



## HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

BETWEEN:

**REDDIT, INC.**  
Plaintiff

and

**COMMONWEALTH OF AUSTRALIA**  
First Defendant

**MINISTER FOR COMMUNICATIONS**  
Second Defendant

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA  
(INTERVENING)**

## PART I: CERTIFICATION

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1. These submissions are in a form suitable for publication on the internet.

## PARTS II & III: INTERVENTION

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2. The Attorney-General for the State of **Victoria** intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the First Defendant.

## PART IV: ARGUMENT

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### A. Summary of argument

3. The analytical framework for the implied freedom of political communication proceeds by way of three questions.<sup>1</sup> *First*, does the impugned law effectively burden freedom of communication about governmental or political matters in its terms, operation or effect. *Second*, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. *Third*, is the impugned law reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of that constitutionally prescribed system of government.
4. Victoria's submissions address two points related to the third of these questions (in respect of Question 2 of the Special Case). In summary, they are:
  - 4.1 The analogical use of United States case law on the First Amendment must be undertaken having regard to the differences between the constitutional framework in the United States and in Australia. Having regard to those differences, the authorities relied on in the submissions filed on behalf of NetChoice and the Electronic Frontier Foundation (if granted leave) concerning challenges to legislation regulating social media in several United States jurisdictions<sup>2</sup> provide very little assistance.
  - 4.2 The degree of scrutiny that the Court applies, including as to the nature and extent of the evidence that may be required, in assessing whether a law is reasonably appropriate and adapted to advance the identified legitimate purpose

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<sup>1</sup> *Hopper v Victoria* (2026) 100 ALJR 582 at [27] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567-568; *Coleman v Power* (2004) 220 CLR 1 at [93], [95]-[96] (McHugh J). See also *Brown v Tasmania* (2017) 261 CLR 328 at [156] (Gageler J).

<sup>2</sup> Submissions dated 11 September 2026 (**NetChoice**).

must be calibrated not only by reference to the nature and extent of the burden but also by reference to the nature and importance of the purpose of the law. In the context of Pt 4A of the *Online Safety Act 2021* (Cth), it is sufficient that there is evidence capable of supporting a reasoned assessment of credible risks of harm and of the efficacy of the protective response, even if some uncertainty exists: see **DS [7], [30]**.

## **B. Approaching the question of justification generally**

5. The method by which the question of whether a law is reasonably appropriate and adapted to advance the identified legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government is designedly “flexible”.<sup>3</sup>
6. Careful consideration of the nature and extent of the burden is necessary to determine the strength of the justification required.<sup>4</sup> That is because “not every law which effectively burdens freedom of political communication poses the same degree of risk to the efficacy of electoral accountability for the exercise of legislative and executive power”.<sup>5</sup> It follows that “not every law which effectively burdens freedom of political communication in pursuit of a legitimate purpose demands the same degree of justification, and concomitantly not every law which effectively burdens freedom of political communication needs to be subjected to the same intensity of judicial scrutiny”.<sup>6</sup> So, for example, a law which directly targets political communication will be substantially more difficult to justify than a law which indirectly impedes the flow of political communication.<sup>7</sup>

## **C. The nature and extent of the burden**

7. Within Pt 4A of the *Online Safety Act*, inserted by the *Online Safety Amendment (Social Media Minimum Age) Act 2024* (Cth), s 63D in its legal and practical operation is a temporary restriction (being an age restriction) on children under the age of 16

<sup>3</sup> *Babet v Commonwealth* (2025) 99 ALJR 883 at [49] (Gageler CJ and Jagot J).

<sup>4</sup> *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at [57] (Gageler CJ, Gordon and Beech-Jones JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 (*Unions (No 1)*) at [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>5</sup> *Brown* (2017) 261 CLR 328 at [164] (Gageler J), citing *Tajjour v New South Wales* (2014) 254 CLR 508 at [151].

<sup>6</sup> *Brown* (2017) 261 CLR 328 at [164] (Gageler J).

<sup>7</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ).

creating or holding accounts on “age-restricted social media platforms” as specified in s 63C of the Act. That operation is effected through the obligation in s 63D on a provider of an age-restricted social media platform to take reasonable steps to prevent “age-restricted users” (being those aged under 16)<sup>8</sup> having accounts with that platform.

8. Section 63C(1) then defines “age-restricted social media platforms” to mean, relevantly, electronic services satisfying certain conditions, including conditions specified in the legislative rules. Such rules include the *Online Safety (Age-Restricted Social Media Platforms) Rules 2025* (Cth), r 4A of which states that a prescribed electronic service for the purpose of s 63C(1)(a)(iv) is a service that has either or both of a “recommender feature” and a “logged-in feature”.

9. It is apparent that Pt 4A does not directly target communication of any kind, let alone political communication. Rather, it targets conduct of providers of age-restricted social media platforms as to the reasonableness of the steps they take to prevent children aged under 16 having accounts on their platforms. That obligation incidentally affects political communication to the extent that such communication is dependent on children aged under 16 having accounts on those platforms and informs electoral choice: see **DS [19]-[22]**. The incidental nature of the burden is especially significant where alternative modes of communication, including other means of online communication (such as WhatsApp, Messenger and Discord: see **SC [308.4]**), are available, practical and convenient.<sup>9</sup>

### C.1 Relevance of First Amendment authorities

10. The extent to which analogical support may be derived from First Amendment authorities in the United States in the characterisation of the nature and extent of the burden and in turn, the justification required for the burden, turns on a proper understanding of the First Amendment jurisprudence and the differences in the manner in which the First Amendment operates compared to the implied freedom of political communication that is the subject of this Court’s consideration.<sup>10</sup> NetChoice’s submissions gloss over these differences.

