Written PROPONENT testimony for HB 2592 Requiring the use of age-verification technology to permit access to internet websites containing material that is harmful to minors.

To: Madam Chair Representative Susan Humphries and House Judiciary Committee members

From: Dr. Kevin Vance

Date: February 6, 2024

Madam Chair Humphries and members of the committee,

My name is Kevin Vance. Thank you for the opportunity to speak as a PROPONENT to bill HB 2592. I'm a political scientist whose expertise is in constitutional law. My testimony is directed to the claim that this bill might restrict constitutionally protected free speech. First, this bill does not even touch on constitutionally protected speech since obscenity has no connection with the purpose of the First Amendment and no relationship to any fundamental right protected by the Fourteenth Amendment that is deeply embedded in our nation's history and tradition *and* implicit in the concept of ordered liberty. Second, even if the courts *did* decide to treat this bill as a burden on constitutionally protected speech, this bill should easily satisfy even the highest level of scrutiny that the courts might apply.

To my first point, restrictions on pornographers – much less restrictions on pornographers who do not protect children from accessing their obscene material – bear no connection to the purpose of the First Amendment's freedom of speech provision. The First Amendment was intended to protect deliberation connected to political affairs and to the search for truth. The early controversies over the Alien and Sedition Acts as well as early common law prosecutions pertaining to various kinds of utterances that bore no connection to the search for truth or political deliberation underline this point. If anything, the distribution of pornographic materials to children might foster addictions that would make deliberation and the search for truth even more difficult. Even if the First Amendment were assumed by the courts to have a relationship to pornography, the First Amendment only restricts the powers of the state of Kansas to protect the children of Kansas insofar as the First Amendment embodies a "fundamental liberty" protected by the Fourteenth Amendment's due process clause. According to *Washington v. Glucksberg* (1997), which was only recently reaffirmed in *Dobbs v. Jackson Women's Health* (2022), only those rights which are both deeply embedded in our nation's history *and* implicit in the concept of ordered liberty can be deemed to be fundamental. A supposed right to distribute pornographic materials without any responsibility to protect children is certainly not deeply embedded in our nation's history, and a "liberty" that includes the right to carelessly distribute obscenity can hardly be "ordered."

There *is* a fundamental right at play that is deeply embedded in our nation's history, implicit in the concept of ordered liberty, and continuously reaffirmed by the U.S. Supreme Court starting with *Pierce v. Society of Sisters* (1925). That is the fundamental right of parents to direct the education of their children, which is grounded in the natural duty that parents have to care for their offspring. Parents in Kansas and the rest of the country are finding it increasingly difficult to shoulder all of the burden in protecting their children from online harms. The fundamental rights of parents are continually undermined by companies seeking profit maximization without due care for protecting children from obscene content.

Finally, even if the courts decide to treat this bill and those like it under First Amendment strict scrutiny analysis, this bill would easily satisfy even that highest level of judicial scrutiny. It is unlikely that anyone would question the compelling state interest of states to protect children from obscene materials, so judicial analysis would likely center around the question of whether this bill is narrowly tailored to achieving that compelling

state interest. Twenty years ago, when the internet was less embedded in every aspect of our lives, the Supreme Court supposed that internet filters might be a less restrictive means of achieving a compelling state interest connected to internet pornography. Not only has there been enough turnover on the Court so that *Ashcroft v. ACLU* (2004) would likely come out a different way today, but twenty years of experience has shown that there is simply not a less restrictive approach to achieve the compelling state interest of helping Kansas parents fulfill their duties to their children by protecting them from online obscenity. Few parents have the time or resources to manage every new outlet that their children might encounter to access the internet and learn to use the *limited* and complex parental control features that many companies make available. It is long past time for the burden to shift to the companies themselves as the only means available to achieve the state's compelling interest.

Thank you, Madam Chair and members of the committee, for allowing me to provide support for HB 2592 Please feel free to reach out to me if I can be of assistance to you in this worthy endeavor to protect our children and provide needed services to them. Thank you for your consideration.

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