UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FREE SPEECH COALITION, INC.; DEEP CONNECTION TECHNOLOGIES, INC.; CHARYN PFEUFFER; ELIZABETH HANSON; and JFF PUBLICATIONS, LLC, Plaintiffs, v. JAMES M. LE BLANC, in his official capacity as THE SECRETARY OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; JAY DARDENNE, in his official capacity as THE COMMISSIONER OF THE LOUISIANA DIVISION OF ADMINISTRATION; and JEFFREY LANDRY, in his official capacity as THE ATTORNEY GENERAL OF LOUISIANA, Defendants.	)	CASE NO.: 23-cv-2123 SECTION E

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs, through undersigned counsel, respectfully move this Honorable Court for preliminary injunctive relief pending resolution of the case on the merits.

Support for this motion is provided in the accompanying memorandum.

By */s/ Jeffrey Sandman*

Date: June 21, 2023

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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"Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection."

- Judge Lowell A. Reed, Jr.

ACLU v. Reno, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999)

I. INTRODUCTION

After numerous federal court decisions invalidating as unconstitutional state and federal laws seeking to regulate or ban the publication of material harmful to minors on the internet, the Louisiana legislature has tried yet again. Codified at La. R.S. § 9:2800.29 (hereinafter, "Private Enforcement Act") and La. R.S. § 51:2121 (hereinafter, "Public Enforcement Act"), these laws (collectively, "Acts" or "Louisiana Acts") place substantial burdens on Plaintiff website operators, content creators, and countless others who use the internet by requiring websites to age-verify every internet user before providing access to non-obscene material that meets the State's murky definition of "material harmful to minors."

This attempt to restrict access to online content is not novel. The United States Supreme Court invalidated a federal law restricting internet communications deemed harmful to minors on First Amendment grounds in *Reno v. ACLU*, 521 U.S. 844 (1997). The Third Circuit invalidated a second such law on First Amendment grounds in *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009). And in state after state—including Louisiana—laws containing content-based restrictions on internet communications deemed harmful to minors have been held unconstitutional. *See Garden Dist. Book Shop, Inc. v. Stewart*, 184 F. Supp. 3d 331 (M.D. La. 2016). Yet despite this long legacy of constitutional invalidity, the Louisiana legislature has used not just the same tired justifications, but even the same statutory terms and definitions that led to invalidation of those past efforts. In doing so, it has placed Plaintiffs in the untenable position of abiding by the Acts' terms and enduring the constitutional infringement, or violating them and risking private lawsuits and substantial civil penalties.

The Acts violate the First Amendment in several respects. They impose content-based restrictions on protected speech requiring narrow tailoring and use of the least restrictive means to

serve a compelling state interest, yet they capture a substantial quantity of protected speech without accomplishing their stated purpose of protecting minors from materials they may easily obtain from other sources and via other means. Because they are substantially overbroad and vague, the Acts pose additional concerns under the First and Fourteenth Amendments. They also significantly burden interstate commerce by regulating out-of-state conduct and contributing to a growing patchwork of state laws legislating the 21st Century's most crucial instrumentality of commerce—the internet.

Plaintiffs are a diverse mix of individuals and entities who, pursuant to 18 U.S.C. § 2201 and 2202, and 42 U.S.C. § 1983 and 1988, are seeking declaratory and injunctive relief to vindicate rights secured by the Constitution. To stave off irreparable injury from the (present and continuing) deprivation of these rights, they move herein for a preliminary injunction pending the final determination of their claims.[1]

II. FACTUAL BACKGROUND

1. The Acts

Both Acts impose liability upon a "commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on the Internet from a website that contains a substantial portion of such material . . . [where] the entity fails to perform reasonable age verification methods to verify the age of an individual attempting to access the material." Whereas the Private Enforcement Act creates a private right of action for "damages resulting from a minor's accessing them material," the Public Enforcement Act empowers the Attorney General to "conduct an investigation of the alleged violation and initiate a civil action . . . on behalf of the state to assess civil penalties."

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[1] At this time, Plaintiffs do not move for a preliminary injunction as to claims that the Acts (a) works as a presumptively unconstitutional "prior restraint" on speech; (b) violates the Equal Protection Clause by excepting certain "news-gathering organizations" from its ambit; (c) violates "fundamental rights" secured by the Due Process Clause; or (d) is preempted by 47 U.S.C. § 230 ("Section 230"). Plaintiffs reserve all rights to assert these claims at a later date.

Other than their means of enforcement, the Acts are virtually identical. A "commercial entity" includes every "legally recognized entit[y]" from the largest corporation down to the smallest "sole proprietorship." "Substantial portion" means "more than thirty-three and one-third percent of total material on a website, which meets the definition of 'material harmful to minors' as defined[.]" "Reasonable age verification methods" are limited to use of (a) a "digitized identification card[2]"; or (b) a "commercial age verification system" that verifies the age of the user via reference to "government-issued identification" or another "commercially reasonable method that relies on public or private transactional data." The Acts' definition of "material harmful to minors" attempts to track the Supreme Court's modified-for-minors *Miller* Test[3] and includes "(a) any material that the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (b) material that exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated display or depiction of [certain body parts (including "the nipple of the female breast") or sexual acts (including "touching . . . of "nipples, breasts, [or] buttocks")] in a manner patently offensive with respect to minors; *and* (c) the material taken as a whole lacks serious literary, artistic, political, or scientific value for minors" (emphasis added). "Minor" is defined as "any person under 18 years old."

2. The Plaintiffs

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[2] *See* La. R.S. § 51:3211 (defining "digitized identification card" as "a data file available on any mobile device which has connectivity to the internet through a state-approved application that allows the mobile device to download the data file from the Department of Public Safety and Corrections or an authorized representative of the Department of Public Safety and Corrections that contains all of the data elements visible on the face and back of a license or identification card and displays the current status of the license or identification card").