<sup>8</sup> *Online Safety Act 2021* (Cth), s 5 (definition of “age-restricted user”).

<sup>9</sup> See *Farmer* (2025) 99 ALJR 1408 at [252] (Jagot J).

<sup>10</sup> *Clubb v Edwards* (2019) 267 CLR 171 at [179] (Gageler J); *Comcare v Banerji* (2019) 267 CLR 373 at [99] (Gageler J). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [17] (Gleeson CJ).

11. *First*, the fact that the First Amendment is understood as a personal right to freedom of speech<sup>11</sup> has two relevant aspects: that it is a personal right and that it is concerned with all forms of speech (not simply political or governmental communication).<sup>12</sup> Neither aspect finds equivalent foothold in this Court’s explanation of the implied freedom of political communication. As has been repeatedly affirmed by this Court, the implied freedom is *not a personal right*, but rather a limitation on “legislative and executive power that invalidates a law that so burdens freedom of *communication on governmental or political matters* that the impugned law may be taken to affect the system of government for which the Constitution provides, a system which depends for its existence upon that freedom”.<sup>13</sup> Each of these aspects means that, insofar as NetChoice seeks to bring to this Court’s attention how US courts have considered whether certain laws have passed an applicable tier of judicial scrutiny, those cases must be understood in light of how the relevant law came to attract judicial scrutiny at all.
12. Most recently, in *Moody v NetChoice, LLC*,<sup>14</sup> the United States Supreme Court held that the Texan and Floridian laws regulating the ability of social media companies to engage in content moderation violated the First Amendment because it was the free speech rights *of the social media companies* that were impacted, with *speech understood broadly* as the creation of expressive products, the design of algorithms, and the curation of content.<sup>15</sup>
13. *Second*, the First Amendment rights of children have been considered by the US Supreme Court through the lens of the division of responsibility between government and those *in loco parentis*.<sup>16</sup> That conceptual lens has no analogue in Australia. Not only does no person in Australia, adult or child, personally hold any right to freedom of speech, but more critically, the analytical approach is distinct. The relevant consideration is not whether there is any impact *on the child* from some impediment on the flow of political communication but rather the effect of that impediment on communication from children *on electors’* ability to exercise a free and informed choice

<sup>11</sup> *Clubb* (2019) 267 CLR 171 at [179] (Gageler J).

<sup>12</sup> See *Sorrell v IMS Health Inc*, 564 US 552 at 566-567, 570 (2011).

<sup>13</sup> *Farmer* (2025) 99 ALJR 1408 at [37] (Gageler CJ, Gordon and Beech-Jones JJ) and the cases cited there.

<sup>14</sup> 603 US 707 (2024).

<sup>15</sup> *Moody v NetChoice, LLC*, 603 US 707 at 716, 727-728, 731 (2024). See also *Sorrell*, 564 US 552 (2011).

<sup>16</sup> *Tinker v Des Moines Independent Community School District*, 393 US 503 (1969); *Mahanoy Area School District v B.L.*, 595 US 180 (2021).

when choosing their representatives.<sup>17</sup> That analytical distinction results in the nature and extent of the burden being qualitatively different as between the United States and Australia for any law which affects children's speech.

14. Appreciating those differences, the analytical tools used in the United States to identify the nature and extent of the limitation on freedom of speech may be of some assistance to this Court in identifying the nature and extent of the burden. Indeed, that has been the use of First Amendment jurisprudence by this Court to date.<sup>18</sup> Relevantly, those analytical tools are whether a law is content neutral or content-based, as well as whether a law engages in viewpoint discrimination.

- 10 15. **Content neutrality.** In the United States, content neutrality triggers “intermediate scrutiny” by the courts, which demands that the law pursues an important government interest by means that are substantially related to that interest, whereas a content-based law triggers “strict scrutiny”, requiring that a law pursue a compelling government interest by means that are narrowly tailored to achieve that interest. Indicators of content neutrality include that a law does not directly regulate expressive activity or conduct with an expressive component, or that it imposes only a geographic distinction on speech.<sup>19</sup>

- 20 16. **Viewpoint discrimination.** A law that discriminates between speech on the basis of viewpoint is subjected to strict scrutiny. That includes where a law treats a speaker (or class of speaker) differently, such that it effectively reflects a preference for certain content. However, strict scrutiny will be unwarranted “when the differential treatment is ‘justified by some special characteristic of’ the particular medium being regulated”.<sup>20</sup>

<sup>17</sup> *Farmer* (2025) 99 ALJR 1408 at [36] (Gageler CJ, Gordon and Beech-Jones JJ), [175] (Gleeson J); *Unions (No 1)* (2013) 252 CLR 530 at [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Lange* (1997) 189 CLR 520 at 560.

