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House Judiciary Committee
Ohio House of Representatives
77 S. High St.

RE: House Bill 226, the "App Store Accountability Act"

To Chairman Thomas, Vice Chair Mathews, Ranking Member Isaacsohn, and members of the House Judiciary Committee, I want to thank you for this opportunity to provide testimony regarding House Bill 226, the "App Store Accountability Act." The constitutionality of such laws is sound: the Government has a clear, compelling interest to protect children from harmful content online, age verification is a well-tailored means to meet that Government interest which protects the First Amendment rights of adults, and the ability of minors to enter into contracts is properly regulated by the state of Ohio. As a constitutional law firm dedicated to the First Amendment's protections of speech and religious practice, we take the concerns of those who might object to this law seriously. However, ultimately, H.B. 226 meets the rigorous standards the Supreme Court has laid out for meeting First Amendment scrutiny.

Federal courts are extremely cautious about laws restricting adolescent Americans' access to protected speech. While obscene material is afforded no protection, laws targeting such obscenity can nevertheless become invalid under the First Amendment if they catch up protected speech in their wake. *Compare Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that "obscenity is not protected expression and may be suppressed") *to Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004) (striking down "a content-based restraint on the dissemination of constitutionally protected speech"); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (striking down a California law

prohibiting the sale or rental of "violent video games" to those under eighteen). However, there are four points which differentiate H.B. 226 from previous internet regulations and make it constitutionally sound.

The first is that this law puts discretion with parents instead of legislators or bureaucrats. Instead of the constitutionally dubious undertaking of putting the government in charge of which speech minors can access, it empowers parents to take control of their child's media consumption. That is not only well within a well-established right of a parent to control their child's upbringing, but it is indeed their duty. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose… [is that] the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."); *Wisconsin v. Yoder*, 406 U.S. 205. 214 (1972) (emphasizing the "traditional interest of parents with respect to the religious upbringing of their children."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'").

These rights of parents are fundamental. "The liberty interest at issue in this case–the interest of parents in the care, custody, and control of their children–is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Even in *Brown,* the Supreme Court acknowledged that "the state has the power to enforce parental prohibitions." *Brown*, 564 U.S. at 795 n.3. The Supreme Court has left undisputed "that parents have traditionally had the power to control what their children hear and say." *Id.* The Supreme Court's jurisprudence has consistently "reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

Second, this law does not make content-based exceptions. There is a federal injunction in place, issued last year, against another Ohio parental consent law, the Parental Notification by Social Media Operators Act, Ohio Rev. Code § 1349.09(B)(1). *See NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 546 (S.D. Oh. Feb. 12, 2024). I reference that law to highlight this crucial distinction. The act in that case required "certain website

operators to obtain parental consent before allowing any unemancipated child under the age of sixteen to register or create an account on their platform." *Id.* The legislation singled out content which "targets children," or "is reasonably anticipated to be accessed by children," raising serious concerns. Moreover, the legislation in that case made exceptions for certain content providers: leading the court to find that Ohio was "therefore favoring engagement with certain topics, to the exclusion of others. That is plainly a content-based exception deserving of strict scrutiny." *Id.* at 558..

This case contrasts markedly with such content-based restrictions. The law here makes no exceptions depending on content provider, it is a categorical protection of minors. The Weather App is treated identically to TikTok which is treated identically to Tinder. Ohio would not engage in any content-based discrimination under H.B. 226, nor would application be categorized. Violence, sexual content, bullying, and other sorts of concerning content are not condemned by H.B. 226. Rather, parents are empowered with additional tools to make their own decisions free from government moderation. The Government's only role is to ensure that the application store provider's age verification is sufficiently robust. Neither this legislature, nor an executive appointee, nor a judge, makes any call as to what media any parent's child may consume. Further, H.B. 226 only regulates application store providers. Internet users or content creators around Ohio will never have to self-censor on the internet for fear of H.B. 226, since it imposes no penalties or duties on them, nor anyone else save application store providers. By regulating only the firms which produce this narrow type of electronic store, the burden is sufficiently narrow to ensure that no ordinary Ohioan faces additional legal burdens.

