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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FREE SPEECH COALITION, INC.; DEEP CONNECTION TECHNOLOGIES, INC.; CHARYN PFEUFFER; JFF PUBLICATIONS, LLC; ANNA LOUISE PETERSON; LYNSEY GRISWOLD; PHE, INC.; AND CONVERGENCE HOLDINGS, INC.,

Plaintiffs,

v.

AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana

Defendant.

Case No. 9:24-cv-00067-DWM

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND DEMAND FOR JURY TRIAL

INTRODUCTION

Montana passed SB544 to combat concerns over the corroding influence of pornography on minors. And SB544 imposes a limited and sensible obligation on commercial entities that publish online pornography: take reasonable steps to ensure that those seeking to access your age-restricted content are, in fact, of age. SB544 doesn't prohibit performing in, producing, or publishing online pornography, nor does it prevent adults from accessing it. That is, SB544 doesn't limit content available to adults on the internet to "that which would be suitable for a sandbox." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983).

Yet Plaintiffs question the sincerity of Montana's interest in protecting minors because "the burden [imposed by SB544] on *adults* is so great." Pls.' Resp. Opp'n Def.'s Mot. Dismiss ("Opp.Br.") at 10-11, ECF No. 19. But if SB544's incidental burden is too great, no effort to protect children from the corrosive effects of online pornography will ever pass constitutional muster. Because Plaintiffs fail to state a claim for relief on any of their legal theories, this Court should dismiss their claims.

ARGUMENT

I. Plaintiffs fail to allege a plausible First Amendment claim.

Obscene content "is unprotected by the First Amendment" and may be regulated. *Miller v. California*, 413 U.S. 15, 23 (1973). SB544 applies only to "material harmful to minors," which it defines to track *Miller*'s definition of obscenity but tailored to minors. *See* §1(1), (7)(d). Because obscenity is unprotected, states may pass laws like SB544 that protect minors from material that is "obscene as to youths." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).

Neither *Reno* nor *Ashcroft* suggest otherwise. Br. Supp. Def.'s Mot. Dismiss ("Mont.Br.") at 7-9, ECF No. 18. Unlike the CDA in *Reno*, SB544 doesn't omit *Miller*'s requirement that the obscenity relate to "sexual conduct." 521 U.S. 844, 870, 873 (1997). Nor does SB544 impose criminal liability on speech that is constitutionally protected for adults, like the CDA in *Reno, id.* at 859, and the COPA in *Ashcroft*, *see* 542 U.S. 656, 661 (2004). SB544 merely limits the distribution *to minors* of content that's *obscene to minors*. §1(1). It doesn't "suppress[] a large amount of speech that adults have a constitutional right to receive." *Reno*, 521 U.S. at 874. Nor does it deny "adults their free speech rights by allowing them to

[access] only what [is] appropriate for children." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1986). Unlike COPA, age-verification procedures are the statutory obligation, not an affirmative defense, so if the covered entities perform those procedures, they won't violate SB544 no matter what content they offer. §1(1).

Plaintiffs' compelled speech and prior restraint arguments fail too. Mont.Br.9-11. *First*, SB544's requirement that commercial entities verify that their customers may access age-restricted services doesn't compel them to speak any message. It doesn't require them to host a state-sponsored message, like the "Live Free or Die" motto in *Wooley*, nor does it require them to alter the expressive content of their speech, like in

Hurley. Mont.9-10. Because SB544 doesn't require commercial entities to host any message or alter their speech, it doesn't compel speech.[1]

Second, SB544 doesn't restrict speech before expression, establish a permitting scheme, or give discretion to any government enforcement authority, so it doesn't operate as a prior restraint. Mont.Br.10-11. Plaintiffs instead claim that SB544's "prescription of limited and specific 'reasonable age verification methods'" in effect creates a private permitting regime and thus operates "as a prior restraint on speech." Opp.Br.7. SB544 does no such thing. It lists three age-verification methods that commercial entities may use, §1(7)(g)(i)-(ii), and if the entity uses *any* of

[1] Plaintiffs argue that age-verification checks insinuate that website operators' content is inappropriate for all minors. Opp.Br.6-7. Despite DCT's fear that O.school's website content may trigger SB544 obligations, Compl.¶14, its allegations suggest the opposite. DCT doesn't allege that its content appeals to minors' prurient interests, that it could be seen as patently offensive with respect to minors, or that it lacks serious value for minors. *Id.* ¶¶14-15. Quite the opposite: it alleges that it "provides critical sex education that it deems appropriate (and necessary) for older minors." *Id.* ¶15; *Friends of George's, Inc. v. Mulroy*, 2024 U.S. App. LEXIS 17669, at *10 (6th Cir. July 18, 2024) (plaintiff hadn't "alleged that its performances lack serious value for a 17-year-old" because its allegations "insist[ed] the exact opposite").

those methods and finds that a consumer is of age, its SB544 obligation is complete.[2]

Even if this Court finds that rational-basis doesn't apply, SB544 survives under the secondary-effects doctrine. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (statutes targeted at the secondary effects of expressive conduct need only survive heightened scrutiny).

