

Tennessee SB 0138

OPPOSITION TESTIMONY

March 20, 2023

Tennessee General Assembly
Senate Commerce and Labor Committee

Dear Chair Bailey and members of the committee:

NetChoice respectfully asks that you **oppose** SB 0138 because it:

- Violates the 1st Amendment of the US Constitution;
- Usurps and undermines the traditional role of Tennessee families; and
- Disincentivizes technological innovations to keep kids safe online..

As further outlined below, this bill would immediately invite constitutional challenges.. In fact, the Supreme Court has already struck down a similar bill after finding it violated the First Amendment rights to receive information and to free speech.

Additionally, the bill represents a major government incursion into the traditional role that the family has played in Tennessee and American history. Parents are the best stewards of their own children, not the state. SB 0138 could give families the false impression that parental oversight into the online practices of their kids is no longer necessary, thereby making it more likely young Tennesseans are exposed to vile content.

Finally, the bill is more likely to freeze the innovation of parental control products rather than spur them. As it stands, there are many different options in the marketplace for parents to choose from, and manufacturers and developers compete with each other to create more attractive products. To avoid any of these negative outcomes, the committee should reject SB 0138.

SB 0138 violates the First Amendment

Congress passed the Communications Decency Act in 1996. The law was an attempt to restrict the access of minors to obscene content on the internet. The legislation criminalized the “knowing” dissemination of “obscene or indecent” material or knowingly sending messages “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs” to those under the age of 18.¹ It created safe harbors for those who made good faith attempts to restrict minors’ access to such content.²

The law was almost immediately enjoined and then struck down as unconstitutional by a District Court. The federal government lost on appeal to the Supreme Court in the 9-0, landmark case, *Reno v. ACLU*. The Supreme Court held that the broad nature of the restrictions, their punitive nature, and their attachment to a medium which enjoys full 1st Amendment protections, among other issues, were enough to rule that the Communications Decency Act was violative of the 1st Amendment.

The bill sponsors, just like Congress in 1996, are concerned with the welfare of children online. That is a laudable goal, and one that NetChoice shares. The reality however, is that the Supreme Court looks more seriously at unintended negative consequences to constitutional rights rather than well-intentioned goals. There is no question, seeing as the issues at the core of both cases are identical, that SB 0138 would quickly meet the same fate as the Communications Decency Act. The confusion and significant cost to the Tennessee taxpayers a challenge would bring is best avoided in an already settled case as this one.

SB 0138 replaces the Tennessee family with the Tennessee legislature

Tennessee parents are the ultimate arbiters of their children’s wellbeing and moral development. Conservative and other limited government groups have long fought for a parent’s right to set the course of their children’s lives, unencumbered by government bureaucrats, panels, or committees. The moments when the state usurps the parent should be few and far between and should be recognized as a failure, not a triumph of public policy.

A terrible but altogether predictable side effect of SB 0138 is that the bill would give parents a false sense of security. Filtering technology is only so precise, and even the most sophisticated software will

¹ Cornell Law school, Legal Information Institute, [Reno v. ACLU | US Law | LII / Legal Information Institute \(cornell.edu\)](https://www.legalinformationinstitute.org/US/Supreme-Court/First-Amendment/Internet-Access-to-Information/Internet-Access-to-Information-1996/)

² *Ibid*

only keep out a certain number of online threats. That means, even in the most secure environments, parents need to be overseeing their childrens' online activity. SB 0138 sends a false all-clear message to parents who would otherwise remain vigilant.

Tennessee parents need to be empowered to make the decisions they deem appropriate for their own children. Government should not be making the de facto choice on their behalf that a family must then remedy. If the state wants to be a genuine partner to parents in their efforts to keep kids safe online, there are much more targeted, constitutional remedies available. States, like Florida, have begun to consider online and social media specific education in the classroom. This would help arm young people with the information they need to keep their data more secure, focused on age appropriate content, and away from bad actors who would do them harm. The state could also take steps to publicize the resources that are available to filter content or monitor and control screen time. Solutions for families and kids don't need to come in the form of big government mandates. Parents should be treated like the responsible adults they are, not like criminals in need of filtering and monitoring.

Government intrusion will make filtering tech worse, not better.

As it stands, dozens of manufacturers and other private companies offer device filtering technology and other parental control software to help kids stay safe online. Due to the incentives of the free market, all of those entities compete tirelessly against each other for business. That means technology is always improving, services are getting more sophisticated and easy to use, and over time kids are safer for it.

SB 0138 would take a wrecking ball to the entire private market of these offerings. With broad, confusing language, and legal liability attached, the freedom to innovate would be stripped away. A one-size-fits-all approach to filtering and child safety would need to be adopted in order for companies to be sure that they would avoid lawsuits or government sanction.

The elimination of competition and the creation of a single, government-approved mode of ensuring a child-safe online environment would be the end of innovation in this space. That would be a disaster. Everyone agrees that more can be done to keep kids safe online, but that is only a reasonable possibility when there is freedom for our innovators to create new solutions. Innovation at the speed of government is not a wise model for this committee to adopt.

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For these reasons, we respectfully ask you to **oppose SB 0138**. 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,

Zachary Lilly
Deputy Director of State and Federal Affairs
NetChoice

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