

## Tennessee HB 1891

## VETO REQUEST

April 29, 2024

Governor Lee:

NetChoice respectfully asks that you **veto HB 1891**, legislation that would block access to valuable speech and impose age-verification for use of a social media platform. In practice, HB 1891 would require that all users provide “ID for the internet.” Accordingly, the legislation would ultimately be struck down in court as unconstitutional.

HB 1891 suffers from significant constitutional flaws:

1. HB 1891 would put Tennessee residents’ privacy and data at risk, leaving them vulnerable to breaches and crime; and
2. HB 1891’s core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.

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.

While we share the goal to better protect minors from harmful content online, unconstitutional laws don’t help anyone. NetChoice members take issues of teen safety seriously and in recent years 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 1891 and instead encourage the Tennessee legislature to return to the drawing board to craft constitutionally sound legislation that will actually protect minors online.

## **1. HB 1891 would put Tennessee residents' privacy data at risk, leaving them vulnerable to breaches and crime.**

Any scheme for online age-verification or parental consent presents serious privacy concerns. To comply with such schemes, websites will necessarily collect sensitive information from their users in order to treat minors as the law requires. This necessary collection will make social media websites a prime target for identity thieves, hackers, and other bad actors.<sup>1</sup>

Requirements that data be deleted or only used for certain purposes will not alleviate these concerns. A website required to delete sensitive information while facing liability if it does not properly verify a user's age will necessarily be compelled to retain information to demonstrate that they are complying with the law when the attorney general comes calling. Accordingly, a website will need to provide the collected information to confirm its compliance. In other words, websites will need to store this sensitive information and produce it at the government's request—a hacker's dream.

Despite the desire to protect minors online, if enacted, HB 1891 would create more dangers for Tennessee's youth.

By restricting access to valuable speech, requiring age-verification, parental consent, and necessitating the collection of sensitive data, HB 1891 violates the Constitution and sets up Tennesseans for significant security risks.

Ultimately, Tennessee would be better served by exploring legislative efforts to improve online literacy for its citizens as Florida and Virginia have done. 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.

## **2. HB 1891's core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.**

HB 1891 contains several constitutional defects. Chief among these defects are the provisions that require social media companies to perform age-verification and obtain parental consent for their minor users. Laws containing similar defects as those in HB 1891 have already been challenged in federal court.

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<sup>1</sup> See e.g., Javelin, *1.7 Million U.S. Children Fell Victim to Data Breaches According to Javelin's 2022 Child Identity Fraud Study*, (Oct. 26, 2022), <https://javelinstrategy.com/press-release/17-million-us-children-fell-victim-data-breaches-according-javelin-s-2022-child>.

Indeed, Arkansas,<sup>2</sup> California,<sup>3</sup> and Ohio<sup>4</sup> passed similar laws and have all been enjoined. Similarly, Utah’s social media law is currently subject to legal challenge.<sup>5</sup>

### Restricting Access to Lawful Content

The internet is the world’s largest private library, it makes information, discourse, and speech “as diverse as human thought” readily accessible.<sup>6</sup> And the First Amendment prohibits the government from restricting the ability to access, receive, or engage in online speech.<sup>7</sup> Indeed, the First Amendment’s protections are enjoyed by minors and adults alike.<sup>8</sup> When challenged, the Supreme Court has consistently reaffirmed this bedrock First Amendment principle.<sup>9</sup>

The fact that HB 1891 covers the internet rather than books, television programs, or video games, does not change the First Amendment issue.<sup>10</sup> 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.”<sup>11</sup>

If enacted, HB 1891 would violate minors’ First Amendment rights by imposing a presumptive ban on access to the veritable panoply of protected speech on social media. Additionally, it chills access for minors who would try to comply and whose parents would otherwise grant consent but are reluctant to provide additional documentation to the website. By prohibiting and chilling access to speech, the First Amendment applies.<sup>12</sup>

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<sup>2</sup> *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).

<sup>3</sup> *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).

<sup>4</sup> *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).

<sup>5</sup> *NetChoice v. Reyes*, 2:23-cv-00911 (D. Utah).