Like the challenged statute in *City of Renton*, SB544 is "aimed not at the *content* [produced by the covered entities], … but rather at the *secondary effects*" of allowing minors to access online pornography. *See* 475 U.S. 41, 47 (1986). Plaintiffs counter that *City of Renton* doesn't control because "the impact of speech *on its listener* is not a 'secondary' effect at all." Opp.Br.9-10. But this misses the mark. Each of the cases Plaintiffs rely on involve statutes that imposed liability based in part on the

[2] If this Court finds that SB544 burdens protected speech, it should apply rational-basis review from *Ginsberg v. State of New York*, 390 U.S. 629 (1968), and uphold SB544. Mont.Br.11-12 (citing *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 267 (5th Cir. 2024), *cert. granted*, No. 23-1122 (U.S. July 2, 2024)). But the Supreme Court granted certiorari in *Paxton* to resolve whether *Ginsberg*'s rational-basis standard or *Ashcroft*'s strict-scrutiny standard applies to laws like SB544, and the Court's decision will likely have direct relevance to Plaintiffs' First Amendment claim. So Montana focuses here on the "secondary-effects" doctrine and stands on the rational basis and strict scrutiny arguments in its opening brief. Mont.Br.11-15.

offensiveness of constitutionally protected speech. *See Reno*, 521 U.S. at 868 (statute targeted at "primary effects of 'indecent' and 'patently offensive' speech"); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (permitting fees tied to "amount of hostility likely to be created by the speech based on its content"); *Boos v. Barry*, 485 U.S. 312, 320 (1988) (statute targeted at "international law obligation to shield diplomats from speech that offends their dignity"). But SB544 imposes no liability based on the content's offensiveness or effect on its listener—it regulates the secondary effects on minors' health and well-being by imposing liability on covered entities for failure to employ reasonable age-verification methods. §1(1), (3)(a).

To survive heightened scrutiny, SB544 must promote a "substantial government interest," and not suppress substantially more speech than necessary to achieve Montana's objectives. *Ward*, 491 U.S. at 799. SB544 clears that bar. Montana's interest in "protecting the physical and psychological well-being of minors" is compelling. *Sable*, 492 U.S. at 126. It's also appropriately tailored. SB544 doesn't cut off speech avenues for covered entities, it just requires them to ensure that only adults are accessing their content. §1(1). And it prohibits storing customer data used

for age-verification and enforces that through private rights of action. §1(2), (3)(b).

II. Plaintiffs fail to allege standing for their substantive due process and equal protection claims.

Article III requires that at least one Plaintiff establish standing for *each claim* they seek to press and *each form of relief* they seek. *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017); *see also Davis v. FEC*, 554 U.S. 724, 733-34 (2008) (standing to challenge one statutory provision doesn't grant standing to challenge another)).[3] That requires Plaintiffs to allege an injury-in-fact to a legally protected interest, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). For pre-enforcement challenges, Plaintiffs must allege, at a

[3] Plaintiffs claim that Montana "misunderstands the standing requirements that apply to particular *claims* once Article III has been satisfied with respect to the *action*." Opp.Br.28. If correct, so too does the Supreme Court. Both *Town of Chester* and *Davis* held that the requirement that standing exist for *each claim* was a matter of Article III standing. *Town of Chester*, 581 U.S. at 439; *Davis*, 554 U.S. at 733-35. Rather than address these binding authorities, Mont.Br.16, Plaintiffs sweep them aside and rely on a 47-year-old case that supports Montana's basic premise. Opp.Br.28-29 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 (1977)). In *Arlington Heights*, the Court searched for plaintiffs with standing to assert Fourteenth Amendment claims—"the heart of th[at] litigation"—even though another plaintiff had standing for other claims. 429 U.S. at 263-64.

minimum, that they intend to engage in conduct arguably proscribed by the statute and affected with a constitutional interest. Mont.Br.17 (quoting *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 487 (9th Cir. 2024)).

An organization can assert Article III standing to sue for injuries it has sustained, or it can sue on behalf of its members. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 393 (2024) (direct); *Fellowship of Christian Athletes (FCA) v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 681 (9th Cir. 2023) (associational). To sue for their own injuries, organizations must satisfy the same Article III requirements that apply to individuals. *Hippocratic Med.*, 602 U.S. at 393-94. An organization has standing to sue on behalf of its members *only* if (1) at least one of its members has standing, (2) the interests the suit seeks to vindicate are germane to its purpose, and (3) neither the claim nor the relief requires the individual members to join the suit. *FCA*, 82 F.4th at 681.