<sup>18</sup> See, eg, *Australian Capital Television* (1992) 177 CLR 106 at 143 (Mason CJ), 169 (Deane and Toohey JJ), 234-235 (McHugh J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 299 (Mason CJ); *Levy v Victoria* (1997) 189 CLR 579 at 618-619 (Gaudron J), 638-642 (Kirby J); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [68] (French CJ), [131] (Hayne J); *Tajjour* (2014) 254 CLR 508 at [37] (French CJ), [146] (Gageler J); *Brown* (2017) 261 CLR 328 at [119]-[120] (Kiefel CJ, Bell and Keane JJ), [202] (Gageler J) and see also at [291] (Nettle J); *Clubb* (2019) 267 CLR 171 at [165], [180]-[181] (Gageler J), [364], [375] (Gordon J), [507]-[508] (Edelman J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at [177] (Gordon J); *Comcare* (2019) 267 CLR 373 at [90] (Gageler J); *Babet* (2025) 99 ALJR 883 at [176] (Gordon J), [250] (Beech-Jones J); *Farmer* (2025) 99 ALJR 1408 at [57] (Gageler CJ, Gordon and Beech-Jones JJ), [250], [252] (Jagot J).

<sup>19</sup> *TikTok Inc v Garland*, 604 US 56 (2025); *City of Austin, Texas v Reagan National Advertising of Austin, LLC*, 596 US 61 (2022).

<sup>20</sup> *Turner Broadcasting System, Inc v Federal Communications Commission*, 512 US 622 at 660-661 (1994).

17. However, these analytical tools must also be approached with caution, given the nature of the rights conferred by the First Amendment will necessarily inform their use. For example, a law which, in the United States, might be regarded as content-based or as discriminating based on viewpoint because it affects speech by social media platforms differently from other speech should properly be regarded in Australia as a law which affects political communication, if at all, only indirectly and incidentally.

## C.2 Approaching NetChoice's cases

18. Insofar as NetChoice seeks to rely substantively on certain US State laws that it has mostly – though not entirely – successfully enjoined in lower courts by way of injunction (**NetChoice [10]-[13], [31]-[32]**), those cases must be viewed in light of the terms, operation and effect of the laws in question, each of which differed from Pt 4A of the *Online Safety Act* and the Rules, and the important distinctions described above at paragraphs 11 to 13 in relation to the different constitutional context. Once that is done, it is apparent that there can be no “uncritical translation” of those preliminary holdings to the present proceeding.<sup>21</sup> Instead, the relevant aspects of the courts’ reasoning support, rather than detract, from the validity here of the Amendment Act.
19. In particular, the following features emerge from a review of the case law.
- 19.1 There is a lack of consistency at the lower court levels as to the approach taken to the First Amendment analysis of laws broadly seeking to regulate social media. As a matter of persuasive authority, these cases thus diminish in their force in light of that inconsistency, compounded by the fact that most of the appellate decisions by Circuit Courts of Appeal have reversed or stayed injunctions issued by district courts.
- 19.2 Where preliminary injunctions have been granted against these laws, the essential premise has been that the social media companies’ own speech rights have been infringed by the relevant State law, which has led the lower courts generally to apply a strict scrutiny analysis on the basis of the law being content-based or engaging in viewpoint discrimination.
- 19.3 By contrast, where, as in Florida for instance, the law has been characterised by reference to it regulating the ability of social media companies to contract with

<sup>21</sup> *Clubb* (2019) 267 CLR 171 at [179] (Gageler J), citing *Roach* (2007) 233 CLR 162 at [17] (Gleeson CJ).

children rather than the social media companies' own First Amendment protected speech, the law was held to be content neutral and able to withstand intermediate scrutiny, in light of the addictive features of such social media.

20. **Arkansas.** In *NetChoice v Griffin*,<sup>22</sup> the District Court granted NetChoice's motion for summary judgment permanently enjoining Arkansas' "Social Media Safety Act". That Act required certain social media platforms to verify the age of all account holders resident in Arkansas in order to prevent minors from opening accounts without parental consent. The District Court characterised the law as burdening users' speech by foreclosing access to social media to minors whose parents do not consent to their use of social media, as well as adults required to produce documentation to prove their age or submit to biometric age verification. The Court also accepted that the law discriminated based on both content and viewpoint as between different social media platforms (platforms which were digital news websites with social features were exempted if the news content was posted by the provider of the website), and accordingly applied strict scrutiny.
21. The District Court stated that it "does not doubt the reality, well supported by the record, that unfettered social media access can and does harm minors" and that the protection of minor children is a compelling government interest.<sup>23</sup> However, the Court considered the law was not narrowly tailored because of the extent of exemptions, including in respect of YouTube; and the ability for parents to consent to their children using social media, meaning the law could not properly address a serious social problem.<sup>24</sup>
22. Given the premise of the District Court's decision was the personal right to speech of children and adults alike, as well as that of social media companies, it did not engage with the extent to which the flow of speech generally might be affected, let alone the flow of political or governmental communication. Further, to the extent that the District Court accepted that there were content- and speaker-based restrictions, that reflects the different terms of the law there in question as compared to Pt 4A of the *Online Safety Act* and the Rules.

<sup>22</sup> WD Ark, No 5:23-CV-5105, 31 March 2025 (under appeal in *NetChoice v Griffin*, No 25-1889 (8<sup>th</sup> Cir, 2025)).

<sup>23</sup> *Griffin* (WD Ark, No 5:23-CV-5105, 31 March 2025) at 11.

<sup>24</sup> *Griffin* (WD Ark, No 5:23-CV-5105, 31 March 2025) at 10-14.

