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State of Arkansas  
Senate Judiciary Committee

January 30, 2023

Re: **Opposition to SB 81—Age-Gating the Internet**

Dear Chair Stubblefield, Vice-Chair Flowers, and Members of the Judiciary Committee:

We respectfully ask that you **oppose** SB 81. The bill's goal—to protect minors from adult content—is laudable and one NetChoice supports. But the bill's chosen means are **unconstitutional** and **unworkable**. First, the bill is unconstitutional because it infringes on adults' lawful access to constitutional speech—a regulation Congress has already tried and the Supreme Court has already repudiated. And second, the bill is unworkable because it will **suppress lawful speech** online while **driving minors to the web's darker fringes**.

## **SB 81 Violates the First Amendment.**

NetChoice shares Senator Sullivan and Representative Gonzales' concerns about minors accessing adult content online. But it is precisely because SB 81 is well intentioned that it's already been tried by other lawmakers (Congress), and already repudiated by the U.S. Supreme Court.

In the landmark case *Reno v. ACLU*, the Supreme Court struck down the federal Communications Decency Act because the law's attempt to protect minors from explicit material online was an "unnecessarily broad suppression of speech addressed to adults."<sup>1</sup> Indeed, the Court reaffirmed that "the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"<sup>2</sup> Like the Communications Decency Act, SB 81 restricts adults' access to constitutional speech: to comply with the law, covered entities must guess at what the legislature might mean by "patently offensive way"—the same term used and struck down in the CDA. Because they must guess, they

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<sup>1</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>2</sup> *Id.*

are likely to err on the side of caution and remove constitutional speech, limiting access both to adults and minors.

Similarly, the bill is unconstitutional because its terms are both overbroad and underinclusive. As Justice Scalia held in *Brown v. Entertainment Merchants Association*, California’s attempt to protect children from buying or rent “violent video games” was unconstitutional because “the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of sexual conduct.”<sup>3</sup> Like California’s law, SB 81 extends the definition of obscenity beyond “depictions of sexual conduct” by leaving online content providers guessing about which content counts as “deviate,” for example.

### **SB 81 Is Unworkable.**

Even if SB 81 were constitutional, it’s unworkable. For starters, the providers who will abide the law are already the providers who protect minors online. But because the bill extends liability to inherently subjective, and often split-second, judgment calls, it result in less constitutional speech online. In other words, at the same time the public wants more speech online, this bill would encourage the removal of more.

At the same time, the bill will leave bad actors to grow their influence. As more reputable sites err on the side of caution and remove access to content, bad actors will grow their appeal to minors—who, after all, have a predisposition to avoid restrictions. Thus well-intentioned efforts to protect minors may indeed backfire, driving them to the furthest—and least moderated—places online.

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For these reasons we respectfully ask that you **oppose** SB 81.

Sincerely,

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**NetChoice**

*NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.*

<sup>3</sup> *Brown v. Entertainment Merchants Association*, 564 U.S. 768 (2011).