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NetChoice
Defending Free Speech and Free Enterprise Online

# Louisiana HB 61 and SB 162 : Relating to Social Media Age Verification

**OPPOSITION TESTIMONY**

April 18, 2023

Dear Members of committee:

We respectfully urge you to oppose HB 61 and SB 162, the Secure Online Child Interaction and Age Act. The bill's goal of protecting minors from harmful content online is laudable and one that NetChoice supports. However, HB 61 and SB 162 risks subjecting every social media user in Louisiana to intrusive age verification requirements that would compromise the ability to speak freely and anonymously online. Furthermore, by restricting minors' access to non-obscene, constitutionally-protected speech, the bill raises serious First Amendment concerns. These bills:

1. Eliminate anonymous speech online
2. Chill Louisiana's ability to share non-mainstream political views; and
3. Violate the First Amendment.

## HB 61 and SB 162 Eliminate Anonymous Speech Online

Should HB 61 & SB 162 become law, anonymous and pseudonymous speech will end. Louisianans will no longer be secure in the knowledge that, should they wish to, their identities can remain hidden online. Today, Louisianans can create pseudonymous online accounts with as little as an email address. These pseudonymous accounts allow Louisianans to engage in online discussion without fearing retribution from online mobs. Indeed, because today's culture is one of hyper-sensitivity around certain topics, anonymous or private speech is more valuable than ever.

Under the proposed law, the government would make such anonymity illegal for all Louisianans who wish to access the internet. To comply with these proposals, websites must "verify the age of each existing or new Louisiana account holder." To comply with the law, adults will need their ages verified as well. How is a person's age to be verified? The proposal states that a "valid government identification

card" shall be required for identification purposes. For those minors who obtain parental consent, this will require producing either a birth certificate or a social security card. For adults, at least a drivers' license would be required. Such documentation contains sensitive information which is typically not divulged to the general public—one's address or social security number being the two most obvious identifiers.

Of course, the proposed law would not merely require showing an identifying document one time. No, the bill would require social media companies to retain the information collected. Only after Louisianans have submitted to the government's demands and turned over their identifying information would they be allowed the privilege of accessing social media platforms.

Compliance, in other words, is impossible without gathering and retaining Louisianan's sensitive personally identifiable information. information gathering and record preservation at the government's behest.

The more information a website collects, the greater the risk of sensitive information getting into the wrong hands. Earlier this year, a national poll conducted by the Center for Growth and Opportunity at Utah State University 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." Already, two out of three Americans aren't comfortable sharing identification information with social media.[1] One can imagine that number goes up significantly when asked about sharing information with websites that host adult content. 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."[2]

## HB 61 and SB 162 Chill Non-Mainstream Political Views

Should these bills become law and thereby end anonymous speech online, it will be minority viewpoints that will be shut out from the marketplace of ideas. Those brave enough to risk speaking their minds will have to worry about public shaming, reprisal from employers, or doxxing from the online mob for simply expressing a different point of view.

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

In 1995, the Supreme Court observed that "'[a]nonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hands of an intolerant society."[3] American history is rife with examples showcasing the value of increased public engagement through anonymous and pseudonymous speech. Indeed, the Constitution's ratification, and the addition of the Bill of Rights, depended on it.[4] Entire political movements and messages have relied on the protection of anonymity to convey those messages.[5]

But the value and importance of encouraging more discussion on important issues is not something that was only valuable in the past and holds no value today. Nor, as history teaches us, will today's majority viewpoint remain the dominant view. Americans continue to make use of anonymity and pseudonymity to engage in important dialogues over contemporary issues. The recent Covid-19 crisis was itself a catalyst for an incredible range of viewpoints—many expressed anonymously—on everything from the virus's origin to what the proper role of government is when responding to a pandemic. By foreclosing Louisianans' ability to speak anonymously and pseudonymously, these bills risk curtailing important discussions on future topics and depriving Louisianans of the ability to grapple with a full range of perspectives.