23. **Colorado.** In *NetChoice v Weiser*,<sup>25</sup> the District Court granted NetChoice’s motion for a preliminary injunction against Colorado’s “Protections for Youth Using Social Media” law. The law required social media platforms to provide all children (ie, those aged under 18) information about the impact of social media on brain development and mental and physical health. The Court “fully appreciate[d] Colorado’s legitimate effort to protect the children and adolescents of our state from the impacts of social media use on their health and well-being”,<sup>26</sup> and accepted that Colorado had a compelling interest in “informing youth about the risks of excessive social media use”.<sup>27</sup> However, the Court determined that strict scrutiny was triggered, as the law “requir[ed] social media companies, which are likely engaged in expressive speech ... to speak at all”.<sup>28</sup>
24. The analogical value of this decision is therefore extremely limited given the material difference between the relevant law and Pt 4A of the *Online Safety Act*, as well as the focus on the personal speech rights of the social media companies.
25. **Utah.** In *NetChoice v Reyes*,<sup>29</sup> the District Court granted NetChoice’s motion for a preliminary injunction against Utah’s “Minor Protection in Social Media Act”. The law required social media platforms to verify users’ ages and impose special restrictions on minors’ accounts such as default privacy settings. The Court considered that the law imposed a content-based restriction on “the speech at issue in this case—the speech social media companies engage in when they make decisions about how to construct and operate their platforms”,<sup>30</sup> compared to other forms of speech, and must therefore satisfy “a tremendously high level of constitutional scrutiny”.<sup>31</sup> The Court “recognize[d] the State’s earnest desire to protect young people from the novel challenges associated with social media” but held that “owing to the First Amendment’s paramount place in our democratic system”,<sup>32</sup> and on the record before the Court, the State had not established a compelling government interest “warranting the Act’s intrusion on social media companies’ First Amendment rights”.<sup>33</sup>

<sup>25</sup> 808 F Supp 3d 1223 (D Colo, 2025) (under appeal in *NetChoice v Weiser*, No 25-1456 (10<sup>th</sup> Cir, 2025)).

<sup>26</sup> *Weiser*, 808 F Supp 3d 1223 (D Colo, 2025) at 1228.

<sup>27</sup> *Weiser*, 808 F Supp 3d 1223 (D Colo, 2025) at 1240.

<sup>28</sup> *Weiser*, 808 F Supp 3d 1223 (D Colo, 2025) at 1232 and see also at 1239.

<sup>29</sup> 748 F Supp 3d 1105 (D Utah, 2024) (under appeal in *NetChoice v Brown*, No 24-4100 (10<sup>th</sup> Cir, 2025)).

<sup>30</sup> *Reyes*, 748 F Supp 3d 1105 (D Utah, 2024) at 1120.

<sup>31</sup> *Reyes*, 748 F Supp 3d 1105 (D Utah, 2024) at 1111.

<sup>32</sup> *Reyes*, 748 F Supp 3d 1105 (D Utah, 2024) at 1111.

<sup>33</sup> *Reyes*, 748 F Supp 3d 1105 (D Utah, 2024) at 1124.

26. The Court’s premise – that it was the intrusion on the speech rights of corporate entities that warranted justification – has no comparable force in Australia. Indeed, as the Court expressly recognised, the basis of NetChoice’s challenge was “not that the [Act] restricts minor social media users’ ability to, for example, share political opinions. Rather, the focus of NetChoice’s challenge is that the [Act] restricts social media companies’ abilities to collage user-generated speech into their ‘own distinctive compilation[s] of expression’”.<sup>34</sup> Moreover, the evidence before the Court appears to have been much less substantial than that set out in the Special Case in this proceeding,<sup>35</sup> and the Court appeared to view the evidence with a degree of scepticism that, for the reasons discussed below, should not be carried over to the present context.

27. **Louisiana.** In *NetChoice v Murrill*,<sup>36</sup> the District Court granted NetChoice’s motion for a preliminary and permanent injunction and summary judgment against Louisiana’s “Secure Online Child Interaction and Age Limitation Act”. That Act required “social media companies” to impose age verification, parental consent requirements, and restrictions on direct messaging between unconnected accounts. The Court considered that the law burdened social media companies’ ability to publish speech on their platforms, and also burdened current and prospective users’ ability to access and engage in speech on the relevant platforms.<sup>37</sup> The law was also characterised as content-based because it classified sites based on social interaction, which required consideration of their content.<sup>38</sup>

28. Applying strict scrutiny, the Court assumed there to be a causal relationship between social media use and harms to minors, but concluded that the law was not narrowly tailored, as it was both underinclusive and overinclusive (including because parents already had tools to control children’s access to and use of relevant platforms).<sup>39</sup> That under- and over-inclusivity led to the law failing intermediate scrutiny, assuming that to be the applicable standard of review.<sup>40</sup> As with the earlier District Court decisions

<sup>34</sup> *Reyes*, 748 F Supp 3d 1105 (D Utah, 2024) at 1123.

<sup>35</sup> *Reyes*, 748 F Supp 3d 1105 (D Utah, 2024) at 1125.

<sup>36</sup> 812 F Supp 3d 594 (MD La, 2025) (under appeal in *NetChoice v Murrill* (5<sup>th</sup> Cir, No 26-30016, 1 January 2026)).

<sup>37</sup> *Murrill*, 812 F Supp 3d 594 (MD La, 2025) at 643.

<sup>38</sup> *Murrill*, 812 F Supp 3d 594 (MD La, 2025) at 644.

<sup>39</sup> *Murrill*, 812 F Supp 3d 594 (MD La, 2025) at 647-648.

