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NOTE

HONEY, I SHRUNK THE KIDS (SOCIAL MEDIA ACCESS): STATES' ACTIONS TO REGULATE SOCIAL MEDIA ACCESS FOR MINORS THROUGH PARENTAL CONSENT AND THE FIRST AMENDMENT

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Introduction

Social media—how it is used, how it affects our society, and how it affects us individually—may be the defining element of our time. More

* Juris Doctor Candidate, Oklahoma City University School of Law, May 2025. More than anyone else, I thank my wife, Mary, and my daughter, Charlotte, for filling my life with love, joy, and purpose. I am especially grateful for their patience and the many sacrifices they made while I worked on this Note and pursued my dream of a legal education. Without their love and unwavering support, none of this would have been possible. I would also like to thank Professor Marc Blitz for his invaluable insight and guidance on this Note, and Professor Homer Pointer for the thoughtful discussions and memorable debates that enriched my time in law school. Lastly, I thank all of my family, especially my mother, Dianna L. Morey, for shaping me into the person I am today and for always reminding me that I can do all things through Him who gives me strength.

than half of humans use social media.¹ In the United States and Canada, eighty-two percent (82%) of the population use social media.² In teens, almost all, ninety-five percent (95%), use a type of social media.³ For eight- to twelve-year-olds, almost forty percent (40%) use social media.⁴ For these teens and minors, one-third say they use social media “almost constantly.”⁵ With social media so widespread, its effects on us, especially teens and minors, are very important. And if the effects are negative or detrimental, action should be taken—whether it be legislation from the states or other alternatives—but it must stay within the bounds of the First Amendment.

The United States Surgeon General, Vivek Murthy, decided to study and examine the effects of social media on youths in the U.S. with an advisory in May 2023.⁶ The culmination of the advisory resulted in a dire call to action—social media platforms need to contain “[w]arning labels[] like those . . . on tobacco and alcohol products.”⁷ The warning label—which would require congressional approval and has not been passed—would advise users and parents of the damage that the social media platforms might have on adolescents.⁸ But what are the dangers and the damage of social media?

U.S. Surgeon General Advisories are only issued and “reserved for significant public health challenges that require the nation’s immediate

1. Simon Kemp, *More than Half of the People on Earth Now Use Social Media*, DATAREPORTAL (July 21, 2020), <https://datareportal.com/reports/more-than-half-the-world-now-uses-social-media> [https://perma.cc/W7DL-YY6R].

2. *Id.*

3. Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [https://perma.cc/YW3E-6H9E].

4. Victoria Rideout et al., *The Common Sense Census: Media Use by Tweens and Teens, 2021*, COMMON SENSE 33 (2022), https://www.commonsensemedia.org/sites/default/files/research/report/8-18-census-integrated-report-final-web_0.pdf [https://perma.cc/TUR5-QH3S].

5. Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [https://perma.cc/W7DL-YY6R].

6. *See generally* U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH (2023).

7. Ellen Barry and Cecilia Kang, *Surgeon General Calls for Warning Labels on Social Media Platforms*, N.Y. TIMES (June 17, 2024), <https://www.nytimes.com/2024/06/17/health/surgeon-general-social-media-warning-label.html?pgtype=Article&action=click&module=RelatedLinks>.

8. *Id.*

awareness and action.”⁹ Although there are positives to social media for adolescents¹⁰—like fostering community, connection, support, promoting self-expression, creativity, and access to information—there are negatives as well, with “ample indicators that [it] can also have a profound risk of harm to the mental health and well-being.”¹¹ The effects are shaped by many complex factors

including, but not limited to, the amount of time children and adolescents spend on platforms, the type of content they consume or are otherwise exposed to, the activities and interactions social media affords, and the degree to which it disrupts activities that are essential for health like sleep and physical activity.¹²

When examining the risk of harm, “[b]rain development is a critical factor.”¹³ Adolescents “are undergoing a highly sensitive period of brain development.”¹⁴ They are at the peak of engaging in risk-taking behaviors, a time when their well-being experiences great fluctuations, and mental health issues, like depression, often begin to surface.¹⁵ With this, adolescents’ “brain development is especially susceptible to social

9. U.S. SURGEON GEN.’S ADVISORY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 3 (2023).

10. Yalda T. Uhls et al., *Benefits and Costs of Social Media in Adolescence*, 140 PEDIATRICS S67, S67–S70 (2017).

11. U.S. SURGEON GEN.’S ADVISORY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 4 (2023); see generally Gwen Schurgin O’Keefe et al., *Clinical Report—The Impact of Social Media on Children, Adolescents, and Families*, 127(4) PEDIATRICS 800, 800-04 (2011).

12. U.S. SURGEON GEN.’S ADVISORY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 5 (2023) (footnote omitted).

13. *Id.*

14. *Id.* (footnotes omitted); see Delia Fuhrmann et al., *Adolescence as a Sensitive Period of Brain Development*, 19(10) TRENDS IN COGNITIVE SCIS. 545, 558-66 (2015); see generally Sarah-Jayne Blakemore & Kathryn L. Mills, *Is Adolescence a Sensitive Period for Sociocultural Processing?*, 65 ANN. REV. PSYCH. 187, 187-207 (2014).

15. Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52(3) DEVELOPMENTAL PSYCH. 263, 263-76 (2010); National Academies of Sciences, Engineering, and Medicine (NASEM), *THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH* (The National Academies Press, 2019); Ronald C. Kessler et al., *Age of Onset of Mental Disorders: A Review of Recent Literature*, 20(4) CURRENT OP. PSYCH. 359, 359-64 (2007).

pressures, peer opinions, and peer comparison.”¹⁶ Research has even shown that frequent social media use distinctly changes the developing brain in the “amygdala (important for emotional learning and behavior) and the prefrontal cortex (important for impulse control, emotional regulation, and moderating social behavior), and could increase sensitivity to social rewards and punishments.”¹⁷

“[A]dolescents who spen[d] more than [three] hours [a] day on social media” platforms “face[] double the risk of experiencing poor mental health outcomes including symptoms of depression and anxiety.”¹⁸ For adolescent girls and those already experiencing poor mental health, extended social media use points to “particular health outcomes like cyberbullying-related depression, body image and disordered eating behaviors, and poor sleep quality.”¹⁹ It can “predict[] poor sleep, online harassment, poor body image, low self-esteem, and higher depressive symptom scores.”²⁰

The content that adolescents are exposed to is another negative impact. On social media platforms, “[e]xtreme, inappropriate, and harmful content . . . [is] easily and widely accessible.”²¹ This content is “spread through direct pushes, unwanted content exchanges, and algorithmic designs.”²² And this “content may be especially risky for children and adolescents

16. U.S. SURGEON GEN., SOCIAL MEDIA AND YOUTH MENTAL HEALTH 5 (2023) (footnotes omitted); see Sarah-Jayne Blakemore & Kathryn L. Mills, *Is Adolescence a Sensitive Period for Sociocultural Processing?*, 65 ANN. REV. PSYCH. 187, 187-207 (2014); see National Academies of Sciences, Engineering, and Medicine (NASEM), THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH (The National Academies Press, 2019).

17. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 5 (2023) (footnotes omitted); Maria T. Maza, et al., *Association of Habitual Checking Behaviors on Social Media with Longitudinal Functional Brain Development*, 177(2) [J]AMA PEDIATRICS 160, 160-167 (2023); Eveline A. Crone & Elly A. Konjin, *Media Use and Brain Development During Adolescence*, 9 NATURE COMM’NS 588 (2018).

18. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 6 (2023) (footnote omitted); see generally Kira R. Riehm, et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76(12) [J]AMA PSYCHIATRY 1266, 1266-73 (2019).

19. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 7 (2023) (footnote omitted).

20. *Id.* at 7 (footnote omitted); see generally Yvonne Kelly, et al., *Social Media Use and Adolescent Mental Health: Findings From the UK Millennium Cohort Study* 6 ECLINICALMEDICINE 59 (2018).

21. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 8 (2023).

22. *Id.*

who are already experiencing mental health difficulties.”²³ Specifically for self-acts and content, studies have “found that discussing or showing this content can normalize such behaviors.”²⁴ Adolescents are also exposed to cyberbullying on social media, which shows a consistent relationship with depression.²⁵ And they can be exposed to “interactions with malicious actors” and those with “predatory behaviors” who target adolescents online.²⁶ These actions include adults online “seeking to sexually exploit children, to financially extort them through the threat or actual distribution of intimate images, or to sell illicitly manufactured fentanyl[.]”²⁷ Almost sixty percent (60%) of adolescent girls state “they’ve been contacted by a stranger on these [social media] platforms in ways that make them uncomfortable.”²⁸

Excessive and problematic use of social media harms adolescents. “Social media platforms are . . . designed to maximize user engagement, which has the potential to encourage excessive use and behavioral dysregulation.”²⁹ The social media platforms maximize the adolescent’s

23. *Id.* (footnote omitted); see generally Steven A. Sumner et al., *Association of Online Risk Factors with Subsequent Youth Suicide-Related Behaviors in the US*, 4(9) [J]AMA NETWORK OPEN 1, 1-10 (2021).

24. U.S. SURGEON GEN.’S ADVISORY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 8 (2023).

25. Michele P. Hamm et al., *Prevalence and Effect of Cyberbullying on Children and Young People: A Scoping Review of Social Media Studies*, 169(8) [J]AMA PEDIATRICS 770, 770-77 (2015).

26. U.S. SURGEON GEN.’S ADVISORY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 9 (2023).

27. *Id.*; see generally Janis Wolak et al., *Sextortion of Minors: Characteristics and Dynamics*, 62(1) J. ADOLESCENT HEALTH 72, 72-79 (2018); see generally Press Release, Federal Bureau Of Investigations, FBI and Partners Issue National Public Safety Alert on Financial Sextortion Schemes (Dec. 19, 2022), <https://www.fbi.gov/news/press-releases/fbi-and-partners-issue-national-public-safety-alert-on-financial-sextortion-schemes>; see generally U.S. DRUG ENF’T ADMIN., *DEA Washington Warns of Deadly Counterfeit Drugs on Social Media* (July 23, 2021), <https://www.dea.gov/stories/2021/2021-07/2021-07-23/counterfeit-drugs-social-media>.

28. Jacqueline Nesi et al., *Teens and Mental Health: How Girls Really Feel About Social Media*, COMMON SENSE 15 (2023), https://www.common sense media.org/sites/default/files/research/report/how-girls-really-feel-about-social-media-research-report_final_1.pdf [<https://perma.cc/K5AD-MXLX>].

29. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 9 (2023) (footnotes omitted); see generally *Pathways: How Digital Design Puts Children at Risk*, 5RIGHTS FOUNDATION (July 2021), <https://5rightsfoundation.com/wp-content/uploads/2021/09/Pathways-how-digital-design-puts-children-at-risk.pdf> [<https://perma.cc/2ZM9-DZMS>]; see generally Daria J. Kuss & Mark D. Griffiths, *Online Social*

engagement through “[p]ush notifications, autoplay, infinite scroll, quantifying and displaying popularity (i.e., ‘likes’), and algorithms that leverage user data to serve content recommendations.”³⁰ “[N]early a third (31%) of social media use may be attributable to self-control challenges magnified by habit formation,” and “social media exposure can overstimulate the reward center in the brain and[] . . . can trigger pathways comparable to addiction.”³¹ Excessive use can lead to changes in brain structure that resemble those found in addictions to gambling or substance abuse.³² This leads to many adolescents “say[ing] they feel ‘addicted’” or manipulated to stay on the platforms.³³

The excessive and problematic use of social media has also “been linked to sleep problems, attention problems, and feelings of exclusion among adolescents.”³⁴ Research continues to show that there is “a consistent relationship between social media use and poor sleep quality, reduced sleep duration, sleep difficulties, and depression among youth.”³⁵ “Poor sleep health has been linked to altered neurological development in adolescent brains, depressive symptoms, and suicidal thoughts and behaviors.”³⁶ For attention problems, the problematic use has “been linked

Networking and Addiction—A Review of the Psychological Literature, INT’L J. ENV’T R. & PUB. HEALTH 3528, 3528-52 (2011); see generally Mark D. Griffiths, *Adolescent Social Networking: How Do Social Media Operators Facilitate Habitual Use?*, 36(3) EDUC. & HEALTH 66, 66-69 (2018).

30. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 9 (2023).

31. *Id.* (footnotes omitted); see generally Cecilie S. Adreassen, *Online Social Network Site Addiction: A Comprehensive Review*, 2 CURRENT ADDICTION 175, 175-84 (2015) (footnotes omitted).

32. Qinghua He et al., *Brain Anatomy Alternations Associated with Social Networking Site (SNS) Addiction*, 7 SCI. REPS. 45064 (2017); Christian Montag et al., *Facebook Usage On Smartphones And Gray Matter Volume Of The Nucleus Accumbens*, 329 BEHAV. BRAIN R. 221, 221-228 (2017).

33. See Jacqueline Nesi et al., *Teens and Mental Health: How Girls Really Feel About Social Media*, COMMON SENSE 6, 26 (2023), https://www.common sense media.org/sites/default/files/research/report/how-girls-really-feel-about-social-media-researchreport_final_1.pdf [<https://perma.cc/D5GL-4T9E>]; see generally Daria J. Kuss & Mark D. Griffiths, *Online Social Networking and Addiction—A Review of the Psychological Literature*, INT’L J. ENV’T R. & PUB. HEALTH 3528, 3528-52 (2011).

34. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 10 (2023) (footnotes omitted).

35. *Id.* (footnote omitted); see generally Rea Alonzo et al., *Interplay Between Social Media Use, Sleep Quality, and Mental Health in Youth: A Systematic Review*, 56 SLEEP MED. REVS. 101414 (2021).

36. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 10 (2023) (footnotes omitted).

to both self-reported and diagnosed attention-deficit/hyperactivity disorder (ADHD) in adolescents.”³⁷ And finally, “social media-induced fear of missing out, or ‘the pervasive apprehension that others might be having rewarding experiences from which one is absent,’ has been associated with depression, anxiety, and neuroticism.”³⁸

But all of these negative impacts can be stopped or reversed—by limiting use, restricting access, or stopping use completely. When the adolescent is limited to only thirty minutes a day on social media, it can lead to significant improvements in mental health—reversing the negative mental health effects.³⁹ By quitting altogether, the “deactivation of a social media platform . . . improved subjective well-being (i.e., self-reported happiness, life satisfaction, depression, and anxiety).”⁴⁰

With just some of the positive and negative impacts of social media use on adolescents known, states decided to act—taking matters into their own hands for their adolescent citizens. Part I of this Note will discuss how states have attempted to combat the negative effects of social media on those under eighteen years old within their state. The acts passed by the states include requiring parental consent for minors to access social media platforms, requiring the social media company and platform to reasonably verify the age of its users, and requiring certain privacy and settings for minors on the platform.

Before many of these acts by the states took effect, most, if not all, were challenged in court for violating the First Amendment rights of the citizens of that state—some were also challenged as being unconstitutionally vague or overbroad. Part II of this Note discusses the relevant First Amendment law—how the First Amendment is examined and applied to legislation, and how it applies to social media and minors. Part II will also discuss the cases resulting from these challenges. Courts have all tended to agree that the states’ acts violate the First Amendment

37. *Id.* (footnote omitted); see generally Tycho J. Dekkers & Jorien van Hoorn, *Understanding Problematic Social Media Use in Adolescents with Attention-Deficit/Hyperactivity Disorder (ADHD): A Narrative Review and Clinical Recommendations*, 12(12) BRAIN SCIS. 1625 (2022).

38. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 10 (2023) (footnotes omitted).

39. Melissa G. Hunt et al., *No More FOMO: Limiting Social Media Decreases Loneliness and Depression*, 37(10) J. SOC. & CLINICAL PSYCH. 751, 751-68 (2018).

40. U.S. SURGEON GEN.’S, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 7 (2023) (footnote omitted).

rights of the citizens. Each case is examined, and an in-depth analysis is given as to why the court ruled the way it did.

Since the states have been stopped from acting, this Note will provide in Part III that there are alternative solutions that states can enact to help combat the real problem—that even courts can agree exists—of social media and minors that do not violate the First Amendment. This Note will argue that action can be taken to address the issue without stepping on the constitutional rights of minors. These solutions are just some of the alternative ways to address the issue and not the only way. And hopefully, with continued discussion on the issue, other solutions are brought to light to help address possibly the defining element of our time for children—social media.

I. States Act

A. Arkansas: Social Media Safety Act

In April 2023, Arkansas Governor Sarah Huckabee Sanders signed into law Senate Bill 369—the “Social Media Safety Act” (Arkansas Act).⁴¹ The primary goals of the Arkansas Act are “to require age verification for [the] use of social media; and to clarify liability for failure to perform age verification for [the] use of social media and illegal retention of data.”⁴² The Arkansas Act—codified in Arkansas statute as section 4-88-1102—states that “social media compan[ies] shall verify the age of an account holder.”⁴³ The Arkansas Act defines social media companies as an “online forum” that permits its account holders to: (1) “[c]reate a public profile[] . . . for the primary purpose of interacting socially with other profiles and accounts”; (2) “[u]pload or create posts or content”; (3) “[v]iew posts or content of other account holders”; and (4) “[i]nteract with other account holders . . . through request and acceptance.”⁴⁴ And the Arkansas Act exempts—or does not include—any social media company that “[d]erives less than twenty-five percent (25%)

41. Press Release, Sarah Huckabee Sanders, Arkansas Governor, Sanders Signs SB396 (Apr. 13, 2023), https://governor.arkansas.gov/news_post/sanders-signs-sb396/ [<https://perma.cc/KNM4-GGZZ>].

42. *Id.*

43. ARK. CODE ANN. § 4-88-1102(b)(1) (2023). At the time of the writing of this Note, the Arkansas Act was enacted into the Arkansas Code. Since being found unconstitutional, it has since been removed. The corresponding sections still match that of Act 689.

44. *Id.* § 4-88-1101(7)(A).

of [its] revenue from operating a social media platform” and “[o]ffers cloud storage services.”⁴⁵

The “social media compan[ies] shall use a third-party vendor to perform reasonable age verification before allowing access,” with the methods of verifying the user’s age being a “digitized identification card, including a digital copy of a driver’s license,” a “[g]overnment-issued identification,” or “[a]ny commercially reasonable age verification method.”⁴⁶ Self-reporting of a user’s age is not enough. If the user is a minor, parental consent is required because a “social media company shall not permit an Arkansas user who is a minor to be an account holder . . . unless the minor has the express consent of a parent or legal guardian.”⁴⁷ The Arkansas Act places the burden on the social media company to confirm that the minor has the consent of the parent when opening the account.⁴⁸

The Arkansas Act places the liability on the social media companies that fail to “perform[] a reasonable age verification,” which authorizes the Arkansas Attorney General to bring an enforcement action against the company.⁴⁹ The companies will be liable to the individual for penalties up to “two thousand five hundred dollars (\$2,500) per violation” and “[d]amages resulting from a minor accessing a social media platform without . . . parent’s . . . consent.”⁵⁰

B. Ohio: Parental Notification by Social Media Operators Act

In July 2023, Ohio Governor Mark DeWine signed into law House Bill 33—which includes the “Parental Notification by Social Media Operators Act” (Ohio Act). The Ohio Act “require[s] certain online companies to obtain verifiable parental . . . consent . . . before permitting kids under the age of 16 to use their platforms.”⁵¹ The overall aim of the

45. *Id.* § 4-88-1101(7)(B)(iv)(a)-(b).

46. *Id.* § 4-88-1102(c)(1)-(2).

47. *Id.* § 4-88-1102(a).

48. *Id.* § 4-88-1102(b)(2).

49. *Id.* § 4-88-1103(a)(1), (b)(2).

50. *Id.* § 4-88-1103(c)(1).

51. Press Release, Jon Husted, Ohio Lt. Governor, What They’re Saying: Social Media Parental Notification Act (June 9, 2023).

Ohio Act is “to give parents more control over their children creating new social media accounts.”⁵²

The Ohio Act regulates “[o]perator[s]”—not explicitly calling these social media companies—which includes “any business, entity, or person that operates an online web site, service, or product that . . . allows those users to do all of the following”: (1) “[i]nteract socially with other users”; (2) “[c]onstruct a . . . profile for the purpose of signing into and using the online web site, service, or product”; (3) create a list of other users where the user can “share[] or has the ability to share a social connection within”; (4) “[c]reate or post content viewable by others including on message boards, chat rooms, video channels, direct or private messages or chats, and a landing page or main feed that presents the user with content generated by other users.”⁵³ But the exception for these operators occurs where “interaction between users is limited to”: “(1) [r]eviewing products offered for sale by electronic commerce or commenting on reviews posted by other users; (2) [c]omments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events.”⁵⁴

If an operator “targets children, or is reasonably anticipated to be accessed by children,” it is required by the Ohio Act to “[o]btain verifiable consent [from the child’s parent or legal guardian] for any contract with a child, including . . . to register[] [or] sign up[].”⁵⁵ To determine if the operator “targets children, or is reasonably anticipated to be accessed by children,” the Ohio Attorney General or court may consider:

- (1) Subject matter; (2) Language; (3) Design elements; (4) Visual content; (5) Use of animated characters or child-oriented activities and incentives; (6) Music or other audio content; (7) Age of models; (8) Presence of child celebrities or celebrities who appeal to children; (9) Advertisements; (10) Empirical evidence regarding

52. *News Releases, Parental Notification by Social Media Operators Act Takes Effect in January*, DAVE YOST OHIO ATT’Y GEN. (Dec. 27, 2023), <https://www.ohioattorneygeneral.gov/Media/News-Releases/December-2023/Parental-Notification-by-Social-Media-Operators-Ac> [<https://perma.cc/HJB2-RVC8>].

53. OHIO REV. CODE ANN. § 1349.09(A)(1) (2023).

54. *Id.* § 1349.09(O).

