

## Florida HB 1

## OPPOSITION TESTIMONY

Jan. 17, 2023

### Florida House of Representatives Judiciary Committee

NetChoice respectfully asks that you **oppose** HB 1, legislation which would block access to valuable speech and require age verification for the use of a social media platform.

While well-intentioned, HB 1 has significant constitutional flaws:

1. HB 1's core provisions are unconstitutional under the First Amendment—and already being actively litigated in other states; and
2. HB 1 would put Florida residents' privacy and data at risk, leaving them vulnerable to breaches and crime.

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that internet business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression.

We share the sponsor's goal to better protect minors from harmful content online. NetChoice members have taken issues of teen safety seriously and in recent years have rolled out numerous new features, settings, parental tools, and protections to better empower parents and assist in monitoring their children's use of social media. We ask that you oppose HB 1 and instead use this bill as a way to jumpstart a larger conversation about how best to protect minors online and consider alternatives that do not raise constitutional issues.

### **1. HB 1's core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.**

HB 1 contains several constitutional defects. Chief among them are the requirements that social media companies 1) block access to their services for anyone under the age of 16; and 2) perform

age-verification to identify users' ages. Laws containing similar defects as those in HB 1 have already been challenged in federal court. Laws from California and Arkansas are currently enjoined.<sup>1</sup> Ohio is currently prohibited from enforcing its social media regulation law while a legal challenge proceeds.<sup>2</sup> Similarly, Utah's social media law is currently subject to legal challenge.<sup>3</sup>

## Restricting Access to Lawful Content

The First Amendment prohibits the government from restricting an individual's ability to access lawful speech, engage in discourse, express opinions, and more. Indeed, the right of free speech is enjoyed by minors and adults alike.<sup>4</sup> When challenged, the Court has consistently reaffirmed this bedrock First Amendment principle.<sup>5</sup>

If passed, HB 1 would violate minors' First Amendment rights by imposing a blanket restriction on access to constitutionally protected speech for anyone who is either under the age of 16 or refuses to comply with the law's age-verification requirements. The fact that HB 1 covers the internet rather than books, television programs, or video games, does not change the First Amendment issue.<sup>6</sup> To the contrary, social media allows users to "engage in a wide array of . . . activity on topics 'as diverse as human thought'"---all "protected by the First Amendment" from government interference."<sup>7</sup> These wide array of activities and topics can include religious worship, political dialogue, sharing recipes, and more.

In fact, in certain respects, HB 1 resembles California's unconstitutional parental consent law for video games. The Supreme Court struck down California's law over a decade ago.

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. 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.

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<sup>1</sup> *NetChoice v. Bonta*, 2023 WL 6135551 (enjoining California's Age-Appropriate Design Code Act for violation of the First Amendment); *NetChoice v. Griffin*, 2023 WL 5660155 (enjoining Arkansas's parental consent and age-verification law to access social media for violation of the First Amendment).

<sup>2</sup> *NetChoice v. Yost*, 2:24-cv-00047 (S.D. Ohio, Jan. 9, 2024), available at: <https://netchoice.org/wp-content/uploads/2024/01/2024.01.09-ECF-27-ORDER-Granting-TRO.pdf>

<sup>3</sup> *NetChoice v. Reyes*, 2:23-cv-00911 (D. Utah).

<sup>4</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that minors enjoy First Amendment rights).

<sup>5</sup> See e.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021).

<sup>6</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997) (holding that the First Amendment applies to the internet).

<sup>7</sup> *NetChoice v. Griffin*, 2023 WL 5660155 at \*5 quoting *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

Indeed, HB 1 is *more* troubling than the California scheme because its scope is not limited merely to “violent” content but applies to “social media companies” which offer a range of content including religious services, educational videos, advice on navigating mental health struggles and more. Nor does HB 1 even pretend to put parents in control of their children’s online experience. HB 1’s blanket ban on access is nothing more than a government restriction on access to speech. As Justice Scalia observed, the government does not have the “free-floating power to restrict the ideas to which children may be exposed.”<sup>8</sup> Because HB 1 purports to exercise precisely this free-floating power to restrict ideas, it is unconstitutional and, if enacted, would be swiftly struck down. Further, because HB 1 places a complete bar on access to protected speech, it is even *less* constitutionally sound than the Arkansas, California, Ohio, and Utah laws attempting to place roadblocks and restrictions on access to speech.