<sup>40</sup> *Murrill*, 812 F Supp 3d 594 (MD La, 2025) at 651, 654.

set out above, the premise of personal speech rights undermines this decision's relevance to the strictness of judicial scrutiny applicable in the present matter.

29. **Nebraska.** In *NetChoice v Hilgers*,<sup>41</sup> the District Court granted NetChoice's motion for a preliminary injunction against Nebraska's LB 383, a law requiring social media companies to obtain parental consent before allowing a minor (aged under 18 years) to open a social media account, as well as to provide parents with oversight tools to monitor and manage their children's account activity on social media platforms. The Court characterised the law as content-based given the exemptions to the statutory definitions of "social media platform" and "content", which required an evaluation of, for example, whether a platform "primarily provides career development opportunities".<sup>42</sup> In so characterising the law, the Court also had regard to the legislative history which included statements by the Attorney-General that there was a need to restrict the "inappropriate material" available to minors online.<sup>43</sup>
30. Applying strict scrutiny, the Court recognised that data showed increased social media use had caused a mental health crisis in States including Nebraska,<sup>44</sup> but that the law was not tailored (substantially or narrowly) to any of the specific addictive features identified in the evidence such as algorithmic feeds.<sup>45</sup> The characterisation of this law as content-based essentially stems from the definitional attempt to carve out, indirectly, certain platforms such as LinkedIn (as a platform which "primarily provides career development opportunities")<sup>46</sup> rather than through any direct exception or exclusion by operation of criteria relevant to the harm being addressed such as specific addictive features. The identification of age-restricted social media platforms is relevantly different under Pt 4A of the *Online Safety Act*: while there are exclusions for services with certain primary purposes,<sup>47</sup> the Rules identify age-restricted social media platforms by reference to functional criteria (ie, addictive features such as recommender and logged-in features), and the Minister has the power to expressly designate particular platforms.

<sup>41</sup> D Neb, No 4:26-CV-3149, 27 June 2026.

<sup>42</sup> *Hilgers* (D Neb, No 4:26-CV-3149, 27 June 2026) at 7.

<sup>43</sup> *Hilgers* (D Neb, No 4:26-CV-3149, 27 June 2026) at 8.

<sup>44</sup> *Hilgers* (D Neb, No 4:26-CV-3149, 27 June 2026) at 9.

<sup>45</sup> *Hilgers* (D Neb, No 4:26-CV-3149, 27 June 2026) at 9.

<sup>46</sup> *Hilgers* (D Neb, No 4:26-CV-3149, 27 June 2026) at 7.

<sup>47</sup> Rules, r 5(1).

31. At the appellate level, however, US Courts of Appeals have stayed or reversed preliminary injunctions granted by District Courts in Florida and Ohio.

32. **Florida.** In *Computer and Communications Industry Association v Uthmeier*,<sup>48</sup> the US Court of Appeals for the Eleventh Circuit stayed the District Court's grant of a preliminary injunction (pending its appeal) against Florida's HB3, a law requiring social media platforms employing certain addictive features to prohibit children under 14 years of age from creating accounts, and requiring parental consent for 14- and 15-year-old account holders. The Court of Appeals stayed the injunction on the basis that the State was likely to succeed on the merits of the First Amendment claim, as HB3 was likely content neutral and satisfied intermediate scrutiny.<sup>49</sup> Specifically, the Court of Appeals characterised the law as likely content neutral because it operated to restrict social media platforms' ability to contract with children under a certain age, if those platforms included certain addictive features with no reference to content but rather only to the form of expression.<sup>50</sup>

33. The Court of Appeals further recognised that Florida has a "legitimate and substantial interest in regulating young minors' use of platforms employing addictive features",<sup>51</sup> and that the State was likely to show that the law was the most effective way to achieve its interests, given the evidence that the platforms leverage personal data from users to maximise the effectiveness of addictive features, and that thereafter it was not to the point that the plaintiffs or the court might disagree with the legislature's chosen approach.<sup>52</sup> It may be noted that the characterisation of the law as content neutral because it regulated the contracting capacity of the social media platforms (rather than the First Amendment rights of those platforms) would likely be approached in the same way under the implied freedom.

34. **Ohio.** In *NetChoice v Yost*,<sup>53</sup> the US Court of Appeals for the Sixth Circuit reversed the District Court's grant of a preliminary injunction in relation to Ohio's "Parental Notification by Social Media Operators Act". That Act required social media sites to obtain verifiable parental or legal guardian consent for any contract with a child prior

<sup>48</sup> 11th Cir, No 25-11881, 25 November 2025.

<sup>49</sup> *Uthmeier* (11th Cir, No 25-11881, 25 November 2025) at 3.

<sup>50</sup> *Uthmeier* (11th Cir, No 25-11881, 25 November 2025) at 4.

<sup>51</sup> *Uthmeier* (11th Cir, No 25-11881, 25 November 2025) at 6.

<sup>52</sup> *Uthmeier* (11th Cir, No 25-11881, 25 November 2025) at 8-9.

<sup>53</sup> 180 F 4th 268 (6th Cir, 2026).

to allowing the child to access or use the site, and to present to the parent or guardian a list of the site's content moderation features.

