UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FREE SPEECH COALITION, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:24-cv-00980-RLY-MG
	)	
TODD ROKITA, in his official capacity as the Attorney General of the State of Indiana,	)	
	)	
	)	
Defendant.	)	

ENTRY DENYING MOTION FOR STAY PENDING APPEAL

In its Entry granting a preliminary injunction, the court concluded its analysis of the likelihood of success on the merits by stating "[o]n this record and in this preliminary posture, this case is not close." (Filing No. 35, Entry Granting Motion for Preliminary Injunction). Now, because he believes he has a substantial likelihood of success on appeal, the Attorney General of the State of Indiana moves to stay the enforcement of the court's preliminary injunction. Nothing in the Attorney General's motion changes the court's prior conclusion that Plaintiffs are significantly likely to prevail on the merits. For that reason and the other reasons discussed below, the motion for a stay pending appeal is **DENIED**.

I. Legal Standard

Stays intrude mightily on "the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). As a result, a stay "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*,

555 U.S. 7, 24 (2008); *accord Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926) (explaining stays are "not a matter of right, even if irreparable injury might otherwise result to the appellant"); *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973). Thus, "the issuance of a stay is left to the court's discretion." *Nken*, 556 U.S. at 434.

The court's discretion is "guided by sound legal principles," *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005), distilled into a four-factor balancing test that analyzes: "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies," *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The party "seeking a stay pending appeal" carries the burden. *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006). Further, because the appellate standard of review of a preliminary injunction is for "abuse of discretion," the injunction should be upheld "[i]f the underlying constitutional question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (*Ashcroft II*).

II. Discussion

A. Likelihood of Success on the Merits

The Attorney General makes seven arguments to attempt to demonstrate a likelihood of success on the merits. None are successful. A preliminary note, however, is necessary before jumping into the specific arguments. Many of the Attorney General's

arguments are predicated on "facts" that conflict with the court's findings of fact.[1] Put bluntly, to the extent these alternative facts conflict with or are not stated in the "Background" section of the court's Entry Granting the Preliminary Injunction, they are not facts for the purposes of this case in this posture.[2] So for example, the Plaintiffs' websites are not obscene *in toto*. Whether something appeals to the prurient interest or is patently offensive is a "question[] of fact." *Miller v. California*, 413 U.S. 15, 30 (1973). The court did *not* find the Plaintiffs' entire websites appealed to the prurient interest or were patently offensive. To the opposite, the court made factual findings that a "significant amount" of the websites' content was not obscene and, in one case, contained core political speech.[3] (Entry at 4–5).

Though this is not exhaustive, the following numbered list may help clarify some of the key findings as this case proceeds on appeal:

1. Websites impacted by age verification requirements see approximately 80% of their viewership leave to peruse other websites. (*Id.* at 2). This is in large part because roughly 66% of Americans are not comfortable using age verification methods online. (*Id.* at 2–3).

2. Age verification is quite costly for websites given the volume of users many websites see. (*Id.* at 3).

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[1] The Attorney General refers to the court's determination of the facts as "inappropriate" in this posture. (Filing No. 41, Def.'s Br. at 18). Yet determining the facts is exactly the function entrusted to this court. Fed. R. Civ. P. 52(a)(2) ("In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.").

[2] This is not to say the court's findings of fact and conclusions of law have the same force as those following a trial on the merits. Should the case proceed that far, the Attorney General shall have the opportunity to develop the record more fully and the court's findings and conclusions may change. (*See* Entry at 20 (explaining the court's "conclusions may change based on the development of the record")).

[3] The Attorney General tries to get around these findings by claiming his evidence is unrebutted, but this is inaccurate.

3. The Plaintiff websites contain "a significant amount of non-obscene materials" that have some form of artistic, literary, scientific, or political value such as political blog posts, podcasts, clothed modeling galleries, and comedic videos. (*Id.* at 4–5).

4. There is a significant amount of obscene material on social media websites like Reddit and search engines that are not covered by the Act. (*Id.*).

5. IP geolocation is ineffective at determining location and is easy to get around with a variety of easy-to-use tools like VPNs, proxy servers, and TOR. (*Id.* at 6–8).

6. An alternative, filtering and blocking software, is quite effective at preventing minors from viewing obscene images, even though it has some weaknesses. (*Id.* at 8–9).[4] Filtering and blocking software is particularly effective because it has kept up with rapidly changing internet technologies. (*Id.*).

7. No evidence suggests the age verification processes laid out in the Act would be effective in preventing minors from seeing adult content because it is easy to circumvent and because it does not impose age verification on websites like Reddit and search engines. (*Id.* at 4, 8)

With these preliminaries addressed, the court proceeds to the Attorney General's seven arguments for why he is likely to prevail on the merits of his appeal.

1. The Facial Analysis

The Attorney General's first contention is that the court failed to conduct the facial analysis consistent with the Supreme Court's decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024).[5] There, the Supreme Court vacated opinions of the Fifth and Eleventh Circuits because those courts failed to properly conduct the analysis required for facial challenges under the First Amendment. *Id.* at 2399. It explained, "[t]he first step

[4] Though filtering software has some flaws, the Attorney General's burden is "not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective." *Ashcroft II*, 542 U.S. at 669.

[5] The Supreme Court decided *Moody* after this court granted the preliminary injunction.

in the proper facial analysis is to assess the state laws' scope." *Id.* at 2398. At that point, the court considers "which of the laws' applications violate the First Amendment," then "measure[s] [the unconstitutional applications] against the rest." *Id.* If the court finds "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," the law is facially unconstitutional under the First Amendment. *Id.* at 2397 (alteration in original) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021)).

