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NetChoice
Defending Free Speech and Free Enterprise Online

Maryland SB 844

OPPOSITION TESTIMONY

March 7, 2023

Maryland General Assembly
Senate Finance Committee

Dear members of the committee:

We respectfully ask that you **oppose** SB 844. The bill's goal is laudable and one NetChoice supports. But its chosen means are unconstitutional by imposing prior restraints on online speech, erecting barriers to sharing and receiving constitutionally-protected speech, and by providing only vague notice to online businesses as to what the law prohibits. The Supreme Court struck down a similar law in 1996 after finding that "knowing…minors are likely to access a website—and therefore create liability for the website—would…[place] an unacceptably heavy burden on protected speech."[1]

NetChoice has an active First Amendment lawsuit against California for its nearly-identical Age-Appropriate Design Code (AB 2273) for these reasons.[2] To avoid unnecessary litigation, this committee should not advance SB 844 while this litigation is pending. SB 844:

1. Violates the First Amendment;
2. Litigation is already underway over an identical law in *NetChoice v Bonta;*
3. Comes with many other problems, as outlined in the attached slide deck.

SB 844 Imposes Prior Restraints on Speech

A prior restraint is a form of censorship that requires the government to approve First Amendment-protected expression before it is published.[3] Prior restraints are "the most serious and least tolerable infringement on First Amendment rights" which face a "heavy presumption against [their]

[1] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[2] Available at http://bit.ly/3ZjVMFs.
[3] *See generally Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).

constitutional validity."[4] SB 844's requirement that online services create "data protection impact assessments" "[b]efore" presenting speech in order to allow the government to develop plans to "mitigate or eliminate" speech that is "potentially harmful" is a prior restraint by definition.

SB 844's state-imposed barriers to accessing speech are also a form of prior restraint. In *ACLU v. Mukasey*, for example, the Third Circuit held invalid a law which prohibited online services from transmitting allegedly "harmful" speech to minors unless they age-verified users after finding the law would "deter[]" "many users" from sharing and accessing speech online and would cause "[w]ebsite owners" to "be deprived of the ability to provide this information to those users"; the court found the law was effectively a prior restraint.[5]

Further, as we explain in our preliminary injunction motion against California's version of this bill, age-gating the internet "restrains speech that both minors and adults are constitutionally entitled to receive. The government cannot "reduce the adult population … to reading only what is fit for children" to protect children from ostensibly inappropriate speech.[6] In *Reno v. ACLU*, the Supreme Court struck down a similar law, 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."[7] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[8] SB 844's requirements will be found unconstitutional by courts for the same reason.

SB 844 is Void for Vagueness

SB 844 is also unconstitutional because its operative provisions rests on standards and phrases that are impermissibly vague. 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.[9] A law is unconstitutionally vague 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."[10] Laws regulating expression face an even "more

[4] *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976).
[5] 534 F.3d 181, 196-97 (3d Cir. 2008).
[6] *Butler v. Michigan*, 352 U.S. 380, 381, 383 (1957).
[7] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[8] *Id.* at 885.
[9] *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).
[10] *United States v. Williams*, 553 U.S. 285, 304 (2008).

stringent" test because they cause speakers "to steer far wider of the unlawful zone."[11]

SB 844's "likely to be accessed by [minors]" standard fails to provide sufficient notice of which specific services and features are subject to the law; several of the "indicators" that define the standard are vague, subjective, and undefined. A service falls under the law, for example, if it is "determined, based on competent and reliable evidence regarding audience composition, to be routinely accessed by a significant number" of minors. But the law fails to define how many minors is "significant" and whether that number should be assessed in absolute terms or relative to the provider's user base.

Nor is it clear how frequent access must be—and over what time period—to be "routine[]." SB 844's vague terms leaves regulators boundless discretion to discriminate among services and to review and evaluate each service's practices without any disclosed criteria. This makes it constitutionally void by virtue of its lack of clarity.

* * *

For these reasons, we respectfully ask you to **oppose SB 844**. 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.

[11] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).