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Kansas SB 394

OPPOSITION TESTIMONY

February 3, 2024

Kansas State Senate
Judiciary Committee

NetChoice respectfully asks that you **oppose** SB 394 as it:

- Violates the 1st Amendment of the US Constitution;
- Usurps and undermines the traditional role of Kansas families; and
- Disincentivizes technological innovations to keep kids safe online.

As further outlined below, this bill would immediately invite constitutional challenges. In fact, the Supreme Court has already struck down a similar bill after finding it violated the First Amendment rights to receive information and to free speech.

Additionally, the bill represents a major government incursion into the traditional role that the family has played in Kansas and American history. Parents are the best stewards of their own children, not the state. SB 394 could give families the false impression that parental oversight into the online practices of their kids is no longer necessary, thereby making it more likely young Kansas citizens are exposed to vile content.

Finally, the bill is more likely to freeze the innovation of parental control products rather than spur them. As it stands, there are many different options in the marketplace for parents to choose from, and manufacturers and developers compete with each other to create more attractive products. To avoid any of these negative outcomes, the committee should reject SB 394.

SB 394 violates the First Amendment

Congress passed the Communications Decency Act in 1996. The law was an attempt to restrict the access of minors to obscene content on the internet. The legislation criminalized the “knowing” dissemination

of "obscene or indecent" material or knowingly sending messages "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to those under the age of 18.¹ It created safe harbors for those who made good faith attempts to restrict minors' access to such content.²

The law was almost immediately enjoined and then struck down as unconstitutional by a District Court. The federal government lost on appeal to the Supreme Court in the 9-0, landmark case, *Reno v. ACLU*.

The Supreme Court held that the broad nature of the restrictions, their punitive nature, and their attachment to a medium which enjoys full 1st Amendment protections, among other issues, were enough to rule that the Communications Decency Act was violative of the 1st Amendment.

A terrible but altogether predictable side effect of SB 394 is that the bill would give parents a false sense of security.

The bill sponsors, just like Congress in 1996, are concerned with the welfare of children online. That is a laudable goal, and one that NetChoice shares. The reality however, is that the Supreme Court looks more seriously at unintended negative consequences to constitutional rights rather than well-intentioned goals. There is no question, seeing as the issues at the core of both cases are identical, that SB 394 would quickly meet the same fate as the Communications Decency Act. The confusion and significant cost to the Kansas taxpayers a challenge would bring is best avoided in an already settled case as this one.

SB 394 replaces the Kansas family with the Kansas legislature

Kansas parents are the ultimate arbiters of their children's wellbeing and moral development. Conservative and other limited government groups have long fought for a parent's right to set the course of their children's lives, unencumbered by government bureaucrats, panels, or committees. The moments when the state usurps the parent should be few and far between and should be recognized as a failure, not a triumph of public policy.

A terrible but altogether predictable side effect of SB 394 is that the bill would give parents a false sense of security. Filtering technology is only so precise, and even the most sophisticated software will only keep out a certain number of online threats. That means, even in the most secure environments, parents

¹ Cornell Law school, Legal Information Institute, [Reno v. ACLU | US Law | LII / Legal Information Institute \(cornell.edu\)](#)

² *Ibid*

need to be overseeing their childrens' online activity. SB 394 sends a false all-clear message to parents who would otherwise remain vigilant.

Kansas parents need to be empowered to make the decisions they deem appropriate for their own children. Government should not be making the de facto choice on their behalf that a family must then remedy. If the state wants to be a genuine partner to parents in their efforts to keep kids safe online, there are much more targeted, constitutional remedies available.

States, like Florida, have begun to consider online and social media specific education in the classroom. This would help arm young people with the information they need to keep their data more secure, focused on age appropriate content, and away from bad actors who would do them harm.

