing that the challenged provisions fail strict scrutiny. App'n 21-24, 26-27, 33-35, 36-37. But because strict scrutiny does not apply, the Act does not need to satisfy a "least restrictive means" standard, *FSC*, 145 S. Ct. at 2317

(cleaned up); *contra* App'n 22-23, 27, 33; is not subject to a "freestanding underinclusiveness limitation," 145 S. Ct. at 2318; *contra* App'n 34-35, 37; and is not "invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," 145 S. Ct. at 2318; *contra* App'n 27, 33-34, 37. So these arguments fail. NetChoice makes only spotty suggestions that the Act fails intermediate scrutiny (App'n 21, 23-24, 27, 37), but it says nothing to overcome the *FSC*-reinforced points set out above.

Errors pervade NetChoice's tailoring analysis anyway. NetChoice says that the age-verification provision will "require adults and minors to provide personally identifying information" and forgo "anonym[ity]" to access protected speech. App'n 27. NetChoice knows that is not so. NetChoice represents covered platforms that already verify age without requiring documentation or forgoing anonymity. *See* Instagram, How does video selfie age verification work on Instagram?, https://bit.ly/4jclTYB (video-selfie age-verification option that uses technology that "can't identify specific people," takes "minutes," and "delete[s] the image"); Facebook, How video selfie age verification works on Facebook Dating, https://bit.ly/43j4mIa (same). Other modern methods (unlike the 1990s methods to which NetChoice alludes) rely on a user's hand gestures or voice. Age Verification Providers Association Br. 6-7, *Free Speech Coalition, Inc. v. Paxton*, S. Ct. 23-1122.

NetChoice says that the parental-consent provision "does not account for the difficulty of verifying the parent-child relationship." App'n 22. But the Act does not require verifying that relationship. App.29a. NetChoice suggests that this means that the Act "cannot promote parental oversight." App'n 22 (cleaned up). That is not so: it just means that the Act may not successfully involve parents in every case. That is permissible under intermediate scrutiny—and it was a reasonable compromise between involving parents to avert harms "while at the same time allowing" users to

access online platforms after only "modest burden[s]." *FSC*, 145 S. Ct. at 2317. (NetChoice also disputes that the State has "a sufficient governmental interest," App'n 21—a view that even the district court did not adopt—but that argument rests on the flawed view that the Act targets speech rather than predators, App'n 21-22.)

NetChoice faults the strategy provision as "overinclusive" because Mississippi's criminal law "already addresses the unlawful conduct" that the Act targets and "underinclusive" because it does not regulate other websites "where minors can encounter content prohibited by the Act." App'n 33-34. Again, intermediate scrutiny does not require that sort of tailoring. *See* 145 S. Ct. at 2318. And the Act does not "prohibit[ ]" "content." Indeed, the fact that minors can encounter the same content on other websites confirms that the Act does not target content and instead targets predators on social-media platforms.

C. NetChoice's Remaining Attacks On The Stay Order Fail.

NetChoice's remaining arguments, App'n 13-15, 35, fail too.

1. NetChoice's "Orderly Appellate Process" Argument Fails.

NetChoice's lead argument for vacatur is that the stay undercuts an "orderly appellate process." App'n 13; *see* App'n 13-15. That is not an argument that the Fifth Circuit was "demonstrably wrong in its application of accepted standards." *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). And the argument is deeply flawed.

To start, this is not a tenable argument from a party that, in defying the Fifth Circuit's mandate, has shown that it supports an "orderly appellate process" only when the process goes its way. And that process is proceeding in an orderly way, with the record already filed with the Fifth Circuit and the State's opening brief due September 2. What NetChoice really means by an "orderly appellate process" is a process where NetChoice always has an injunction. *See* App'n 14 (describing

NetChoice's preferred arrangement, including prompt injunctions, no swift appellate oversight, and States that do not seek appellate stays). NetChoice suggests that it is entitled to have courts halt laws like Mississippi's "*before*" they "go into effect." App'n 14. But our legal system does not presume that state laws will be enjoined until courts give the go-ahead. A preliminary injunction is an "extraordinary remedy" that itself departs from the ordinary, orderly litigation process. *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party cannot get that relief unless it carries a demanding burden. NetChoice did not carry that burden here, which is why the Fifth Circuit had to intervene.