The primary problem with the Fifth and Eleventh Circuit's analysis was that they focused too much on "heartland" conduct, while ignoring the full range of activities covered by the law. *Id.* Serious questions were left underdeveloped, such as whether the statutes there applied to "Gmail filters," the displaying of "customer reviews," and ride-share services like Uber. *Id.* at 2398. The end result was an analysis that looked "more like as-applied claims than like facial ones." *Id.*

The Supreme Court's opinion in *Moody*, though, did not break new ground; the Court has long espoused these requirements for a facial overbreadth challenge. *See United States v. Williams*, 553 U.S. 285, 293 (2008) ("The first step in the overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."); *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) (explaining a law should be invalidated as overbroad if a substantial number of its applications are unconstitutional when compared to the statute's plainly legitimate sweep); *United States v. Hansen*, 599 U.S. 762, 771

(2023) ("To judge whether a statute is overbroad, we must first determine what it covers.").

This court's analysis tracked the analysis laid out by *Moody* and earlier cases. The court began by determining the Act's scope. (Entry at 23). The court concluded the Act imposed the age verification burdens on any website with over one third material harmful to minors, except search engines and news services. (*Id.* at 4, 23). It also determined the Attorney General had not proposed a limiting construction and that the Act was not amenable to one. (*Id.* at 23). Unlike *Moody*, there are no potentially unknown applications of the statute; "the Act's meaning is clear." (Entry at 23); *cf. Moody*, 144 S. Ct. at 2398.

The court then measured the Act's unconstitutional applications (almost all of them) by measuring the breadth of the statute. (Entry at 24–29). In doing so, the court considered a variety of applications of the statute such as to websites hosting scenes from "the popular show 'Game of Thrones,' the 1985 film 'The Color Purple,' or the 2011 film 'the Girl with the Dragon Tattoo,'" (Entry at 24); a blog that was 99% core political speech, (Entry at 38 n.23); and a website that was over 50% "entirely acceptable, and constitutionally protected, material," (Entry at 24–25). It also discussed the Act's

heartland applications—how it applied to Plaintiffs' websites—and determined the Attorney General could not constitutionally apply it there.[6] (Entry at 28–29).

The Attorney General complains the court focused too much on the Plaintiff websites for the facial analysis to have been proper. But "[a] party cannot complain of errors which it committed, invited, induced the court to make, or to which it consented." *Wharton v. Furrer*, 620 F. App'x 546, 548 (7th Cir. 2015) (citing *Weise v. United States*, 724 F.2d 587, 590 (7th Cir. 1984)); *see also Int'l Travelers Cheque Co. v. BankAmerica Corp.*, 660 F.2d 215, 224 (7th Cir. 1981) (same). When the court turned its eye toward the Plaintiff websites, it was in response to the Attorney General focusing his analysis on the Act as it applied to the Plaintiff websites instead of the wide range of other websites the Act applies too. (*See* Entry at 27). And the court emphasized that the "specifics of Plaintiffs' websites do not matter" because of the facial nature of the challenge. (*Id.*).

The court's limited focus on the Act's heartland conduct was not misplaced either. The heartland applications represented one of the Act's strongest cases for constitutionality. And it failed to satisfy constitutional scrutiny. As the applications advanced further towards the periphery of the Act's coverage, the more egregiously unconstitutional it became. So for example, the court had no trouble concluding the Act's

[6] More specifically, the court determined the Act burdened speech such that rational basis review was inappropriate, strict scrutiny was proper, and the Act failed strict scrutiny. The Act receives strict scrutiny because it facially discriminates amongst speakers and is, facially, a content-based regulation, and as such, the Act receives strict scrutiny in any situation that it burdens protected speech. (Entry at 29–31). And because the result of the strict scrutiny analysis does not change in each application—filtering remains a superior and less restrictive option—the law is unconstitutional in the vast majority of its applications.

application to a blog that contained hundreds of political posts because of a single indecent image, effectively suppressing the blog by chilling up to 80% of its viewers, was unconstitutional. (*See* Entry at 38 n.23).

The facial challenge here can be thought of as a variety of as-applied challenges from four different groups of plaintiffs: (1) a website contesting the constitutionality of the age verification requirements to the extent the website speaks on its own; (2) other speakers on an affected website bringing suit, as their speech will reach significantly less people;[7] (3) adult users of affected websites bringing suit, as they will be chilled from engaging with material on websites with adult content; and (4) minor users of affected websites bringing suit, as they will be chilled from engaging with material on websites with adult content. (*See* Entry at 2 (describing how traffic to websites with age verification will be reduced by 80%, reducing the ability of speakers to get their message out)). The website the plaintiff runs, speaks from, or uses can also be broken down by the amount of content on the website that is harmful to minors, as the Act only triggers once a website contains at least one-third material harmful to minors. Ind. Code § 24-4-23-1. Put differently, each website subject to the Act will contain anywhere from 33% material harmful to minors up to 100% material harmful to minors.

As relevant to the owners of websites, speakers on websites, and adult website users, the Act receives strict scrutiny because it imposes content-based burdens on

[7] Speakers may post non-obscene content on adult-oriented websites because that is where the speakers are found and most recognized. For example, an adult performer may post their non-obscene podcast on the same website that hosts their obscene videos because viewers will be significantly more likely to recognize them there.

constitutionally protected speech. (Entry at 29–32). The Act is unconstitutional under strict scrutiny for the reasons discussed in the court's Entry. (*Id.*) The Act is also unconstitutional when it applies burdens to websites with 100% material harmful to minors. As the court explained, "materials unsuitable for minors may not be obscene under the strictures of *Miller*, meaning the statute places burdens on speech that is constitutionally protected but not appropriate for children." (Entry at 24); *cf. ACLU v. Ashcroft*, 322 F.3d 240, 268 (3d Cir. 2003) ("The type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old."). These applications similarly receive (and fail) strict scrutiny. In every application of the statute to adults, the Act is unconstitutional whether the website contains 33% material harmful to minors, 99% material harmful to minors (or anything in between), or 100% material harmful to minors. This leaves whether the law can constitutionally be applied to minor users as the only remaining question.

