Patrick Hedger
Director of Policy
NetChoice

NetChoice
Protecting Free Speech and Free Enterprise Online

New Hampshire SB 263

TESTIMONY IN OPPOSITION

April 9, 2025

New Hampshire House of Representatives
House Judiciary Committee

Dear Chairman Lynn, Vice Chairman Mannion and members of the Committee:

NetChoice is a trade association working to make the internet safe for free enterprise and free expression. In line with that mission, we write in opposition to SB 263, a bill that seeks to criminalize speech and undermine New Hampshire's artificial intelligence (AI) development. NetChoice respectfully asks that you oppose this bill as it would:

> 1. Violate the First Amendment, and
> 2. Create a Private Right of Action (PRoA) that would be a death sentence for AI development in New Hampshire

SB 263 is an Unconstitutional Prior Restraint on Speech

SB 263 attempts to criminalize speech generated through the use of AI. The categories of speech the bill focuses on are, among others, related to violence, sexually explicit conduct, illegal drug use, and self-harm and suicide. While we share the sentiment that children should be protected from harmful content online, this bill causes multiple constitutional problems and ultimately unconstitutional laws protect no one.

First, the bill does not specify that a minor has to engage with the criminalized speech on the AI platform directly for liability to attach. This means that a bad actor can use any AI chatbot or service, copy and paste it onto another site, and send it to a child at a later date. Since there is no accounting for the depravity of individuals willing to target children, this in essence is a mandate from the state to prevent any AI chatbot from being able to generate adult-appropriate material whatsoever. The scope of speech swept up by this is incredibly wide. Beyond what the bill authors surely intend, providers of AI systems could assume liability for providing information on topics such as sexual and mental health to recipes involving alcohol. While the intent is noble, the results violate the First Amendment.

The state is not empowered to preemptively censor the speech of private entities or individuals. This is understood to be a "prior restraint" on speech, and the Supreme Court has routinely held that this is among the most egregious of First Amendment violations. While the state certainly has an interest in the welfare of the children living in it, that does not supersede the fundamental constitutional rights of every

New Hampshire citizen.

Even if SB 263 did specify that liability would only attach if the minor engaged with the speech in question directly on the AI platform, First Amendment problems would still persist. In this case, for the provision to be reasonably enforceable, AI providers would necessarily have to perform some form of age verification. After all, if you don't know who is a child, you either have to collect the user's personal identifiable information or simply assume everyone is a child. Treating everyone as a minor and coupling it with a censorship mandate, as we have already clarified, is a massive prior restraint violation. But a state-mandated age verification regime is also violative of the First Amendment.

Courts have consistently recognized that even minors have constitutional rights to receive information and ideas through various media. But SB 263's requirements would effectively create a barrier to constitutionally protected speech for users *of all ages*, not just minors.

The Supreme Court has invalidated such restrictions when they impermissibly chill access to lawful speech.[1] In *Brown v. Entertainment Merchants Association*, the Court struck down a California law restricting minors' access to violent video games without parental consent. The Court rejected the notion that a new category of unprotected speech could be created for speech directed at children, emphasizing that minors are entitled to significant First Amendment protection. Justice Scalia's majority opinion noted that the government cannot "restrict the ideas to which children may be exposed" simply because it disagrees with them.

Several state laws aimed at requiring age verification for online access are being challenged in federal courts on constitutional grounds. Last month, a Federal judge permanently enjoined an Arkansas law requiring social media platforms to conduct age verification:

> "Age-verification requirements are also more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies. 'Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source.' *Ashcroft v. ACLU*, 542 U.S. 656, 657 (2004). And '[u]nder a filtering regime, adults . . . may gain access to speech they have a right to see without having to identify themselves[.]' *Id*. Similarly, the State could always 'act to encourage the use of filters . . . by parents' to protect minors. Id.; *see also Playboy Ent. Grp*., 529 U.S. at 809–10, 815 (finding that voluntary, 'targeted blocking' of certain content by viewers 'is less restrictive than banning' the same content)."[2]

Federal judges have also preliminarily blocked these laws in multiple other states - including California,[3] Mississippi,[4] Texas,[5] and Utah,[6] and Ohio[7] - pending full legal review of the challenges. A similar legal challenge to SB 263 would bring confusion and significant cost to New Hampshire taxpayers and is best avoided.

---

[1] *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011).
[2] *NetChoice, LLC v. Griffin* (W.D. Ark. 2023)
[3] *NetChoice v. Bonta* (N.D. Cal. 2024)
[4] *NetChoice, LLC v. Fitch* (S.D. Miss. 2024)
[5] *Computer & Communications Industry Association v. Paxton* (W.D. Tex. 2024)
[6] *NetChoice, LLC v. Reyes* (D. Utah 2024)
[7] *NetChoice, LLC v. Yost* (S.D. Ohio 2024).

A PRoA is an Easily Abused Disaster for New Hampshire's Innovation Economy

In a noble attempt to protect children, the bill introduces a number of major unintended consequences. For one, the bill does not focus any attention on the individuals actually soliciting this content in order to target children. Instead, it would criminalize and fine completely unrelated entities. If, for example, a local New Hampshire restaurant created a chatbot to facilitate customer service interactions, the restaurateur could face liability if their chatbot discussed the alcoholic drink options on the menu with a minor, despite the fact that any minor looking at a paper menu could see the same information. If another chatbot was misused by a bad actor to generate fifty bullying statements that were later sent to children, the bad actor who harassed those children would not be liable for anything under this bill. Instead, the chatbot provider, including small business owners with customer service interfaces, would be criminally prosecuted and fined $50,000.

This Private Right of Action (PRoA), instead of being a tool to empower victims, would instead immediately transform into a weapon for trial attorneys to target small businesses and other small to medium sized entities throughout New Hampshire–every one of which are likely trying their best to be good faith actors in their community.

Instead of trying to educate and empower the small business community to safely and effectively adopt AI tools into their business models, this bill condemns them by forever closing off access to a potentially game changing technology. For most, the threat of tens or hundreds of thousands of dollars worth of fines will be plenty to avoid adopting these tools. Consumers throughout New Hampshire will miss out on an entire generation of customer service tools that will improve the experience and outcomes for residents of other states.

Again, it must be pointed out that nothing in this bill, neither the speech criminalization (which is unquestionably unconstitutional) or the PRoA, are targeted at actual bad actors. If a predator uses a small business's chatbot to create a message targeting children and then sends that message across an unrelated platform or medium, the only person that this bill holds liable is the small business owner who has no control over that situation and who wants the best for the members of their community. Ultimately, SB 263 places a target on the backs of small businesses and the First Amendment rights of every Granite Stater while letting the real bad actors off scot-free.

Again, we respectfully ask for you to oppose SB 263. 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.

Sincerely,

Patrick Hedger
Director of Policy, NetChoice[8]

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

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