NetChoice also faults the Fifth Circuit because it did not explain why it granted a stay. App'n 13. But "there is no fixed requirement that a court ... explain its reason" for issuing a stay. *PACCAR*, 424 U.S. at 1305. When this Court grants a stay it often does not explain why. NetChoice says that the district court has issued "two extensively reasoned" opinions. App'n 13; *see* App'n 14. But neither opinion aligns with the law: that is why the Fifth Circuit vacated the first and had a compelling basis to stay the second. *Supra* Parts I-A & I-B. Nor was there anything "reflexive[ ]" about the stay order. App'n 13. Throughout this case the Fifth Circuit has been deliberate and careful. It declined to stay the first injunction. App.56a; *see* App'n 11 (calling that decision "[n]otabl[e]"). This time the basis for a stay was stronger, and the Fifth Circuit awarded the relief that was appropriate.

Last, NetChoice suggests that vacating the stay order would align with this Court's 5-4 order vacating a Fifth Circuit stay in *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022), which involved a Texas law restricting websites' content-moderation choices. App'n 4, 13. But there was powerful reason to vacate the stay in *Paxton*, as reflected in the fact that this Court later granted certiorari in that case and ruled that the Fifth Circuit's rejection of the preliminary injunction was not just "wrong" but reflected an "especially stark," "serious misunderstanding of First Amendment

precedent and principle." *Moody*, 603 U.S. at 726, 727. That is not so here—especially when the mandate rule alone justifies rejecting the injunction. Plus, *Paxton* predated both *Moody* (which dooms NetChoice's facial challenge here) and *Free Speech Coalition* (which dooms NetChoice's First Amendment claims). Now with the benefit of both *Moody* and *Paxton*, the Fifth Circuit rightly granted a stay here.

2. NetChoice's Never-Ruled-Upon Vagueness Claim Fails.

Last, NetChoice argues that the strategy provision is unduly vague because it turns on the words "promotes" and "facilitates." App'n 35. The district court did not reach this claim. And the claim cannot support the injunction, which blocks much more than the strategy provision. The claim fails anyway. The strategy provision ties those words to specific harms that flow from targeted, interactive acts perpetrated online, § 6, so statutory "context" provides the clarity that a word like "promotes" might lack "[w]hen taken in isolation." *United States v. Williams*, 553 U.S. 285, 294 (2008) (relying on "context" to construe the word "promotes"). The provision is thus unlike the hopelessly capacious statute condemned in *Baggett v. Bullitt*, 377 U.S. 360 (1964), which required taking an oath to "promote respect" for the flag and government institutions. *Id.* at 361-62, 371. And any edge cases requiring "context"-dependent analyses (App'n 35) might support as-applied challenges, but not pre-enforcement facial invalidation. *See Williams*, 553 U.S. at 302-03; *id.* at 305-06 ("the mere fact that close cases can be envisioned," which is true of "virtually any statute," does not "render[ ] a statute vague").

II. NetChoice Has Failed To Show That This Court Would Likely Review A Reversal Of The District Court's Injunction.

NetChoice has not shown that this Court "very likely would ... review[ ]" a Fifth Circuit decision reversing the injunction. *PACCAR*, 424 U.S. at 1304 (Rehnquist, J.).

NetChoice argues that a Fifth Circuit decision upholding the Act would be certworthy because the Act violates the First Amendment. App'n 15-17. Put aside for now that NetChoice's First Amendment arguments fail. *Supra* Part I-B. Whatever the certworthiness of any First Amendment issue in this case, the Fifth Circuit has an alternative, independent ground for rejecting the injunction: it defies that court's mandate. *Supra* Part I-A. NetChoice does not claim that a Fifth Circuit decision reversing on that ground would be certworthy. It does not dispute that appellate courts are entitled to enforce their mandates, claim that a Fifth Circuit decision rejecting the injunction under the mandate rule would conflict with any decision of this Court, or contend that such a decision would implicate a circuit conflict. It does not mention the mandate-rule problem once. That dooms the application. NetChoice cannot soundly claim that the Fifth Circuit "has decided" (or will decide) an important First Amendment question when there is an alternative basis to reject the injunction. App'n 16. Imagine a cert petition seeking review of a judgment that rests on an alternative, independent, case-specific, splitless, uncertworthy holding that the petition nowhere mentions or challenges: this Court would deny review. That is this case. This renders irrelevant NetChoice's claim that any First Amendment issue is certworthy whether it is (App'n 17) or is not (App'n 15-16) the subject of a lower-court conflict. Given the independent basis to deny certiorari, none of that helps NetChoice.