Broadly speaking, it cannot. "Children have First Amendment rights." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001). To the extent the Act chills a minor's ability to engage with constitutionally protected speech, the Act receives strict scrutiny, which it fails. *Id.* (requiring a compelling justification for a law that restricts minor's ability to engage with violent video games); *accord Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Thus, the Act is unconstitutional to the extent it chills the ability of minors to engage with websites containing some measure of

constitutionally protected speech.[8] The Act can, however, be constitutionally applied when a minor accesses a website that contains 100% material harmful to minors, *see Ginsberg v. New York*, 390 U.S. 629 (1968), but this category does not include any of the Plaintiff websites or any of the websites in the record.

The following table visually depicts the possible applications of the Act with the possible plaintiffs down the left, the ratio of material harmful to minors on the top, and whether the application is constitutional in the middle:

	33% Harmful	99% Harmful	100% Harmful
Website	Unconstitutional	Unconstitutional	Unconstitutional
Speaker	Unconstitutional	Unconstitutional	Unconstitutional
Adult User	Unconstitutional	Unconstitutional	Unconstitutional
Minor User	Unconstitutional	Unconstitutional	Constitutional[9]

[8] Whether a user intends to access obscene or protected speech is irrelevant to the constitutional analysis because the user will be chilled from accessing the constitutionally protected speech on the website if they are blocked from the website in its entirety. *See* Ind. Code § 24-4-23-10 (requiring the website "to prevent a minor from accessing the adult oriented website"). A minor seeking harmful materials on a website might still engage with constitutionally protected speech. By blocking the minor from the website, Indiana chills the minor's ability to engage with the constitutional speech on that website (they will peruse harmful materials on other websites or search engines). This should *not* be read to suggest that the State cannot restrict the ability of the minor to see that content; it can. *Ginsberg v. New York*, 390 U.S. 629 (1968). It must, however, leave as much constitutionally protected speech unchilled as possible. Indiana can bar a minor from the adult-only section, but not from the library. That is where filtering comes in. To the extent filtering will still cause a chilling effect, the law would pass strict scrutiny by being tailored to the least restrictive means. Put differently, the chilling effect is not what results in unconstitutionality; it only triggers the heightened scrutiny. That limited age verification functions as a dulled saw and not a sharp scalpel is what causes the unconstitutionality. (Entry at 32–41).

[9] The Act only applies the age verification requirements based on the ratio of harmful images and videos rather than the ratio of content as a whole (i.e., text-only content is not considered). (Entry at 38 n.23). As a result, a website may contain 100% material harmful to minors under the Act but still have text-only constitutionally protected speech. (*Id.*). In that case, the Act could not be constitutionally applied to a minor seeking to access the website.

The above makes clear that the Act is unconstitutional in a substantial number of its applications as compared to its plainly legitimate sweep.

The Attorney General suggests that another factor for consideration is whether the website is 100% obscene, as obscenity receives no constitutional protection, but this is not correct. For one, Indiana already criminalizes obscenity, so the suppression of a website that is 100% obscene is not part of the Act's legitimate sweep. *See* Ind. Code § 35-49-3-2; *see also Brown v. Kemp*, 86 F.4th 745, 778 (7th Cir. 2023) (noting the focus in a facial challenge is on whether the state can "constitutionally prohibit conduct not already criminalized"). And even if the court did consider 100% obscene websites as part of the Act's plainly legitimate sweep, that would fail to change the balance of the overbreadth analysis because the Act is unconstitutional in an overwhelming number of other applications. That is especially so because the Attorney General has not identified any significant subset of websites that are 100% obscene.[10] *Ctr. for Ind. Freedom v. Madigan*, 697 F.3d 464, 486 (7th Cir. 2012) ("Courts do not decide facial challenges on the basis of such speculative hypotheticals.").

The Attorney General's final redoubt is to argue that the court ignores that foreign corporations run some websites covered by the Act. (*But see* Entry at 13–14). But Indiana has no legitimate interest in applying its statute wholly extraterritorially. *Cf. Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (explaining the "Dormant Commerce

[10] The Attorney General attempts to point to the Plaintiff websites, but the court found these websites have "a significant amount of non-obscene materials" with literary, artistic, scientific, or political value. (Entry at 4).

Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, , 642–43 (1982))); *see also The Antelope*, 23 U.S. 66, 99, 122 (1825) (explaining "the obligation of [a] statute cannot transcend the legislative power of the state which may enact it" and that laws of the Untied States cannot have application to purely foreign persons who are neither citizens, nor in the United States). For Indiana to have a legitimate interest in enforcing the age verification burdens against a foreign-run website, there must be *some* conduct that reaches into Indiana (or even the United States). That would almost certainly be an Indiana-based person, who has First Amendment rights, using the website. And an Indiana-based user—or whoever else is operating in Indiana sufficiently to trigger Indiana's ability to apply its laws to an entirely foreign entity—who is chilled from using a foreign website because of the age verification burdens would prevail in arguing the burdens unconstitutionally chill their ability to use the foreign website. The foreign or domestic status of the website therefore does not affect whether the application of age verification burdens to that website is constitutional. (*See* Entry at 14 ("This argument also overlooks the websites' ability to vindicate the First Amendment rights of its Indiana visitors through a facial challenge.")).

To sum up, there is one application of the Act that is constitutional. Every other application, of which there are myriad, is unconstitutional because the statute triggers strict scrutiny, which it fails. The court concluded as much in its Entry. (*See* Entry at 42 ("The court has found that Plaintiffs' facial overbreadth challenge . . . is likely to succeed

on the merits because the Act is likely overbroad such that a substantial number of the Act's applications are impermissible in relation to its plainly legitimate sweep.")). There was no error here.