### Age-Verification

Parents, not governments, should guide their children’s upbringing. Parents have the ability to determine what language their children learn,<sup>9</sup> what school to attend,<sup>10</sup> their religious upbringing,<sup>11</sup> 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 of “good parenting” in place of the judgment of individual parents. As discussed above, HB 1 substitutes a parent’s view of acceptable parenting for the view held by the government.

But HB 1 actually goes further than merely usurping the role of parents. The bill would also curtail the speech rights of *adults*. HB 1 would require social media companies to engage in a cumbersome process of age-verification for all users. The bill even requires that service be denied to anyone who does not undergo age-verification.

But requiring age-verification cuts to the heart of another core First Amendment protection: anonymity. The framers understood this point and valued anonymity. It is not an exaggeration to say that we owe the existence of our constitutional system to anonymous speech.<sup>12</sup> The Supreme Court has explicitly

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<sup>8</sup> *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 794 (2011) (cleaned up).

<sup>9</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>10</sup> *Pierce v. Society of Sisters*, 269 U.S. 510 (1925).

<sup>11</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>12</sup> See ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter, 2003); THE ANTI-FEDERALIST PAPERS (Ralph Louis Ketcham, 2003). The essays supporting and opposing ratification of the Constitution in these papers were published pseudonymously.

affirmed that the First Amendment covers the right to speak anonymously<sup>13</sup> and has repeatedly struck down age-verification schemes<sup>14</sup> finding that they would force users to “forgo the anonymity otherwise available on the internet.”<sup>15</sup>

Indeed, Arkansas’s age-verification scheme has been enjoined,<sup>16</sup> and Utah’s is currently facing a similar challenge.<sup>17</sup>

## **2. HB 1 would put Florida’s residents’ privacy data at risk, leaving them vulnerable to breaches and crime.**

Almost as though it were lifted from Arkansas’s age-verification scheme, HB 1 not only requires age-verification but requires that verification be done by a third-party. Age-verification, as HB 1 implicitly acknowledges, requires the collection of incredibly sensitive personal information.

Of course, the Arkansas model is currently enjoined as unconstitutional, but it’s worth flagging why, as a matter of policy and data security, it would be unwise to implement the strategy.

While HB 1 requires that information obtained for the purpose of verification “may not be retained” that is hardly a guarantee that a third-party will actually delete the information. Indeed, by removing the verification process from the hands of companies themselves, it increases the risk that the information will be disclosed given the lack of relationship between users and the third party. Any requirement to collect data raises concerns over security. Criminals and identity thieves are actively looking for any opportunity to exploit sensitive personal information for their own ends. As we know from recent experience, any time there is a store of sensitive information it becomes a prime target for identity thieves and other nefarious individuals. Even government agencies have fallen victim to these attacks.

So, although HB 1 requires that the information be deleted, by requiring collection in the first place, the bill sets up Floridians as prime targets for crime.

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<sup>13</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (internal citations omitted).

<sup>14</sup> *E.g. Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 662, 667 (2004); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997); *see also NetChoice v. Griffin*, 2023 WL 5660155, at \*17.

<sup>15</sup> *Id.* quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).

<sup>16</sup> *NetChoice v. Griffin*, 2023 WL 5660155.

<sup>17</sup> *NetChoice v. Reyes*, 2:23-cv-00911 (D. Utah).

By restricting access to valuable speech, requiring age-verification, and further requiring that such verification be performed by a third-party, HB 1 violates the Constitution and sets up Floridians for significant security risks.

Ultimately, Florida would be better served by redoubling its legislative efforts to improve online literacy for young people. We believe educating students and adults about how to use social media in a safe and responsible manner, and avoiding heavy handed government mandates is the best path forward.

Again, we respectfully **ask you to oppose HB 1**. As always 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.<sup>18</sup>

Sincerely,

Carl Szabo

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

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<sup>18</sup> The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.