States, like Florida, have begun to consider online and social media specific education in the classroom. This would help arm young people with the information they need to keep their data more secure, focused on age appropriate content, and away from bad actors who would do them harm. The state could also take steps to publicize the resources that are available to filter content or monitor and control screen time. Solutions for families and kids don't need to come in the form of big government mandates. Parents should be treated like the responsible adults they are, not like criminals in need of filtering and monitoring.

Government intrusion will make filtering tech worse, not better.

As it stands, dozens of manufacturers and other private companies offer device filtering technology and other parental control software to help kids stay safe online. Due to the incentives of the free market, all of those entities compete tirelessly against each other for business. That means technology is always improving, services are getting more sophisticated and easy to use, and over time kids are safer for it.

SB 394 would take a wrecking ball to the entire private market of these offerings. With broad, confusing language, and legal liability attached, the freedom to innovate would be stripped away. A one-size-fits-all approach to filtering and child safety would need to be adopted in order for companies to be sure that they would avoid lawsuits or government sanction.

The elimination of competition and the creation of a single, government-approved mode of ensuring a child-safe online environment would be the end of innovation in this space. That would be a disaster. Everyone agrees that more can be done to keep kids safe online, but that is only a reasonable possibility when there is freedom for our innovators to create new solutions. Innovation at the speed of government is not a wise model for this committee to adopt.

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For these reasons, we respectfully ask you to **oppose SB 394**. As ever, 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,

Carl Szabo
Vice President & General Counsel
NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.

SENATE BILL No. 394

By Committee on Judiciary

1-24

1 AN ACT concerning consumer protection; relating to internet content that
2 is harmful to minors; requiring age verification for access to such
3 content; providing for civil penalties for violations; establishing a civil
4 cause of action for damages, attorney fees and costs.
5

6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. (a) Any commercial entity that knowingly o r
8 i n t e n t i o n a l l y shares or
9 ~~distributes material that is harmful to minors on a website and such~~
10 ~~material appears on 25% or more of the webpages viewed on such website~~
11 ~~that contains a substantial portion of the material is harmful to minors~~

12 in any calendar month, or that knowingly hosts such website shall verify
13 that any person attempting to access such website, who is a resident of this
14 state or who is located in this state at the time of such attempted access, is
15 18 years of age or older. It shall be a violation of this section to allow a
16 person to access such website without verifying such person is 18 years of
17 age or older. Such age verification shall be conducted through the use of:

18 (1) A commercially available database that is regularly used by
19 businesses or governmental entities for the purpose of age and identity
20 verification; or

21 (2) any other commercially reasonable method of age and identity
22 verification.

23 (b) Any person who was able to access a website without verifying
24 such person's age in violation of this section may report such violation to
25 the attorney general. Upon receipt of any such report, the attorney general
26 shall investigate and may bring an action for injunctive relief to enjoin any
27 continuing violation. In addition to any injunctive relief, such action may
28 also seek to impose a civil penalty on the commercial entity of not less
29 than \$500 and not more than \$10,000 for each such violation instead of the
30 penalty provided for in K.S.A. 50-636(a), and amendments thereto. Each
31 instance in which a website is accessed in violation of this section shall
32 constitute a separate violation.

33 (c) Any violation of this section is an unconscionable act and practice
34 under the Kansas consumer protection act.

35 (d) For purposes of the remedies and penalties provided by the
36 Kansas consumer protection act:

(1) The person alleging a violation of this section shall be deemed a
consumer, and the commercial entity that violates this section shall be