None of the Plaintiffs have standing to assert a substantive due process or equal protection claim.

Substantive Due Process. None of the Individuals plausibly allege an intent to engage in conduct arguably proscribed by SB544 because it imposes liability only on commercial entities, not on individuals.

Mont.Br.18-19. While SB544's "commercial entity" definition *could* sweep in individuals operating businesses as sole proprietors, neither Pfeuffer, Peterson, nor Griswold allege that they engage in any business activities that could make them sole proprietors. Mont.Br.18-19. Plaintiffs argue that they need not allege these basic facts because sole proprietorships have "no separate legal existence distinct from the operator of the business." Opp.Br.18-19. True enough, but beside the point. Individuals are sole proprietors only if they *operate a business* without forming a specific legal entity. None of the Individuals allege that they are engaged in business activities, so there's no basis for this Court to infer that they are "sole proprietors." Thus, the Individuals lack standing to assert their substantive due process claim.

Plaintiffs also lack standing to assert a substantive due process claim because they fail to allege a protected "liberty" interest. Mont.Br.20-21. To do so, a plaintiff must provide a "careful description of the asserted fundamental liberty interest" and show that the identified liberty interest is "objectively, deeply rooted in this Nation's history and tradition." *Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1822 (2024). Plaintiffs fail to meet either requirement.

While Plaintiffs assert a fundamental "liberty" interest in "private sexual conduct," *see* Mont.Br.20-21; Opp.Br.20, they identify no authority supporting the existence of that broad and amorphous "liberty" interest, Opp.Br.20-21. They lean on *Lawrence v. Texas* for support, but it didn't secure any right—much less a fundamental right—in private sexual conduct. *See* Mont.Br.20-21.

Nor do the Entities allege a "liberty" interest in private sexual conduct, Mont.Br.20-21, and for good reason, *see Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial persons.").[4]

FSC too fails to allege a protected "liberty" interest. Compl. ¶¶12-13. While it may sue on behalf of its injuries, FSC has, at most, alleged injury to its ability to secure its members' First Amendment rights. *Id.* That alleged injury may be enough to grant standing for a First

[4] The Entities look to third-party standing as a lifeline, Opp.Br.15-17, but the Court has "not looked favorably upon third-party standing" outside the First Amendment context. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). There's no reason rely on that doctrine here because Montana only challenges Plaintiffs' standing for their substantive due process and equal protection claims. No plaintiff has plausibly alleged a legally cognizable substantive due process or equal protection injury. Even if the Entities have standing for their First Amendment claim, that doesn't confer third-party standing to assert rights that third parties don't have.

Amendment claim, *Hippocratic Med.*, 602 U.S. at 393, but it isn't enough for a substantive due process claim. *Davis*, 554 U.S. at 733-34; *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) ("[I]f a constitutional claim is covered by a specific constitutional provision" the claim "must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

FSC argues that it's claim to associational standing is "open-and-shut." Opp.Br.17. To be sure, FSC may assert the rights of its members *if it meets the requirements for associational standing*. But FSC fails to identify a single member with standing. Compl. ¶¶12-13. And this Court cannot simply assume, without a single supporting allegation, that there are members with standing. Even so, any members FSC identifies would lack standing for the substantive due process claims for the same reasons the Individuals and Entities lack standing.

Plaintiffs' failure to allege that their asserted "liberty" interest is "objectively, deeply rooted in this Nation's history and tradition" provides another reason to dismiss this claim. *Muñoz*, 144 S. Ct. at 1822.

Equal Protection. The Individuals also lack standing to assert their equal protection claim because SB544 doesn't "arguably proscribe"

their intended conduct. *Peace Ranch*, 93 F.4th at 487. Because FSC fails to plausibly allege an injury-in-fact or associational standing, *see supra*, it too lacks standing to assert an equal protection claim. Montana argued that Plaintiffs failed to alleged an injury-in-fact sufficient to support an equal protection claim, Mont.Br.25-28, and Plaintiffs didn't respond to this argument *at all*, Opp.Br.28-29. That failure amounts to an "abandonment … of whatever argument they may have offered [this Court] to support that claim." *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 881 (9th Cir. 2022).

III. Plaintiffs fail to state a procedural due process claim.

Plaintiffs fail to plausibly allege that SB544 doesn't "give fair notice of the conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). None of the statutory terms Plaintiffs identify—considered in context—"fail[] to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* at 253. Yet Plaintiffs demand of SB544 what the Supreme Court has refused to require: "mathematical certainty [in its terms]," *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The Court hasn't, as Plaintiffs claim,

Opp.Br.22, required this of "regulations that restrict expressive activity," *United States v. Williams*, 553 U.S. 285, 304 (2008).

