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NetChoice
Defending Free Speech and Free Enterprise Online

Texas HB 18

VETO REQUEST

May 31, 2023

Texas Governor Greg Abbott

NetChoice respectfully asks that you **veto HB 18** as it:

> - Violates the principles of limited government and individual responsibility;
> - Violates the First Amendment of the U.S. Constitution;
> - Usurps and undermines Texans' parental rights; and
> - Mirrors California's Age-Appropriate Design Code, which is now facing legal challenges in *NetChoice v. Bonta* (2022).

As further outlined below, the device filtering language would immediately invite constitutional challenges. In fact, the Supreme Court has already struck down a similar approach after finding it violated the First Amendment rights to receive information and to free speech.

Additionally, HB 18 represents a major government incursion into the traditional role that the family has played in Texas and American history. Parents are the best stewards of their own children's wellbeing, not the state. The device filtering language could give families the false impression that parental oversight into the online practices of their kids is no longer necessary, thereby making it more likely young Texans are exposed to vile content.

To avoid any of these negative outcomes, we ask that you veto HB 18.

HB 18 Violates the First Amendment

Requiring identity authentication of all users adds several unconstitutional barriers to sharing and accessing First Amendment-protected online speech.

First, HB 18's identity verification requirements prevent anonymous and pseudonymous browsing.

Second, HB 18 unconstitutionally restricts both adults' and minors' access to First Amendment-protected content. Laws that chill and restrict Americans' speech in this way are unconstitutional under the First Amendment unless they pass strict scrutiny; a stringent test HB 18 will surely fail.[1]

Third, HB 18 violates online services' well-established First Amendment right to editorial discretion.

HB 18's requirements apply to significantly more companies than necessary. Such overbreadth is inherently a violation of the First Amendment. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[2] HB 18 is overbroad because it "burn[s] the house to roast the pig."[3]

HB 18 unconstitutionally restricts Texan's access to digital content on account of their age. In *Reno v. ACLU*, the Supreme Court struck down a similar law to HB 18, 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."[4] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[5] For this reason, NetChoice is suing[6] California over its similar law, the Age-Appropriate Design Code.[7]

Laws that restrict Americans' access to digital content on account of age are unconstitutional under the First Amendment unless they pass strict scrutiny.[8] To survive strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest.[9] The government nearly always fails this test—in

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[1] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[2] *Brown v. Enter. Merchants Ass'n*, 564 U.S. 786, 794 (2011).
[3] *Butler v. Michigan*, 352 U.S. 380, 381, 383 (1957) (invalidating universal ban on material "tending to the corruption of the morals of youth").
[4] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[5] *Id.* at 885.
[6] Available at https://bit.ly/3jjMhXy.
[7] Available at https://bit.ly/3RkFrh2.
[8] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[9] *Reno*, 521 U.S. at 874.

state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors.[10] HB 18 will be no different.

While the Supreme Court has acknowledged that the government has an important interest in children's welfare[11], Texas "must specifically identify an 'actual problem' in need of solving" to establish a "compelling interest."[12] 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.

HB 18 Replaces the Texas Family with the Texas Legislature

Texas parents are the ultimate arbiters of their children's wellbeing and moral development. Conservative and other limited government groups have long fought for a parent's right to set the course of their children's lives, unencumbered by government bureaucrats, panels, or committees. The moments when the state usurps the parent should be rare and should be recognized as a failure, not a triumph of public policy.

A terrible but altogether predictable side effect of the device filtering language is that this would give parents a false sense of security. Filtering technology is only so precise, and even the most sophisticated software will only keep out a certain number of online threats. That means, even in the most secure environments, parents need to be overseeing their childrens' online activity. The device filtering language also sends a false all-clear message to parents who would otherwise remain vigilant.

Texas parents need to be empowered to make the decisions they deem appropriate for their own children. Government should not be making the de facto choice on their behalf that a family must then

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[10] *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).

[11] *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").

[12] *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).

remedy. If the state wants to be a genuine partner to parents in their efforts to keep kids safe online, there are much more targeted, constitutional remedies available.

> *States, like Florida, have begun to consider online and social media specific education in the classroom. This would help arm young people with the information they need to keep their data more secure, focused on age appropriate content, and away from bad actors who would do them harm.*

States like Florida have begun to consider online and social media specific education in the classroom. This would help arm young people with the information they need to keep their data more secure, focused on age appropriate content, and away from bad actors who would do them harm. The state could also take steps to publicize the resources that are available to filter content or monitor and control screen time. Solutions for families and kids don't need to come in the form of big government mandates. Parents should be treated like the responsible adults they are, not like criminals requiring content filtering and monitoring.

Creating a Legal Morass

HB 18 is riddled with vague terms that generate ambiguity about what companies are required to do and potential violations of privacy laws. Consider the terms "socially interact" or "harmful material." Such ambiguous terms would open the floodgates of litigation and drown American businesses in a swamp of legal challenges.

Indeed, challenges would be particularly vexing because companies would be caught between a rock and a hard place by the requirements to collect and monitor certain information. Many federal and state privacy laws prevent deep pack inspection and reading of communications of users. But under this bill, such requirements are mandated, many of which are prohibited under theFederal Privacy protection - the Electronic Communications Privacy Act of 1986. It is even possible that such actions would violate Texas's own privacy legislation, the Texas Data Privacy and Security Act.

Government Intrusion Will Worsen Filtering Tech & Stifle Innovation

As it stands, dozens of manufacturers and other private companies offer device filtering technology and other parental control software to help kids stay safe online. Due to the incentives of the free market, all those entities compete tirelessly against each other for business. That means technology is always improving, services are getting more sophisticated and easy to use, and over time kids are safer for it.

The device filtering language would take a wrecking ball to the entire private market of these offerings. With broad, confusing language, and legal liability attached, the freedom to innovate would be stripped away. A one-size-fits-all approach to filtering and child safety would need to be adopted for companies to be sure that they would avoid lawsuits or government sanction.

The elimination of competition and the creation of a single, government-approved mode of ensuring a child-safe online environment would be the end of innovation in this space. That would be a disaster. Everyone agrees that more can be done to keep kids safe online, but that is only a reasonable possibility when there is freedom for our innovators to create new solutions. Innovation at the speed of government is not a wise model for this committee to adopt.

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For these reasons, we respectfully ask you to **veto HB 18**. 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
Vice President & General Counsel
NetChoice

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