No. 15-1194

In the Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,
v.
STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF FOR COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NORTH CAROLINA

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INTEREST OF *AMICI CURIAE*[*]

The *amici* filing this brief are associations of governments and public officials who know all too well that sex offenders pose serious threats to children. These associations and their members also are all too aware that the internet, smartphones, and social-networking sites have substantially enhanced these threats. And these associations and their members believe that the First Amendment does not stand in the way of reasonable governmental efforts, like North Carolina's, to keep sex offenders from taking advantage of this situation. State and local governments need to be able to respond to these concerns not only in the particular context of social networking but also in other contexts that will arise in the future. These associations are filing this brief to urge the Court to adopt a constitutional framework that shows appropriate deference to the difficult choices governments and their officials make when addressing these problems.

These associations are the following:

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international

[*] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than these *amici* or their counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

SUMMARY OF ARGUMENT

This Court's review should be marked by respect for North Carolina's good-faith attempt to solve a vexing social problem. Sex offenders have long presented difficulties for state and local governments, but the advent of internet social networking has made things worse. The same lack of maturity that renders juveniles less morally culpable for Eighth Amendment purposes also leaves them susceptible to manipulation by sexual predators on these websites. Social media has become so integral to many young teenagers' identities that, when their vulnerability leads to an encounter with a predator, they may not tell their parents for fear of losing their access to this part of their lives. There is no easy way for state and local governments to address these issues. When they do, this Court should offer appropriate deference in light of the difficult choices involved. That deference should manifest itself in two ways in this case.

A. First, this Court should apply intermediate scrutiny to North Carolina's law, not the strict scrutiny Packingham and his *amici* are advocating. North Carolina's law focuses on a sex offender's conduct, not speech, and it is content-neutral. That reality makes intermediate scrutiny the appropriate standard. The arguments Packingham and his *amici* have offered for strict scrutiny are inconsistent with settled precedent. The breadth of a restriction is relevant to whether it passes intermediate scrutiny, but has no relevance to whether intermediate scrutiny applies as an initial matter. Intermediate scrutiny is not limited to cases in which the need for a time, place, or manner restriction arises from congestion or incompatible uses of certain spaces. Nor does the fact that North Carolina's law applies only to registered sex offenders trigger strict scrutiny.

B. Second, the Court should defer to the limiting construction of the statute offered by North Carolina, and should resist Packingham and his *amici*'s assertions that the statute must be assumed to have an implausibly broad scope. Packingham's conviction arose from his access to Facebook—conduct that was squarely within the language and intended scope of the statute. The suggestion by Packingham and his *amici* that the statute would bar sex offenders' access to news websites such as nytimes.com, and that it would be a crime to accidentally access a covered site, is inconsistent with the statutory text. North Carolina's representations about its law's limits deserve respect. This Court need not and should not assume that North Carolina courts will give the statute an unnaturally broad scope that would call its constitutionality into question.

ARGUMENT

The First Amendment does not bar governments from stopping sexual predators' use of websites that could facilitate their abuse of children. Packingham and his *amici* demonstrate too little understanding of the reasons governments are acting on this issue, and too little appreciation for the practical difficulties inherent in this task. The balance governments like North Carolina are striking deserves respect and deference, not the skeptical review Packingham and his *amici* are advocating.

Sexual predators pose a vexing threat in the internet age. That has become even more of a reality in more recent times, when smartphones and social networks have become a vital part of many children's identities. Parents once had to worry about predators being present in places like neighborhood parks, school playgrounds, and shopping malls. Now parents have to worry about predators being present, in a virtual sense, in laptops in their children's bedrooms and on phones their teenagers carry with them almost everywhere they go.