55. *Id.* § 1349.09(B)(1).

audience composition; and (11) Evidence regarding the intended audience.⁵⁶

To obtain parental consent, the operators can use “any of the following methods”: (1) a signed consent form from the parent, (2) require the parent “to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder,” (3) require the parent “to call a toll-free telephone number implemented by the operator and staffed by trained personnel,” (4) require the parent “to connect to trained personnel by videoconference,” (5) verifying the parent’s identify using their “government-issued identification against databases of such information.”⁵⁷ Once consent is acquired, the operator must send, either by mail or by telephone, confirmation to the parent.⁵⁸ If the parent does not consent, “the operator shall deny the child access” to the operator’s site.⁵⁹

The Ohio Attorney General “shall investigate” noncompliance with the Ohio Act, and if the operator is found to be in noncompliance by a court, a civil penalty will be pursued.⁶⁰ These penalties include “(1) [u]p to one thousand dollars” (\$1,000) per day for “the first sixty days,” (2) “up to five thousand dollars” (\$5,000) for the next thirty days, and (3) up to an additional ten thousand dollars (\$10,000) per day for ninety-one days and beyond.⁶¹

C. Utah: Utah Minor Protection in Social Media Act

In March 2024, Utah Governor Spencer Cox signed into law Senate Bill 194—codified in Utah statute as section 13-71—which created the “Utah Minor Protection in Social Media Act” (Utah Act).⁶² The Utah Act partially “replaces Utah’s Social Media Regulation Act of 2023,” which the State repealed after a challenge to the constitutionality of it.⁶³ The Utah Act aims to protect the “compelling interest in safeguarding the well-being

56. *Id.* § 1349.09(C)(1)-(11).

57. *Id.* § 1349.09(B)(1)(a)-(e).

58. *Id.* § 1349.09(D)(1)-(2).

59. *Id.* § 1349.09(E).

60. *Id.* § 1349.09(G)-(H).

61. *Id.* § 1349.09(I).

62. S.B. 194, 65th Leg., Gen. Sess. (Utah 2024).

63. *NetChoice, LLC v. Reyes*, No. 2:23-CV-00911-RJS-CMR, 2024 WL 4135626, at *2 (D. Utah Sept. 10, 2024).

and privacy of [Utah] minors.”⁶⁴ To achieve this goal, the Utah Act requires social media companies to “implement an age assurance system to determine whether a current or prospective Utah account holder . . . is a minor.”⁶⁵ And if the user is a minor, the Utah Act requires the social media companies to set default privacy settings, to disable certain features, and to protect the personal information of these minors.⁶⁶

The Utah Act applies to and regulates “[s]ocial media compan[ies],” which “means an entity that owns or operates a social media service.”⁶⁷ A social media service is defined as a “public website or application that”: (1) “displays content that [users] primarily generate[],” (2) allows an individual to “create a profile that is . . . visible to the public or . . . other users,” (3) “connects account holders” with others socially within the service, (4) “makes available to each account holder a list” of other users who they can “share[] a connection with[],” and (5) “allows account holders to post content viewable by other users.”⁶⁸ Exempt from the definition of what a social media service is in the Utah Act are (1) “email,” (2) “cloud storage,” and (3) “document viewing, sharing, or collaboration services.”⁶⁹

When verifying the age of a Utah resident, the social media company must use an age assurance system.⁷⁰ An age assurance system is a system that is “reasonably calculated to enable a social media company to identify whether a current or prospective Utah account holder is a minor with an accuracy rate of at least 95%.”⁷¹ The company must also “implement a review process allowing account holders to appeal the account holder’s age designation by submitting documentary evidence to establish the account holder’s age range” and review the evidence within thirty days of submission.⁷²

If the user is determined to be a minor, the social media company must “set default privacy settings to prioritize maximum privacy, including settings that”: (1) “restrict the visibility of a Utah minor account holder’s account to only connected accounts”; (2) “limit the . . . ability to share

64. UTAH CODE ANN. § 13-71-102 (2024).

65. *Id.* § 13-71-201(1).

66. *Id.* § 13-71-202(1)-(2).

67. *Id.* § 13-71-101(13).

68. *Id.* § 13-71-101(14)(a).

69. *Id.* § 13-71-101(14)(b).

70. *Id.* § 13-71-201(1).

71. *Id.* § 13-71-101(2).

72. *Id.* § 13-71-201(3).

content to only connected accounts”; (3) “restrict any data collection and sale of data . . . that is not required for core functioning of the social media service”; (4) “disable search engine indexing of [the] account holder profiles”; (5) “restrict . . . direct messaging capabilities to only allow direct messaging to connected accounts”; and (6) “allow a[n] . . . account holder to download a file with all information associated with the . . . account.”⁷³ These default settings cannot be changed “without . . . obtaining verifiable parental consent.”⁷⁴

For minors, the Utah Act also requires social media companies to “disable” certain “features that prolong user engagement.”⁷⁵ These features include “autoplay functions that continuously play content without user interaction,” “scroll or pagination that loads additional content as long as the user continues scrolling,” and “push notifications prompting repeated user engagement.”⁷⁶ And the Utah Act requires “supervisory tools” for minors, which the minors can choose to activate themselves.⁷⁷ These tools must include capabilities for the minor to set limits for daily usage, schedule mandatory breaks during a selected time, and view data related to their usage, connections, blocked connections, and settings.⁷⁸

The Utah Act states that a “social media company’s terms of service related to a Utah minor account holder shall be presumed to include an assurance of confidentiality for the Utah minor account holder’s personal information.”⁷⁹ This presumption “may be overcome if the social media company obtains verifiable parental consent.”⁸⁰ And the presumption for confidentiality “does not apply to a social media company’s internal use or external sharing of a Utah minor account holder’s personal information if the use or sharing is necessary to”: (1) “maintain or analyze functioning of the . . . service,” (2) “enable network communications,” (3) “personalize the user’s experience,” (4) “display a username,” (5) “obtain age assurance information,” or (6) “comply with the requirements of this [Act] or other federal or state laws.”⁸¹

73. *Id.* § 13-71-202(1)(a)-(f).

74. *Id.* § 13-71-204(1).

75. *Id.* § 13-71-202(5).

76. *Id.* § 13-71-202(5)(a)-(c).

77. *Id.* § 13-71-203(1).

78. *Id.* § 13-71-203(2).

79. *Id.* § 13-71-204(2).

80. *Id.* § 13-71-204(3).

81. *Id.* § 13-71-204(4).

Enforcement of the Utah Act is granted to the Division of Consumer Protection (Division), and the Utah Attorney General may advise or counsel the Division.⁸² The Division “may impose an administrative fine of up to [two thousand five hundred dollar] \$2,500 for each violation,” and the Division “may bring an action in court to enforce a provision” of the Utah Act.⁸³

D. Louisiana: Secure Online Child Interaction and Age Limitation Act

In June 2023, Governor John Bel Edwards signed Senate Bill 162—codified in Louisiana title 51, chapter 20—creating the Secure Online Child Interaction and Age Limitation Act (Louisiana Act).⁸⁴ The Louisiana Act requires social media platforms to verify the age of Louisiana account holders using “commercially reasonable efforts.”⁸⁵ The Louisiana Act has been in effect since July 1, 2024.⁸⁶

The Louisiana Act applies to social media companies, which are “person[s] or entit[ies] that provide[] a social media platform that has at least five million account holders worldwide and [are] an interactive computer service.”⁸⁷ A social media platform is a “public or semipublic internet-based service or application that has users in Louisiana that meets all of the following”: (1) allows users to connect and interact socially, (2) allows the user to construct a profile to sign into or use the platform, (3) allows the user to populate a list of other users whom they can share “a social or virtual connection within the system,” and (4) allows the users to create or post content that is viewable to other users.⁸⁸ There are exceptions to what is a social media platform covered under the Louisiana Act, such as email services; gaming services that allow the creation and uploading of content for the purpose of “interactive gaming, educational

82. *Id.* § 13-71-301.

83. *Id.* § 13-71-301(3).

84. *United States of America: Signed Louisiana Secure Online Child Interaction and Age Limitation Act Including Content Moderation Regulation*, DIGITAL POL’Y ALERT, <https://digitalpolicyalert.org/event/12589-signed-louisiana-secure-online-child-interaction-and-age-limitation-act-including-content-moderation-regulation> [https://perma.cc/R8MB-N3RL].

85. LA. STAT. ANN. § 51:1752(A) (2024).

86. WAFB Staff, *New Laws Going into Effect in Louisiana this Week*, WAFB (July 1, 2024), <https://www.wafb.com/2024/07/01/new-laws-going-into-effect-louisiana-this-week/> [https://perma.cc/X6RQ-3YN9].

87. LA. STAT. ANN. § 51:1751(11) (2024).

88. *Id.* § 51:1751(12)(a).

entertainment, or, associated entertainment”; streaming services that only provide licensed media; “[n]ews, sports, entertainment, or other content that is preselected by the provider and not user generated”; career development sites; photograph editing sites; and business-to-business software.⁸⁹

Age verification is required because the Louisiana Act states that social media companies “shall not permit a Louisiana resident who is a minor to be an account holder . . . unless the minor has the express consent of a parent or guardian.”⁹⁰ The parent can give express consent in any of the following ways: (1) a parental consent form returned to the social media company, (2) “a toll-free telephone number for the . . . parent . . . to consent,” (3) a call with the parent using “video conferencing technology,” (4) using government-issued identification of the parent and then deleting the information after verifying, (5) allowing the parent to consent via email but “taking additional steps to verify identity of the . . . parent,” or (6) “[a]ny other commercially reasonable means of obtaining consent using available technology.”⁹¹

If the user is a minor, the Louisiana Act prohibits the social media companies from allowing them to open an account that is “ineligible . . . pursuant to any other provision of state or federal law.”⁹² The Act also prohibits adults from the direct messaging of a minor account holder unless they are already connected on the platform, the display of advertising on the account using the minor’s personal information, and the collecting or using of the personal information of the minor “beyond what is adequate, relevant, and reasonably necessary.”⁹³

Once the social media company has verified that the user is a minor and the parent has consented, the company must give the parent of the minor the power to “initiate account supervision.”⁹⁴ The account supervision must allow the parent the ability “to view privacy settings of the minor’s account, set daily time limits for the service, schedule breaks, and offer the minor the option to set up parental notifications when the minor reports a person or issue.”⁹⁵

89. *Id.* § 51:1751(12)(b).

90. *Id.* § 51:1752(B).

91. *Id.* § 51:1752(B).

92. *Id.* § 51:1752(C).

93. *Id.* § 51:1753(1)-(3).

94. *Id.* § 51:1754.