[3] *See Ginsberg v. United States*, 390 U.S. 629, 639 (1968) (adapting general test of obscenity under the First Amendment to reflect "prevailing standards in the adult community as a whole with respect to what is suitable material for minors").

Plaintiffs are a collection of non-profits, for-profits, and individuals who rely on the internet for communication, both as providers and recipients of First Amendment-protected materials.

Free Speech Coalition, Inc. (FSC) is a not-for-profit trade association representing hundreds of businesses and individuals involved in the production, distribution, sale, and presentation of constitutionally-protected and non-obscene materials that are disseminated to consenting adults via the internet. Most of that material would fit within Louisiana's statutory definition of "material harmful to minors." *See* Declaration of Alison Boden (hereinafter, "Boden Decl.").

Deep Connection Technologies Inc. (DCT) is the company that operates O.school, an online educational platform focused on sexual wellness. Because of the breadth and vagueness of the "material harmful to minors" definition, DCT is concerned that one-third or more of O.school content meets the statutory definition. As a provider of critical sex education appropriate (and necessary) for older minors, DCT opposes any age-verification measure that would preclude those teens from accessing O.school's content. *See* Declaration of Andrea Barrica (hereinafter, "Barrica Decl.").

Charyn Pfeuffer (Pfeuffer) is a 50-year-old woman living in Seattle, WA who has written professionally about sex and relationships for 25 years and created online sexual content for three. She is concerned that one-third of the online archive of her writings, as well as much of her video content on webcam sites OnlyFans and SextPanther, might contain what qualifies as "material harmful to minors." She worries that she will be unable to perform qualifying "reasonable age verification methods," particularly as to content hosted on platforms operated by other commercial entities. *See* Declaration of Charlyn Pfeuffer (hereinafter, "Pfeuffer Decl.").

Elizabeth Hanson (Hanson) is a 40-year-old woman living in Slidell, LA. She is a veteran of the United States Coast Guard and married to an active-duty Coast Guardsman. During the prolonged periods of separation from her husband when he is deployed, Hanson relies on pornography to cope with the mental strain of his absence and to keep the romantic light aflame between them. Although she has followed her husband to Louisiana after his recent relocation orders, she is protected by the Military Spouse Residency Relief Act from having to update her

residency from Texas, where she and her husband lived before their recent change-of-station move. Without a Louisiana driver's license, Hanson is unable to access adult websites that rely on LA Wallet to age-verify their users, and—particularly after the recent data breach of Louisiana's Office of Motor Vehicles—too concerned about hackers obtaining her search and watch histories from verification vendors to entrust them with her identity information.

JFF Publications, LLC (JFF) is the limited liability company that operates an internet-based platform at the domain <JustFor.Fans> that allows independent performers of erotic audio-visual works to publish their content and provide access to fans on a subscription basis. JFF is confused about what the Acts cover and demand, and concerned about the costs of compliance. *See* Declaration of Dominic Ford (hereinafter, "Ford Decl.").

III. LEGAL BACKGROUND AND HISTORY

For almost as long as the internet has been in American households, legislators at the state and federal levels have tried their hands at legislating disfavored content in a manner that would pass constitutional muster. They have roundly failed.

The first such attempt came via the federal Communications Decency Acts (CDA) that criminalized, *inter alia,* the knowing dissemination of "obscene or indecent messages" to a recipient under 18 years of age and any message that "in context, depicts or describes, in terms measured by contemporary community standards, sexual or excretory activities or organs." *See* 47 U.S.C. § 223(a), (d). Shortly after the CDA took effect, groups of businesses, libraries, not-for-profit organizations, and educational societies brought a First Amendment challenge, which a three-judge panel in the Eastern District of Pennsylvania granted, enjoining the enforcement of the statute. *See ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

The government appealed directly to the Supreme Court, which invalidated the challenged provisions and affirmed the lower court's injunction. *See Reno v. ACLU*, 521 U.S. 844 (1997). The Court first held that the provisions prohibiting transmission of "indecent" or "patently offensive" materials were blanket content-based restrictions on speech and not mere time,

place, and manner regulations. As such, they would be strictly scrutinized. *See id.* So, too, were they facially overbroad—capturing much constitutionally protected material. *See id.* In reaching its decision, the Court did not apply the standards applicable to traditional broadcasting, which—*unlike* the internet—is a scarce and highly regulated resource. *See id.* at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soap box. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, 'the content on the Internet is as diverse as human thought.'").

After that invalidation, Congress returned to the drawing board to pass the Child Online Protection Acts (COPA), which prohibited any person from knowingly "making any communication [over the internet] for commercial purposes available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231. Publishers could assert an affirmative defense to prosecution if they restricted minors' access in one of several ways: "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." *Id.* at § 231(c)(1). More limited than "indecent" or "patently offensive" messages, material "harmful to minors" was restricted to any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

Again, the statute was challenged by a diverse array of website operators offering everything from "resources on obstetrics, gynecology, and sexual health" to "books and images for sale." The district court for the Eastern District of Pennsylvania granted a preliminary injunction, holding that the legislation, like that before it, was "content-based," presumptively invalid, and subject to strict scrutiny that it could not endure. *See ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (holding that the prohibitions were not the "least restrictive means" of protecting children from the perceived harm). The Court of Appeals affirmed the injunction, albeit on different grounds—concluding that COPA's use of "contemporary community standards" to identify material that is "harmful to minors" by itself rendered the statute substantially overbroad, as the borderless nature of the internet would require speakers to abide by standards set by "the most puritan of communities in any state." *See ACLU v. Reno*, 217 F.3d 162, 175 (3d Cir. 2000). Because of the attending chilling effect, the panel reasoned that websites would "shield vast amounts of material" in order to avoid potential liability—"lead[ing] inexorably to [its] holding of a likelihood of unconstitutionality of the entire COPA statute." *Id.* at 174.