- 1 deemed the supplier; and
- 2 (2) proof of a consumer transaction shall not be required.
- 3 (e) The parent or legal guardian of a minor, who was able to access a
4 website without verifying such minor's age in violation of this section,
5 may bring a private action against the commercial entity that violates the
6 provisions of this section. Notwithstanding the provisions of K.S.A. 50-
7 634 and 50-636, and amendments thereto, a person bringing such action
8 may seek the following relief:
- 9 (1) Actual damages resulting from a minor's access to material that is
10 harmful to a minor;
- 11 (2) statutory damages in an amount not less than \$50,000; and
- 12 (3) reasonable attorney fees and costs.
- 13 (f) (1) A commercial entity or third party that performs the required
14 age verification shall not retain any identifying information of the
15 individual after access has been granted to the website.
- 16 (2) If a commercial entity is found to have knowingly retained
17 identifying information of an individual after access to a website has been
18 granted to such individual, then such commercial entity shall be liable to
19 such individual for damages resulting from such retention, including
20 reasonable attorney fees and costs as ordered by the court.
- 21 (g) Nothing in this section shall be construed to impose an obligation
22 or liability on an internet service provider or the user of an interactive
23 computer service.
- (h) This section may not apply to any bona fide news or public interest
broadcast, website video, report, or event and may not be construed to affect the
rights of any news-gathering organizations.
- (i) An internet service provider or its affiliates or subsidiaries, a search engine, or
a cloud service provider may not be held to have violated the provisions of this
section solely for providing access or connection to or from a website or other
information or content on the internet or a facility, system, or network not under
that provider's control, including transmission, downloading, intermediate
storage, access software, or other forms of access or storage to the extent the
provider is not responsible for the creation of the content of the communication
that constitutes material harmful to minors.
- 24 (j~~h~~) As used in this section:
- 25 (1) "Commercial entity" means a corporation, partnership, limited
26 liability company, limited liability partnership, limited partnership, sole
27 proprietorship or any other for profit organization.
- 28 (2) "Commercially reasonable method of age verification" means:
- 29 (A) Any method expressly approved by the attorney general; or
30 (B) any method that is certified in documented international standards
31 for age verification as specified by the attorney general.
- 32 (3) "Harmful to minors" means the same as defined in K.S.A. 21-
33 6402, and amendments thereto.
- 34 (4) "Host" means to provide the technology and resources necessary
35 to store and maintain the electronic files and applications associated with a
36 website on a computer server in order for such website to be accessible via
37 the internet. The term "host" does not include an internet service provider.

1 other health records; (H) social security number; (I) biometric information;
2 (J) disabilities; (K) socioeconomic information; (L) food purchases; (M)
3 political affiliations; (N) religious information; (O) text messages; (P)
4 documents; (Q) employment identifiers; (R) search activity; (S) photos;
5 (T) voice recordings; or (U) geolocation information.

6 (6) "Interactive computer service" means any information service,
7 system or access software provider that provides or enables computer
8 access by multiple users to a computer server, including a service or
9 system that provides access to the internet and such systems operated or
10 services offered by libraries or educational institutions.

11 (7) "Material" means any book, magazine, newspaper, pamphlet,
12 poster, print, picture, figure, image, description, motion picture film,
13 record, recording tape or video tape.

(8) "News-gathering organization" means any of the following:

(i) an employee of a newspaper, news publication, or news source,
printed or on an online or mobile platform, of current news and public
interest, while operating as an employee as provided in this subsection
(j)(8), who can provide documentation of employment with the
newspaper, news publication, or news source; and

(ii) an employee of a radio broadcast station, television broadcast
station, cable television operator, or wire service, while operating as an
employee as provided in this subsection (j)(8), who can provide
documentation of employment.

14 (8) "Shares or distributes" means to display or present material or
15 make such material available for download, with or without consideration.

(9) "Substantial portion" means more than 33 1/3% of total material on a
website, which meets the definition of "harmful to minors" as defined by
this section.

16 (i) The provisions of this section are declared severable. If any
17 provision, clause or subsection of this section or the application thereof to
18 any person shall be held invalid, such invalidity shall not affect the validity
19 of the remainder of this section.

20 Sec. 2. This act shall take effect and be in force from and after its
21 publication in the statute book.

38 (5) "Identifying information" means information that personally
39 identifies an individual or that is linked to information that personally
40 identifies an individual, including, but not limited to: (A) First and last
41 name; (B) home address; (C) home telephone or cellphone number; (D)
42 electronic mail address; (E) any other information that allows physical or
43 online contact with the individual; (F) criminal records; (G) medical or