95. *Id.*

The Louisiana Act is enforced by the Department of Justice's public protection division (Department) of the Department of Justice.⁹⁶ The Department has the power to "impose . . . administrative fine[s] of up to two thousand five hundred dollars" (\$2,500) per violation, and they can bring an enforcement action if the violation is not cured within forty-five days.⁹⁷ In the enforcement action, the Department can impose civil violations for two thousand five hundred dollars (\$2,500) per violation, issue an injunction, order disgorgement, and award actual damages to injured consumers.⁹⁸

II. The First Amendment and Cases Challenging the States

With the states acting—requiring the social media companies to verify the age of users, requiring parental consent, and implementing mandatory privacy settings and collection—the issue is whether these actions are constitutional. Examining the states' acts, most, if not all, appear unconstitutional on First Amendment grounds and will not—and have not—stood up to the challenge.⁹⁹

A. The First Amendment

i. The First Amendment Applies to Social Media Platforms/Companies and Access

The conclusion that the First Amendment applies to social media and children must be reached before analyzing the First Amendment challenges to these acts. In *Moody v. NetChoice*, the Supreme Court held that social media platforms receive First Amendment protections.¹⁰⁰ In *Moody*, the Court explained that "[t]o the extent that social-media platforms create expressive products, they receive . . . First Amendment[] protection."¹⁰¹ The Court has "repeatedly held that laws curtailing their editorial choices must meet the First Amendment's requirements"; this "principle does not change because the curated compilation has gone from

96. LA. STAT. ANN. § 51:1751(3) (2024); S.B. 162, 2023 Leg. Reg. Sess. (LA. 2023).

97. LA. STAT. ANN. § 51:1756(C)(4) (2024).

98. *Id.* § 51:1756(C).

99. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("The First Amendment, applicable to the States through the Fourteenth Amendment.").

100. *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024).

101. *Id.*

the physical to the virtual world.”¹⁰² The Court emphasizes that “government efforts to alter an edited compilation of third-party expression” and “the laws [that] limit the platforms’ capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post”—must comply with the First Amendment.¹⁰³

The First Amendment protects access to social media platforms and websites. In *Packingham v. North Carolina*, the Court held that a North Carolina statute that prohibited sex offenders from accessing social media websites was unconstitutional as it violated the First Amendment.¹⁰⁴ The North Carolina law made it a felony for a registered sex offender “to access a commercial social networking [w]eb site where the sex offender knows that the site permits minor children to become members or to create or maintain personal [w]eb pages.”¹⁰⁵ The Court explained that a “fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”¹⁰⁶ These forums—where individuals can speak, converse, and share their thoughts—are “quintessential . . . for the exercise of First Amendment rights.”¹⁰⁷ In modern times, this forum has become the “cyberspace—the ‘vast democratic forums of the Internet’ in general[] . . . and social media.”¹⁰⁸ “Social Media allows users to gain access to information and communicate with one another about it on any subject that might come to mind.”¹⁰⁹ And in today’s ever-online world, the Court explained that social media “provide[s] perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard,” and it allows anyone “with an [i]nternet connection to become a town crier with a voice that resonates farther than it could from any soapbox.”¹¹⁰ Holding the North Carolina statute unconstitutional, the Court concluded that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”¹¹¹

102. *Id.* at 717.

103. *Id.*

104. *Packingham v. North Carolina*, 582 U.S. 98, 109 (2017).

105. *Id.* at 101 (quoting N.C. GEN STAT. § 14-202(a), (e) (2015)).

106. *Id.* at 104.

107. *Id.* (citation omitted).

108. *Id.* at 104 (citing *Reno v. Am. C.L. Union*, 521 U.S. 844, 868 (1997)).

109. *Id.* at 107 (citation omitted).

110. *Id.* (citation omitted); *Reno*, 521 U.S. at 870.

111. *Packingham*, 582 U.S. at 108.

ii. Children Receive First Amendment Protections

Minors are granted the same protections under the First Amendment. In *Brown v. Entertainment Merchants Ass'n*, the Court held that a California law that “prohibit[ed] the sale or rental of ‘violent video games’ to minors” was unconstitutional under the First Amendment.¹¹² California’s justification for the law was to protect children from the negative effects of video games and to aid in parental authority— “[b]y requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate.”¹¹³ The Court first noted that “[m]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”¹¹⁴ Although states possess the “legitimate power to protect children from harm,” that power “does not include a free-floating power to restrict the ideas to which children may be exposed.”¹¹⁵ The Court noted that “[s]peech . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”¹¹⁶ The Court—finding that the First Amendment applied—analyzed the California statute under the First Amendment framework—noting that the State’s apparent justification was not a compelling interest and narrowly tailored—and held the statute unconstitutional.¹¹⁷

But not all Justices in *Brown* agreed with the decision. Justice Thomas, dissenting, noted that by looking to history, the First Amendment—specifically “the freedom of speech”—“as originally understood, does not include a right to speak to minors (or a right of minors to access speech)

112. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 789 (2011) (citation omitted) (covering video games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors”).

113. *Id.* at 802.

114. *Id.* at 794 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975)).

115. *Id.*

116. *Id.* at 795 (quoting *Erznoznik*, 422 U.S. at 213-14).

117. *Id.* at 805.

without going through the minors' parents or guardians."¹¹⁸ Justice Thomas stated that when examining the "practices and beliefs held by the Founders," the Founders felt there was a category of excluded speech not protected by the First Amendment: "speech to minor children bypassing their parents."¹¹⁹ Justice Thomas continued by explaining the history that led to this decision. Having examined and used this history, Justice Thomas concluded that he does "not believe that laws limiting such speech—for example, by requiring parental consent to speak to a minor—'abridg[e] the freedom of speech' within the original meaning of the First Amendment."¹²⁰ And by holding that California's justification—to protect children from the content and aid in parental authority—was not compelling, the Court had gone against the idea that "[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."¹²¹

iii. The First Amendment Framework

Knowing that the First Amendment applies to social media platforms, companies, and children, the acts must be examined under the First Amendment framework to determine their constitutionality. The First Amendment framework—or methodology—used by the Court is split between the types of restriction on speech: content-based and content-neutral.¹²²

Content-based laws are "presumptively unconstitutional."¹²³ These restrictions or regulations must satisfy strict scrutiny—meaning they "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."¹²⁴ "If a less restrictive alternative would serve the Government's purpose . . . [it] must use that

118. *Id.* at 821 (Thomas, J., dissenting) (citation omitted).

119. *Id.* at 822 (Thomas, J., dissenting) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring)).

120. *Id.* at 835 (Thomas, J., dissenting).

121. *Id.* at 837 (Thomas, J., dissenting) (quoting *Erznoznik*, 422 U.S. at 212 (Breyer, J., dissenting)).

122. *See Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015).

123. *Id.* at 163.

124. *Id.* at 163 (citation omitted); *see United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

alternative.”¹²⁵ The restrictions are content-based if the “law applies to particular speech because of the topic discussed or the idea or message expressed.”¹²⁶ This is a “commonsense” meaning of the phrase “content-based” and “requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”¹²⁷ But not all “facial distinctions . . . are obvious,” and a law “cannot escape classification as facially [content-based] simply by swapping an obvious subject-matter distinction for a ‘function or purpose’ proxy that achieves the same result.”¹²⁸

Also, laws that appear facially content-neutral “will be considered content-based” if the “laws . . . cannot be ‘justified without reference to the content of the regulated speech,’ or [they] were adopted by the government ‘because of disagreement with the message’ [the speech] conveys.”¹²⁹ This is displayed in *Reed v. Town of Gilbert*, where the Court held that a municipal sign code that divided signs based on their “communicative content”—such as “[i]deological [s]ign[s],” “[p]olitical [s]ign[s],” and “[t]emporary [d]irectional [s]ign[s]”—which regulated each category differently were content-based and unconstitutional.¹³⁰ The Court reasoned that “a speech regulation targeted at a specific subject matter is [content-based] even if it does not discriminate among viewpoints within that subject matter.”¹³¹ And in this case, the “Town’s Sign Code . . . singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.”¹³² But in *City of Austin v. Reagan National Advertising of Austin, LLC*, the Court held that a municipal sign code that differentiated signs between “on-premises” and “off-premises signs” was not facially content-based.¹³³ The Court noted that although the sign “distinction required a reader to inquire ‘who is the speaker and what is the speaker saying,’” the inquiry was “only

125. *Playboy Ent. Grp., Inc.*, 529 U.S. at 813.

126. *Reed*, 576 U.S. at 163 (citation omitted).

127. *Id.* at 163 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011)).

128. *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022).

129. *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

130. *Id.* at 159-60.

131. *Id.* at 169 (citation omitted).

132. *Id.*

133. *City of Austin*, 596 U.S. at 66 (“[T]he City’s sign code defined the term ‘off-premise sign’ to mean ‘a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.’”).

in service of drawing neutral, location-based lines.”¹³⁴ And here “the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content.”¹³⁵ The Court found the distinction to be “content-neutral” and would not need to meet strict scrutiny—but rather intermediate scrutiny.¹³⁶

A speech restriction or regulation is content-neutral if it applies to all speech regardless of the content or message and generally governs the time, place, and manner of speech.¹³⁷ “The principal inquiry in determining content neutrality[] . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”¹³⁸ “[T]he controlling consideration” is the “government’s purpose” in implementing the restriction.¹³⁹ A restriction or “regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others,” and the “regulation of expressive activity is [content-neutral] so long as it is ‘justified without reference to the content of the regulated speech.’”¹⁴⁰ When the restriction is deemed content-neutral, the Court applies intermediate scrutiny. To survive intermediate scrutiny, the law must be “narrowly tailored to serve a significant governmental interest,” and the law must not “burden substantially more speech than is necessary to further the government’s legitimate interests.”¹⁴¹

Also, restrictions of speech can be held unconstitutional if they are vague. A speech restriction or regulation is unconstitutional for vagueness when a reasonable person—or people “of common intelligence”—cannot tell what speech is permitted versus prohibited—the people “must necessarily guess at its meaning.”¹⁴² The Court explained in *Grayned v. City of Rockford*:

[v]ague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the

134. *Id.* at 68-69.

135. *Id.* at 69.

136. *Id.*

137. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

138. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

139. *Id.* at 791.

140. *Id.* (emphasis omitted) (citation omitted).

141. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

142. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.¹⁴³

These vague restrictions violate due process of law because they do not give adequate notice of prohibited conduct.¹⁴⁴

A restriction cannot also be overbroad. A valid government restriction on speech is unconstitutional “when the law reaches too broadly and also can be applied to constitutionally protected expression.”¹⁴⁵ In both doctrines—vagueness and overbreadth—the speaker “may self-censor their own speech to ensure that they do not violate” the restriction.¹⁴⁶

Some speech falls outside the First Amendment protection, and the standard framework does not apply. These categories include obscenity, child pornography, incitement, true threats, speech that is likely to cause imminent violence or be integral to a crime, and commercial speech.¹⁴⁷ Of particular importance to the restrictions and regulations of social media—specifically social media companies—is the aspect of commercial speech. The Court has stated that commercial speech is “speech proposing no more than a commercial transaction.”¹⁴⁸ But advertisements, references to specific transactions, and speech with economic motivations also count as commercial speech.¹⁴⁹ Commercial speech receives “lesser protection” than normal speech, but that does not mean it receives no protection.¹⁵⁰ The Court has developed a “four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected” speech:

143. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (footnotes omitted).

144. *Connally*, 269 U.S. at 391 (“its application violates the first essential of due process of law”).

145. 2 JOHN B. MORRIS JR. & JULIE M. CARPENTER, *FREE SPEECH ON THE INTERNET, INTERNET LAW AND PRACTICE* § 24-7 (West 2024).