The Supreme Court vacated the holding that the uncertainly regarding the "community standard" in and of itself rendered COPA unconstitutional, remanding for a determination whether the statute was unconstitutionally overbroad or void for vagueness under a strict scrutiny analysis. On remand, the Court of Appeals affirmed the district court's holding that the statute was unconstitutional insofar as it "was not narrowly tailored to serve a compelling government interest, was overbroad, and was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them." *See ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). In so holding, the Third Circuit acknowledged that device-level filters and blocking software achieved the purpose of restricting access by minors without suppressing the speech of the person who posts content on the Web. *See id.* at 261-66.

Upon review a second time, the Supreme Court affirmed the grant of a preliminary injunction. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004). Specifically, it agreed that the least

intrusive means of preventing minors from accessing erotic materials was through device-level technology, not site-level restrictions on speech:

> Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech that have a right to see without having to identify themselves or provide credit card information. Even adults with children may obtain access to the same speech on the same terms by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, regardless of how broadly or narrowly the definitions in COPA are construed.

Id. at 667. *See also id.* (noting that filtering software was more effective than COPA at keeping minors from harmful material online, per "findings of the Commission on Child Online Protection, a blue-ribbon Commission created by Congress in COPA itself").

The Court remanded the case "for a trial on the merits in order to, *inter alia*, update the factual record to reflect current technological developments, account for any changes in the legal landscape, and to determine whether Internet content filters are more effective than COPA or whether other possible alternatives are less restrictive and more effective than COPA." *See ACLU v. Gonzales*, 478 F. Supp. 2d 775, 779 (E.D. Pa. 2007). After a trial, the district court applied strict scrutiny and concluded that that the statute failed to use the least restrictive means of achieving the state's interest where content filtering software was both less restrictive and more effective. *Id.* at 810-16. The court also found the statute substantially vague and overbroad in multiple respects. *Id.* at 816-20. For example, the terms "communication for commercial purposes" and "engaged in business" could be construed to apply even to web-based publishers of free material who nevertheless receive revenue through advertising—which would chill a substantial amount of constitutionally protected speech. *Id.* And by defining a "minor" as "any person under 17 years of age," the statute would apply equally to "an infant, a five-year old, or a person just shy of age seventeen"—even though what is "patently offensive," of "prurient interest," and of "serious literary, artistic, political, or scientific value" varies greatly depending on a minor's age. *Id.*

The Third Circuit again affirmed. *See ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008) ("COPA cannot withstand a strict scrutiny, vagueness, or overbreadth analysis and thus is unconstitutional."). Specifically, it found a lack of precision in Congress's tailoring the statute to its interest in protecting children. The terms and phrases "as a whole," "minor," and "commercial purposes" caused the statute to capture too much protected material, whereas the affirmative defenses were not practicable because "many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." *Id.* at 190-92. So, too, did COPA fail to employ the least restrictive means of effecting the government's interest, as the record below demonstrated that "filters and the Government's promotion of filters are more effective than COPA." *Id*. at 202. For many of the same reasons, COPA was vague and substantially overbroad, as well. *Id.* at 204-07.

With the Supreme Court's denial of certiorari, *see* 555 U.S. 1137 (2009), Congress ostensibly lost its will to tinker with the statute once more, and the Third Circuit's *Mukasey* decision remains the last authoritative word on a federal attempt to restrict "harmful to minors" content on the internet. But states, including Louisiana, have taken up that mantle—albeit with the same record of failure.[4] In *Garden Dist. Book Shop, Inc. v. Stewart*, 184 F. Supp. 3d 331 (M.D. La. 2016), the district court for the Middle District of Louisiana enjoined enforcement of a state statute criminalizing the publication of "material harmful to minors on the Internet" without first "requir[ing] any person attempting to access the material to electronically acknowledge and attest that the person seeking to access the material is eighteen years of age or older." *Id.* at 334

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[4] *See, e.g., American Booksellers Foundation v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011) (Alaska); *American Booksellers Foundation v. Coakley*, 2010 WL 4273802 (D. Mass. 2010) (Mass.); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (Virginia); *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003) (Vermont); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (Michigan); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); *ACLU v. Goddard*, Civ. 00- 0505 (D. Ariz. Aug. 11, 2004) (Arizona); *Southeast Booksellers v. Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D.S.C. 2003) (South Carolina); *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York).

(quoting La. R.S. § 14:91.14). In granting the preliminary injunction, the court applied strict scrutiny to the statute and relied on the Supreme Court's findings as to the lesser intrusion and greater effectiveness of device-level filtering technology vis-à-vis site-level restrictions. *Id.* at 338-39 ("The Supreme Court held that content-filtering was less restrictive and more effective than COPA and, under the facts presented here, this Court is compelled to reach the same conclusion as to § 14:91.14. The State has only attempted to identify flaws associated with content-filtering, but it has not demonstrated that content-filtering is less effective."). So, too, was the injunction justified by the substantial overbreadth and vagueness of the challenged statute. *See id.* at 340-41.

This most recent effort from Louisiana reflects the early wave of another swell of moral panic animating similar bills working through state legislatures around the country. *See, e.g.,* Utah S.B. 287 (effective May 3, 2023); Mississippi S.B. 2346 (effective July 1, 2023); Virginia S.B. 1515 (effective July 1, 2023); Arkansas S.B. 66 (effective July 31, 2023); Texas H.B. 1181 (effective September 1, 2023); Montana S.B. 544 (effective January 1, 2024). Shockingly, the Acts do nothing to redress the many noted infirmities that led to COPA's demise at the federal level and invalidation of Louisiana's last attempt at the state level. In some respects, this most recent effort has made those defects even worse.

IV. ARGUMENT

1. Legal standards governing issuance of a preliminary injunction.

To succeed on a motion for a preliminary injunction, a movant must show "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013).