<sup>6</sup> *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

<sup>7</sup> *See Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

<sup>8</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that minors enjoy First Amendment rights).

<sup>9</sup> *See e.g., Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021).

<sup>10</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997) (holding that the First Amendment applies to the internet).

<sup>11</sup> *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 794 (2011).

<sup>12</sup> *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.”).

## Age-Verification & Parental Consent

The First Amendment prohibits the government from erecting barriers to lawful speech. Indeed, the Supreme Court has struck down online age-verification schemes because they infringe on access to broad swaths of speech and chill both potential speakers and willing listeners from entering the marketplace of ideas.<sup>13</sup> Similarly, the Supreme Court has also invalidated parental consent requirements because they impermissibly chill access to lawful speech.<sup>14</sup>

Parents, not governments, determine what languages their children learn,<sup>15</sup> what school to attend,<sup>16</sup> their religious upbringing,<sup>17</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. Likewise, it is for parents to decide what speech their children access. But HB 1891 flips the script and puts the government in the driver's seat.

At the very least, by requiring parental consent to access social media, HB 1891 poses the same defects as 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. Instead, the law imposed *governmental authority* subject only to a parental veto.<sup>18</sup> 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.<sup>19</sup>

Indeed, HB 1891 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.

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<sup>13</sup> See *Reno v. ACLU*, 521 U.S. 844, 855-857 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

<sup>14</sup> *Pico* at 867.

<sup>15</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

<sup>17</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>18</sup> *Brown* at 795, fn. 3.

<sup>19</sup> *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).

Federal courts have already had occasion to pass on three different attempts to restrict access to the internet (and social media companies specifically) through age-verification and parental consent requirements. In every case, the court struck down the law as unconstitutional under the First Amendment.

The closest analogue to HB 1891 is Arkansas' Act 689 which required social media companies to perform age-verification and receive parental consent for minors to access their websites. Like Act 689, HB 1891 imposes unconstitutional age-verification and parental consent requirements. But HB 1891 exacerbates the constitutional injury by extending the presumptive restriction to *all users*. Arkansas' law only imposed age-verification for the creation of *new* accounts. But HB 1891 would impose these requirements on new and existing accounts. Indeed, HB 1891 would bar any adult who refuses to comply with the law's age-verification requirement from accessing the speech available on the website. The district court found Arkansas' age-verification requirement for new accounts unconstitutional precisely because it would restrict lawful speech and chill speech on the social media site by discouraging access.<sup>20</sup> Because HB 1891 goes further than Arkansas' law and would require age-verification for all users, it would certainly be struck down as unconstitutional.

Of course, Arkansas is not the only example here. California's Age-Appropriate Design Code required websites to conduct "age assurance" and was enjoined for violating the First Amendment.<sup>21</sup> Similarly, Ohio attempted to avoid the First Amendment by claiming its law restricted only the ability to "contract" to create an account. There the district court observed that there is no contract exception to the First Amendment. Accordingly, Ohio's law was enjoined.<sup>22</sup>

These age-verification and parental consent requirements cut to the heart of another core First Amendment protection: anonymity. The framers understood this point and valued anonymity as a tool for political engagement. It is not an exaggeration to say that we owe the existence of our constitutional system to anonymous speech.<sup>23</sup> The Supreme Court has explicitly affirmed that the First Amendment covers the right to speak anonymously<sup>24</sup> and has repeatedly struck down schemes that would force users

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<sup>20</sup> *NetChoice v. Griffin*, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark.) (Aug. 31, 2023)..

<sup>21</sup> *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal., Sep. 18, 2023).

<sup>22</sup> *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129, \*12 (S.D. Ohio) (Feb. 12, 2024).

<sup>23</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.

<sup>24</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (internal citations omitted).

to “forgo the anonymity otherwise available on the internet.”<sup>25</sup> HB 1891 would, therefore, face the same fate.

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Again, we respectfully **ask you to veto HB 1891**. 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.<sup>26</sup>

Sincerely,

Carl Szabo  
Vice President & General Counsel, NetChoice

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

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<sup>25</sup> *Griffin* at \*51 quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).

<sup>26</sup> The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.