

Florida HB 3

VETO REQUEST

March 7, 2024

Dear Governor DeSantis,

NetChoice respectfully asks that you **veto HB 3**. This bill suffers from similar constitutional flaws as the recently-vetoed HB 1. Like its predecessor, HB 3 would violate Floridians' constitutional rights and place their privacy at risk.

HB 3 places absolute bans on access to protected speech, imposes parental consent requirements to access that same speech for others, and, in essence, imposes an "ID for the internet" regime. We ask you to veto HB 3 precisely because its faults mirror those of HB 1 and echo the issues for which you rightfully criticized former South Carolina governor Nikki Haley on the campaign trail last year.¹

You were right to veto HB 1 for its constitutional defects. Don't be fooled by the legislature's purported alternative. HB 3 is similarly unconstitutional. As Justice Scalia would say: "this wolf comes as a wolf."²

Like HB 1, HB 3 suffers from significant constitutional flaws:

1. HB 3's core provisions are unconstitutional under the First Amendment—and already being actively litigated in other states; and
2. HB 3 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.

¹ Elizabeth Crisp, *DeSantis slams Haley over 'dangerous' calls for social media reforms*, THE HILL (Nov. 15, 2023, 11:08 AM), <https://thehill.com/homenews/campaign/4310712-desantis-haley-social-media-verification/>.

² *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

We share the goal of better protecting minors from harmful content online, but an unconstitutional law helps no one. 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 veto HB 3 and urge the legislature to use this as a way to jumpstart a larger conversation about how best to protect minors online. NetChoice would be happy to meet with your office or the legislature to discuss effective, constitutionally sound ways to protect minors online.

HB 3’s core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.

HB 3 contains several constitutional defects. Chief among them are the requirements to 1) block access to social media sites for anyone under the age of 14³; 2) obtain verifiable parental consent before permitting minors to access social media, and 3) implicitly perform age-verification to identify users’ ages. Laws containing similar defects as those in HB 3 have already been challenged in federal court. Laws from Arkansas,⁴ California,⁵ and Ohio⁶ are currently enjoined. Similarly, Utah’s social media law is currently subject to legal challenge.⁷

Restricting Access to Lawful Content

The internet has made information, discourse, and speech “as diverse as human thought” readily accessible.⁸ And the First Amendment prohibits the government from restricting the ability to access lawful speech, engage in discourse, express opinions, and more.⁹ Indeed, the First Amendment’s protections are enjoyed by minors and adults alike.¹⁰ When challenged, the Supreme Court has consistently reaffirmed this bedrock First Amendment principle.¹¹

³ Or, if certain provisions are enjoined, anyone under the age of 16.

⁴ *NetChoice v. Griffin*, 2023 WL 5660155 (W.D. Ark., Aug. 31, 2023) (enjoining Arkansas’s parental consent and age-verification law to access social media for violation of the First Amendment).

⁵ *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal., Sep. 18, 2023) (enjoining California’s Age-Appropriate Design Code Act for violation of the First Amendment).

⁶ *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio, Feb. 12, 2024) (enjoining Ohio’s parental consent for social media law as unconstitutional under the First Amendment).

⁷ *NetChoice v. Reyes*, 2:23-cv-00911 (D. Utah).

⁸ *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

⁹ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

¹⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that minors enjoy First Amendment rights).

¹¹ See e.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021).

The fact that HB 3 covers the internet rather than books, television programs, or video games, does not change the First Amendment issue.¹² Social media websites provide access to speech on topics ranging from religious worship and political dialogue to sharing recipes and offering well-wishes. And the Supreme Court has made clear that the government lacks the “free-floating power to restrict the ideas to which children may be exposed.”¹³

If signed, HB 3 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 14 or refuses to comply with its parental consent requirements. HB 3 cannot avoid First Amendment scrutiny by attempting to classify its prohibition as a regulation of “contract.” By prohibiting access to speech, the First Amendment applies.¹⁴

Parental Consent

HB 3 prohibits fourteen- and fifteen-year-olds from “contracting” to create a social media account absent parental consent. Although not a complete ban, requiring parental consent to access lawful speech is also unconstitutional.