As regards the first factor, Plaintiffs are "not required to prove [their] entitlement to summary judgment in order to establish a substantial likelihood of success on the merits for preliminary injunction purposes." *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009). Although they bear the burden on the preliminary injunction factors, the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). Thus, when considering the likelihood of success, a court should inquire "whether there is a sufficient likelihood the State will ultimately fail to prove its regulation constitutional." *Id.* ("Applying the proper standards, we have little difficulty in concluding that appellants are likely to succeed on their claim because the State has not shown its ability to justify the statutes' constitutionality."); *Ashcroft v. ACLU*, 542 U.S. at 666).

Plaintiffs are entitled to a preliminary injunction in this case. They have a strong likelihood of success on the merits, as the Acts restrict constitutionally protected content in a manner that is woefully ineffective, poorly tailored to the State's interest, overbroad, vague, and disruptive to interstate commerce. So, too, will they suffer irreparable injury absent the grant of an injunction, as they'll face the untenable choice between (on one hand) ruinous tort liability and civil penalties and (on the other) statutory compliance at great expense and sacrifice of constitutional freedoms. The balance of equities tips heavily in favor of granting the injunction, which—because it will vindicate constitutional rights—will serve the public interest rather than frustrate it.

2. Plaintiffs are substantially likely to prevail on the merits.

The Acts impose clear violations of Plaintiffs' rights under the First and Fourteenth Amendments to, and the Commerce Clause of, the United States Constitution. Much of the Acts' language is warmed over from previous efforts to restrict online content, which the Supreme Court, federal appellate courts, and state supreme courts all have roundly criticized.

A. The Acts are content-based regulations of speech that cannot survive strict scrutiny, as the First Amendment demands.

The Acts impose substantial burdens on content providers that want to publish constitutionally-protected materials on the internet. They preclude older minors from accessing important information about sex and sexuality at a time in their lives when they need it most. And swept within their ambit is a broad swath of content published by pornographic and *non*-pornographic websites alike that adults have a First Amendment right to share and receive without state interference. *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (recognizing that "sexual expression which is indecent but not obscene is protected by the First Amendment" and that the government cannot pursue its interest in protecting minors through an "unnecessarily broad suppression of speech addressed to adults").

As content-based restrictions on protected, non-obscene speech, the Acts are "presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted). To endure, the Acts must survive strict scrutiny—meaning they must: (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of advancing that interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989).

Plaintiffs acknowledge that Louisiana has a compelling interest in protecting minors from exposure to harmful material on the internet. *See id.* ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors[.]"). But the Acts fail to withstand strict scrutiny because they are neither narrowly tailored to achieve the State's interest nor the least restrictive means of doing so. At state and federal levels, laws containing content-based restrictions on internet communications deemed harmful to minors have been held unconstitutional. *See supra* at 6-12. In enacting both Acts, Louisiana has not learned its lessons from the past.

i. <u>The Acts are not narrowly tailored to serve Louisiana's interest</u>

Most of the Actss' definition of "material harmful to minors" was pulled verbatim from challenged sections of COPA that the district court for the Eastern District of Pennsylvania, Third Circuit, and Supreme Court declared unconstitutional. The Louisiana legislature did not so

much as attempt to revise these definitions to save them from constitutional challenge, and there has been no intervening legal development to shield them today from the same arguments that carried the day two decades ago.

The Acts are poorly tailored in at least the following respects:

a. "As a whole"

COPA defined material "harmful to minors" as that which:

> (A) the average person, applying contemporary community standards, would find, taking the material *as a whole* and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken *as a whole*, lacks serious literary, artistic, political, or scientific value for minors.

ACLU v. Mukasey, 534 F.3d at 191 (citing 47 U.S.C. § 231(e)(6)) (emphasis added). As the Third Circuit recognized,

> when contemporary community standards are applied to the Internet, which does not permit speakers or exhibitors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings.
>
> This burden becomes even more troublesome when those evaluating questionable material consider it "as a whole" in judging its appeal to minors' prurient interests. As Justice Kennedy suggested in his concurring opinion [in *Ashcroft v. ACLU*, 535 U.S. 564, 599 (2002)], it is "essential to answer the vexing question of what it means to evaluate Internet material 'as a whole,' when everything on the Web is connected to everything else."

ACLU v. Ashcroft, 322 F.3d at 253.

Although COPA did not define what, exactly, constituted the "whole" to be judged, the definition's reference to "*any* communication, picture, image file, article, recording, writing, or other matter of any kind" that satisfies the three prongs of the "harmful to minors" test led the Third Circuit to conclude that the statute "mandates evaluation of an exhibit on the Internet in isolation, rather than in context"—which "surely fails to meet the strictures of the First Amendment." *Id.* at 252–53 (noting that "one sexual image, which COPA may proscribe as harmful

material, might not be deemed to appeal to the prurient interest of minors if it were to be viewed in the context of an entire collection of Renaissance artwork"); *see also Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) ("[It is] an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene.").

The Acts are virtually identical in relevant respects—including their resort to parts (A) and (C) of the "harmful to minors" definition outlined above, and their failure to define "as a whole" while including, as "material harmful to minors," "*any* material" that meets the modified-for-minors *Miller* Test. Just as COPA failed to satisfy the First Amendment by "mandat[ing] evaluation of an exhibit on the Internet in isolation, rather than in context," so do these Acts.