2. The Act Burdens Constitutionally Protected Speech

Next, the Attorney General contends that age verification is not a burden on speech at all. This argument was not raised in the merits briefing and is waived. *Cf. Mendez v. Perla Dental*, 646 F.3d 420, 423–24 (7th Cir. 2011) ("It is well-established that arguments raised for the first time in the reply brief are waived."); *see also Jackson v. Regions Bank*, No. 1:19-cv-1019, 2020 WL 2949777, at *4 (S.D. Ind. June 3, 2020) (holding argument was waived for making the argument for the first time in a reply brief); *see also Studio & Partners, s.r.l. v. KI*, No. 06-c-0628, 2008 WL 426496, at *11 (E.D. Wis. Feb. 14, 2008) ("The parties' arguments—especially when both sides are represented by counsel—are precisely what frame a court's approach to an issue, and a court should be entitled to rely on what the parties argue in their briefs."). As a result, it cannot support any likelihood of success on the merits.

But even considering this argument, it fails to make any impact. For one, it runs headlong into the court's findings of fact. The age verification requirements sharply suppress the ability of websites and speakers on those websites to speak their message to others, as they see a drop of 80% of their usership with age verification. (Entry at 2). It cannot be said that that is not a burden on their ability to speak. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) (explaining that burdening the "communication between speakers and willing adult listeners" triggers First Amendment scrutiny); *see*

also Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views . . . .").

In the face of the herculean task of overturning this court's factual findings, the Attorney General cites two cases for the proposition that requiring users to show their driver's license imposes no First Amendment burden. First, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court held that age and identity requirements for voting did not violate a citizen's right to vote. In doing so, it noted that the burden of obtaining a state identification card "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198 (plurality).

This case is not relevant here because the analytical framework for voting rights claims is significantly different than for First Amendment claims. Voting rights cases use the sliding scale analysis announced in *Burdick v. Takushi*, 504 U.S. 428 (1992). Under that analysis, the court weighs the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the state," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

This analysis would be anomalous in the First Amendment context because the severity of the burden is unimportant.[11] *Compare Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are subject to strict scrutiny."), *with Norman v. Reed*, 502 U.S. 279, 289 (1992) (noting laws impinging on voting rights receive strict scrutiny only if the law is a "severe restriction"). Every justice in *Crawford* agreed that age verification imposed some burden—the disagreements were over the severity of that burden. 553 U.S. at 199 (assuming the identification requirement "imposed a special burden on" the right to vote but noting that "[t]he severity of that burden is, of course, mitigated by the fact that" voters could vote without identification by utilizing an affidavit); *see id.* at 204 (Scalia, J., concurring) ("I prefer to decide these cases on the grounds . . . that the burden at issue is minimal and justified."). That is enough under the First Amendment. *See, e.g.*, *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) ("Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny."); *see also Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582–83 (1983)

[11] *Crawford* is also not remotely factually similar to this case as the burden imposed by the age and identity verification requirements in this case far exceed those present in *Crawford*. *Compare Crawford*, 553 U.S. at 188 n.6 (noting the district court found that 99% of Indiana's population would be able to vote with the identification requirements), *with* (Entry at 2 (finding the age verification requirements would result in 80% of viewers refusing to engage further with the website)). That is certainly because of the differences in Americans' comfort level flashing identification to a poll worker versus sharing those documents with online platforms. (*See* Entry at 2–3 (discussing how 66% of Americans are uncomfortable sharing their identification with online platforms)). And this is not something the Attorney General can wave away: to the extent Americans' discomfort with online identification stops them from engaging with websites hosting constitutionally protected content as speakers or listeners, the identification requirements chill First Amendment activity and trigger scrutiny based on whether it imposes content-based or content-neutral burdens.

("A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest . . . . Any tax that the press must pay, of course, imposes some 'burden.'") (citation omitted); *cf. NAACP v. Button*, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive."); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636–37 (1994) (explaining laws that regulate speech trigger First Amendment scrutiny but "not every interference with speech triggers the same degree of scrutiny under the First Amendment").

Second, the Attorney General cites *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941), where the Court held that a regulation requiring those seeking to parade down the streets apply for and receive a license did not "contravene[] any constitutional right." The Attorney General's theory is that if the state has the ability to require licensure for parades, it must also be true that imposing age verification requirements on websites is constitutionally acceptable. This is off base.

Cox v. New Hampshire regarded "the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994); *see also Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) ("For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox v. New Hampshire*, 312 U.S. at 576."). There is no similar interest in mediating amongst competing uses of the internet.

Moreover, licensing regulations are not automatically constitutional, as the Supreme Court has struck down a multitude of other licensing schemes for one reason or another. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990) ("Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."); *City of Lakewood v. Plain Dealer Publ'g*, 486 U.S. 750 (1988); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Staub v. City of Baxley*, 355 U.S. 313 (1958). In other words, there is more analysis to do.[12]

And that is fundamentally the problem with the Attorney General's citation to *Cox v. New Hampshire*—he prematurely terminates the analysis before proceeding through the necessary framework. Licensing schemes are an ordinary type of "time, place, or manner" regulation. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And because these regulations are usually "justified without reference to the content of the regulated speech," intermediate, rather than strict, scrutiny typically applies. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). But even a time, place, or manner regulation "may not be based upon either the content or subject matter of speech," elsewise it will face strict scrutiny. *Consol. Edison Co. of NY, Inc. v. Pub. Serv. Comm'n of NY*, 447 U.S. 530, 536 (1980); *see also Police Dep't of Chi. v. Mosley*, 408

[12] The Act is also quite plainly not a time, place, or manner restriction like a licensing scheme. The Act does not regulate when users may use a website, where they may use the websites from, or the methods a user may use to speak on those websites.

U.S. 92, 99 (1972) (explaining subject-matter based regulations "slip from the neutrality of time, place, and circumstance into a concern about content" and face exacting scrutiny).