Parents, not governments, determine what languages their children learn,¹⁵ what school to attend,¹⁶ their religious upbringing,¹⁷ 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 key is that for each of these decisions it is the *parents* who are in the driver’s seat when it comes to their children and their families. The government may not override parental judgments of “good parenting” and replace them with its own. But that is precisely what HB 3 does.

In fact, in certain respects, HB 3 resembles California’s unconstitutional parental consent law for video games. The Supreme Court struck down California's law over a decade ago.

¹² *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997) (holding that the First Amendment applies to the internet).

¹³ *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 794 (2011).

¹⁴ *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129, *17 (S.D. Ohio, Feb. 12, 2024) (There is no “contract exception” to the First Amendment.”). This problem is exacerbated by HB 3 Section 1, Subsection 4 which would extend the blanket ban on access to minors under 16.

¹⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁶ *Pierce v. Society of Sisters*, 269 U.S. 510 (1925).

¹⁷ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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. Instead, the law imposed *governmental authority* subject only to a parental veto.¹⁸ 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.¹⁹

Indeed, HB 3 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. Other states have already tried imposing parental consent requirements on access to social media. Laws in Arkansas²⁰ and Ohio²¹ have been enjoined because, like California’s video game law, these restrictions are unconstitutional.

Age-Verification

To the extent that HB 3 would require social media companies to engage in age-verification to confirm its users are over a certain age, it encounters additional First Amendment problems. Age-verification schemes for the internet are blatantly unconstitutional. Because the internet is home to significant amounts of First Amendment speech, users should not be forced to forfeit their anonymity in order to access it.

The Supreme Court has rejected the idea that there is any justification for requiring age-verification online.²² And as with parental consent, lower courts have similarly rejected the idea that the states can require age-verification to access social media websites.²³ Age-verification not only precludes minors from accessing lawful speech but also chills the speech rights of *adult* users who elect not to use the site to safeguard their personal information

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

¹⁸ *Brown* at 795, fn. 3.

¹⁹ *Id.* at 802 quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975) (explaining that the First Amendment does not permit the government to penalize third parties from disseminating speech just in case the parents disapprove of the speech).

²⁰ *NetChoice v. Griffin*, 2023 WL 5660155 (W.D. Ark., Aug. 31, 2023)

²¹ *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129, *17 (S.D. Ohio, Feb. 12, 2024)

²² See e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 662, 667 (2004).

²³ *Griffin*, 2023 WL 5660155 (W.D. Ark., Aug. 31, 2023)

of our constitutional system to anonymous speech.²⁴ The Supreme Court has explicitly affirmed that the First Amendment covers the right to speak anonymously²⁵ and has repeatedly struck down age-verification schemes finding that they would force users to “forgo the anonymity otherwise available on the internet.”²⁶ HB 3 would, therefore, face the same fate as the Arkansas law.

HB 3 would put Florida’s residents’ privacy data at risk, leaving them vulnerable to breaches and crime.

Any scheme for online parental consent or age-verification presents serious privacy concerns. To comply with any such scheme, websites will necessarily collect sensitive information from their users to confirm that they are either above the age threshold or that they have the required parental consent. This necessary collection will make social media websites a prime target for identity thieves, hackers, and other bad actors.

Requirements that data be deleted or only used for certain purposes will not alleviate these concerns because websites will need to be able to verify to the government that they are following the age-verification or parental consent requirements. Accordingly, they will need to provide the information and confirmation to the government. In other words, websites will need to store this sensitive information and produce it at the government’s request.

Despite the desire to protect minors online, if signed, HB 3 would create more dangers for Florida’s youth.

By restricting access to valuable speech, requiring parental consent, and necessitating the collection of sensitive data, HB 3 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.

²⁴ 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.

²⁵ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (internal citations omitted).

²⁶ *Griffin* at *51 quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).

Again, we respectfully **ask you to veto HB 3**. 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 you with our thoughts on this important matter.²⁷

Sincerely,

Carl Szabo

Vice President & General Counsel, NetChoice

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

²⁷ The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.