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NetChoice
Defending Free Speech and Free Enterprise Online

South Carolina H. 4700

OPPOSITION TESTIMONY

Jan. 10, 2023

South Carolina House of Representatives
Judiciary Committee

NetChoice respectfully asks that you **oppose** H. 4700, legislation which would require age verification and parental consent for a minor's use of a social media platform.

While well-intentioned, H. 4700 has significant constitutional flaws:

> 1. H 4700's core provisions are unconstitutional under the First Amendment—and already being actively litigated in other states; and
> 2. H. 4700 would put South Carolina 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 H. 4700 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. H 4700's core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.

H. 4700 contains several constitutional defects. Chief among them are the requirements that social media companies 1) obtain parental consent for current and future minor users; 2) perform

age-verification to identify minor users; and 3) restrict minors from accessing certain pieces of lawful content.

Parental Consent and Age-Verification

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 for what "good parenting" looks like for the judgment of individual parents. And yet this is precisely what H. 4700 does.

In the name of "aiding parents," H. 4700 usurps parental decision making. Should H. 4700 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. No, H. 4700 would require every South Carolina parent to become a "helicopter parent" and consistently monitor their children online to give their blessing to every discrete action the child 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.[4]

The First Amendment does not magically apply once a person turns eighteen. The Supreme Court has routinely held that minors enjoy First Amendment rights.[5] By placing a presumptive restriction on access to First Amendment-protected content, H. 4700 would curb minors' ability to engage meaningfully online and run afoul of the First Amendment. In fact, in this respect, H. 4700 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 South Carolina's proposal would fare no better in the courts.

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

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."[6] 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, South Carolina's proposed law 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, South Carolina's proposal would not vindicate parental authority but enforce the government's authority and judgment subject only to a parental veto. Indeed, H. 4700 is *more* troubling 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.

The fact that H. 4700 also includes an age-verification requirement only exacerbates its First Amendment problems. The Supreme Court has routinely struck down age-verification schemes to access speech online.[7] Such requirements require that users "forgo the anonymity otherwise available on the internet."[8]

Indeed, these types of parental consent requirements for social media have been already been enacted elsewhere and are either enjoined as unconstitutional[9] or are subject to active litigation.[10]

Restricting Access to Lawful Speech

H.4700 also restricts the distribution of and access to lawful political, social, and commercial speech in violation of the First Amendment. Specifically, the Act restricts the dissemination of suggested content, accounts, groups, as well as commercial advertisements for minors. This violates the First Amendment

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[6] *Brown* at 795 n.3.
[7] *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.
[8] *Id.* quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).
[9] *See NetChoice v. Griffin*, 2023 WL 5660155; *NetChoice v. Bonta*, 2023 WL 6135551.
[10] *See NetChoice v. Reyes*, D.Utah (2023), https://netchoice.org/netchoice-v-reyes/; *NetChoice v. Yost*, S.D.Ohio (2024), https://netchoice.org/netchoice-v-yost/.

rights of both the social media companies to disseminate content,[11] and the minors to receive lawful speech free from government interference.[12]

By restricting the dissemination and receipt of constitutional speech, H. 4700 doubly violates the First Amendment. These sorts of restrictions, too, have already been struck down or challenged.[13] Indeed, H. 4700 is a carbon copy of Utah's SB 152. Utah's law is currently being litigated in *NetChoice v. Reyes*. Additionally, some of H. 4700's core provisions—parental consent and age-verification—have already been enjoined in NetChoice's suit against Arkansas's Act 689—*NetChoice v. Griffin*.

2. H. 4700 would put South Carolina's residents' privacy data at risk, leaving them vulnerable to breaches and crime.

Like Arkansas and Utah, H. 4700 requires age-verification by use personal, sensitive information provided either to the social media company or a third-party service. Indeed, H. 4700 requires the processor of that sensitive information to retain it.

While H. 4700 requires the company retaining the data to retain it "only for the purpose of compliance," the bill would still subject South Carolinians to dramatically increased data risks. Indeed, by requiring that this data be retained it creates a new avenue for criminals to access South Carolinians' data. 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.

By requiring age-verification, parental consent, and the retention of sensitive information, H. 4700 would result in South Carolinians significant security to access substantial amounts of valuable speech. This is a risk they should not have to assume.

Ultimately, South Carolina would be better served by pursuing legislative efforts to improve online literacy for young people similar to legislation and implement updated digital citizenship curriculum in schools which states like Virginia and Florida have done. We believe educating students and adults how

[11] *See 303 Creative v. Elenis*, 600 U.S. 570 (2023) (holding that websites and corporations have a First Amendment right to disseminate constitutional speech).
[12] Stanley v. Georgia, 394 U.S. 557, 564 (1969).
[13] *See e.g., NetChoice v. Bonta*, 2023 WL 6135551.

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 H. 4700.** 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.[14]

Sincerely,

Carl Szabo
Vice President & General Counsel, NetChoice
NetChoice is a trade association that works to protect free expression and promote free enterprise online.

[14] The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.