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Chair James, Vice-Chair Cabral-Guevara, and Honorable Members of the Senate Committee on Mental Health, Substance Abuse Prevention, Children and Families:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide written testimony in opposition to Senate Bill 683.

Put simply, SB-683 raises significant concerns around privacy, surveillance, and the First Amendment. While the ACLU of Wisconsin is sympathetic to the overarching goal of this legislation, we do not believe an appropriate trade-off is compromising the civil liberties of *all* Wisconsinites.

SB-683 proposes to “card” all people who access websites with content deemed “material harmful to minors.” Under the bill, age verification could be conducted by checking a website-user’s government-issued identification card or “by using any commercially reasonable method that uses public or private transactional data gathered about the individual.”

The language in SB-683 bears a striking resemblance to a law passed in Texas<sup>1</sup> that has been challenged in federal court on First Amendment grounds.<sup>2</sup> A similar age-verification law aimed at social-media platforms passed in Arkansas was enjoined following a lawsuit challenging the law’s constitutionality.<sup>3</sup> In enjoining each of these laws, federal courts in Texas and Arkansas found that the laws unconstitutionally discriminated against protected speech and impermissibly placed speech behind age verification requirements for both minors and adults.<sup>4</sup>

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<sup>1</sup> Texas H.B. 1181, <https://capitol.texas.gov/tlodocs/88R/billtext/html/HB01181H.htm>.

<sup>2</sup> *Free Speech Coalition, Inc. v. Colmenero*, No. 23-CV-917 (W.D. Tex. Aug. 31, 2023), [available here](#).

<sup>3</sup> *NetChoice, LLC v. Griffin*, 23-vs-5105 (W.D. Ark. Aug. 31, 2023), [available here](#). The ACLU, ACLU of Arkansas, and the Electronic Frontier Foundation filed an amicus brief in support of the challenge to this Arkansas law, [available here](#).

<sup>4</sup> The two decisions follow long-established protections for speech online. Social media's primary purpose is to allow users to speak, and "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham v. North Carolina*, 582 U.S. 98, 108 (2017). The Supreme Court has been adamant that children "are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 794-95 (2011); accord *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503 (1969). Thus, broad bars to accessing speech online based on age are likely unconstitutional.

The two decisions further recognize that the laws' preferred regulation of speech online—age verification—places impermissible barriers between adult and minor users and the right to speech by undermining their privacy. The Arkansas court recognized that age verification requires adults and minors to surrender their anonymity.<sup>5</sup> The Texas court expressly concluded that the evidence showed that age verification technology remains intrusive of privacy, despite purported advances in the technology.<sup>6</sup> Even requirements in the law that data not be retained or used for other purposes did not alleviate the chilling effect from loss of anonymity.<sup>7</sup>

Common age verification methods include uploading a driver's license or state ID, facial recognition technology, or private transactional data such as a credit card. These requirements could "serve as a complete block to adults who wish to access [online] material but do not" have the necessary form of identification.<sup>8</sup> Under SB-683, that could include Wisconsinites who do not have a driver's license or other government-issued form of identification or a credit card, including undocumented immigrants or transgender and gender-nonconforming people who may lack identification that matches their true identity.

For example, the issue of storage and access could be illustrated by the difference between showing an ID at a bar and uploading an ID to a website online. At a bar, the bouncer takes a quick look at the ID to verify the age without storing or holding this sensitive information. Uploading an ID to a website carries far greater privacy risks, and the fear of the consequences of data misuse from uploading an ID to a website without knowledge is enough to scare many users away from accessing this content.

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<sup>5</sup> "Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and 'discourage[s] users from accessing [the regulated] sites.' *Reno v. American Civil Liberties Union*, 521 U.S. 844, 856 (1997). Age-verification schemes like those contemplated by Act 689 'are not only an additional hassle,' but 'they also require that website visitors forgo the anonymity otherwise available on the internet.' *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003); see also *ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to 'relinquish their anonymity to access protected speech')."

<sup>6</sup> "First, the restriction is constitutionally problematic because it deters adults' access to legal sexually explicit material, far beyond the interest of protecting minors...People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers... [the] Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech." (internal question marks omitted)

<sup>7</sup> The Texas court said, "Defendant contests this, arguing that the chilling effect will be limited by age verification's ease and deletion of information. This argument, however, assumes that consumers will (1) know that their data is required to be deleted and (2) trust that companies will actually delete it. Both premises are dubious, and so the speech will be chilled whether or not the deletion occurs. In short, it is the deterrence that creates the injury, not the actual retention."

<sup>8</sup> *PSINet, Inc. v. Champan*, 362 F.3d 227, 237 (4th Cir. 2004); see also *Am. Booksellers Found.*, 342 F.3d at 99 (invalidating age verification requirement that would make "adults who do not have [the necessary form of identification] . . . unable to access those sites").

Determining who is a minor requires collecting sensitive information from all users—information that can then be stolen and exploited even years later.<sup>9</sup> As the court noted in *ACLU v. Gonzales*, age verification deters “many users who are not willing to access information non-anonymously...from accessing the desired information.”<sup>10</sup>

Ultimately, by forcing adults to identify themselves in this manner to access lawful, fully protected content online that may fall under the bill’s definition of “material harmful to minors,” SB-683 imposes an unconstitutional burden on adult access to protected speech. The bill’s age verification requirement will likewise burden users who do not have government identification, who wish to exercise their First Amendment right to anonymity or who are otherwise concerned about privacy and security, or whose age or identity “commercially reasonable method[s]” will fail to accurately gauge.

Courts have consistently invalidated laws that prohibit granting minors access to online content without age verification, in large part because of the significant burden verification imposes on all users and the availability of less-restrictive alternatives such as 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. As currently written, SB-683 is extremely likely to trigger litigation at significant cost to Wisconsin taxpayers.

We can make the internet safer without sacrificing the privacy and constitutional rights of all Wisconsinites.

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<sup>9</sup> Matt Perault, J. Scott Babwah Brennan, “To Protect Kids Online, Policymakers Must First Determine Who is a Kid,” Tech Policy Press (July 5, 2023), <https://www.techpolicy.press/to-protect-kids-online-policymakers-must-first-determine-who-is-a-kid/>.

<sup>10</sup> *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).