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State of Utah
Senate Business and Labor Committee

February 15, 2023

Re: **Opposition to Utah HB 311**

Dear Chair Bramble and members of the committee:

We respectfully ask that you **oppose** HB 311. The bill's goal—to protect children from harmful content—is one NetChoice supports. But the bill's chosen means are **unconstitutional** and will require businesses to collect sensitive information about children, **counterproductively putting children at risk**.

- The bill violates the First Amendment in multiple ways, including by banning anonymous speech and infringing on adults' lawful access to constitutional speech.
- Government-mandated sharing of children's personally identifiable information (PII) increases the risks that it will be captured and misused by malefactors. HB 311 purports to protect children, but instead it puts their sensitive data at greater privacy and security risks.

For these reasons, NetChoice is currently suing[1] California over its similar law, the Age-Appropriate Design Code.[2] To avoid unnecessary First Amendment litigation, this committee should at least wait until this lawsuit is resolved to advance HB 311.

HB 311 Violates the First Amendment

Requiring identity authentication of all users adds several unconstitutional barriers to sharing and accessing First Amendment-protected online speech. First, HB 311's mandatory identity verification requirements prevent anonymous and pseudonymous browsing. Second, HB 311 unconstitutionally restricts both adults' and minors' access to First Amendment-protected content. Laws that chill and restrict Americans' speech in this way are unconstitutional under the First Amendment unless they pass strict scrutiny; a stringent test HB 311 will surely fail.[3] Third, HB 311 violates online services' well-established First Amendment right to editorial discretion.

First, HB 311's requirement for online services to collect PII of anyone who visits their websites functionally eliminates all unattributed activity and content on the Internet. This would hurt many

[1] Available at https://bit.ly/3jjMhXy.
[2] Available at https://bit.ly/3RkFrh2.
[3] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).

communities, such as political minorities concerned about revealing their identity. The Supreme Court has repeatedly affirmed the First Amendment provides robust protection for anonymous speech as " . . . a shield from the tyranny of the majority. . . . It exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society."[4] HB 311 violates this principle.

Second, HB 311 unconstitutionally restricts Utahns' access to digital content on account of their age. In *Reno v. ACLU*, the Supreme Court struck down a similar law to HB 311, the Communications Decency Act of 1996, after finding that "knowing…minors are likely to access a website—and therefore create liability for the website—would surely burden communication among adults," placing an "unacceptably heavy burden on protected speech."[5] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[6] For this reason, NetChoice is currently suing[7] California over its similar law, the Age-Appropriate Design Code.[8]

Laws that restrict Americans' access to digital content on account of age are unconstitutional under the First Amendment unless they pass strict scrutiny.[9] To survive strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest.[10] The government nearly always fails this test—in state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors.[11] HB 311 will be no different.

While the Supreme Court has acknowledged that the government has an important interest in children's welfare[12], Utah "must specifically identify an 'actual problem' in need of solving" to establish a "compelling interest."[13] In *Brown v. Entertainment Merchants' Ass'n*, the Supreme Court invalidated California's ban on the sale of violent video games to minors. The Court held that California failed strict

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[4] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).
[5] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[6] *Id.* at 885.
[7] Available at https://bit.ly/3jjMhXy.
[8] Available at https://bit.ly/3RkFrh2.
[9] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[10] *Reno*, 521 U.S. at 874.
[11] *See, e.g.*, *American Booksellers Foundation v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011); *American Booksellers Foundation v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004).
[12] *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (identifying "the need to protect children from exposure to patently offensive sex-related material" as an interest "this Court has often found compelling").
[13] *Brown v. Entertainment Merchants' Ass'n*, 564 U.S. 786, 799 (2011) (invalidating California's attempt to ban minors from accessing "violent" video games because violent video games are protected speech).

scrutiny because (1) violent video games are constitutionally protected speech and (2) the state's "predictive judgments" that such games cause aggression in minors was not aimed at an actual problem. Indeed, the State's interest was not compelling because "without direct proof of a causal link" between video games and aggression, the State was merely speculating about a potential problem.

Nor is HB 311 narrowly tailored. For example, a federal district court enjoined Louisiana's attempt to block minors from accessing "harmful" content as substantially overbroad..[14] Compliance with HB 311 also violates First Amendment-protected editorial discretion. Covered entities may have community standards that allow for anonymous browsing or posting; policies which fall squarely within the First Amendment's protection.[15] Many online services have policies against collecting data from users. Yet those that place a premium on privacy must violate their principles by forcing users—including adults—to prove their identity before accessing digital content, and retain that PII however Utah rulemakers prefer.

Third, HB 311 violates First Amendment-protected editorial discretion by imposing liability on covered entities when their "practice, design, or feature" causes "a Utah minor account holder to become addicted to the social media platform." Indeed, under the current version of HB 311, users may sue to recover damages for any self-reported "financial, physical, or emotional harm suffered as a consequence of using or having an account on the social media company's social media platform." Because covered entities have the First Amendment right to decide which messages to host, how to curate those messages, and how to disseminate them, HB 311 provision allowing lawsuits against them for doing just this violates the First Amendment.[16]

HB 311 Puts Minors' Sensitive Data at Risk

HB 311 was ostensibly introduced to protect children but instead it puts children's sensitive data at *greater* privacy and security risks. For social media companies to comply with HB 311's command "to verify the age of Utah residents," they must force every user to to turn over extremely sensitive PII. The Utah Division of Consumer Protection is charged with determining "acceptable form[s] of identification." Documents which conclusively establish users' birthdates are likely to be government-issued. Large-scale

[14] *Garden Dist. Book Shop, Inc. v. Stewart*, 184 F. Supp. 3d 331, 339 (M.D. La. 2016) ("The Supreme Court held that content-filtering was less restrictive and more effective than COPA and, under the facts presented here, this Court is compelled to reach the same conclusion.").

[15] *See generally, Netchoice v. Moody*, No. 21-12355 (11th Cir. May 23, 2022).

[16] *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974) ("[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."

mandatory collection of highly sensitive government identification data increases the risks that it will be captured and misused.

In evaluating HB 311, this committee should recall the data breach Utah's Child Protection Registry suffered in 2006. The Utah agency in charge of policing Web-based purveyors of pornography, alcohol, tobacco and gambling accidentally divulged children's sensitive information; information the state expressly promised to safeguard. With this legislation, Utah is forgetting the failures of the past, and unlike just email addresses of minors, the data that's being amassed under HB 311 is some of the most sensitive and potentially dangerous possible.

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For these reasons, we respectfully ask you to oppose HB 311. As ever, we offer ourselves as a resource to discuss any of these issues with you in further detail, and we appreciate the opportunity to provide the committee with our thoughts on this important matter.

Sincerely,
Carl Szabo
Vice President & General Counsel, NetChoice

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