Sites like Snapchat, Instagram, and Facebook have become immensely popular among children, and sexual predators have capitalized on this dynamic. Even in 2006, before social-networking sites were as popular as they are now, a "survey of a nationally representative sample of local, state, and federal law enforcement agencies in the United States estimated 503 arrests for sex crimes involving minors" and social-networking sites. Eric J. Chan, Dale E. McNiel, and Renee L. Binder, *Sex Offenders in the Digital Age*, 44 J. AM. ACADEMY PSYCH. & L. 368, 371-72 (2016). These websites "were used" by sexual predators "to initiate relationships and to communicate with or to disseminate information or pictures of the victims." *Id.* at 372. The media have recounted details about numerous individual incidents in recent years. *See, e.g.*, *Registered Sex Offender Charged with Meeting a 16-Year-Old for Sex*, TAMPA BAY TIMES, Aug. 24, 2015 (noting that authorities determined that a "registered sex offender" had been talking to the victim "through social media for about two weeks and that he knew she was 16"); Martin Evans, *Facebook Sex Predator Jailed and Banned from Using the Site*, THE TELEGRAPH, May 18, 2012 (discussing apprehended "sexual predator, who groomed more than 1,000 girls on Facebook").

This problem admits of no easy solution in light of the victims involved. As the Court has observed in Eighth Amendment cases, "children are different." *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012). "A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults," which may "result in impetuous and ill-considered actions and decisions." *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Juveniles are also "more vulnerable or susceptible to negative influences and outside pressures." *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

The same qualities that make these children less blameworthy for Eighth Amendment purposes make it uniquely easy for predators to take advantage of them on social-networking sites. One agent from a state Bureau of Investigation has explained that children are routinely divulging information about themselves on these sites, and "'[t]here is no real way for parents to monitor it all.'" Byron Acohido, *Sex*

Predators Target Children Using Social Media, USA TODAY, March 1, 2011 (quoting a Special Agent from the Georgia Bureau of Investigation). Predators can learn who the child is, what they value, and, due to global-positioning-system technology, where these children are. *See id.* As that law-enforcement official puts it, predators manipulate this situation and "'approach children who don't think anybody else cares about their problems or wants to spend time with them.'" *Id.* Meanwhile, "most children won't tell a parent about troubling online encounters for fear of getting their technology taken away." *Id.* It thus should come as no surprise that some social-networking sites that allow children to develop profiles, such as Facebook, have barred registered sex offenders from using their services. *See* N.C. Br. 6.

The stakes of this problem are exacerbated by the effect sexual abuse has on a child's psyche. Juveniles are living through "a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Rape in particular can have "a permanent psychological, emotional, and sometimes physical impact on the child." *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008). From the perspective of many state and local governments, these considerations make it insufficient to simply punish child molestation after the fact. It is imperative for governments to stop child rape before it happens, through reasonable measures Packingham and his amici wrongly deride as "prophylactic." CATO Br. 16.

The value our society places on children, and respectful consideration for the practical difficulties associated with protecting them, calls for a careful approach when reviewing the constitutionality of North Carolina's proposed solution. Doing so is consistent with the way this Court has analyzed similar laws. As this Court has explained, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). That reality has led this Court to "sustain[] legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). This Court has "held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity." *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)). This Court likewise held that the government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *Id.* (citing *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978)). And this Court refused to strike down a ban on child pornography, even while recognizing that some of its applications might have serious artistic value or otherwise be protected by the First Amendment. *See id.* at 773-74.

Similar considerations should lead the Court to reject Packingham's call to facially invalidate North Carolina's law. As explained below, this Court should emphasize two principles in reaching this result. First, this Court should eschew the strict-in-theory, fatal-in-fact review Packingham and his *amici* are proposing, and should apply intermediate scrutiny instead. Second, this Court should decline Packingham's invitation to broadly construe this statute to reach effectively every website on the internet, and should instead defer to North Carolina's representations that the statute reaches only classic social-networking sites like Facebook.

A. Respect for state and local governments calls for deferential review.

Considering the respect due to governments addressing these problems, this Court should review North Carolina's statute under the same intermediate standard that traditionally has governed time, place, and manner restrictions on speech, not the more exacting standard advocated by Packingham and his *amici*. Packingham's argument for strict scrutiny is inconsistent with this Court's precedents, and his approach would deprive state and local governments of effective means of protecting children from sexual predators. Under this Court's First Amendment precedents, laws of this variety are content-neutral restrictions subject to intermediate scrutiny. This standard provides sufficient safeguards for speech while giving governments space to protect their children.