35. Judge Clay (of the majority) characterised the law as burdening the social media companies' protected speech by inhibiting their "preferred method of disseminating [their] content" and "chilling" those companies' engagement in speech that children might reasonably be likely to access.<sup>54</sup> His Honour further considered the law to be content-based because its application varied based on the content of the speech, including by being focused on content reasonably anticipated to be accessed by children.<sup>55</sup> Nonetheless, it was likely that the law would survive strict scrutiny review because: (i) the law did not restrict what ideas social media companies could circulate to children;<sup>56</sup> (ii) there was evidence about a "potentially significant connection between social media and serious harms such as depression and body dysmorphia";<sup>57</sup> and (iii) the parental consent requirement that the law effected constituted a "marginal burden" that targeted the "multi-faceted problem" identified by the State.<sup>58</sup>
36. Judge Batchelder (also of the majority) was sceptical that the law was content-based regulation,<sup>59</sup> but ultimately did not reach the merits of the First Amendment claim because her Honour considered that NetChoice had not established the threshold requirements for its facial challenge to the law (ie, challenging the law across its full range of applications).<sup>60</sup>
37. This decision presents little analogical assistance essentially because the majority of the Court of Appeals proceeded on the distinct premise of the personal speech rights of the social media sites. Judge Clay's conclusion that the law was content-based because it was focused on content reasonably anticipated to be accessed by children is also inapt in the Australian context. Such a law could not be regarded as one that is directly addressed to political communication. However, it is of some limited assistance to note that, in circumstances where the problem being addressed is multi-faceted and the

<sup>54</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 287.

<sup>55</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 288.

<sup>56</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 289.

<sup>57</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 290. See also at 299 ("This is not to say the record before us universally points to a causal relationship between children's using social media and then manifesting symptoms of poor mental health") (Batchelder J).

<sup>58</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 292.

<sup>59</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 310.

<sup>60</sup> *Yost*, 180 F 4th 268 (6th Cir, 2026) at 311.

legislative record shows a “potentially significant” linkage between social media use and harm, the legislature could validly enact such a law.

**D. Assessing the nature and extent of the requisite justification**

38. The question of whether a law is reasonably appropriate and adapted to advance an identified legitimate purpose is to be answered at the level of constitutional fact,<sup>61</sup> requiring that the Court be satisfied of “every fact the existence of which is necessary in law to provide a constitutional basis for the legislation”.<sup>62</sup> The Court needs to be satisfied that there is a factual basis for validity, “at a level of specificity no greater than is necessary to resolve the constitutional controversy before it”. It does not undertake the same adjudicative task as if the matter were an ordinary question of fact arising between the parties referable to some criterion of liability or defence under the law.<sup>63</sup> This reflects the respective constitutional responsibilities of the legislature and the judiciary: the “wisdom and expediency” of “competing courses are matters of policy for the governments to consider, and not for the Court”.<sup>64</sup> It is “not a matter of deference” but is rather “a matter of the boundaries between the legislative and judicial functions”.<sup>65</sup>
39. Answering the justification question at the level of constitutional fact means that the question is resolved at the level of whether there is a credible basis for what Parliament has done because thereafter, the “view of facts and the policy upon which” the exercise of legislative power is predicated are “no concern of the Court”.<sup>66</sup> The targeted and limited nature of this Court’s inquiry, focused on the evidentiary basis that goes to the validity of a law and not its preferability, also reflects its institutional competence vis-à-vis the political branches of government: “Australian courts have no constitutional mandate to tinker with legislative design in order to improve on the product of democratic choice”.<sup>67</sup>

<sup>61</sup> *Unions NSW v New South Wales* (2019) 264 CLR 595 at [94] (Gageler J).

<sup>62</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 222 (Williams J).

<sup>63</sup> *Vanderstock v Victoria* (2023) 279 CLR 333 at [153] (Kiefel CJ, Gageler and Gleeson JJ). See also *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ); *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 (Brennan J).

<sup>64</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at 60 (Gibbs CJ).

<sup>65</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at [90] (French CJ, Kiefel, Bell and Keane JJ).

<sup>66</sup> *Australian Communist Party* (1951) 83 CLR 1 at 198 (Dixon J). See also *Unions (No 1)* (2013) 252 CLR 530 at [132] (Keane J).

<sup>67</sup> *Clubb* (2019) 267 CLR 171 at [207] (Gageler J).

40. Further, the intensity of the Court’s review of the question of whether a law is reasonably appropriate and adapted to advance the identified legitimate purpose must be informed not only by the nature and extent of the burden but also by the nature and importance of the purpose. In turn, those matters inform the Court’s scrutiny of the evidentiary basis supporting both the importance of the purpose and the likely efficacy of the particular measures adopted to achieve it.
41. Difficulties that may exist in identifying the precise contours of harm because of the nature of that harm itself, such as corruption being inherently clandestine and so difficult to demarcate exactly,<sup>68</sup> can moderate the breadth and depth of the evidentiary justification required. So too “epistemic uncertainty” about the nature and extent of harm where vulnerable persons are considered, such as women seeking safe access to abortion services,<sup>69</sup> can moderate the breadth and depth of the evidentiary justification required to establish whether the means adopted by the legislature are reasonably necessary to achieve the legitimate purpose of addressing that harm. That also means that under-inclusiveness is not by itself fatal to the constitutional validity of a law: see **DS [39]**.<sup>70</sup>
42. In this proceeding, the justification question is whether Pt 4A of the *Online Safety Act* is reasonably appropriate and adapted to advance the identified legitimate purpose of reducing the risk of harm to Australian children aged under 16 from the use of accounts on social media platforms with identified “engagement-promoting features” (**DS [2], [5], [26]-[27]**). The protection of children from psychological and developmental harm is self-evidently a compelling legislative purpose. Children are a vulnerable group within the community.<sup>71</sup> That vulnerability is amplified by the time-sensitive nature of the harm presented by social media and sought to be addressed by the Amendment Act, in light of the effect on the neurological and psychological stage of children’s development (**DS [27]**).
43. The nature of that purpose, being concerned with the protection of children from harm caused by the use of social media platforms having certain technological features,

<sup>68</sup> *McCloy* (2015) 257 CLR 178 at [51] (French CJ, Kiefel, Bell and Keane JJ).