Plaintiffs argue that Montana may not "hide behind some lesser standard attending facial—as opposed to as-applied—challenges" because it raised both challenges. Opp.Br.28 n.13. While Plaintiffs plead an as-applied *First Amendment* challenge, Compl. ¶87, they don't plead an as-applied *procedural due process* challenge, *id.* ¶¶91-95. Plaintiffs simply speculate about hypothetical issues arising from the terms identified in their complaint without alleging vagueness issues (beyond generalized confusion) specific to them. Mont.Br.23-25.

Plaintiffs have in function if not in form pressed a facial challenge, "and that decision comes at a cost." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). So Plaintiffs must show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* Because they've failed to show that SB544's application won't be clear in the "vast majority of its intended applications," Mont.Br.22-25, this Court should dismiss their procedural due process claim. *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

IV. Plaintiffs fail to state a Commerce Clause claim.

Even if SB544 indirectly affects out-of-state communications, *see* Opp.Br.29-30, it regulates only intrastate activity—it requires commercial entities to employ reasonable methods to verify the ages of their Montana customers. §1(1). The only question is whether its indirect effects impose a substantial harm to interstate commerce that clearly outweighs Montana's interests in protecting minors from online pornography. *Nat'l Pork Prods. Council v. Ross*, 598 U.S. 356, 377, 385 (2023).

Plaintiffs' extraterritorial-effects argument runs headlong into this Circuit's extraterritoriality principle, which has limited its application to statutes that dictate the price of products and tie in-state prices to out-of-state prices. Mont.Br.30. State laws, like SB544, that regulate only intrastate conduct don't have impermissible extraterritorial effects. *Pork Prods.*, 598 U.S. at 358.

Plaintiffs argue that SB544 "violates the long-established rule barring states from enacting differing standards for instrumentalities of national commerce where uniformity is required." Opp.Br.30. But "concerns about national uniformity are simply part of the *Pike* burden/benefit balancing analysis." *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307

(10th Cir. 2008). Plaintiffs must allege that SB544 imposes "a substantial harm to interstate commerce" that is "clearly excessive in relation to the putative local benefits." *Pork Prods.*, 598 U.S. at 377, 385.

Plaintiffs fail to meet that standard. By limiting minors' early exposure to online pornography, SB544 minimizes the likelihood that minors will develop "body-image disorders," "emotional and medical illnesses," and other health-related issues. SB544, Preamble. Compliance with SB544 imposes costs on covered commercial entities, and there is a threat of inconsistent regulations. But these burdens fall on in- *and* out-of-state content providers, so SB544 doesn't depart from the Court's "antidiscrimination rule." *Pork Prods.*, 598 U.S. at 377. Nor does SB544's age-verification requirement fall within the rare class of state regulations preempted because "the lack of national uniformity would impede *the flow* of interstate goods." *Id.* at 379 n.2; *Quik Payday*, 549 F.3d at 1311-12 (dormant Commerce Clause doesn't require national regulation of "one-to-one commercial exchanges," rather than internet communications generally, "just because the parties use the Internet to communicate"). This Court should dismiss Plaintiffs' Commerce Clause claim.

V. JFF's Section 230 claim fails.

Section 230(c) neither immunizes website operators from state-law obligations that don't require monitoring or deletion of third-party content, nor does it authorize website operators to publish their own content. Instead, it protects website operators, like JFF, from liability for good-faith efforts to restrict content they host, not for content they publish. Mont.Br.32-34; *Paxton*, 95 F.4th at 285 (Section 230(c)(1) isn't a "shield for purposefully putting 'offensive material' onto the Internet."). So if JFF serves only as a passive conduit, §230(c)(1) protects it from liability for third-party content, and §230(c)(2) ensures that it doesn't become a publisher because it tries to remove harmful content. But if JFF creates its own content, §230(c) doesn't protect it from liability. §230(f)(3).

SB544 complements §230(c)'s framework. *See* §230(e)(3) (states may enforce state laws "consistent with this section"). It doesn't treat website operators, like JFF, as publishers of third-party content they passively host—it imposes liability only on commercial entities that publish or distribute covered content *without* performing reasonable age-verification methods. But if JFF employs these measures and a minor evades them and is later harmed by third-party content on JFF's site, §230(c)'s

protections kick in and bar liability. Because there is no conflict between §230(c) and SB544, this Court should dismiss JFF's Section 230 claim.

CONCLUSION

This Court should grant Defendant's Motion to Dismiss in full.

DATED this 29th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,250 words, excluding the caption, tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

/s/ *Peter M. Torstensen, Jr.*
PETER M. TORSTENSEN, JR.

CERTIFICATE OF SERVICE

I hereby certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: July 29, 2024

/s/ *Peter M. Torstensen, Jr.*
PETER M. TORSTENSEN, JR.