1. This Court's precedents call for intermediate scrutiny.

The first task in the First Amendment analysis is "to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). Speech restrictions are subject to the most stringent scrutiny when they are directly based on the content of the speech or, if facially neutral, adopted or applied as a proxy for regulating content. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). Content-neutral restrictions, such as time, place, or manner restrictions or conduct-based regulations that impose incidental burdens on speech, are subject to intermediate scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (stating that the *O'Brien* test for conduct regulations incidentally burdening speech, "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)).

North Carolina's law is a regulation on conduct that involves speech. Like a law precluding sex offenders from being present at a school or playground, North Carolina's law regulates registered offenders' attempts to access certain places where children may be, in the virtual sense. Like a law precluding sex offenders from being present at a school or playground, North Carolina's statute has only incidental effects on speech that act, at most, as place or manner restrictions. A prosecution under this law does not require consideration of the content of any speech. There is no indication North Carolina intended for this statute to restrict protected speech because North Carolina disagreed with the message. Under this Court's precedents, this law is subject only to intermediate scrutiny.

2. Packingham and his *amici* advance no persuasive argument for strict scrutiny.

It is fitting that Packingham prefaces his argument for strict scrutiny with the disclaimer that it is not necessary for this Court to decide which level of scrutiny applies. *See* Packingham Br. 35-36. The arguments he makes largely do not touch on the factors that trigger heightened review.

a. This law is content-neutral.

Packingham has not made any coherent showing that North Carolina's law is content-based. It is true that under *Reed*, a statute can be deemed content-based if it requires consideration of speech's content, even though the lawmakers who enacted it did not intend to censor particular kinds of speech. But a conviction under the North Carolina statute does not turn on the content of the speech. It turns on whether offenders have accessed the websites in question. Packingham has not shown that the North Carolina legislature was, through this statute, trying to stop a particular kind of speech.

Nor can Packingham nudge this case toward strict-scrutiny by asserting that this law achieves neutrality in "a constitutionally unsavory way" by "punishing access categorically, before registrants have an opportunity to speak." Packingham Br. 42. That theory, if correct, would abolish the Court's rule requiring intermediate scrutiny of time, place, and manner restrictions. All such restrictions act on a categorical basis, within the proscribed time, manner, or place, before the person has the opportunity to speak. That does not make them prior restraints. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-23 (2002) (holding that park-permitting regulation was not an improper prior restraint censoring particular subject matter but a "content-neutral time, place, and manner regulation of the use of a public forum").

The precedents Packingham cites for his assertion that North Carolina's law is "constitutionally unsavory" and worthy of strict scrutiny do not support that theory. Two of the decisions Packingham cites addressed content-based, totally prohibitive prior restraints on speech. *See* Packingham Br. 42 (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722-23 (1931); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in the judgment)). The third decision explicitly did not decide the level of scrutiny and found that the statute was overbroad "regardless of the proper standard." *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

Nor are Packingham's *amici* right to suggest that North Carolina's law is viewpoint- and content-based because it effectively "pronounces that the views of former offenders . . . are less worthy of consideration by the public." Cato Br. 28. The North Carolina statute does not prohibit registered offenders from expressing their viewpoints on multiple internet forums. It simply precludes their access to *social networking sites that contain profiles for children*. By doing so, this law does not suggest that those views are "less worthy of consideration by the public." *Id.* It suggests, at most, that giving these offenders access to those websites will endanger children. This is not because of what those offenders may *say*, but what they may *do*. Strict scrutiny of this restriction is neither necessary nor appropriate.

b. The restriction's scope does not determine whether intermediate scrutiny applies.

Packingham also plows new ground when he argues that intermediate scrutiny applies only to regulations that "operate[] on a limited scope." Packingham Br. 37. No authority he cites holds as much, and this Court's precedents make clear that this is not the rule. The scope of a time, place, and manner restriction is relevant to whether it is sufficiently tailored to survive intermediate scrutiny. *See, e.g.*, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 771–72 (1994). But the threshold determination of whether intermediate scrutiny applies does not depend on whether the regulation's scope is "large." Packingham Br. 37. The critical question on that point is, instead, whether the regulation imposes a time, place, or manner restriction and whether that restriction is content-neutral. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 655–58 (1984) (addressing a federal law prohibiting reproductions of currency and applying strict scrutiny to the content-based portion and the time, place, and manner analysis to the content-neutral portion).

