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NetChoice
Defending Free Speech and Free Enterprise Online

Arkansas Senate Bill 396—Social Media Safety Act

OPPOSITION TESTIMONY

March 13, 2023

Arkansas State Senate
Insurance & Commerce Committee

Dear Members of the Committee:

NetChoice respectfully asks that you **oppose** SB 396. Although well-intentioned, SB 396 is not ready for prime time. To highlight two big flaws:

> 1. SB 396 will put Arkansans' privacy and data at risk, leaving them vulnerable to breaches and crime; and
> 2. The bill's core provisions are unconstitutional under the First Amendment.

NetChoice shares the Committee's goal to protect minors from harmful content and to safeguard their privacy online. Minors' wellbeing is critically important and deserves thoughtful attention. To that end, we ask that the Committee use SB 396 as the opening of a larger conversation about how best to protect minors online and consider alternatives too. One promising proposal, for example, is Florida's push to teach online responsibility in public school.

1. SB 396 risks harming Arkansans, free speech, and online privacy.

Today, Arkansans can create pseudonymous online accounts with usually just an email. These pseudonymous accounts allow Arkansans to engage in online discussion without fearing online mobs—indeed, with cancel culture's onward march, users value anonymous or private speech more than ever. As the Fourth Circuit warned about age-verification laws: "the stigma associated [with so-called "controversial" content] may deter adults from [accessing it] if they cannot do so without the assurance of anonymity."[1]

[1] *Psinet, Inc. v. Chapman*, 362 F.3d 227, 236–37 (4th Cir. 2004)

But if SB 396 becomes law, anonymous or pseudonymous speech will end. Arkansans will no longer trust that their online speech is protected not just from cancel culture, but from ***the government***. To comply with this bill, websites must "reasonably verify" users' ages, including those of adults, before allowing access to content. And to do that, SB 396 requires use of a government database. And even though the bill forbids websites from maintaining collected data, it says little about records maintained for government inspection. How else can the bill be enforced?

Compliance, in other words, is impossible without information gathering and record preservation. So even if websites found a way to anonymize or otherwise protect some data, SB 396 necessitates proof that websites reasonably verified users' ages. And at its core SB 396 still requires widespread data collection of Arkansans' (and those *in* the state, including tourists) to give up sensitive information about themselves just to access constitutionally protected speech.

Falling into the wrong hands, data could be used for identity theft or locating Arkansans at their homes. And this data could be used to reveal an Arkansan's online search or comment history, subjecting him or her to further privacy violations and possibly even real-world violence.

2. SB 396 Violates the First Amendment.

When California tried to prohibit minors from buying "violent" video games without parental consent, Justice Antonin Scalia, in a 7-2 majority opinion striking down the law, wrote: "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[2]

For that reason, Justice Scalia explained, "it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent*. The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents' prior written consent—even a rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors."[3] Laws like SB 396, Justice Scalia cautioned, "do not enforce *parental* authority over children's speech and religion; they impose ***governmental* authority**, subject only to a parental veto" and thus "must be unconstitutional."[4]

SB 396 violates minors' First Amendment rights. Laws that restrict minors' access to digital content are unconstitutional under the First Amendment unless they pass strict scrutiny.[5] To survive strict scrutiny a law must be narrowly tailored to achieve a compelling government interest.[6] The government nearly

[2] *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 796 at 790 (2011) (internal quotation marks omitted) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 593 (1952)).
[3] *Brown*, 564 U.S. at 795 n.3 (emphases in original).
[4] *Id.*
[5] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[6] *Reno*, 521 U.S. at 874.

always fails this test—in state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors.[7] Like those laws, SB 396 fails strict scrutiny. Minors have "significant" First Amendment rights, including the right to access constitutional speech.[8] And while the Supreme Court has reaffirmed that the government has a compelling interest in children's welfare[9], Utah "must specifically identify an 'actual problem' in need of solving."[10]

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 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.

SB 396 is similarly unconstitutional because it also blocks minors' access to constitutional speech. And like California's legislature, Arkansas cannot prove with specificity an "actual problem." While lawmakers would likely cite psychological studies allegedly establishing a link between social media use and mental health problems in minors, studies also show the opposite is true too: social media and internet use benefits a majority of teens.[11]

Nor is SB 396 narrowly tailored. Arkansas could instead educate parents about the use of content-filtering technology and parental controls built into digital devices, services, and platforms. For example, a district court enjoined Louisiana's attempt to block minors from accessing "harmful" content in part because such filters are a less intrusive means of protecting minors.[12] Indeed, the Supreme Court has explicitly cited filtering technology as a less restrictive and more effective means of protecting minors online:

> Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or

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[7] *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).
[8] *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975).
[9] *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").
[10] *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).
[11] Indeed, a majority of teens report having positive experiences on social media. *See Teens' Social Media Habits and Experiences*, Pew Research Center (Nov. 28, 2018), https://www.pewresearch.org/internet/2018/11/28/teens-and-their-experiences-on-social-media/.
[12] *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").

> provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.[13]

Indeed, the Supreme Court has instructed that courts "should not presume parents, given full information, will fail to act."[14]

SB 396 also violates adults' First Amendment rights. SB 396 burdens more speech than necessary and is thus unconstitutional. Requiring "reasonable age verification" of all users will add barriers to using web services, reducing people's willingness to share First Amendment-protected speech. Mandatory age verification prevents anonymous or pseudonymous browsing—something that's critical for political minorities to share speech.[15] Likewise, verification also discourages people from sharing criticism, such as negative consumer reviews, or whistleblowing about wrongful conduct.

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."[16] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[17]

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NetChoice shares lawmakers' concerns about minors online. But SB 396 is not ready for prime time. We stand ready to work with lawmakers to achieve a win-win policy for Arkansans.

Sincerely,
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NetChoice is a trade association that works to protect free expression and promote free enterprise online.

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[13] *Ashcroft II*, 542 U.S. at 667.
[14] *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 824 (2000) ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").
[15] *See, e.g. McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
[16] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[17] *Id.* at 885.