Thus, the question is whether the Act is like the regulation in *Cox v. New Hampshire*, which required any person seeking to parade to apply for and receive a license. It is not. The Act only imposes its burdens on a certain subset of speakers. (Entry at 36–37). The Act is more similar to a law requiring only religious groups to get a license to parade, which would be obviously unconstitutional. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993) (holding the government cannot deny only one group from the usage of its forum based on the message); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."). Additionally, the Act burdens websites based on their content: if a website is 100% indecent, and therefore constitutionally protected, material, the website must utilize age verification. (Entry at 30–31); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *see also id.* at 165 (noting a regulation is also content based if it "cannot be justified without reference to the

content of the regulated speech"). This also requires the application of strict scrutiny. *Id.* at 165. *Cox v. New Hampshire* is not helpful for the Attorney General.[13]

The Attorney General's only response is that age verification is a requirement to effectuate a regime that restricts minors' ability to view obscenity. This is not true and does not account for the strict scrutiny test. As an initial matter, there is no evidence the age verification requirements assist any regime that restricts minors' ability to view obscenity. (Entry at 38 ("The Attorney General has not submitted any evidence suggesting age verification would prohibit *a single* minor from viewing harmful materials . . . .") (emphasis in original)).

Even if there were such evidence, the thrust of the strict scrutiny analysis is to determine whether another less restrictive option is equally effective at advancing the state's interest. *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (explaining content-based burdens on speech are "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"). In determining that the age verification requirements failed to be narrowly tailored, the court found another method that was superior at restricting minors' ability to view obscenity.[14] (Entry at 40 (explaining filtering and content blocking was "a superior alternative")).

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[13] The Attorney General also discusses nude dancing in support of his argument that the age verification burdens are not constitutionally significant. He fails, however, to grapple with the court's explanation for why this case presents issues distinct from requiring ID to enter nude dancing establishments. (Entry at 31 n.17).

[14] To use an imperfect metaphor: a bar need not check IDs at the counter if it checks them entering the building, or if it is located in an area only accessible to those over the age of 21 (such as a 21+ cruise ship). So too with the internet. If Indiana imposed device level filtering, there would be no need to verify ages when a user accessed a website because minors would automatically have the content blocked.

Were it true that the only way to restrict minors from viewing online obscenity was website-based age verification, the Act would survive strict scrutiny. But because there was no evidence of that and considerable evidence to the opposite, the Act fails to meet strict scrutiny. (Entry at 41 ("Indiana's legislature chose an ineffective and more broad method to protect minors from harmful materials than other alternatives.")).

3. Ginsberg

The Attorney General also returns to *Ginsberg v. New York*, 390 U.S. 629 (1968). In his view, the distinctions the court drew "are immaterial," (Def.'s Br. at 10), even though those were the distinctions drawn by the Supreme Court, *Reno*, 521 U.S. at 865; (*see also* Entry at 25–26). He believes the facts here are materially identical to the ones in *Ginsberg*.

That contention is frivolous. For one, *Ginsberg* was an as-applied challenge, not a facial one. (*See* Entry at 26 (explaining "*Ginsberg* might be applicable" in "an as-applied challenge where a website was defending a suit because they communicated obscene materials to a minor during a commercial transaction without the consent of the minor's parents")). In an overwhelming number of applications of the Act, the as-applied factual situation of *Ginsberg* is not present because the communications are not sexual, not indecent for minors, are occurring only between adults, or are occurring outside the context of a sale. (*See, e.g.*, Entry at 4–5).

Nor does the Act allow any role for parents, despite the Attorney General's contentions. (*See id.* at 25–26); *cf. Reno*, 521 U.S. at 865 (describing how leaving a role for parents is an important component of why the statute in *Ginsberg* was constitutional).

The Act requires websites "to prevent a minor from accessing the adult oriented website." Ind. Code § 24-4-23-10. The Attorney General suggests parents may use their driver's licenses to gain access to an adult-oriented website and then intentionally provide the harmful materials to their children. That would be a felony. Ind. Code § 35-49-3-3(a)(1).[15] Even if it were not, the websites are still in danger of suit because the Act requires the website to prevent a minor's access entirely.[16]

Ginsberg only dealt with the *sale* of indecent sexual material to a minor. As the court found, in an overwhelming number of applications of this statute, there is no sale of sexual material. (Entry at 4 (explaining most videos were free to view)). The Attorney General disagrees and contends the websites' speech is only commercial in nature.[17]

This is doubly incorrect. First, the court has found, as a factual matter, that the websites contain speech that has artistic, educational, or political purposes even if it may also be partially commercial. (*See* Entry at 4–5; *see also* Filing No. 4-2, Andreou Decl. ¶ 12 (describing videos with "education content regarding sexual health and wellness"

[15] Other subsections contain express carve outs for when the minor is accompanied "by the minor's parent or guardian," but not subsection (a)(1). *Cf.* Ind. Code § 35-49-3-3(a)(2).
[16] The Attorney General's own expert states that the primary benefit of age verification over filtering is that age verification blocks minors from viewing the content even if their parents consent. (Allen Decl. ¶ 41 (arguing that filtering is supposedly flawed because "parents might release the [filtering] controls to allow the[ir child] to access various content")). This is the exact *strength* of filtering over age verification. *See Reno*, 521 U.S. at 865 (explaining the Communications Decency Act was deficient in part because "the parents' consent" could not "avoid the application of the statute").
[17] The Attorney General disclaims any reliance on the doctrine of commercial speech. Instead, he means that the websites are commercial, and receive less protection, because they make money and are focused on making money.

through "The Pornhub Sexual Wellness Center")). Second, the Supreme Court has rejected the idea that speaking for pay receives less protection:

> Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is the sole member-owner. But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.

303 Creative LLC v. Elenis, 600 U.S. 570, 594 (2023) (cleaned up); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (explaining the Court "cannot agree" that movies received lesser First Amendment protection for the reason that they are "a large-scale business conducted for private profit" because "books, newspapers, and magazines are published and sold for profit" which "does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment"); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) ("[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.").