146. *Id.* § 24-4.

147. *Id.* § 24-14.

148. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981).

149. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983).

150. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980).

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.¹⁵¹

B. Cases Challenging the States' Acts

The states' actions against social media—to protect children—are being challenged in court. And most are being preliminarily enjoined as unconstitutional on First Amendment grounds.

The states' statutes are all being challenged by NetChoice. NetChoice is an “Internet trade association whose members include Facebook, Instagram, Twitter [X], TikTok, Snapchat, Pinterest, and Nextdoor.”¹⁵² NetChoice’s described mission is to “work[] to make the Internet safe for free enterprise and free expression.”¹⁵³ It has also been described as “the Big Tech lobbying firm”¹⁵⁴ or “the main litigation powerhouse for the industry.”¹⁵⁵ Whatever its mission or motive is, NetChoice has been aggressive—and mostly successful—in its litigation against states.¹⁵⁶

151. *Metromedia, Inc.*, 453 U.S. at 507 (citing *Central Hudson*, 447 U.S. at 563-66).

152. *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155, at *1 (W.D. Ark. Aug. 31, 2023).

153. *About Us, Our Mission*, NETCHOICE, <https://netchoice.org/about/#our-mission> [<https://perma.cc/A7KF-FP7X>].

154. Issie Lapowsky, *The Same Big Tech Lobbying Firm is Behind the Two New Supreme Court Social Media Cases*, FASTCOMPANY (Feb. 23, 2024), <https://www.fastcompany.com/91034936/meet-netchoice-big-techs-legal-bulldog-at-the-center-of-two-major-supreme-court-cases>.

155. Lily Jamali & Jesus Alvarado, *How NetChoice Became Big Tech's Ally Against Social Media Regulation*, MARKETPLACE TECH (Feb. 26, 2024), <https://www.marketplace.org/shows/marketplace-tech/how-netchoice-became-big-techs-ally-against-social-media-regulation/> [<https://perma.cc/B8CC-E9AK>].

156. *Litigation Center*, NETCHOICE, <https://netchoice.org/litigation/> [<https://perma.cc/P8SW-5DB7>]; see also Issie Lapowsky, *The Same Big Tech Lobbying Firm is Behind the Two New Supreme Court Social Media Cases*, FASTCOMPANY (Feb. 23, 2024), <https://www.fastcompany.com/91034936/meet-netchoice-big-techs-legal-bulldog-at-the-center-of-two-major-supreme-court-cases>.

i. Arkansas: NetChoice, LLC v. Griffin

In 2023, NetChoice challenged the constitutionality of the Arkansas Act (Act 689) before it was set to take effect.¹⁵⁷ NetChoice contended that the Arkansas Act was “unconstitutionally vague because it is impossible to determine which social media companies and platforms fall within its purview,”¹⁵⁸ and that the Act violated the First Amendment rights of Arkansas citizens because the “age-verification requirements are not narrowly tailored to address the harms that minors may face on social media, while at the same time placing an undue burden on both adults’ and minors’ access to constitutionally protected speech.”¹⁵⁹ Arkansas—through its Attorney General Tim Griffin—argued the Arkansas Act “is a constitutional way to curtail minors’ access to social media platforms” because the Act “is narrowly tailored to address the harms posed by social media, while the alleged burdens are neither too costly for NetChoice members nor too intrusive for Arkansans who wish to open social media accounts.”¹⁶⁰

The court began by finding the Arkansas Act “unconstitutionally vague because it fails to adequately define which entities are subject to its requirements.”¹⁶¹ The court noted that in defining a “social media company,” Arkansas does not define what “primary purpose” is within that definition.¹⁶² The “term [is] critical to determining which entities fall within [the Arkansas Act’s] scope.”¹⁶³ The Act also does not “provide[] any guidelines about how to determine a forum’s ‘primary purpose.’”¹⁶⁴ This leaves the “companies to choose between risking unpredictable and arbitrary enforcement (backed by civil penalties, attorneys’ fees, and potential criminal sanctions) and trying to implement the Act’s costly age-

157. *Griffin*, 2023 WL 5660155, at *1.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at *13.

162. *Id.* (emphasis omitted) (“A ‘social media company’ is defined as ‘an online forum that a company makes available for an account holder’ to ‘[c]reate a public profile, establish an account, or register as a user for the primary purpose of interacting socially with other profiles and accounts,’ ‘[u]pload or create posts or content,’ ‘[v]iew posts or content of other account holders,’ and ‘[i]nteract with other account holders or users, including without limitation establishing mutual connections through request and acceptance.’”).

163. *Id.* (alteration in original).

164. *Id.*

verification requirements.”¹⁶⁵ This ambiguity alone renders the law unconstitutional. But Arkansas argued that the definitions in the Act are “clear” and that “any person of ordinary intelligence can tell that [the Arkansas Act] regulates Meta, Twitter[,] and TikTok.”¹⁶⁶ The court disagreed, relying on experts from other social media companies who said they were unsure if they qualified.¹⁶⁷

The definition of “social media platform” is also vague. The definition relies on “‘substantial function or ‘predominant . . . function,’” with the Act not defining either.¹⁶⁸ This again “leav[es] companies to guess whether their online services are covered.”¹⁶⁹ And the Act fails to define what type of proof will be sufficient to demonstrate that a platform has obtained the “express consent of a parent or legal guardian.”¹⁷⁰ Arkansas’s expert testified that the “biggest challenge . . . with parental consent is actually establishing the relationship, the parental relationship,” and the “State offers no guidance about the sort of proof that will be required to show parental consent.”¹⁷¹

Next, the court addressed the Act’s constitutionality under the First Amendment.¹⁷² The court first had to determine what scrutiny to examine the Act under—meaning it needed to decide whether or not it was content-based or content-neutral.¹⁷³ NetChoice contended the Act’s “age-verification requirements target speech on social media websites and platforms based on content, speaker, and viewpoint, so the Act is subject to strict scrutiny.”¹⁷⁴ Arkansas “disagree[d] and argue[d] that [the act’s] age-verification requirements are merely a content-neutral regulation on access to speech at particular ‘locations,’ so intermediate scrutiny should apply.”¹⁷⁵

The court noted that the question of what scrutiny applies and whether the Act is content-based or content-neutral “turns on the reasons the State gives for adopting the Act.”¹⁷⁶ Arkansas gave the reasons that more time

165. *Id.*

166. *Id.* at *14 (internal quotations omitted).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* (quoting ARK. CODE ANN. § 4-88-1102(a) (2023)).

171. *Griffin*, 2023 WL 5660155, at *4, *15.

172. *Id.* at *15.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

on social media for minors leads to “negative mental-health outcomes” and “that adult sexual predators on social media seek out minors and victimize them”—and that by restricting the access for minors it is simply regulating the “location” like restrictions on minors entering a bar or casino.¹⁷⁷ The court found that even if some of this speech “is harmful for children to view,” it “is likely protected nonetheless.”¹⁷⁸ And the court found the location analogy “weak.”¹⁷⁹

But the court declined to rule that the Arkansas Act is content-based and subject to strict scrutiny, because it did not want to “at this early stage in the proceedings.”¹⁸⁰ The court instead agreed to examine the Act under intermediate scrutiny.¹⁸¹ The Arkansas Act “clearly serves an important governmental interest,” so the focus is on the burden imposed on adults and minors and whether the Act is narrowly tailored.¹⁸²

The court held that the Arkansas Act burdens adults’ and minors’ speech. For adults, the Act’s age verification will discourage users from accessing the sites as it is an additional hassle and requires adults to “forgo the anonymity otherwise available on the internet.”¹⁸³ By “requiring Internet users to provide personally identifiable information to access a Web site[,] [it] would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet.”¹⁸⁴ With the age-verification requirement, “[i]t is likely that many adults who otherwise would be interested in becoming account holders on regulated social media platforms will be deterred—and their speech chilled—as a result of the age-verification requirements.”¹⁸⁵

The Arkansas Act “bars minors from opening accounts on a variety of social media platforms, despite the fact that those same platforms contain vast quantities of constitutionally protected speech, even as to minors”— “[i]t follows that [the Act] obviously burdens minors’ First Amendment Rights.”¹⁸⁶ The majority of the content on social media is not “damaging,

177. *Id.*

178. *Id.*

179. *Id.* at *16.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at *17.

184. *Id.* (citations omitted).

185. *Id.*

186. *Id.*

harmful, or obscene as to minors,” and even though Arkansas’ goals are “admirable,” the court held it is not justified to suppress speech.¹⁸⁷

Next, the court examined whether the Arkansas Act was narrowly tailored. Relying on *Brown*, the court held the Act to be “not narrowly tailored to address the harms that the State contend[ed] are encountered by minors on social media.”¹⁸⁸ “To begin,” the court believed “the connection between these harms and ‘social media’ [was] ill defined by the data.”¹⁸⁹ And it questioned why the Act exempted some social media platforms and not others.¹⁹⁰ Specifically, the court asked why YouTube is exempt when there is evidence it is the most popular with minors and why gaming and video chat sites are exempt when they are known places for minor exploitation by adult predators.¹⁹¹ And the court questioned why parental consent is the be-all-end-all when “research suggests that it is the amount of time that a minor spends unsupervised online and the content that he or she encounters there that matters.”¹⁹²

The court concluded that the Arkansas Act “is not narrowly tailored to target content harmful to minors” because “[i]t simply impedes access to content writ large.”¹⁹³ There are other ways to address the real issue without universal restrictions on all users.¹⁹⁴ The Arkansas Act is unconstitutionally vague, not narrowly tailored, and places an “undu[e] burden [on] adult and minor access to constitutionally protected speech.”¹⁹⁵ And in this case the court appears to be correct in holding this.

ii. Ohio: NetChoice, LLC v. Yost

In 2024, the Ohio Act was found unconstitutional because the Act was content-based and failed strict scrutiny, violated the First Amendment rights of Ohio minors, and was void for vagueness.¹⁹⁶ NetChoice again brought a First Amendment challenge similar to the one against the

187. *Id.*

188. *Id.* at *19.

189. *Id.* (internal quotations omitted).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at *20.

194. *Id.* at *20-21.

195. *Id.* at *21.

196. *See generally* NetChoice, LLC v. Yost, 716 F. Supp. 3d 539 (S.D. Ohio Feb. 12, 2024).

Arkansas Act.¹⁹⁷ Specifically, NetChoice argued against the Act for three reasons:

(1) that the [Ohio] Act violates NetChoice's member organizations First and Fourteenth Amendment rights because it is so vague that NetChoice's member organizations do not have fair notice as to whether they must comply with the Act's dictates, and if so, how; (2) that the Act imposes impermissible speaker- and content-based restrictions on First Amendment protected speech; and (3) that the Act imposes an impermissibly overinclusive and underinclusive ban on minors' access to First Amendment protected speech.¹⁹⁸

The court began by addressing whether the Act regulates protected speech—deciding whether the First Amendment protections and framework apply. Ohio—through its Attorney General Yost—argued that the Act only “regulates commercial activity and does not regulate speech at all” because the Act regulates the “ability of minors to contract,” which gives Ohio the “authority to regulate as commercial transactions.”¹⁹⁹ The court disagreed—finding “that the Act regulates speech in multiple ways: (1) it regulates operators’ ability to publish and distribute speech to minors and speech by minors; and (2) it regulates minors’ ability to both produce speech and receive speech.”²⁰⁰ And there is not a “contract exception” to the First Amendment.²⁰¹ “[T]he Act is an access law masquerading as a contract law,” and the First Amendment is implicated.²⁰²

The court then found that the Ohio Act is content-based, requiring it to meet strict scrutiny to stand.²⁰³ “NetChoice argues that the Act is . . . content-based because it targets some websites while exempting others.”²⁰⁴ Since there are exceptions in the Act—such as “product review websites and ‘widely recognized’ media outlets”—the court found these

197. *Id.* at *549.