<sup>69</sup> *Clubb* (2019) 267 CLR 171 at [267], [269], referring also to *Brown* (2017) 261 CLR 328 at [282].

<sup>70</sup> *Brown* (2017) 261 CLR 328 at [222] (Gageler J).

<sup>71</sup> See, eg, *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [29] (Gleeson CJ); *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 at [3], [104] (Gageler CJ, Jagot and Beech-Jones JJ). See also SC [343]-[344].

means that the justification question in this case requires the assessment of a legislative response to a complex and multifaceted policy issue, with psychological, technological and time-sensitive dimensions. The confluence of these factors is such that, consistently with its power to legislate prophylactically,<sup>72</sup> Parliament is entitled to rely on credible evidence of causation and harm in order to legislate, even though the evidence may not yet be settled or indeed there is presently disagreement among experts (DS [30]). Further, provided Parliament can put forward a credible basis for its legislation, the means then chosen by Parliament to address that harm are a matter of “legislative judgment” to which the Court gives meaningful weight in answering the constitutional question.<sup>73</sup>

44. This Court has had regard to the Canadian approach to justification in the context of the implied freedom of political communication.<sup>74</sup> The Canadian Supreme Court, in assessing the evidentiary basis for the purposes of justification under s 1 of the *Canadian Charter* in limiting guaranteed rights, has stated that “legislative justification does not require empirical proof in a scientific sense”.<sup>75</sup> Instead, it is sufficient that “the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has”, with “common sense and inferential reasoning [able to] supplement the evidence”.<sup>76</sup>

45. For example, in *Canada (Attorney-General) v JTI-Macdonald*,<sup>77</sup> a law requiring tobacco companies to display a warning label on cigarette packaging which occupied half the space on the packaging was justified despite its infringement of the freedom of expression on the basis that the evidence “established that bigger warnings may have a greater effect”.<sup>78</sup> That is, the evidence was not conclusive, but the reasonable linkage established between warning labels and the health issues presented by tobacco meant

<sup>72</sup> *McCloy* (2015) 257 CLR 178 at [233] (Nettle J); *Brown* (2017) 261 CLR 328 at [288] (Nettle J); *Spence v Queensland* (2019) 268 CLR 355 at [95]-[96] (Kiefel CJ, Bell, Gageler and Keane JJ), [323] (Edelman J).

<sup>73</sup> See *Clubb* (2019) 267 CLR 171 at [82], [90] (Kiefel CJ, Bell and Keane JJ), [197], [208] (Gageler J); *Australian Capital Television* (1992) 177 CLR 106 at 144 (Mason CJ).

<sup>74</sup> See, eg, *Comcare* (2019) 267 CLR 373 at [98] (Gageler J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [75]-[77] (McHugh J).

<sup>75</sup> *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 at [18] (McLachlin CJ on behalf of McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

<sup>76</sup> *Sauvé* [2002] 3 SCR 519 at [18] (McLachlin CJ on behalf of McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

<sup>77</sup> [2007] 2 SCR 610.

<sup>78</sup> *JTI-Macdonald* [2007] 2 SCR 610 at [137].

that the justification under s 1 of the *Canadian Charter* was established, especially as the Court noted that Parliament here was tackling a “complex social problem” where there “may be many ways to approach a particular problem” but “no certainty as to which will be the most effective”.<sup>79</sup>

46. The Court in that case relevantly cited *Irwin Toy Ltd v Quebec*,<sup>80</sup> in which the Supreme Court considered that consumer protection laws which regulated advertising intended for children under 13 years old were justified under s 1 of the *Canadian Charter*. Relevantly to the justification analysis, the majority of the Supreme Court (Dickson CJ, Lamer and Wilson JJ) noted that while the government could not “assert *post facto* a purpose” which did not animate the legislation in the first place, “in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available”,<sup>81</sup> including “[s]tudies subsequent to the enactment of the legislation”.<sup>82</sup> That also reflected the Court’s observation that the “degree to which a purpose remains or becomes pressing and substantial” can change over time.<sup>83</sup>

47. The Attorney-General of Quebec had relied on various reports and studies “reaching somewhat different conclusions about the age at which children generally develop the cognitive ability to recognize the persuasive nature of advertising and to evaluate its comparative worth”.<sup>84</sup> The Court considered that while the evidence was strongest with respect to younger children aged six or younger, “the legislature was not obliged to confine itself solely to protecting the most clearly vulnerable group. It was only required to exercise a reasonable judgment in specifying the vulnerable group”.<sup>85</sup> It was a matter for the legislature to “mediate[] between the competing claims of different groups in the community”, and that:<sup>86</sup>

[i]f the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

<sup>79</sup> *JTI-Macdonald* [2007] 2 SCR 610 at [43].