The Attorney General even ignores the most important limitation on *Ginsberg*: the statute there did not restrict, in any way, the ability of non-minors to access, peruse, or purchase the indecent material. *See Butler v. Michigan*, 352 U.S. 380, 382–83 (1957) (invalidating statute that prohibited adults from selling indecent materials that had a

deleterious influence on minors); *see also Ginsberg*, 390 U.S. at 634–35 (explaining the statute was constitutional because it did not "bar the appellant from stocking the [indecent] magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid under our decision in *Butler v. Michigan*") (cleaned up). The statute in *Ginsberg* simply did not intrude on the ability of adults to access constitutionally protected material, elsewise the New York statute would have violated *Butler*. *But see Free Speech Coalition v. Paxton*, 95 F.4th 263, 271 (5th Cir. 2024). The Supreme Court explained this expressly. *Ginsberg*, 390 U.S. at 634–35; *see also Reno*, 521 U.S. at 875 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. *Ginsberg*, 390 U.S. at 639. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults."); *id.* at 889 (O'Connor, J., concurring) ("In *Ginsberg* . . . for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.").[18]

The court did not treat *Ginsberg* as overturned; it just stands for a far less broad principle than the Attorney General suggests. *Ginsberg* simply holds that a state may restrict the ability of purveyors of indecent materials to sell their content to minors. This court explained as much in its Entry. (Entry at 26 (explaining how *Ginsberg* would be

[18] The court notes that this record does not reflect Justice O'Connor's hope that "it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws." *Reno*, 521 U.S. at 890, 892 (O'Connor, J., concurring) (describing the prospect of "zoning . . . the internet" as "promising"). Due to the easy access to proxy servers, VPNs, and TOR, it does not appear possible to construct such barriers.

applicable to a case involving the sale of sexual materials to minors)). The Supreme Court thought the same: *Ginsberg* "approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child." *Brown*, 564 U.S at 786 (emphasis removed). And the Supreme Court reemphasized that *Ginsberg* does not provide the state "a free-floating power to restrict the ideas to which children may be exposed." *Id.* at 795. When *Ginsberg* is properly understood, it is no great marvel that the Supreme Court distinguished it in *Brown*. That case involved a prohibition on "the sale or rental of 'violent video games' to minors." *Id.* at 789. No burdens or restrictions were placed on adults.

That is entirely unlike the Act in case, which imposes burdens regardless of the status of the viewer or whether the speaker attempts to communicate with adults or minors.[19] A speaker on a website may only be attempting to reach adults with political speech, which is sharply distinct from *Ginsberg* (and *Brown*), where the sole purpose of the transaction was to sell indecent speech to minors. Indeed, the Act would even prohibit some adults from accessing constitutionally protected material. (Entry at 3–4).

Thus, the Act clashes with the principle that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for

[19] A speaker using an adult-oriented website to promulgate political speech to adults will see an 80% decrease in the number of speakers they could feasibly reach. (*See* Entry at 2). This is unquestionably a severe burden on their First Amendment rights even though they may never, factually, address their speech to a minor nor say anything that approximates material harmful to minors.

them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975). The court found there is a significant amount of speech here—such as the podcasts, satirical videos, and blog posts—that is neither obscene nor proscribable for other reasons. (Entry at 4–5). That a speaker who uses an adult-oriented website to promulgate political speech or comedy will reach 80% less adult listeners because other, different speech might not be acceptable for children is exactly the situation where "the adult population" is reduced "to reading only what is fit for children." *Butler*, 352 U.S. at 383.

4. Ashcroft II

The Attorney General suggests *Ashcroft II* does not require the application of strict scrutiny. In his view, the Supreme Court deliberately committed error and declared a statute unconstitutional, even though it was not, merely because the United States conceded that strict scrutiny applied. This beggars belief.

While the Supreme Court "does sometimes assume, without deciding that a law is subject to a less stringent level of scrutiny," that occurs when the assumed standard is *less* rigorous than the argued for standard. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014); *McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 199 (2014) (holding that because the law failed intermediate scrutiny, the court could assume intermediate scrutiny was appropriate over strict scrutiny). The "ordinary order of operations" is to decide the level of judicial scrutiny first. *McCullen*, 573 U.S. at 479.

In deciding the level of scrutiny, the Court has "not allowed the parties' litigating positions to place limits upon [its] development of obscenity law." *Playboy*, 529 U.S. at 834 (Scalia, J., dissenting). The Supreme Court certainly was not bound to apply strict

scrutiny, as Justice Scalia stated he would have applied a lower tier of scrutiny. *See Ashcroft II*, 542 U.S. at 676 (Scalia, J., dissenting) ("Both the Court and Justice Breyer err, however, in subjecting COPA to strict scrutiny.").

The application of strict scrutiny with little discussion in *Ashcroft II* makes sense because prior cases had already settled the question. *See Reno*, 521 U.S. at 874 (applying strict scrutiny to statute enacted to protect minors from indecent and patently offensive communications on the internet); *see also Playboy*, 529 U.S. at 811–12 (explaining statute that regulated beyond obscene speech was subject to strict scrutiny); *Ashcroft II*, 542 U.S. at 665 (citing *Reno* for the proposition that the law was subject to strict scrutiny). *Ashcroft II* resolved this case not because it established the proper standard of scrutiny, but because it was nearly factually identical to this one.[20]

In any event, the court detailed why the Act is subject to strict scrutiny. (Entry at 20–30). Throughout that analysis, the court did not cite *Ashcroft II*, but reasoned to the same result from first principles. *Ashcroft II* applied strict scrutiny to a materially identical law; it did so correctly.

