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NetChoice
Defending Free Speech and Free Enterprise Online

Re: Request for Veto: SB 396 relating to Social Media Age Verification

VETO REQUEST

April 9, 2023

Dear Governor Huckabee Sanders:

We respectfully urge you to veto SB 396, the Social Media Safety Act. The bill's goal of protecting minors from harmful content online is laudable and one that NetChoice supports. However, SB 396 risks subjecting every social media user in Arkansas to intrusive age verification requirements that would compromise the ability to speak freely and anonymously online. Furthermore, by restricting minors' access to non-obscene, legally protected speech, the bill raises serious First Amendment concerns.

> 1. Chills non-mainstream discussions;
> 2. Annihilates anonymous speech online; and
> 3. Violates the First Amendment.

SB 396 chills non-mainstream discussions

As further outlined below, should SB 396 become law, anonymous or pseudonymous speech will end. This means that those with alternative views must worry about public shaming, reprisal from employers, and attacks from online mobs, just for expressing a different view.

We've seen over the past couple of years the importance of views that run counter to the mainstream – and we've witnessed as these views are shutdown. Consider whether discussion of COVID origins or reopening schools would have happened without the ability to engage in anonymous speech – the very speech that is annihilated by SB 396.

SB 396 undermines 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]

Should SB 396 become 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.

The more information a website collects, the greater the risk of sensitive information getting into the wrong hands. A national poll conducted by the Center for Growth and Opportunity at Utah State University earlier this year found that most people don't feel "comfortable sharing a government identification document like a driver's license with social media companies in order to verify age." Submitting a government identification to access sites with adult content is far more likely to be a behavior even more unpopular with users. Two out of three Americans said they aren't comfortable sharing identification information with social media.[2]

[1] *Psinet, Inc. v. Chapman,* 362 F.3d 227, 236–37 (4th Cir. 2004)
[2] The Center for Growth and Opportunity at Utah State University, Jan. 2023 https://www.thecgo.org/research/tech-poll/

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."[3]

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."[4] 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."[5]

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.[6] To survive strict scrutiny a law must be narrowly tailored to achieve a compelling government interest.[7] The government nearly always fails this test—in state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors. [8] Like those laws, SB 396 fails strict scrutiny. Minors have "significant" First Amendment rights, including the right to access constitutional speech.[9] And while the Supreme Court has reaffirmed that the government has a compelling interest in children's welfare, 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

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[3] *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)).
[4] *Brown,* 564 U.S. at 795 n.3 *(emphases in original).*
[5] *Id.*
[6] *See, e.g., Reno v. ACLU,* 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II),* 542 U.S. 656 (2004).
[7] *Reno,* 521 U.S. at 874.
[8] *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).
[9] *Reno,* 521 U.S. at 874.
[10] *See Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212-13 (1975).

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 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 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]

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[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").

[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.").

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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In conclusion, NetChoice shares lawmakers' desire to better protect teens online. To this end, we believe there are far better ways to address this complex issue rather than government mandated collection of sensitive information. Several states are considering proposals that would incorporate digital literacy in school curriculum and would make discussions about the benefits and drawbacks of social media use a part of school curricula is one possible example. But SB 396 substitutes government barriers for parental responsibility in protecting youth online.

As always, we offer ourselves as a resource to discuss these issues in further detail. We appreciate your attention to this 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.

[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.*