The Louisiana legislature had two decades to study the history and refine its definition to pass constitutional muster. But it failed to do so, leaving Plaintiffs and others scratching their heads. *See* Pfeuffer Decl. ¶ 7, Ford Decl. ¶ 19.

b. "Minor"

The Supreme Court has strongly suggested that "modified for minors" obscenity regulations are unlikely to survive First Amendment scrutiny if they do not exempt older minors. *See Reno v. ACLU*, 521 U.S. 844, 865–66 (1997) (distinguishing the "junior obscenity" statute upheld in *Ginsberg* from the unconstitutional regulation before the Court on the basis that, among other things, the former exempted 17-year-olds, whereas the latter did not); *see also American Booksellers Foundation v. Webb*, 919 F.2d 1493, 1505 (11th Cir. 1990) ("*Pope* [*v. Illinois*, 481 U.S. 497 (1987)] teaches that if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors.'"). COPA defined "minor" as "any person under 17 years of age"—prompting the Third Circuit to quip that it "need not suggest how the statute's targeted population could be more narrowly defined, because even the Government does not argue, as it could not, that materials that have 'serious literary, artistic, political or scientific value' for a sixteen-year-old would have the same value for a minor who is three years old." *ACLU v. Ashcroft*, 322 F.3d at 253-54. The court concluded that "[e]ven if the statutory

meaning of 'minor' were limited to minors between the ages of thirteen and seventeen, Web publishers would still face too much uncertitude as to the nature of material that COPA proscribes." *Id.* at 255. For that reason alone, the statute was determined to be unconstitutional. *See also ACLU v. Mukasey,* 534 F.3d at 193 ("Our prior decision [in *ACLU v. Ashcroft*] is binding on these issues on this appeal.").

Miraculously, rather than whittling down COPA's definition of "minor," the Louisiana legislature *broadened* it to include seventeen-year-olds—an age group more developed in its sensibilities and more burdened by a blanket definition that judges the "literary, artistic, political, or scientific value" *not* by reference to other seventeen-year-olds, but to the broader (and younger) group of all "minors." The result is the restriction of material appropriate (and in some cases, critical) to an older teen's self-discovery in matters as elemental as sexual expression, sexual orientation, gender identity. *See* Barrica Decl. ¶¶ 8-9. Again, the Louisiana legislature had more than two decades to adjust its definition to pass constitutional muster. Again, it failed to do so.

c. "Substantial portion"

Because the Acts require age-verification in order to access only those websites that offer "material harmful to minors" as a "substantial portion" of total content (defined as one-third or more), minors will face no impediment to obtaining such material from websites watered down—either incidentally or purposefully in order to avoid the statutory consequences—with other content unoffensive to the sensibilities of the Louisiana legislature. Thus, given enough non-"harmful" material on a single site, even the providers of material that is "harmful to minors" under *any* definition will earn a pass under the Acts. At the same time, the Acts seek to preclude minors from accessing even those websites offering mostly anodyne content when one-third of the site's material crosses the threshold into what might be construed as "harmful to minors."

Illogical results flowing from poorly conceived statutes usually occasion little constitutional concern, but the First Amendment demands greater precision. No content-based restriction

on speech that would afford minors access to websites featuring hardcore pornography diluted sufficiently with Sesame Street videos, while denying access to websites (like O.school) offering a fulsome and honest sexual education, can survive strict scrutiny. Even less so when the statutes offer no guidance as to whether total content is determined according to bytes of material, number of web pages, seconds of video, words of a sexual nature, or some other metric entirely. *See* Pfeuffer Decl. ¶ 7, Ford Decl. ¶ 19.

d. "Commercial entity" and "website"

The Acts impose liability and penalties upon any "commercial entity" that distributes material harmful to minors "from a website" containing a substantial amount of such material if *that entity* fails to perform qualifying age-verification checks. Because a "commercial entity" includes every "legally recognized entit[y]" from the largest corporation down to the smallest "sole proprietorship" (created by default when setting up a business[5]), the Acts (intentionally or otherwise) require individual performers to implement their own age-verification protocols even when relying on another company's platform to host their content. The cost placed on individual performers is more than they can feasibly bear while continuing to operate at a profit. *See* Pfeuffer Decl. ¶ 9. By imposing the burden on the performer rather than (or in addition to) the platform operator, Louisiana has chosen an inefficient and cost-prohibitive means of effecting its interest.

Compounding the problem is the lack of precision as to what constitutes a "website" in the first place. In its simplest form, a website *can* mean a series of connected pages under a single domain name. Often, however, webpages have more complicated structures, sometimes involving multiple domain names or subdomains. *See* Pfeuffer Decl. ¶ 7, Ford Decl. ¶¶ 17-18. Some webpages might link to separate but related businesses, and others might be simple

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[5] *Robinson v. Heard*, 809 So. 2d 943, 946 (La. 2002) ("While the individual involved in the sole proprietorship may consider the business to be separate and distinct from his/her person, there exists no legal distinction between the individual and the business.").

clearing houses linking to content housed on different servers. For the operator of a platform (like Plaintiff JFF) that hosts the content of myriad individual performers, defining the bounds of the "website" is critical. Likewise for a content creator (like Plaintiff Pfeuffer) who archives her writings on a publicly accessible site that is itself a subdomain of another site to which she does not control user access. *See* Pfeuffer Decl. ¶¶ 5,7. But in failing to define "website," the Acts potentially capture far more speech than ostensibly intended, and certainly more than is constitutional. *Cf. ACLU v. Gonzales*, 478 F. Supp. 2d at 817 (E.D. Pa. 2007) ("[A]lthough Congress intended COPA to apply solely to commercial pornographers . . . the phrase 'communication for commercial purposes', as it is modified by the phrase 'engaged in the business,' does not limit COPA's application to commercial pornographers. The lack of clarity in these phrases results in Web sites, which only receive revenue from advertising or which generate profit for their owners only indirectly, from being included in COPA's reach.").

e. Chill on adult speech

The Third Circuit acknowledged that COPA would "deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." *ACLU v. Ashcroft*, 322 F.3d at 259 ("People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers."). *See also* Hanson Decl. ¶¶ 11-13. Again and again, the Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves before receiving access to disfavored speech, given the chilling effect on those putative recipients.[6] *See, e.g., Lamont v.*

[6] Requiring internet users to present identification as a condition of access imposes a substantially greater intrusion than does a prove-your-age requirement of a patron at a movie theater, liquor store, or adult bookstore. Unlike digital age verification over the internet, those latter "real world" visits leave no record (or risk of one) and affect only those who are plausibly under-age.