## HB 61 and SB 162 Violate the First Amendment.

It should go without saying, but nonetheless bears repeating: children possess First Amendment rights.[6] 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," including children's expressive rights, "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."[7]

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

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[3] *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 357 (1995) (internal citations omitted).
[4] ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter, 2003); THE ANTI-FEDERALIST PAPERS (Ralph Louis Ketcham, 2003).
[5] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958).
[6] *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
[7] *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)).

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."[8] Laws like those proposed in HB 61 and SB 162, 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."[9]

Louisiana's proposed law violates minors' First Amendment rights. Laws that restrict minors' access to digital content are unconstitutional under the First Amendment unless they pass strict scrutiny.[10] To survive strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest.[11] The government nearly always fails this test—in state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors. [12] Like those laws, Louisiana's proposal fails strict scrutiny. Minors have "significant" First Amendment rights, including the right to access constitutional speech.[13] And while the Supreme Court has reaffirmed that the government has a compelling interest in children's welfare, Louisiana "must specifically identify an 'actual problem' in need of solving." [14]

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 were 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.

HB 61 and SB 162 are similarly unconstitutional because they would also block minors' access to constitutional speech. And like California's legislature, Louisiana cannot prove with specificity that there is an "actual problem." While lawmakers would likely cite psychological studies allegedly establishing a

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[8] *Brown,* 564 U.S. at 795 n.3 *(emphases in original).*
[9] *Id.*
[10] *See, e.g., Reno v. ACLU,* 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II),* 542 U.S. 656 (2004).
[11] *Reno,* 521 U.S. at 874.
[12] *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).
[13] *Reno,* 521 U.S. at 874.
[14] *See Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212-13 (1975).

link between social media use and mental health problems in minors, studies also show the opposite is true: social media and internet use benefits a majority of teens.[15]

Nor is this proposed law narrowly tailored. If Louisiana is concerned about children's experience only, it could instead educate parents about the use of content-filtering technology and parental controls built into digital devices, services, and platforms. In 2016, a Louisiana law which attempted to block minors from accessing "harmful" content was struck down precisely because the law failed to consider filters as a less restrictive means for protecting minors.[16] 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.[17]

The Supreme Court has gone further and instructed that courts "should not presume parents, given full information, will fail to act."[18]

HB 61 and SB 162 also violate adults' First Amendment rights. These bills would burden more speech than necessary and are thus unconstitutional. Requiring age verification of all users will add barriers to the use of web services and thereby reduce 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.[19] Likewise, verification also

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[15] 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/; *See also* Elizabeth Nolan Brown, *5 New Studies That Challenge Conventional Wisdom About Kids and Tech*, REASON (Dec. 27, 2022), https://reason.com/2022/12/27/5-new-studies-that-challenge-conventional-wisdom-about-kids-and-tech/.

[16] *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").

[17] *Ashcroft II*, 542 U.S. at 667

[18] *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.").

[19] *See, e.g. McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995).

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."[20] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[21] As the Court did in *Reno*, Louisiana should reject the current proposals and their theoretical benefits in favor of the principle of free expression and the First Amendment.

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In conclusion, NetChoice shares lawmakers' desire to better protect teens online. Yet there are far better ways to address this complex issue rather than government mandated collection of sensitive information. Several state departments of education are developing tools and plans for teachers to educate students about digital literacy at all grade levels.[22] But HB 61 and SB 162 substitute education and parental responsibility for artificial government barriers in the name of 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,

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NetChoice

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

[20] *Reno v. ACLU,* 521 U.S. 844, 849 (1996).
[21] *Id. at 885.*
[22] *See e.g.,* OHIO DEPT. OF EDUCATION, *Learn to build media literacy in students* (April 3, 2023), https://education.ohio.gov/Media/Ed-Connection/April-2023/Learn-to-build-media-literacy-in-students