Carl Szabo
Vice President & General Counsel, NetChoice
Washington, DC 20005

NetChoice
Defending Free Speech and Free Enterprise Online

Florida HB 591

OPPOSITION TESTIMONY

March 27, 2023

Florida House of Representatives
Choice & Innovation Subcommittee

Dear Chair Tuck and members of the subcommittee:

We respectfully ask that you **oppose** HB 591. The bill's aim, to protect minors online, is one NetChoice supports, but its chosen means are unconstitutional. First, HB 591's compels online businesses to make specific statements, which violates the First Amendment's free speech clause. Second, the bill is unconstitutionally vague because it provides unclear notice to online businesses as to what the law prohibits. The Supreme Court first established in 1997 that the First Amendment's guarantees – including that against compelled speech – apply with full force to the internet. HB 591 violates these guarantees.

NetChoice has an active First Amendment lawsuit against California for another vague law, the Age-Appropriate Design Code.[1] To avoid wasting Florida taxpayers' resources with unnecessary litigation while this case is pending, this committee should not advance HB 591. In sum, HB 591:

1. Violates the First Amendment;
2. Fails to clearly define what the law prohibits; and
3. Litigation is already underway over a similarly-vague law in *NetChoice v Bonta.*

HB 591 Violates the First Amendment by Compelling Speech

The First Amendment's compelled speech doctrine sharply limits the ability of government to force individuals and companies to speak when they would prefer not to speak. As Chief Justice Roberts

[1] Available at http://bit.ly/3ZjVMFs.

wrote, "freedom of speech prohibits the government from telling people what they must say."[2] "This [doctrine] applies . . . when the government literally puts words in citizens' mouths" and "when the government forces someone to speak when they would prefer not to speak."[3] By requiring online services to make disparaging characterizations of their services (the "disclaimer" requirement) and forcing them to share speech against their will, HB 591 does exactly that.

In *Washington Post v. McManus,* the Fourth Circuit Court of Appeals struck down a Maryland advertisement disclosure law which required online platforms to "display somewhere on their site the identity of [advertisement] purchaser[s], the individuals exercising control over the purchaser, and the total amount paid for the ad."[4] The Court found the law violated the First Amendment because it compelled platforms to share speech that they otherwise wouldn't have shared: "the integrity of these expressive commodities," social media platforms, "is presumptively at risk as soon as the government compels any alteration to their message."[5] Compelled speech doctrine will likewise require courts to strictly scrutinize the messages HB 591 forces social media platforms to share.

HB 591 is Void for Vagueness

HB 591's requirements are unconstitutionally vague. A statute is void for vagueness and unenforceable if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[6] Vague laws "trap the innocent by not providing fair warning" of proscribed conduct, and invite "arbitrary and discriminatory application" by placing compliance at the whim of "ad hoc and subjective" regulators.[7]

HB 591 does exactly this. First, its requirement that online services disclaim whether they employ "addictive" features and disclose "whether the social media platform considers the best interests of platform users" fails to provide sufficient notice of what disclosure the law actually requires. The operative terms, including "addictive" and "best interests," are vague, subjective, and undefined. It is unclear what feature is popular enough to be considered "addictive" by future regulators, and unclear what disclosures of "best interests" mean or require. Second, HB 591's requirement that platforms provide access to "protective measures such as screen time limitations, data usage limitations, content

[2] .*Rumsfeld v. F. for Acad. & Inst. Rts., Inc*., 547 U.S. 47, 58 (2006); see also *Nat'l Inst. of Family & Life Advoc. v. Becerra,* 138 S. Ct. 2361, 2379 (2018); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796–97 (1988)
[3] Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203 (2022).
[4] *Wash. Post v. McManus,* 944 F.3d 506, 514 (4th Cir. 2019).
[5] *Id.* at 514.
[6] *United States v. Williams,* 553 U.S. 285, 304 (2008).
[7] *Cal. Teachers Ass'n v. State Bd. of Educ*., 271 F.3d 1141, 1150 (9th Cir. 2001).

filters, and other parental settings" leaves regulators with boundless discretion to determine which "protective measures," – and perhaps how many – were sufficient to comply with HB 591's "protective measures" requirement. Under HB 591, regulators and courts will be empowered to pursue legal action against online businesses without any disclosed criteria. HB 591 is unconstitutionally void by virtue of its lack of clarity.

NetChoice has an active First Amendment lawsuit against California for its comparably vague law, the Age-Appropriate Design Code. To avoid wasting Florida taxpayers' resources with unnecessary litigation while this case is pending, this committee should not advance HB 591.

* * *

For these reasons, we respectfully ask you to **oppose HB 591**. 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
General Counsel
NetChoice

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