Postmaster General, 381 U.S. 301 (1965) (holding that federal statute requiring Postmaster to halt delivery of communist propaganda unless affirmatively requested by addressee violated First Amendment); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 732–33 (1996) (holding unconstitutional a federal law requiring cable operators to allow access to sexually explicit programming only to those subscribers who request access to the programming in advance and in writing). This concern is particularly acute following high profile data breaches of a prominent vendor serving, among others, Louisiana's Office of Motor Vehicles.[7]

Here, Louisiana failed even to provide meaningful guideposts for what age-verification methods would prove "reasonable," thereby driving content producers from the marketplace—including Plaintiff JFF. *See* Ford Decl. ¶¶ 12-14, 20; Barrica Decl. ¶ 10. Yet the few indications the State *did* provide all seem to require not just verification of the user's age, but the user's identity—as the Acts demand scrutiny of a "digitized identification card" or confirmation of a user's personal information via "government-issued identification" or some other "commercially reasonable" use of a user's "transactional data." Higher courts have already called out the lack of precision in this same statutory language and the same chill imposed by a condition requiring adults to identify themselves before receiving sexually explicit speech online. Louisiana did not so much as attempt to remedy these failings, leaving the Acts as poorly tailored now as COPA was two decades ago.

f. Compelled speech

Cautious operators of even *non*-pornographic websites must place an age-verification content wall over their entire websites if they wish to continue communicating with Louisiana audiences without risking tort liability or civil fines. Doing so necessarily labels them an adult business peddling "material harmful to minors"—the consequences of which can be dire,

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[7] *See* Office of the Governor, "Major Cyber Attack at OMV Vendor, Louisianans Should Act Urgently to Protect Their Identities," (June 15, 2023), *available at* https://gov.louisiana.gov/index.cfm/newsroom/detail/4158.

including not only declining internet traffic, but social stigma, lost ad revenue, and exclusion from public or private programs or curricula. Websites that process payments may lose the ability to accept major credit cards and be forced to use third-party billing companies that charge fees up to 15% of the purchase price (rather than the 3-5% typically charged by credit card companies). They also may face difficulty purchasing business liability insurance and hiring employees. *See* Ford Decl. ¶¶ 21-22.

By compelling speech based on the message of the speaker, the Acts are, again, content-based restrictions subject to strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 764-68 (5th Cir. 2008) (applying strict scrutiny to statute compelling speech). Requiring website operators to self-identify in such manner shifts the burden of deciphering an indecipherable statute from the State to the regulated operator, thereby capturing the cautious site operators while exempting the most brazen unless and until some private individual decides to sue. This is not the stuff of narrow tailoring, and by placing the onus on private parties to police themselves, the State has proven willing to tolerate a level of over- and under-inclusiveness that would be constitutionally problematic even if the Acts were a paragon of clarity—which, of course, they aren't.

ii. The Acts are not the least restrictive means of serving Louisiana's interest

When it comes to content-based restrictions on speech, it is well established that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813; *see also Reno v. ACLU*, 521 U.S. at 874 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in

achieving the legitimate purpose [of denying minors access to harmful content] that the statute was enacted to serve."); *Sable*, 492 U.S. at 126.

For decades now, courts have recognized the availability, affordability, and effectiveness of device-level blocking and filtering technologies that, as a parental option rather than a government mandate, pose no constitutional concerns. Faced with the argument that voluntary use of blocking and filtering software "places an onus on parents" who might not assume the mantle of responsibility, the Third Circuit was satisfied that the "Supreme Court has effectively answered this contention"—as a court must not assume "a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *ACLU v. Ashcroft,* 322 F.3d at 262 (quoting *Playboy*, 529 U.S. at 805).[8] Nor did arguments about the over- and under-inclusiveness of blocking and filtering programs convince the court that COPA presented the least restrictive *effective* means to prevent children from viewing harmful content online; although the court acknowledged that such programs "may sometimes block too little and sometimes block too much," it credited the district court's finding that such programs could prove *more* effective than site-level restrictions by reaching even "foreign [w]eb sites, noncommercial sites, and materials available online via protocols other than http" that were beyond the reach of site-level restrictions. *Id.*at 264. A later trial on the merits in the case created an exhaustive record detailing the many advantages that device-level filters have over restrictions imposed on the websites themselves. *See ACLU v. Gonzales*, 478 F. Supp. 2d at 789-97; *see also ACLU v. Mukasey*, 534 F.3d at 199-204 (reviewing and affirming district court's findings).

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[8] The *Playboy* Court held unconstitutional a federal statutory provision that required cable operators who provide channels primarily dedicated to sexually-oriented programming to scramble or block those channels completely, or to "time channel" their transmission by limiting their availability to nighttime hours. The Court found this to be a "significant restriction of [protected] communication between speakers and willing adult listeners" that failed strict scrutiny because less restrictive means were available—an opt-out provision whereby a cable subscriber could request the cable company to scramble or block receipt of sexually explicit channels.

Louisiana's legislatively-imposed site-level restriction casts the same wide net that decades ago was found both too wide and too porous to withstand constitutional scrutiny. Since then, that net hasn't shrunk, and the holes have grown only wider. The recent proliferation of cheap VPN programs has given children with a modicum of tech-savvy and access to Google the ability to scramble their IP address to evade a state's site-level restrictions. So, too, has accessing the dark web become simpler than ever before, and site-level content restrictions risk diverting children to corners of the hidden internet that are *not* so restricted and which contain material far more harmful (and illegal) than what is available at an http. *See generally* Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 Stan. L. Rev. 1075, 1087-90 (2017).

Meanwhile, in the years since COPA's constitutional challenge, device-level restrictions have improved dramatically. After a bench trial in the COPA litigation, the district court found that filtering technology can be calibrated to a particular child's age and sensitivity by the child's parents, and that filters, unlike site-level age screening, are "difficult for children to circumvent." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 789 (E.D. Pa. 2007), *aff'd sub nom.*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008). That technology has only improved in the intervening 15 years. So, too, has it proliferated. Today, many of these programs come preinstalled and ready to use from the moment a new computer or phone is purchased; others are free or inexpensive to download and highly customizable, offering benefits well beyond screening for sexual content. *See* Boden Decl. ¶¶ 10-15.