<sup>80</sup> [1989] 1 SCR 927, cited in *JTI-Macdonald* [2007] 2 SCR 610 at [43].

<sup>81</sup> *Irwin Toy* [1989] 1 SCR 927 at 932.

<sup>82</sup> *Irwin Toy* [1989] 1 SCR 927 at 933.

<sup>83</sup> *Irwin Toy* [1989] 1 SCR 927 at 973, 984.

<sup>84</sup> *Irwin Toy* [1989] 1 SCR 927 at 988-989.

<sup>85</sup> *Irwin Toy* [1989] 1 SCR 927 at 989.

<sup>86</sup> *Irwin Toy* [1989] 1 SCR 927 at 990.

48. Further, when it comes to vulnerable groups, legislative protection of such groups is not “necessarily restricted to the least common denominator of actions taken elsewhere”.<sup>87</sup>

49. Similarly, the Supreme Court of the United States has considered the state of the evidentiary record needed to satisfy intermediate or more rigorous standards of scrutiny, particularly where evidence can be difficult to obtain or assess empirically.

50. In *Holder v Humanitarian Law Project*,<sup>88</sup> the US Supreme Court considered that a law prohibiting material support for terrorist organisations, which included training, advice and assistance to such organisations, passed “more rigorous scrutiny” because there was a compelling interest in combating terrorism and the law was sufficiently narrowly tailored including by reference to a congressional finding as to the “fungible” nature of resources such that terrorist organisations do not divide neatly between violent and peaceful activities because the criminal conduct taints any contribution to such an organisation.<sup>89</sup> The Court also noted that in this context, concerning efforts to confront evolving threats, it was an “area where information can be difficult to obtain and the impact of certain conduct difficult to assess”.<sup>90</sup>

51. In *TikTok Inc v Garland*,<sup>91</sup> the divestiture law directed to ByteDance Ltd or TikTok, with respect to TikTok as the social media platform, passed intermediate scrutiny in light of the content-neutral justification of preventing China from collecting vast amounts of sensitive data from 170 million US TikTok users, and Congress’ designation of any application that was operated, directly or indirectly, by ByteDance or TikTok, as a “foreign adversary controlled application”. Further, in considering whether an important government interest was being advanced by means that were substantially related to that interest, the US Supreme Court noted that “[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable”.<sup>92</sup> As to the contended under-inclusiveness of the law, the Court also stated that the government “need not address all aspects of a

<sup>87</sup> *Irwin Toy* [1989] 1 SCR 927 at 999.

<sup>88</sup> 561 US 1 (2010).

<sup>89</sup> *Holder*, 561 US 1 at 28, 47-48 (2010).

<sup>90</sup> *Holder*, 561 US 1 at 34 (2010).

<sup>91</sup> 604 US 56 (2025).

<sup>92</sup> *TikTok Inc*, 604 US 56 at 69-70 (2025), quoting *Turner Broadcasting System* 512 US 622 at 665 (1994).

problem in one fell swoop”,<sup>93</sup> there having been good reason to single out TikTok for special treatment. That was particularly so as the Court then noted that the “validity of the challenged provisions does not turn on whether we agree with the Government’s conclusion that its chosen regulatory path is best or ‘most appropriate’”.<sup>94</sup> The Supreme Court’s consideration here of under-inclusiveness also negates any relevance of the District Court’s assessment of the under-inclusiveness of the law in Louisiana as at paragraph 28 above.

52. Moreover, in the United States lower court decisions considering laws regulating social media in various manners considered above at paragraphs 20 to 30, what is apparent is that the courts have largely accepted the importance of the governmental interest at play when it comes to children and the psychological harms presented by social media, including by reference to addictive features such as algorithmic feeds. The decisions also largely acknowledged and accepted the uncertain or unresolved state of knowledge or evidence, assessing whether the law passed intermediate or strict scrutiny instead by reference to the terms of the impugned laws, and whether there was *any* credible justification supporting the legislative design. The breadth of the impugned law is then viewed as relevant to whether the law required only substantial tailoring (as for intermediate scrutiny) or narrow tailoring (as for strict scrutiny).

## PART V: ESTIMATE OF TIME

53. Victoria estimates that 15 minutes will be required to present oral argument.

Dated: 9 October 2026



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<sup>93</sup> *TikTok Inc*, 604 US 56 at 70 (2025), quoting *Williams-Yulee v Florida Bar*, 575 US 433 at 449 (2015).  
<sup>94</sup> *TikTok Inc*, 604 US 56 at 78 (2025).

**ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR  
VICTORIA**

Pursuant to *Practice Direction No 1 of 2024*, Victoria sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

| No                                      | Description                                                                   | Version | Provision(s) | Reasons            | Applicable date(s)  |
|-----------------------------------------|-------------------------------------------------------------------------------|---------|--------------|--------------------|---------------------|
| <b><i>Constitutional provisions</i></b> |                                                                               |         |              |                    |                     |
| 1.                                      | <i>Constitution</i> (Cth)                                                     | Current | ss 7, 24     | Currently in force | All relevant dates  |
| <b><i>Legislative provisions</i></b>    |                                                                               |         |              |                    |                     |
| 2.                                      | <i>Online Safety Act 2021</i> (Cth)                                           | Current | s 5, Part 4A | Currently in force | All relevant dates  |
| 3.                                      | <i>Online Safety (Age-Restricted Social Media Platforms) Rules 2025</i> (Cth) | Current | r 4A         | Currently in force | Since 26 March 2026 |