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NetChoice
Defending Free Speech and Free Enterprise Online

Ohio Sub. H. B. No. 33 – Illegal Takings of Private Property

OPPOSITION TESTIMONY

June 14, 2023

We respectfully urge you to oppose HB No 33 to the Governor's budget (HB 33) which represents government takings and government interference with private contracts as the bill would prohibit interactive computer services from entering into a contract with a minor without first obtaining parental consent.

This idea was already considered and rejected earlier in the budgetary process. It should once again be removed.

The bill's goal of protecting minors from harmful content online is laudable and one that NetChoice supports. But rather than empower parents, HB 33 would substitute the government's idea of good parenting for actual parents' decision making. Specifically, this bill:

1. Ohioans will be forced to provide credentials for access to sites they use today
2. Substitutes government fiat for parental engagement
3. Curbs minors' access to protected First Amendment content
4. Invalidates every website's terms of service

Parents, not governments, should guide their children's upbringing. Parents have the ability to determine what language their children learn,[1] what school to attend,[2] their religious upbringing,[3] and so forth. Parents are responsible not only for these high-level decisions, but also the granular ones down to what vegetable their child should have with dinner. The government, in short, may not substitute its judgment

[1] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[2] *Pierce v. Society of Sisters*, 269 U.S. 510 (1925).
[3] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

for what "good parenting" looks like for the judgment of individual parents. And yet this is precisely what HB 33 does.

Forcing Ohio citizens to provide credentials for access to sites they use today

HB 33 requires platforms to obtain "verifiable consent" from a minor's parent in order to continue using the platforms, products, and services they rely on. HB 33 purports to only require parental consent for minors, but, in reality, by requiring parental consent on any website which "is reasonably likely to be accessed by children," the proposal would necessitate age verification for all users to prove either that they are *not* minors in need of parental consent or that they *are* minors *and* that they have the necessary consent.

Age verification is impossible without providing some form of identification through, most commonly, government identification or biometric information. By requiring these disclosures, HB 33 would end anonymous and pseudonymous online speech in Ohio.[4] Indeed, if an adult is unwilling to sacrifice the protections of anonymity and pseudonymity, or if he or she is unable to confirm his or her age, then HB 33 would effectively prevent them from accessing crucial online resources.

Compliance, in other words, is impossible without gathering and retaining Ohioans' sensitive personally identifiable information. 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.[5] 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."[6]

[4] *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995).
[5] The Center for Growth and Opportunity at Utah State University, Jan. 2023 https://www.thecgo.org/research/tech-poll/.
[6] *Psinet, Inc. v. Chapman,* 362 F.3d 227, 236–37 (4th Cir. 2004).

Government replacing parental decision making.

In the name of "aiding parents," HB 33 usurps parental decision making. Should HB 33 become law, it would no longer be sufficient for parents to educate their children about digital spaces and then trust them to behave responsibly and come back if they have questions or concerns. HB 33 would require every Ohio parent to become a "helicopter parent" and consistently monitor their children online to give their blessing to every discrete action a 15 year-old takes.

But as the Supreme Court has made clear, parents should be free to decide what is the best approach to raising their child. This grant of parental autonomy does not change during a national emergency (for instance: war), and neither does it change with the advent of new technology. When it comes to childrearing, parents remain supreme, and the government may not impose the preferences of some parents on the rest.[7]

HB 33 would require every Ohio parent to become a "helicopter parent"

The First Amendment does not magically apply once a person turns eighteen. The Supreme Court has routinely held that minors enjoy First Amendment rights.[8] By placing a presumptive restriction on access to First Amendment-protected content, HB 33 would curb minors' ability to engage meaningfully online and run afoul of the First Amendment. In fact, HB 33 copies California's unconstitutional parental consent law for video games and applies the same formula for online activity. The Supreme Court struck down California's law over a decade ago, and HB 33 would fare no better in the courts.

California restricted the sale of violent video games to minors and required parental consent before a minor could make the purchase. The Court struck down the law because it did not enforce parental authority. Rather, it "enforced governmental authority, subject only to a parental veto." Writing for the majority, Justice Scalia explained that because violence or violent content is protected expression under the First Amendment, the State could not restrict minors from accessing it.