198. *Id.* at *551.

199. *Id.*

200. *Id.* at *552.

201. *Id.*

202. *Id.*

203. *Id.* at *558.

204. *Id.* at *554.

to be “easy to categorize as [content-based].”²⁰⁵ Ohio instead argued the Act is content-neutral and speaker-based—but not requiring strict scrutiny—because “its speaker-based distinctions do not disfavor particular communicative content,” but that the exemptions “simply tailor[] the Act’s contract regulation mechanism to entities whose platforms and business practices pose a heightened risk to minors’ privacy, health, and safety.”²⁰⁶ Specifically, Ohio is concerned with the minor’s personal information, addictive functions like “infinite scroll,” the increased risk of mental illness in minors, and the risk of predation towards these minors.²⁰⁷ Because of this, these functions and features are not present in the exempted sites as the Act regulates sites that “target children” or are “reasonably anticipated to be accessed by children.”²⁰⁸ But even then, “the Act regulates much more speech than just speech that targets children.”²⁰⁹

After holding that the Ohio Act is content-based, the court also ruled that it is subject to strict scrutiny because it violates the First Amendment rights of minors.²¹⁰ Quoting *Brown*, the court noted that “the State does not possess ‘a free-floating power to restrict the ideas to which children may be exposed.’”²¹¹ Continuing to quote *Brown*, the court reasoned that these acts—such as the Ohio Act and the California Act in *Brown*—“do not enforce parental authority over children’s speech and religion; they impose governmental authority, subject only to a parental veto.”²¹² The Ohio Act is precisely of this sort, “[a]nd like content-based regulations, laws that require parental consent for children to access constitutionally protected, non-obscene content, are subject to strict scrutiny.”²¹³

Finding that the Ohio Act is subject to strict scrutiny, the court then determined whether the Act can survive strict scrutiny.²¹⁴ In defense of the Act, the court described Ohio’s defense as follows:

205. *Id.* at *557.

206. *Id.* at *554.

207. *Id.* at *555.

208. *Id.* at *547.

209. *Id.* at *556.

210. *Id.* at *558.

211. *Id.* at *558 (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011)).

212. *Id.* at *558 (quoting *Brown*, 564 U.S. at 795 n.3).

213. *Id.*

214. *Id.*

[Ohio] argues both that it seeks to regulate the ability of operators to contract with minors, not to limit minors' access to expressive content, . . . but in the same breath asserts that the State's compelling interest is in protecting minors from harms associated with covered operators' platforms, including mental health issues, data privacy issues, and sexual predation. . . . [Ohio] also argues that the State has a compelling interest in protecting and advancing parents' ability to make decisions about their children's care and upbringing.²¹⁵

The court then addressed each of Ohio's arguments in order.

First, addressing the "minors' ability to contract with operators," the court noted that Ohio has produced evidence of the "risk [of] minors['] 'involuntary releases of personally identifiable and other personal information and data'" and how operators' terms of service play into this.²¹⁶ But the court is unsure whether these are a compelling enough interest for the State.²¹⁷ However, the court found that the Ohio Act "is not narrowly tailored to protect minors against oppressive contracts" because it "regulates access to and dissemination of speech when it could instead seek to regulate the—arguably unconscionable—terms of service that these platforms require."²¹⁸

Next, the court addressed Ohio's argument "that scientific research supports the notion that engagement with operators' platforms can have damaging mental health effects, and subject minors to sexual predation."²¹⁹ To back up its claim, Ohio cited the U.S. Surgeon General's Advisory on the effects of social media on minors' mental health.²²⁰ The court again declined to determine if this is a compelling interest—stating that "it very well may be"—but instead concluded "the Act is not narrowly tailored to those ends."²²¹ By "[f]oreclosing minors . . . from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, [it] is a breathtakingly blunt instrument for reducing

215. *Id.* (citations omitted).

216. *Id.* at *559.

217. *Id.* (internal quotations omitted).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

social media's harm to children."²²² And the "approach is an untargeted one[] as parents" only need to give consent once upon the account creation and after the parents and platform "are otherwise not required to protect against any of the specific dangers" that might occur from the social media site.²²³

Finally addressing the rights of the parents, the court noted that Ohio has failed to "distinguish the State's purported interest from an analogous—and rejected—state interest in *Brown*."²²⁴ Again quoting *Brown*, the court reasoned that there is "a series of preexisting protections to help parents . . . such that 'filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest.'"²²⁵ The court then held that the Ohio Act failed to meet strict scrutiny on the First Amendment challenge.²²⁶

The Ohio Act is void for vagueness as well. "[T]he Act purports to apply to operators that 'target[] children' or are 'reasonably anticipated to be accessed by children.'"²²⁷ This broad language leaves many operators and sites "unsure as to whether it applies to" them.²²⁸ The Act attempts to rectify this by "provid[ing] an eleven-factor list" to determine if a site is covered, but the list is "malleable" and has "broad-ranging considerations," with all of the "listed considerations [being] undefined."²²⁹ The exceptions to the Act are the same, with "no guardrails or signposts for determining" who falls in or out of this group.²³⁰ The court found that "[s]uch capacious and subjective language practically invites arbitrary application of the law."²³¹ Taken all together, the court found the Ohio Act to violate the First Amendment and preliminarily enjoined the Act from taking effect.²³²

222. *Id.*

223. *Id.*

224. *Id.* at *560.

225. *Id.* (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 (2011)).

226. *Id.*

227. *Id.* (alteration in original) (quoting OHIO REV. CODE ANN. § 1349.09(B) (2023)).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

iii. Utah: NetChoice, LLC v. Reyes

In 2024, the Utah District Court found the Utah Act likely violated the First Amendment. NetChoice challenged the Utah Act by asserting that the Act's central coverage definition "imposes unjustified, content-based restrictions on social media companies' speech."²³³ This challenge is different from the Arkansas and Ohio challenges because it relies on the violation occurring to the social media companies' speech—not the state citizens' speech.

The court began by holding that "there is no dispute the Act implicates social media companies' First Amendment rights."²³⁴ And, relying on *Moody*, the court found that "[t]he speech at issue in this case—the speech social media companies engage in when they make decisions about how to construct and operate their platforms—is protected speech."²³⁵

Next, the court examined NetChoice's claim that the Act is a content-based restriction on the social media companies' speech—requiring strict scrutiny to be met. The court found that the Utah Act is "[content-based] because the [Utah Act] draws distinctions between websites that allow users to interact socially and websites that serve another function or purpose, such as" news, education, and shopping sites.²³⁶ Utah—through its Attorney General Reyes—argued that the distinction in the definition of what is covered in the Act "contemplates a social media service's 'structure, not subject matter.'"²³⁷ But Utah's argument "emphasizes the elements of the [definition distinction] that relate to 'registering accounts, connecting accounts, [and] displaying user-generated content' while ignoring the 'interact socially' requirement."²³⁸ "[T]he social interaction-based distinction does not appear designed to inform the application of otherwise content-neutral restrictions"; instead, "[i]t is a distinction that singles out social media companies based on the social subject matter of the material [they] disseminate[]." ²³⁹ Utah also argued the distinction is content-neutral "because it does not prevent minor account holders and

233. *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1120 (D. Utah Sept. 10, 2024) (citation omitted).

234. *Id.* (footnote omitted).

235. *Id.* (footnote omitted).

236. *Id.* at 1121.

237. *Id.* at 1122 (footnote omitted).

238. *Id.* (footnote omitted).

239. *Id.* (internal quotations omitted).

other users they connect with from discussing any topic they wish.”²⁴⁰ But the court noted that Utah misunderstood the nature of the argument at hand because “the focus of NetChoice’s challenge is that the [act] restricts social media companies’ abilities to collage user-generated speech into their ‘own distinctive compilation[s] of expression.’”²⁴¹ Because the Utah Act “distinguishes between ‘social’ speech and other forms of speech,” it is a content-based speech restriction.²⁴²

Finding that the Utah Act is a content-based restriction, the court examined whether the Act satisfies strict scrutiny. Utah asserted that the state “has a compelling interest in safeguarding the well-being and privacy of minors in the state,” or more specifically, “in protecting minors from the mental health- and personal privacy-related harms associated with excessive social media use.”²⁴³ However, the court held that Utah did “not me[e]t their burden to articulate a compelling government interest warranting the [Utah Act’s] intrusion on social media companies’ First Amendment rights.”²⁴⁴

First, the court agreed that social media and the associated concerns could be connected, but Utah did “not provide[] evidence establishing a clear, causal relationship between minors’ social media use and negative mental health impacts.”²⁴⁵ Only one report was submitted by Utah to this effect—the U.S. Surgeon General report linking “social media use and negative mental health”—but it “offers a much more nuanced view of the link” between the two.²⁴⁶ Second, Utah’s position “ignores the basic First Amendment principle that ‘minors are entitled to a significant measure of First Amendment Protection.’”²⁴⁷ The personal information that a minor chooses to share with “a social media service—the content they generate—is fundamentally their speech.”²⁴⁸ And the state may not justify an intrusion into the minors’ constitutional protected rights.²⁴⁹ Third, Utah argued that “parents are caught ‘in a losing battle against social media

240. *Id.* (alteration in original) (internal quotations omitted).

241. *Id.* (quoting *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024)).

242. *Id.* at 1124.

243. *Id.*

244. *Id.*

245. *Id.* at 1125.

246. *Id.*

247. *Id.* at 1126 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975) (Breyer, J., dissenting)).

248. *Id.* at 1126.

249. *Id.*

companies for the attention and well-being of their own children.”²⁵⁰ But it is “far from clear that ‘the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to’ social media services and ‘cannot do so’ otherwise”—with alternative methods such as “parental controls and web filtering technology.”²⁵¹

The Utah Act is also not narrowly tailored. First, Utah did not show that the Act is the least restrictive option for “accomplish[ing] its goals because [it has] not shown existing parental controls are an inadequate alternative.”²⁵² Utah did “present evidence suggesting parental controls are not in widespread use,” but it did “not establish parental tools are deficient.”²⁵³ Instead, it “only demonstrates parents are unaware of parental controls, do not know how to use parental controls, or simply do not care to use parental controls.”²⁵⁴ And Utah did not show that it has even tried, considered, or promoted the option of educating parents on these tools.²⁵⁵ Utah also argued that the Act is essential “because social media platforms contain ‘nicotine-like additives’—namely, seamless pagination, autoplay, and push notification systems—designed to foster ‘over-indulgence’ and ‘user addiction.’”²⁵⁶ But the State did not offer any evidence that “requiring social media companies to compel minors to push ‘play,’ hit ‘next,’ and log in for updates will meaningfully reduce the amount of time they spend on social media platforms.”²⁵⁷

Next, Utah did not show that the Act is “not seriously ‘underinclusive when judged against its asserted justification[s].’”²⁵⁸ The court noted the Utah Act is similar to the California Act in *Brown*, where only violent video games were targeted but not others “like Sonic the Hedgehog . . . [when] research showed [it] produced the same effect in children as violent videogames.”²⁵⁹ The effect this had in *Brown* “raise[d] serious doubts about whether the government [was] in fact pursuing the interest it invoke[d], rather than disfavoring a particular speaker or

250. *Id.* (footnote omitted).