Louisiana of course could have created incentives and campaigned for the improvement and expanded use of content filters—as the Supreme Court has suggested. *See Ashcroft v. ACLU*, 542 U.S. at 670 ("Congress can give strong incentives to schools and libraries to use [device filters]. It could also take steps to promote their development by industry, and their use by parents. . . . By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties."). It hasn't done so—opting instead for a blanket restriction that, by imposing substantial costs on content providers, reveals the

State's true intention of stifling disfavored speech. *See* Ford Decl. ¶¶ 12-14, Barrica Decl. ¶ 10. *See also ACLU v. Mukasey*, 534 F.3d at 195 (suggesting that weaknesses of site-level restrictions, compared against device-level filters, "might raise the inference that Congress had some ulterior, impermissible motive for passing COPA").

"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Elrod v. Burns*, 427 U.S. 347, 363 (1976). Here, that precision is woefully lacking, leaving Defendants with no serious argument that the Acts may survive strict scrutiny.

B. The Acts are both constitutionally overbroad and vague.

A statute that burdens otherwise protected speech is facially invalid when that burden is not only real, but "substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Put another way, the overbreadth doctrine prohibits the Government from restricting even *unprotected* speech where "a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coal.*, 535 U.S. at 237. An overbreadth analysis often engages in the same questions as the narrow tailoring prong of a strict scrutiny analysis. *See ACLU v. Ashcroft*, 322 F.3d at 266 ("Overbreadth analysis—like the question whether a statute is narrowly tailored to serve a compelling governmental interest—examines whether a statute encroaches upon speech in a constitutionally overinclusive manner."); *see also Joint Heirs Fellowship Church v. Ashley*, 45 F.Supp.3d 597, 630 (S.D. Tex. 2014), *aff'd sub* nom., 629 Fed. Appx. 627 (5th Cir. 2015) ("In the First Amendment context, the doctrines of vagueness and overbreadth overlap; both are premised on concerns about chilling constitutionally protected speech.").

So, too, may overbreadth challenges overlap substantially with Fourteenth Amendment void-for-vagueness challenges. *See Kolender v. Lawson*, 461 U.S. 352, 358 n. 8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."). A statute is void for vagueness if it "forbids . . . the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its

application." *Connally v. General Constr. Co*., 269 U.S. 385, 391 (1926); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). "[S]tandards of permissible statutory vagueness are strict in the area of free expression," and the "Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP v. Button*, 371 U.S. 415, 432 (1963); *see also Reno v. ACLU*, 521 U.S. at 871–72 (1997) (where the vagueness arises amidst a "content-based regulation of speech[,] the vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech").

The Louisiana Acts are both substantially overbroad and unconstitutionally vague in myriad respects. As discussed *supra*, the phrase "taken as a whole" in the definition of "material harmful to minors" does not explain how the "whole" is to be judged. Should one consider only a specific article, certain text, or an individual image on a website? Or should one consider the web page on which that text or image appears? Or the entire website? And should one include linked material? As "any material" meeting the modified-for-minors *Miller* Test is deemed "harmful to minors" under the Acts, what then constitutes a discrete and divisible item of "material"? The phrase "substantial portion," defined as "more than 33-1/3% of total material on a website," likewise fails to explain how "total material" is calculated. Is it by the volume of data? The number of posts? What is the proper metric to measure? Gigabytes? Character count? Number of images? Video runtime? And what about linked material? May a website avoid the problem altogether by providing a link to all the innocuous content in the local public library? These ambiguities have led to confusion among the Plaintiffs and fear of liability for noncompliance with the Acts. *See* Pfeuffer Decl. ¶ 7, Ford Decl. ¶ 19.

The term "minor," defined as "any person under 18 years old," is similarly vague in its connotation insofar as it fails to designate the whole from which a content provider must ascertain the average. Whether material is designed to appeal to the prurient interest, is presented in a "patently offensive manner," or lacks serious literary, artistic, political, or scientific value is

determined with respect to minors. But does this "minor" refer to some generic pre-teen reflecting the median sensibility across *all* minors, from infants to high school seniors? Or some other person occupying some other position on a composite maturity spectrum? To the extent that older minors are shut out from accessing critical, age-appropriate content, the definition is substantially overbroad (and potentially dangerous). *See* Barrica Decl. ¶¶ 8-9.

The terms "commercial entity" and "website" are also overbroad and vague to the extent that the former might capture performers publishing content on another company's platform, while the latter could be read to capture just about anything on the internet—from a performer's channel hosted on another platform, to the skeleton of that platform, to the entire contents of that platform and even *other* platforms housed on the same servers and sharing the same code. *See* Ford Decl. ¶¶ 17-18, Pfeuffer Decl. ¶ 7.

The statutory catch-all in the Acts' safe harbor provision permits "any commercially reasonable method that relies on public or private transactional data" as a means of verifying a user's age but provides no guideposts whatsoever as to what "commercially reasonable" demands. *See* Ford Decl. ¶ 20, Barrica Decl. ¶ 10, Pfeuffer Decl. ¶ 9.

Reference to "contemporary community standards" is vague and overbroad due to the borderless nature of the internet. Louisiana is a diverse state, and the "contemporary community standards" vary widely from the French Quarter of New Orleans to the suburbs of Monroe, but when a content provider publishes material on a website, the same material is made available in *every* Louisiana parish. To avoid running afoul of the Acts, websites must abide by a "most prudish community" standard—restricting (in the case of minors) or chilling (in the case of adults) substantial quantities of constitutionally protected content.