5. Ginzburg

The Attorney General next argues the court "declin[ed] to apply another binding Supreme Court precedent" in *Ginzburg*, 383 U.S. 463. This is not accurate. *Ginzburg* is not immediately applicable because "this is a facial challenge, so the specifics of

[20] The Attorney General suggests that *Ashcroft II* noted its holding could change due to the rapid development of internet technology. However, this court found filtering software "has only become more effective in the intervening 20 years," (Entry at 41), whereas age verification is less effective due to newer technologies like VPNs, proxy servers, and TOR, (Entry at 7–8).

Plaintiffs' websites do not matter." (Entry at 27 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011))). For example, *Ginzburg* has no application to a blog wherein 99% of its posts are political speech and that holds itself out as a political blog. (*See id.* at 38 n.23).

Moreover, the Attorney General elides the important distinction between websites and magazines. Magazines are a singular speech product, whereas websites are not. Even to the extent a magazine contains articles from multiple speakers, the magazine's purveyor offers it as one complete product to the subscriber. Websites are more akin to a public square where different speakers are speaking different things with different agendas over different periods of time. The listener does not receive all the speech in one package, but over time and possibly from different speakers.[21] And in the case of the Plaintiff websites, there are in fact many speakers producing a variety of different types of speech. (*See, e.g.*, Andreou Decl. ¶ 12 (describing the various speakers that use the Plaintiff platforms); *see also* Filing No. 4-3, Seifert Decl. ¶ 8 ("Xvideos is a website that hosts adult content uploaded by individual creators and studios from around the world.")).

[21] For example, if a woman gets up on a stump and gives a speech in a park, then gives another speech on the same stump two hours later, she has spoken twice. The same is true when a novelist drafts a book and then another. And again when a website uploads one blog post then a second. And because each piece of speech is separate—unlike the different paragraphs of a speech, chapters in a book, articles in a magazine, or minutes of a video—they must be evaluated separately. *Cf. United States v. McCoy*, 602 F. App'x 501, 504 (11th Cir. 2015) (applying *Ginzburg* by analyzing each of the 276 stories on the website at issue and determining they were obscene); *see id* at 506 (affirming the district court's guilty verdict after "concluding . . . those stories [on the website] were obscene").

Ginzburg is primarily concerned with the peddling of obscene materials as part of a sale. 383 U.S. at 466 ("[W]e view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal."); *id.* at 474–75 (explaining its holding by noting the prosecution was constitutional because "the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter"); *see also Playboy*, 529 U.S. at 832 (Scalia, J., dissenting) ("We are more permissive of government regulation [where a business sells obscenity] because it is clear from the context in which exchanges between such businesses and their customers occur that neither *the merchant nor the buyer* is interested in the work's literary, artistic, political, or scientific value.") (emphasis added). Indeed, the *Ginzburg* Court made clear its holding "rested upon the manner in which the petitioners *sold* the Handbook." 383 U.S. at 466 n.5 (emphasis added). The best reading of *Ginzburg* then is that materials grouped together for the purposes of sale and then advertised as obscene can be found to be obscene. That is not what occurred here; there is no sale, nor grouping, nor advertising.

At bottom, this discussion is academic because the ultimate holding of *Ginzburg* is that "[w]here an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation . . . such evidence *may* support the determination that the material is obscene." *Ginzburg*, 383 at 475–76 (emphasis added); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 257–58 (2002) (*Ashcroft I*) (explaining that "pandering may be relevant, *as an evidentiary matter*, to the question whether particular materials are obscene" (citing *Ginzburg*, 383 U.S. at 474)). In other words, at its zenith,

Ginzburg suggests this court could have found the websites obscene. But it did not; it concluded the websites had artistic and political merit through videos, podcasts, and blogs posted by different speakers for that purpose. After all, in *Ginzburg*, it was "the trial judge" who "found that '[t]he deliberate and studied arrangement of [the magazine] is editorialized for the purpose of appealing predominantly to prurient interests[.]'" 383 U.S. at 471 (quoting *United States v. Ginzburg*, 224 F. Supp. 129, 131 (E.D. Pa. 1963)). Because this court never made any such finding,[22] *Ginzburg* is inapplicable.

6. Intermediate Scrutiny

The Attorney General again suggests that intermediate scrutiny is appropriate. However, he fails to engage with the court's analysis. Nor does he provide any basis for distinguishing the Supreme Court's opinions explaining why intermediate scrutiny is not appropriate. Indeed, he cites no law at all. The law would fail under intermediate scrutiny anyway because it fails to materially advance the government's interest and suppresses orders of magnitude more speech than necessary in an attempt to accomplish that goal. *Ward*, 491 U.S. at 799. The Attorney General is not likely to succeed on this argument.

[22] Nor could it. The Attorney General has not presented anywhere close to sufficient evidence to demonstrate any website is obscene in its entirety. In 2019 alone, 1.36 million hours of videos (136 years' worth) were uploaded to Pornhub.com. (Filing No. 30-5 at 9). The Attorney General never attempts to demonstrate that each of these videos stoop to the level of obscenity. Instead, he cherry-picks the most obscene videos, but that contravenes the entire point of an overbreadth analysis, which is to ensure constitutionally protected speech is not swept up in overeager government regulation. Even compared to *Ginzburg*, the Attorney General presents far less evidence. *See Ginzburg*, 383 U.S. at 471 (explaining 26% of the materials were obscene).

7. Strict Scrutiny

Finally, the Attorney General suggests the law survives strict scrutiny. He takes two tacks to reach this conclusion. The first is that the law actually advances Indiana's compelling interest and is narrowly tailored. Second, he argues that one of the proposed alternatives—to only require age verification when a user accesses obscene content, instead of when accessing websites that may have obscene content elsewhere—was not properly raised by the Plaintiffs.