251. *Id.* (footnote omitted).

252. *Id.* (footnote omitted).

253. *Id.* at 1127 (footnote omitted).

254. *Id.* (footnote omitted).

255. *Id.* (footnote omitted).

256. *Id.* (footnote omitted).

257. *Id.* at 1128.

258. *Id.*

259. *Id.* (footnote omitted).

viewpoint.”²⁶⁰ The Utah Act “appears underinclusive when judged against the State’s interests in protecting minors from the harms associated with social media use because the Act ultimately preserves minors’ ability to spend as much time as they want on social media platforms.”²⁶¹ The “outcome does not comport with a core underpinning of [Utah’s] argument—that excessive social media use harms minors.”²⁶²

Finally, Utah had “not shown the [Act] is not seriously overinclusive, restricting more constitutionally protected speech than necessary to achieve [Utah’s] goals.”²⁶³ Utah had “not identified why the Act’s scope is not constrained to social media platforms with significant populations of minor users, or social media platforms that use the addictive features fundamental to [Utah’s] well-being and privacy concerns.”²⁶⁴ Instead, the Act covers a vast amount of social media service providers no matter whether they fit “the likes of traditional social media platforms—say, Facebook and X”—or whether they actively promote their services to minors or “use features such as seamless pagination and push notification.”²⁶⁵ The court concluded by holding that the Utah Act restricted protected speech, constituted a content-based restriction, and failed to satisfy strict scrutiny because the State had not established a compelling interest and the Act was not narrowly tailored.²⁶⁶

iv. Louisiana: Active Law

The Louisiana Act has been active since July 1, 2024.²⁶⁷ But the Act has not been challenged in court. This begs the question: why? The Louisiana Act is similar to many of the acts discussed. The Act requires parental consent for minors to use social media platforms and has exceptions for what constitutes a social media company and platform.²⁶⁸ These are all similar to the Arkansas Act and the Ohio Act. If the Louisiana

260. *Id.* (footnote omitted).

261. *Id.*

262. *Id.* (footnote omitted).

263. *Id.* at 1129.

264. *Id.* (footnote omitted).

265. *Id.* (footnotes omitted).

266. *Id.*

267. Staff, *New Laws Going into Effect in Louisiana this Week*, WAFB, <https://www.wafb.com/2024/07/01/new-laws-going-into-effect-louisiana-this-week/> [https://perma.cc/3USW-LC63].

268. *Id.*

Act is to be challenged, it would seem almost certain that the Act would be ruled a violation of the users' constitutional First Amendment right.

Like the Arkansas Act in *NetChoice, LLC v. Griffin*, the Louisiana Act would result in the same outcome: being found to be a content-based restriction on the speech of Louisiana citizens, with the State failing to provide a compelling interest, and the Act not being narrowly tailored to justify the intrusion on the First Amendment.

III. Solutions that Can Stand a Challenge

With the current attempted solutions to the issue being found to violate the First Amendment, can it be addressed while staying within the constitutional bounds? Or can no action by the states be taken? Will it take a movement among the general public to respond?

A. Algorithm Risk Audits

Legislation requiring mandatory independent third-party audits of social media companies' and platforms' algorithms is a solution that can address these issues without violating the First Amendment. An algorithm is defined as

a computational process that uses machine learning, natural language processing, artificial intelligence techniques, or other computational processing techniques of similar or greater complexity and that makes a decision or facilitates human decision-making with respect to users' personal information, including to determine the provision of products or services or to rank, order, promote, recommend, amplify, or similarly determine the delivery or display of information to an individual.²⁶⁹

There are many different types of algorithms, but the algorithms targeted in the audits are the "recommendation algorithms, also known as engagement-based algorithms, which passively populate a social media user's feed with content without any direct action or request by the

269. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 43, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

user.”²⁷⁰ These algorithms put forward “the information that shows up in the feed of social media users.”²⁷¹

The algorithm audit—also known as an algorithm risk audit—is a “technique to make algorithms and their effects on [the] content feeds visible.”²⁷² It provides an “objective” way to see how the algorithms “push[] out different content recommendations to different user groups or demographics in an unfair or unbalanced way, without those users purposely seeking out that content.”²⁷³ The audits are conducted by “independent third parties” and can be used to ensure that social media companies and platforms are not pushing content in a biased way toward “different user groups or demographics.”²⁷⁴

“Legally mandating algorithm . . . audits is a relatively new strategy”²⁷⁵ In 2021, New York City passed a law requiring “annual audits assessing bias in automated employment decision tools, which use algorithms to screen applicants.”²⁷⁶ The law requires the employment decision algorithm to have a “bias audit conducted” to identify if the algorithm “might intentionally or unintentionally weed out applicants based on certain demographics, such as race and gender, regardless of whether they meet the job qualifications.”²⁷⁷ The New York City law requires the audit to be conducted by an independent source with the results being “made publicly available . . . prior to the use of such tool.”²⁷⁸

Another real-world example of an algorithm audit is a settlement that took place between Meta Platforms, Inc. (Meta) and the U.S. Department of Justice (DOJ). In June 2022, the DOJ announced it had come to a settlement agreement with Meta over a lawsuit “alleging that Meta’s

270. *Id.*

271. Nancy Costello et al., *Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-level Policy Action to Protect Youth from the Dangers of Social Media*, 49 (2-3) AM. J.L. & MED 135, 149 (2024).

272. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 7, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

273. *Id.*

274. *Id.*

275. *Id.* at 22.

276. *Id.*

277. N.Y.C. ADMIN. CODE § 20-871 (2024); Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 22, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf> (footnote omitted).

278. N.Y.C. ADMIN. CODE § 20-871 (2024).

housing advertising system discriminates against . . . users based on their race, color, religion, sex, disability, familial status, and national origin” in violation of the Fair Housing Act.²⁷⁹ “[T]he complaint allege[d] that Meta uses algorithms in determining which . . . users receive housing ads, and that those algorithms rely, in part, on characteristics protected under” the Fair Housing Act.²⁸⁰ The settlement agreement “require[s] Meta to develop a new system to make the display of housing ads more even” and address the discrimination.²⁸¹ It “marks the first time that Meta will be subject to court oversight for its ad targeting and delivery system.”²⁸² The settlement took a three-step approach—identify the specific harm, determine how to measure the extent of harm, and agree on reporting periods and benchmarks to reduce harm—which can be followed and implemented in algorithm audits to help address the issue that minors are having on social media platforms.

i. The Three-Step Approach for the Algorithm Risk Audit

The first step is to identify the specific harm. An example of the specific harm to minors on social media “might be described as ‘eating disorder rabbit holes,’ such as when adolescent social media users begin searching for and engaging with content related to mental health and body image and then are progressively shown more and more pro-eating disorder related content.”²⁸³ In the case of Meta and the DOJ, the specific

279. Press Release, U.S. Att’y’s Off., Southern Dist. of N.Y., United States Attorney Resolves Groundbreaking Suit Against Meta Platforms, Inc., Formerly Known As Facebook, To Address Discriminatory Advertising For Housing (June 21, 2022), <https://www.justice.gov/usao-sdny/pr/united-states-attorney-resolves-groundbreaking-suit-against-meta-platforms-inc-formerly> [<https://perma.cc/PU34-VCY8>].

280. *Id.*

281. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 22, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

282. Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., United States Attorney Resolves Groundbreaking Suit Against Meta Platforms, Inc., Formerly Known As Facebook, To Address Discriminatory Advertising For Housing (June 21, 2022), <https://www.justice.gov/usao-sdny/pr/united-states-attorney-resolves-groundbreaking-suit-against-meta-platforms-inc-formerly> [<https://perma.cc/PU34-VCY8>].

283. Nancy Costello et al., *Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-level Policy Action to Protect Youth from the Dangers of Social Media*, 49 (2-3) AM. J.L. & MED 135, 169 (2024) (footnote omitted).

283. *Id.* at 167.

harm “was the discrimination caused by housing ads being unevenly displayed to Meta users of certain demographics.”²⁸⁴

The second step is to determine how to measure the specific harm. For this step and continuing on the “eating disorder rabbit holes,”

a social media platform might be required to measure the number of users who have made the transition from mental health and body image-related content to pro-eating disorder related content (e.g., an extremely restrictive dieting plan) within a certain number of minutes, hours, or days. The social media platform could measure the users who plunge into eating disorder rabbit holes and compare the demographics of these users. If the specific concern is adolescent users, the social media platform could compare the number of all users who enter eating disorder rabbit holes to that of adolescent users who do. Comparing the difference between these numbers would show whether adolescent users are disproportionately likely to tumble down eating disorder rabbit holes.²⁸⁵

For Meta and the DOJ, the harm was “shown through [the] differences between the eligible and actual audiences for housing ads.”²⁸⁶ The eligible audience was “all users who (1) fit the targeting options selected by an advertiser for an ad, and (2) were shown one or more of any type of ad on a Meta platform over the past 30 days.”²⁸⁷ “The actual audience include[d] all users in the eligible audience who actually viewed the specific ad.”²⁸⁸ Once the audiences were identified and sorted, “a measurement [was] taken to determine the difference between the number of users of each demographic group in the eligible versus actual audience.”²⁸⁹

The third step is to report the harms—with the social media platform and the governmental body “agreeing on reporting periods and

284. *Id.* at 167.

285. *Id.* (emphasis omitted).

286. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 23, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

287. *Id.* (footnote omitted).

288. *Id.* (footnote omitted).

289. *Id.* (footnote omitted).

benchmarks to reduce harm.”²⁹⁰ This involves collaboration between the social media platform and the governmental entity to determine reporting periods and benchmarks. The governmental body—like the legislature or an enforcement entity—could decide that the social media platform “needs to implement a new system . . . to alter its current algorithm to address the disparate impact it has on adolescent users.”²⁹¹ “In implementing such change, the parties would need to determine benchmarks for improvement and reporting periods to ensure compliance with those benchmarks.”²⁹² These “[r]eporting periods could be required at any reasonable rate, such as on a quarterly, monthly, or even weekly basis.”²⁹³ The report—or audit—would then be required to “be evaluated by a third-party, independent reviewer to ensure compliance with the benchmarks agreed upon by the parties.”²⁹⁴ The independent third-party reviewer ensures the social media platform is not overseeing itself. For the Meta and the DOJ settlement, the two parties agreed to reporting periods and benchmarks—which requires Meta to “meet certain milestones within a specific period of time.”²⁹⁵ Meta will then implement a new system to distribute ads in a way that does not discriminate and “reduce the variance between the eligible and actual audience for housing ads.”²⁹⁶ The parties agreed to a “third-party reviewer to investigate and verify on an ongoing basis whether the new system is meeting” the set benchmarks—the ad distributions—of the settlement.²⁹⁷

290. *Id.* at 27.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Emma Roth, *Meta's New Ad System Addresses Allegations that It Enabled Housing Discrimination*, THE VERGE (Jan. 9, 2023, 5:03 PM CST), <https://www.theverge.com/2023/1/9/23547191/meta-equitable-ads-system-settlement> [https://perma.cc/5HQL-UHEY].

296. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 23, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf> (footnote omitted).

297. Press Release, U.S. Att’y’s Off., S. Dist. of N.Y., United States Attorney Resolves Groundbreaking Suit Against Meta Platforms, Inc., Formerly Known As Facebook, To Address Discriminatory Advertising For Housing (June 21, 2022), <https://www.justice.gov/usao-sdny/pr/united-states-attorney-resolves-groundbreaking-suit-against-meta-platforms-inc-formerly> [https://perma.cc/PU34-VCY8].

The next key element is to “require public disclosure of a social media platform’s compliance with the agreed upon benchmarks.”²⁹⁸ The compliance reports that the independent third-party reviews should be made publicly available for all to see.²⁹⁹ The legislature implementing this policy would establish the frequency with which these reports or audits are published—“on a quarterly, monthly, or even weekly basis.”³⁰⁰ These “public disclosure[s] would provide users with information about a platform’s algorithmic practices, including its benefits and harms,” “allow[ing] users to choose whether to use or not to use the platform.”³⁰¹ The disclosures could also help establish causation, a required “element to prove in [Fair Trade Commission] claims against businesses for unfair or deceptive practices and in products liability claims.”³⁰² The “[p]ublicly disclosed algorithm risk audits would[] . . . provide vital new evidence needed to compel social media companies to change their harmful practices.”³⁰³

ii. The Algorithm Risk Audit Can Navigate the First Amendment

The algorithm risk audit would stay within the bounds of the First Amendment and most likely not be ruled unconstitutional. The first and second steps—identifying the specific harm and measuring that specific harm—do “not regulate content; or speech, on social media platforms, nor prohibit the use of particular algorithms; rather, it would measure the effects an algorithm has on its users.”³⁰⁴ This is because the first two steps “mandate that the harms to be measured are identified and the incidents of harm caused by the platform’s algorithmic design are measured”—not that the content of the algorithm is regulated.³⁰⁵

298. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 30, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

299. Nancy Costello et al., *Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-level Policy Action to Protect Youth from the Dangers of Social Media*, 49 (2-3) AM. J.L. & MED 135, 169 (2024).

300. *Id.*

301. *Id.* at 170 (footnote omitted).

302. *Id.*

303. *Id.*

304. *Id.*

305. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 28, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

However, the third step—reporting the harms—may be open to a First Amendment challenge, but it still may stand. Those challenging the third step may claim that by “mandating that the platforms reduce the . . . harms by agreed upon reporting periods and benchmarks” it “illegally regulates content because the platform might need to change its algorithm to cause less harm.”³⁰⁶ This was not an issue in the Meta and the DOJ settlement “because it corrected Meta’s violation of the Fair Housing Act.”³⁰⁷ However, the specific harms to minors from social media are not illegal—“although it may be disturbing for viewers, a video depicting an extremely thin adolescent girl with protruding bones is not violating any law.”³⁰⁸

To survive the First Amendment challenge on the third step, it can be argued that it is a time, place, and manner restriction—being deemed content-neutral and only requiring intermediate scrutiny to survive. The overall argument for this is that “it does not shut down all speech,” but rather, “[i]t merely regulates the manner in which the speech can be presented to prevent proven harm.”³⁰⁹ In content-neutral and time, place, and manner restrictions, the controlling consideration is the government’s purpose in implementing the restriction.³¹⁰ Here, the content-neutral goal is “protecting youth and adolescent social media users.”³¹¹ The modification of the platform’s algorithm would only have an “incidental effect” to serve the purpose unrelated to the content of the message to “require[] that such content is not algorithmically pushed unevenly to youth and adolescent users.”³¹² The content can still be “deliberately and independently” searched for within the platform—the “searching mechanisms provide a sufficient channel of alternative communication of the speech.”³¹³

A possibility to avoid the First Amendment challenge altogether is to make the third step optional. This would not dilute the entire algorithm audit “because the first two steps of the law still produce the evidence of

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

311. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 29, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

312. Nancy Costello et al., *How to Hold Social Media Platforms Accountable*, STRIPED, March 27, 2024, at 29, <https://hsph.harvard.edu/wp-content/uploads/2024/11/Roadmap-Holding-Social-Media-Platforms-Accountable.pdf>.

313. *Id.*

harm needed for an attorney general's office to bring a claim of deceptive advertising or unfair business practices against" a company or platform.³¹⁴ To avoid this, the company or platform must "be proactive and take a compliant, affirmative step to alter the design of its platform so it does not hurt youth and adolescents."³¹⁵ With the third step gone, it now becomes a two-step approach: the first step being "the design-related harms to be measured are identified," and the second step being that "the risk audits, conducted by an independent auditor, measure the incidents, and the results of the audits be publicly disclosed."³¹⁶

B. Digital Literacy Curriculum

Another alternative is legislation requiring that digital literacy curriculum be taught in schools. "Digital literacy encompasses AI literacy, digital citizenship, digital wellness, information literacy, news literacy, and social media literacy."³¹⁷ It involves teaching how to "responsibly engage[] with digital platforms . . . and understanding the health effects of social media."³¹⁸ It should teach the students "skills to assess online information[] . . . protect their digital presence and make informed decisions to navigate the digital landscape responsibly."³¹⁹ "Building up [the] students' digital literacy" will "ensure[] that students are prepared to engage with technology in productive and meaningful ways" and prevent the harm that is currently being done.³²⁰

The digital literacy curriculum "approach [would] empower young people to use technology in beneficial ways while also advising them what to do should they encounter harmful or concerning content."³²¹ This education-focused approach will allow "young people to make good

314. *Id.*

315. *Id.*

316. *Id.*

317. *State Approaches to Digital Literacy Instruction*, EXCELINED (Feb. 2024), <https://excelined.org/wp-content/uploads/2024/05/2024-State-Approaches-to-Digital-Literacy-Instruction.pdf>.

318. *Id.*

319. *Id.*

320. *Id.*

321. Jennifer Huddleston & Gent Salihu, *The State of Kids Online Safety Legislation at the End of the 2022–2023 State Legislature Session*, CATO INST. (Aug. 1, 2023), <https://www.cato.org/blog/state-kids-online-safety-legislation-end-2023-2024-state-legislature-session-0> [<https://perma.cc/H6VX-GF64>].

decisions around their own technology use.”³²² The teaching of digital literacy should begin “around [when] young people are likely to first have their own accounts” and “should not only focus on risks but also on beneficial ways to use these tools.”³²³ The approach—most importantly—would not violate the First Amendment.

Currently, some states already have digital literacy curriculum being taught.³²⁴ For instance, Utah passed two pieces of legislation that implemented this. “In 2015, Utah passed H.B. 213[,] which requires public schools to form community councils offering guidance on digital citizenship and safe technology use.”³²⁵ “In 2020, Utah passed HB 372, which created the Digital Wellness, Citizenship, and Safe Technology Commission,” which is “tasked with identifying best practices, resources, and research around digital citizenship to ensure that students are digital media-literate and able to use technology responsibly.”³²⁶ Since Utah took further steps to address the issue even after implementing the digital literacy curriculum, the curriculum might best be served as a supplement and not the sole solution.

C. Social Media Companies Themselves Act

A simple solution to the problem is for social media companies and platforms to decide to address the issue—and some have. Meta—the parent company of Instagram—has announced default privacy settings for minors on Instagram.³²⁷ The new settings will be applied to minors who accurately report their age when signing up for an account and those who already have one.³²⁸ The default settings include setting the minors’ account to private, meaning they “need to accept new followers and people who don’t follow them can’t see their content or interact with them,”

322. *Id.*

323. Jennifer Huddleston, *Improving Youth Online Safety Without Sacrificing Privacy and Speech*, CATO INST. (June 20, 2023), <https://www.cato.org/briefing-paper/improving-youth-online-safety-without-sacrificing-privacy-speech> [<https://perma.cc/44ZN-XBP2>].

324. *State Approaches to Digital Literacy Instruction*, EXCELINED (Feb. 2024), <https://excelined.org/wp-content/uploads/2024/05/2024-State-Approaches-to-Digital-Literacy-Instruction.pdf> [<https://perma.cc/U8SG-JWX7>].

325. *Id.*

326. *Id.*

327. *Introducing Instagram Teen Accounts: Built-In Protections for Teens, Peace of Mind for Parents*, INSTAGRAM (Sept. 17, 2024), <https://about.instagram.com/blog/announcements/instagram-teen-accounts/>.

328. *Id.*

messaging restrictions with the account being able to only receive message from accounts they follow, sensitive content restrictions that limit the type of content seen on the platform, limited interactions where the account “can only be tagged or mentioned by people they follow,” an anti-bullying feature that automatically hides “offensive words and phrases” from a post’s comments and messages, time limit reminders where the account “will get notifications telling them to leave the app after 60 minutes each day,” and enabling sleep mode that is automatically “turned on between 10 PM and 7 AM, which will mute notifications overnight.”³²⁹

A glaring issue with this approach is that many minors will lie—or already have lied—about their age when signing up and creating an account. The default privacy settings only apply to the accounts of minors who have accurately reported their age. Meta’s attempt to resolve this issue requires accounts to “verify their age in more places, like if they attempt to use a new account with an adult birthday.”³³⁰ Meta also states it is “building technology to proactively find accounts belonging to teens, even if the account lists an adult birthday” to allow it to find the accounts and place the default settings on the minors’ accounts.³³¹

This solution attempts to address many of the problems without legislation requiring the company or platform to act—with some seeing it as an attempt to “ward off new . . . protections for young people online.”³³² However, only time will tell if this will address the real issue or if it is a way for companies to act like they are addressing the issue without real change.

Conclusion

The impact social media has on minors is an important issue—even courts agree—and some form of action must be taken. The action can come from the parents using already available tools or limiting access in other ways, the social media companies and platforms themselves can act to protect minors, or the States can pass legislation—implementing algorithm risk audits, digital literacy curriculum, or some other action.

329. *Id.*

330. *Id.*

331. *Id.*

332. Mike Isaac and Natasha Singer, *Instagram, Facing Pressure Over Child Safety Online, Unveils Sweeping Changes*, N.Y. TIMES (Sept. 18, 2024), <https://www.nytimes.com/2024/09/17/technology/instagram-teens-safety-privacy-changes.html>.

Whichever action is taken, it must stay within the bounds of the First Amendment and address the issue so as not to end up in the current situation—the acts being found unconstitutional and the children still on social media with the negative effects occurring.