c. *Intermediate scrutiny can apply to regulations that are not designed to regulate incompatible activities.*

Packingham likewise is asking the Court to make new doctrine when he asserts that regulation of "incompatible activities in public spaces is the *sine qua non* of time, place, or manner" restrictions. Packingham Br. 38. He appears to be basing that assertion on the fact that this Court discussed the concept of incompatible uses in one case that applied intermediate scrutiny: *Grayned v. City of Rockford*, 408 U.S. 104 (1972). But the Court in *Grayned* did not hold that incompatible uses are the "*sine qua non* of time, place, or manner regulations," Packingham Br. 38, and Packingham is ignoring numerous precedents finding that preventing crime and promoting public safety are proper purposes of these regulations. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) (recognizing a substantial state interest in "protect[ing] the health and safety of their citizens") (internal quotation marks omitted); *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943) (recognizing "[c]rime prevention" as a proper basis for time, place, and manner regulation). Lower courts have deemed children's safety a legitimate interest for regulations of the sort at issue here. *See Doe v. Prosecutor, Marion Cnty.*, 705 F.3d 694, 698 (C.A.7 2013) (accepting "public safety" and "shielding . . . children from improper sexual communication" as appropriate government interests); *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 152 (C.A.2 2005) (analyzing the tailoring of a "manner-of-presentation restriction" with the "interest in the safety and welfare of children").

d. Intermediate scrutiny can apply to regulations confined to subsets of speakers.

Packingham has no basis for contending that intermediate scrutiny cannot apply to restrictions that apply to a specific subset of speakers. *See* Packingham Br. 40. That contention is in direct conflict with *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994). There, this Court held that speaker-specific laws are subject to strict scrutiny only "when the legislature's speaker preference reflects a content preference." *Id.* at 658. As this Court stated more recently in *Reed*, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." 135 S. Ct. at 2230–31. In other words, the fact that a regulation applies only to a subset of speakers is not, by itself, reason to apply strict scrutiny. Strict scrutiny is triggered only when, as a result of the regulation's limitation to those speakers, the Court can conclude that the regulation is content-based. Packingham has offered no argument that the North Carolina legislature was expressing a content preference when it limited this regulation to registered offenders.

The cases Packingham and his *amici* cite do not support their assertion that laws applying only to certain subsets of speakers are subject to strict scrutiny. *See* Packingham Br. 40-41. Some of these cases simply state that some laws discriminating against certain classes of people or types of communication can, in context, amount to viewpoint- or content-based discrimination. *See* Packingham Br. 40 (citing *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)); Cato Br. 26-27 (citing *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Niemotko v. Maryland*, 340 U.S. 268 (1951)). Another of Packingham's precedents merely found that a regulation applying to certain subsets of speakers could not satisfy intermediate scrutiny. *See* Packingham Br. 41 (citing *Gr. N. Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173 (1999)). None of these cases overrules *Turner* or otherwise suggests that intermediate scrutiny does not apply here. They at most show that a law's application to a certain subset of speakers can give rise to an inference of viewpoint or content discrimination. As North Carolina has shown, no such inference can arise with respect to this law, and intermediate scrutiny is the lens through which to view the constitutional questions in this case.

B. Respect for state and local governments also calls for deference to North Carolina's limited interpretation of its own statute.

Similar principles of deference and respect should dictate the statutory-interpretation principles against which the Court's analysis should operate. The Court should scrutinize the statute that actually was passed by the North Carolina legislature, as interpreted and enforced by the executive-branch officials who are defending the statute. This Court need not and should not determine the validity of the different statute discussed by Packingham and his *amici*.

Packingham and his *amici* extend North Carolina's statute beyond the bounds that either its language or common sense requires. They assert that the law would have precluded Packingham from reading news articles on news sites like nytimes.com. *See* Packingham Br. 46; Cato Br. 3; EPIC Br. 20. They assert that Packingham would have violated the statute by accidentally accessing a covered site. *See* Cato Br. 9. They assert that reading a social networking website's terms of use—merely to determine whether the website allows children to post profiles there—could violate the statute. *Id.* at 20. They even claim that the statute could make it a crime for a registered sex offender to access a social-networking site that bars children from using it, if children are breaking the rules and using the website anyway. *See id.* at 22-23.