Finally, it is unclear what, exactly, a commercial entity must "know" or "intend" to be liable under the Acts. Must the entity merely intend to publish or distribute material that, incidentally, happens to fit the statutory definition of "material harmful to minors?" Must the entity *know* that the published material meets that definition? Must it know that the publishing website's offerings, as a whole, contain at least one-third such material? The question is of particular

salience to commercial entities that publish or distribute materials on websites owned and operated by *other* commercial entities—potentially tasking the former with a duty to inventory the full array of materials offered by the latter.

By placing significant burdens on web publishers' ability to disseminate protected speech and web users' ability to receive it, the Acts encroach upon a significant amount of protected speech beyond that which Louisiana may target constitutionally to prevent minors' access to sexual material. *See Ginsberg*, 390 U.S. at 639–43; *Sable*, 492 U.S. at 126; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975). And by phrasing so much of the operative language in terms that even a trained attorney (never mind an average person) is unable to understand, the Acts are unconstitutionally vague, as well. *See Connally*, 269 U.S. at 391; *Reno v. ACLU*, 521 U.S. at 871–72.

C. The Acts violate the Commerce Clause.

The Acts violate the Commerce Clause because they regulate strictly out-of-state conduct, place burdens on interstate commerce that clearly outweigh their illusory local benefits, and legislate a critical instrumentality of commerce that demands unform regulation.

i. The Acts impermissibly regulate the activities of out-of-state websites.

The Acts burden interstate commerce by impinging on communication occurring outside Louisiana's borders. Unlike, say, pork produced according to animal husbandry practices that violate the standards of another state where it is sold, *see Nat'l Pork Prods. Council v. Ross,* 598 U. S. ____ (2023), content published over the internet *automatically* reaches internet-enabled computers in all 50 states and requires affirmative, costly, and inevitably imperfect steps by the website operator to limit its geographic reach. The Acts thus "has the practical effect of . . . control[ling] conduct beyond the boundaries of the State." *Healy v. Beer Inst*., 491 U.S. 324, 336 (1989).

ii. The Acts' burdens on interstate commerce clearly outweigh any local benefits.

Even if the Acts were not a direct regulation of out-of-state conduct, they still would run afoul of the Commerce Clause by imposing burdens on interstate commerce that are "clearly excessive" in relation to their local benefits. *See Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).

iii. The Acts create inconsistent regulation of the internet.

The Acts also violate the long-established rule barring states from enacting differing standards for instrumentalities of national commerce where uniformity is required. *See Johnson*, 194 F.3d at 1162 ("[C]ertain types of commerce have been recognized as requiring national regulation. The Internet is surely such a medium."); *see id.* at 1161 ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.") (quoting *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168–69 (S.D.N.Y.1997)).

Even to the extent that the Supreme Court's recent decision in *Nat'l Pork Prods. Council v. Ross* read *Pike* narrowly, it reaffirmed the line of cases "in which th[e] Court refused to enforce certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like." 598 U. S. ____ (2023), Slip Copy at 17-18 n.2 (citing *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 523–530 (1959) (mud flaps for trucks and trailers) and *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 763–782 (1945) (length of trains)). The dormant aspect of the Commerce Clause shows its teeth when "a lack of national uniformity would impede the flow of interstate goods." *Id.* (quoting *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 128 (1978)). And while "[p]igs are not trucks or trains," *see id.*, the internet is precisely the type of instrumentality of commerce that demands uniform regulation of materials published thereon.

The threat of inconsistent regulation is clear and present. Louisiana is now one of two states with age-verification requirements currently in place. *See* Utah S.B. 287 (codified at Utah Code Ann. § 78B-3-1001, 1002). But other states are not far behind. *See* Mississippi S.B. 2346

(effective July 1, 2023); Virginia S.B. 1515 (effective July 1, 2023); Arkansas S.B. 66 (effective July 31, 2023); Texas H.B. 1181 (effective September 1, 2023); Montana S.B. 544 (effective January 1, 2024). If the Louisiana Acts are permitted to stand, then publishers of internet content will have to navigate a morass of differing legal standards, "community standards," digitized identification cards, and approved technologies and protocols for age verification. *Cf. Stevens*, 559 U.S. at 476 ("Those seeking to comply with the law . . . face a bewildering maze of regulations from at least 56 separate jurisdictions."). Disparate regulation of erotic material is just the canary in the coal mine; a patchwork of state-by-state regulation of this sort threatens the internet as we know it.

3. Plaintiffs are substantially likely to suffer irreparable injury absent imposition of the injunction.

It is axiomatic that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Croft v. Governor of Texas*, 562 F.3d 735, 745 (5th Cir. 2009). That "irreparable injury stems from the intangible nature of the benefits flowing from the exercise of those rights and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Garden Dist. Book Shop, Inc.*, 184 F. Supp. 3d at 342 (internal quotation marks omitted). Because Plaintiffs will be restricted in the speech they're able to deliver and receive as long as the Acts remain enforceable, monetary relief alone could not suffice to make them whole.

4. The balance of harms tilts toward Plaintiffs.

Louisiana "would need to present powerful evidence of harm to its interests to prevent [Plaintiffs] from showing that the threatened injury outweighs any harm [Louisiana] would suffer as a result of the injunction." *Denton v. City of El Paso, Texas*, 861 F. App'x 836, 841 (5th Cir. 2021) (noting that "vague assertions" do not suffice). *See also* Wright & Miller, FED PRAC. & PROC. § 2948.2. For the reasons discussed *supra*, Plaintiffs are incurring constitutional injury

every day the Acts remains in effect; the State of Louisiana, meanwhile, has no legitimate interest in the maintenance and enforcement of these patently unconstitutional statutes.

5. An injunction is not adverse to the public interest.

The Fifth Circuit has recognized that "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). The Acts reflect a poorly crafted solution to a poorly articulated problem, and the public interest is not advanced by the endurance of overly restrictive, vague, and overbroad statutes that imperil the rights of Louisianans to provide and receive constitutionally-protected material over the internet.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to enjoin enforcement of the Acts pending the final determination of this action.

Respectfully Submitted,

By */s/ Jeffrey Sandman*

Date: June 21, 2023

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