Little needs to be said to reject the first argument because it repeats the arguments made in opposition to Plaintiffs' motion for preliminary injunction.[23] Those arguments are incorrect for the reasons stated in the court's Entry. (*See* Entry at 32–41). The Attorney General's arguments also run up against this court's factual findings: filtering is more effective than age verification, more tailored, and more difficult to circumvent, and there is no evidence this limited application of age verification will prevent any minors

[23] The Attorney General suggests the court should evaluate whether filtering and blocking software combined with age verification would be effective. That is not the law Indiana's legislature passed though, so this question is outside the scope of the strict scrutiny analysis. Glibly referring to filtering as "parallel strategy" does not mean filtering is not an alternative approach. (Filing No. 49, Def.'s Reply Br. at 7).

from viewing obscene content.[24] Even if the Act were not enjoined, minors could still access online pornography with a single click by unblurring obscene images on Google, Bing, Facebook, or Reddit. (*Id.* at 36).

As to the Attorney General's second argument—that one of the alternatives was not properly raised—he improperly attempts to shift his burden to grapple with alternatives onto the Plaintiffs. Once the Plaintiffs demonstrate strict scrutiny applies, the law is presumptively invalid, and the burden shifts to the Attorney General. *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992). And bearing that burden means the Attorney General must show the law advances a compelling interest and that it is utilizing the *least* restrictive means. *See Bonta*, 594 U.S. at 607 ("Under strict scrutiny, the government must adopt the least restrictive means of achieving a compelling state interest.") (quotation marks omitted). All this is to say, the Plaintiffs do not need to offer any alternatives to prevail; the Attorney General must demonstrate Indiana's chosen restriction is "the least restrictive means among available, effective alternatives."

[24] The Attorney General cites his expert who concluded, in a single paragraph, that filters "are less effective than, and not a substitute for, website-based age assurance." (Filing No. 30-3, Allen Decl. ¶ 10). This failed to create a genuine dispute about the comparative effectiveness for a few reasons. First, this opinion does not appear to be based on any evidence contained in the record of this case: Allen does not grapple with the ease-of-circumvention problems of age verification, nor the inaccuracies present in IP address geolocation. Allen even agrees Plaintiffs' expert is correct in their assessment of the positives of filtering software. (Allen Decl. ¶ 39). Moreover, his declaration is focused on age assurance systems generally, not on how the Act has implemented them. This is problematic because age assurance *might* be reliable if it were applied equally, but the Act does not do so. And the issue the Attorney General must reckon with is whether the selective age verification required by the Act (i.e., to only require verification for some obscene sources) advances the compelling interest. Allen does not even attempt to engage with that question, and no evidence suggests that selective age verification is effective. Even if Allen's declaration did create a genuine dispute though, the court found Plaintiffs' expert more credible.

Ashcroft II, 542 U.S. at 666; *Boos v. Barry*, 485 U.S. 312, 321–22 (1988) (explaining strict scrutiny "require[s] the State to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

The Supreme Court explained as much in *McCullen v. Coakley*, 573 U.S. 464 (2014). There, the Court noted that "we, [the Supreme Court], identify a number of less-restrictive alternative measures that the Massachusetts Legislature might have adopted." *Id.* at 479; *see also id.* at 491–93 (proposing alternatives for the Massachusetts Legislature). And the Court noted that the Massachusetts law failed to be tailored to the least restrictive means because "the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." *Id.* at 494. That is equally true here. It is not like only requiring age verification when a user seeks to view an obscene video is an obscure, little-known alternative; the Attorney General must explain why the Act must be this broad and why imposing age verification on a narrower basis would be ineffective.[25] This case is still not close in this posture; the Attorney General has not demonstrated even a substantial case on the merits.

[25] The Attorney General proposes the court narrow its injunction to only enjoin the application of the Act with respect to individual pages of websites that host non-obscene content. The statute, however, requires the website to use age verification "to prevent a minor from accessing the adult oriented website." Ind. Code § 24-4-23-10. Thus, to limit the injunction in the proposed way would require the court to effectively rewrite the Act and determine age verification must be used to prevent minors from accessing adult oriented webpages, not websites. The court cannot do that. *Reno*, 521 U.S. at 884–885 (holding courts "'will not rewrite a . . . law to conform it to constitutional requirements" (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988))).

B. Irreparable Injury

The Attorney General fails to show irreparable injury absent a stay. He cites *Abbott v. Perez*, 585 U.S. 579, 602 (2018) for the proposition that an injunction prohibiting a state from enforcing its laws inflicts irreparable harm. But that only applies if the statute the state is attempting to enforce is constitutional. *Id.* ("*Unless* th[e] statute *is unconstitutional*, [the district court's injunction] would seriously and irreparably harm the State . . . .") (emphasis added); *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute."); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (explaining that prohibiting a school from applying a policy in a way that violates First Amendment rights "is no harm at all"). In this posture, the Act is almost certainly unconstitutional. The Attorney General has not even shown the Act actually advances its compelling interests. (Entry at 8, 36–37). There appears to be no irreparable injury here, but even if there is, it is outweighed by the other factors.

C. Substantial Injury

The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality

opinion)). The Plaintiffs will suffer a weighty injury should the court grant the stay. This factor militates toward denying the stay.

D. The Public Interest

As with the preliminary injunction, the State has no interest in enforcing an unconstitutional law. (Entry at 41–42). The opposite is true: the public interest supports enjoining the law given the Plaintiffs' likelihood of success on the merits. *Christian Legal Soc'y*, 453 F.3d at 859 ("[I]njunctions protecting First Amendment freedoms are always in the public interest."). This factor tips mightily toward denying the stay. In sum, given Plaintiffs' likelihood of success on the merits, their substantial injury, and the public interest, all of which heavily outweigh any potential injury suffered by the Attorney General, the stay should be denied.

III. Conclusion

For the reasons discussed above, the Attorney General's Motion for a Stay Pending Appeal (Filing No. 40) is **DENIED**. His motion to Set an Expedited Briefing Schedule (Filing No. 42) is **DENIED as MOOT.**

IT IS SO ORDERED this 25th day of July 2024.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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