Similarly, HB 33 would place a barrier to protected First Amendment content produced by others and would place a barrier to minors' ability to exercise their own rights to speak. And just as with California's system, HB 33 would not vindicate parental authority but enforce the government's authority and judgment subject only to a parental veto. Indeed, HB 33 is *more* troubling because its scope is not

[7] Brown v. Entm't Merchs. Ass'n. 564 U.S. 786, 804 (2011).
[8] *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021).

limited merely to "violent" content but applies to *all* interactive computer services—including those offered by libraries or education institutions.

Government interference with private contracts and engaging in illegal takings

The broad reach of HB 33 cannot be overstated. Because it applies to *all* interactive computer services, it covers much more than just social media. HB 33 would prevent minors from creating accounts with local news organizations, downloading apps to their mobile devices, accessing music and video streaming platforms, ridesharing apps, and so on.

HB 33 would render "any contract or agreement entered into between a minor and an interactive computer service" without parental consent a nullity. The bill's broad language covers not just prospective contracts but also *existing* contracts between these services and minors. Accordingly, the law runs directly into the Contracts Clause.

The Contracts Clause restricts the State's ability to disrupt contractual arrangements. Disruption occurs when the state law causes a "substantial impairment of the contractual relationship"[9] and when the disruption is not drawn in an appropriate and reasonable way to advance a significant public purpose.[10] Incidental burdens (such as additional paperwork) do not constitute a substantial disruption, particularly where the new requirements are designed to support, rather than impair, the contractual scheme.[11]

Examples of laws which may impose some burden but would not violate the Contracts Clause are recording statutes which specify how rights to real property are established. Even if those statues incidentally result in the extinguishment of a rights-holder's interest, the law itself does not violate the Constitution because they facilitate an appropriate way to determine whose rights control.[12] Similarly, laws which impose a "filing requirement" for contracts do not violate the Contracts Clause because they impose minimal compliance obligations which act to safeguard existing obligations.[13]

When compared to HB 33, the contrast is stark. Rather than guaranteeing existing obligations, HB 33 would invalidate contracts between any minor and an interactive service provider. Indeed, it is not clear that merely obtaining parental consent could restore the original contract. Arguably, the law would

[9] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).
[10] *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983).
[11] *Sveen v. Melin*, 138 S.Ct. 1815, 1823 (2018).
[12] *Id*. at 1824 (citing *Jackson v. Lampshire*, 28 U.S. 280 (1830)).
[13] *Id.* at 1824 (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).

require the minor to enter into an entirely new contract with each service. In other words, all existing contracts with minors—and with those adults who could not prove their age—would be invalidated.

Even if we assume that the existing contracts could be maintained after parental consent is received, the law would still invalidate existing contracts for those minors who are unable to obtain parental consent. Elimination of even a portion of the existing agreements and contracts between interactive computer services and minors is undoubtedly a "substantial impairment of the contractual relationship" between the parties.

The question that remains then is this: is the disruption drawn in an appropriate and reasonable way to advance a legitimate government interest? No, it is not.

HB 33 cannot be considered an appropriate and reasonable way to advance the goal of protecting minors online. The bill's reasonableness is directly undercut by three key problems: 1) the usurpation of parents' rights, 2) the restriction of access to protected First Amendment speech, and 3) the overbreadth of the law's application. These issues, as detailed above, ensure that the law is doomed to fail just as California's law before it—if for slightly more expansive constitutional issues than those presented to the Court in *Brown*.[14]

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NetChoice shares lawmakers' desire to better protect minors online. Yet there are far better ways to address this complex issue rather than government interference between the parent-child relationship. One alternative, currently being considered in several states, is the addition of a digital literacy curriculum in schools or making resources available to parents to better equip them to discuss digital safety with their children.[15]

We respectfully request that you **oppose** HB 33.

Sincerely,

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NetChoice

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

[14] *Brown* at 804-05.
[15] Florida S.B. 561.