This vehicle problem is of NetChoice's making. It could have eliminated the problem by following the Fifth Circuit's mandate. It chose not to do so. Holding it to the consequences of its choice—by denying vacatur—is proper.

III. The Equities Support The Fifth Circuit's Stay Order.

The equities strongly weigh against the injunction and thus favor denying the application. Enjoining enforcement of a "duly enacted [state law] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). The

harm is especially severe because the Act serves the powerful public interest in protecting children. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). The district court "accept[ed]" that "safeguarding the physical and psychological wellbeing of minors online is a compelling interest." App.24a. And "[s]ocial-media platforms" create "unprecedented dangers," *Moody*, 603 U.S. at 716—particularly for minors. The injunction thwarts the State's efforts to protect minors from those dangers and undermines the public interest.

On the equities, the district court and NetChoice both rely on their flawed merits assessments. App.33a, 34a; App'n 38, 39. On irreparable harm, they also rely on compliance costs. App.33a-34a; App'n 38-39. Dreamwidth claims that the costs of complying with the Act "threaten[ ] [its] ability to continue operating." Paolucci Dec. ¶ 35 (App.226a). But as the Fifth Circuit ruled, the Act requires only "commercially reasonable" efforts—not cost-prohibitive ones—based on a particular platform's resources. *NetChoice, LLC v. Fitch*, 134 F.4th 799, 809 (5th Cir. 2025). NetChoice could have presented evidence on what is commercially reasonable for each covered member, *see ibid.* (calling for that showing), but it chose not to do so. NetChoice's other declarations are shot through with errors and do not support the district court's equitable assessment. As examples, the declarations suggest that the age-verification and parental-consent provisions will require "comprehensive and foolproof systems" and "cumbersome registration processes" (Cleland Dec. ¶¶ 45a, 45d (App.254a)), that the age-verification provision will require using facial recognition and demanding government IDs (Veitch Dec. ¶ 32 (App.184a)), that the parental-consent provision will demand expertise in family law (Paolucci Dec. ¶ 35 (App.226a); *see* App'n 39), and that the strategy provision requires blocking content (Cleland Dec. ¶¶ 46a, 46b (App.255a)). All that is wrong. The Act requires only the reasonable efforts that any responsible platform would already make.

NetChoice suggests that platforms' "existing" actions and the "other means available to parents" "amply serve[ ]" "the State's interest." App'n 39-40. But, as the Legislature recognized, existing mechanisms are not adequately protecting children online from sexual abuse, physical violence, or the other harms inflicted on children like Walker Montgomery. *Supra* p. 6. That is why the Act is necessary.

NetChoice claims that, without vacatur, the Act will "transform the internet" (App'n 15), upend Mississippians' experience in accessing online content (App'n 38, 40), force platforms to censor speech (App'n 28-33), and impose staggering costs that will force some platforms to shut down (App'n 38-39). NetChoice has been saying all this for over a year. But for a year the Act has been in full effect for most covered platforms—all those that are not NetChoice members. A year on—and after a May 2025 return to the district court where it could have presented evidence for these claims—NetChoice has not identified anyone with a complaint about accessing any platform in Mississippi, one instance of a platform censoring speech, or any platform that has shut down or had any difficulty complying with the Act. No Mississippian, among the many purportedly "suffer[ing] harm" from the Act (App'n 38), has sued to challenge the Act; no platform, among the "many" not represented by NetChoice (App'n 23), has either. NetChoice's claims are without basis. And again: NetChoice urged the district court to defy the Fifth Circuit's mandate. Equity should not condone that tactic. This Court should not either.

CONCLUSION

The application should be denied.

Respectfully submitted.

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