It is telling that Packingham himself was not convicted of doing any of those things. Packingham was convicted after he created his own profile on Facebook, the most popular and well-known social-networking website in the United States. His activities fell in the heartland of the conduct this statute was intended to reach, and did not implicate the hypotheticals Packingham and his *amici* have trotted out in their brief.

Nor is there any indication that the statute, fairly and authoritatively construed, would reach those hypotheticals. North Carolina has indicated that the statutory term "access" contemplates that the offender actually uses the website. *See* N.C. Br. 28 n. 8. So if the offender accidentally comes upon a site but does not continue to use it, he would not violate the statute. North Carolina has further represented that the statute would apply only to sites that "contain the hallmark of social networking media—the ability to link to the personal pages of other 'friends' on the same site," and thus would not preclude a registered sex offender from accessing a news-oriented site like nytimes.com. N.C. Br. 26-28.

This Court's precedents demand deference to this limiting construction. "Federal courts lack competence to rule definitively on the meaning of state legislation," and "federal courts should hesitate to conclude that '[a State's] Executive Branch does not understand state law.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 & 76 n. 30 (1997) (quoting *Huggins v. Isenbarger,* 798 F.2d 203, 207–210 (C.A.7 1986) (Easterbrook, J., concurring)). This Court's constitutional jurisprudence relies on the presumption that States and local governments act in "good faith" to uphold the Constitution. *Alden v. Maine*, 527 U.S. 706, 755 (1999). These principles require a "cautious approach" when a federal court confronts private litigants' assertions about a state statute's breadth that are not supported by authoritative state-court decisions and are contrary to interpretations offered by attorneys for the State. *Arizonans for Official English*, 520 U.S. at 77-78.

There is ample textual support for North Carolina's assurances that the statute is more limited than Packingham and his *amici* suggest. In addition to the considerations noted by North Carolina, *see* N.C. Br. 26-30, the fact that the statute describes the websites at issue as "social-networking site[s]" undercuts the *amici*'s claims about the sorts of websites the statute covers. As this Court has noted, "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (citing *Johnson v. United States*, 559 U.S. 133, 136 (2010)). That principle has particular significance in the light of the claims by Packingham and his *amici* that the statute prohibits registered offenders from accessing websites for "the New York Times, the Washington Post, Politico, Newsweek, or CNN." EPIC Br. 20. No one thinks of those websites as social-networking sites.

Other common interpretive principles cut against the assertions by Packingham's *amici* that this statute has an implausible reach. A good deal of their parade of horribles is eliminated by the statute's requirement that the sex offender "know[]" that the site he is accessing allows children to create profiles. N.C. GEN. STAT. §14-202.5(a). This requirement means that a registered sex offender does not violate the statute merely by "consulting the website's terms of use" to determine whether minors also have access. Cato Br. 20. Likewise, no reasonable person would read the statute as making it a crime to access a site whose terms of use does not prohibit children to establish profiles or become members—even though some children might circumvent those rules and set up profiles or become members anyway. *See id.* at 22-23. At the very least, the rule of lenity, which "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them," would preclude any prosecution of the sex offender in those circumstances. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

This Court need not and should not follow the interpretive path proposed by Packingham's *amici*. The polestar in these sorts of cases is caution and prudence, not overhasty assumptions about what a duly enacted law might mean. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79. In the context of another First Amendment challenge to a law protecting children from sexual abuse, this Court declined to "assume" that state courts would "widen the possibly invalid reach of the statute by giving an expansive construction" to its terms. *Ferber*, 458 U.S. at 773. This Court should go that same route here.

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Governing frequently involves tough choices like the ones North Carolina and other governments are making here. When governments make these kinds of decisions, balancing First Amendment rights against the need to protect children, judicial review should accommodate all relevant interests. In this case, that accommodation requires intermediate scrutiny rather than strict, and deference to North Carolina's representations about the statute's limited reach. For the reasons North Carolina has offered, application of those principles requires this statute to be sustained.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

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