As a third point, this law restricts contract rights, not speech rights, of minors. Of course children have protections as American citizens under the Bill of Rights and the Fourteenth Amendment. *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 212-213 (1975) ("[M]inors 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."). Furthermore, laws which implicate the First Amendment must have "narrow specificity." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). However, H.B. 226 can be clearly distinguished from cases in which the Supreme Court has struck down laws regarding children's consumption of online media. In the landmark case of *Ashcroft v. ACLU II*, for example, the Government categorized speech based on its content. *Ashcroft* defined "harmful to minors" as media which offended "contemporary

community standards." The Supreme Court rejected this standard as overly broad, one which did not pass the narrow tailoring requirement of the First Amendment. 542 U.S. at 673. *See also Reno v. ACLU*, 521 U.S. 844 (1997). Similarly, the government cannot limit minors' access to speech merely because the legislature deems protected speech detrimental, as California attempted *Brown v. Ent. Merchs. Ass'n* by determining that violence in video games was so concerning as to warrant government intrusion. 564 U.S. 786 (2011).

H.B. 226, rather than limiting speech, regulates a minor's ability to enter into contracts, a well-established power of the government. It targets minors' commercial conduct in creating accounts, purchasing applications, or other electronic transactions. Because it regulates contract formation, not speech, it follows that it has no direct First Amendment implications. Indeed, children's ability to engage in commerce is pervasively regulated. Minors cannot purchase alcohol, tobacco or nicotine products, adult magazines, firearms, and more; not only in Ohio but in any state. All states, including Ohio, severely limit the enforceability of contracts entered into by minors. *See, e.g. Mestetzko v. Elf Motor Co.*, 165 N.E. 93 (Ohio 1929) (holding contracts entered into by minors to be voidable); *Casella v. Tiberio*, 80 N.E.2d 426 (Ohio 1948). In other words, the law no more violates the First Amendment than any of the other many laws that require parental consent or confirmation for contracts by minors.

Parental consent is required for all manner of agreements by minors. ORC 3376.13 requires that consent for student-athlete contracts. ORC 4507.07 requires that consent for vehicle licenses. ORC 2919.12 requires parental notification and consent for minors before abortion. Nor is this a modern or novel innovation, minors who enlisted without parental consent in violation of federal law could find themselves returned home on writs of habeas corpus issued at their parents' request. See, *e.g.*, *United States v. Anderson*, 24 F. Cas. 813 (Tenn. 1812) ("Congress did not intend the minor should have any discretion, either as to enlistment or discharge."); *Commonwealth v. Callan*, 6 Binn. 255 (Pa. 1814) (*per curiam*). This federal law remains. 10 U.S.C. § 505(a).

As a fourth and final point, nothing in law places undue burden on adults' internet activity, privacy or speech. There is no serious claim that age verification poses a constitution-offending privacy invasion in the fields of alcohol and tobacco sales, opening bank accounts, starting jobs, entering into contracts, or myriad other legally significant commercial relationships. Indeed, the same "invasion" of privacy already occurs in the

ordinary course of creating an account with a typical application store. In order to create an Apple ID, one must provide their full name, date of birth, email address, and phone number. In effect, the only change here is that the application store provider must work to actually confirm these details. Revealing such information to an employer, banker, or store clerk to verify identification or sufficient age is a normal, accepted, way of conducting business in the modern world. The same is true here: there are numerous minimally invasive verification techniques that can be used to preserve important privacy concerns.

Even in *Ashcroft II*, the Supreme Court limited the scope of their opinion: "[o]n a final point, it is important to note that this opinion does not hold that [the Government] is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials." 542 U.S. at 672-73. The state of Ohio can "properly conclude that parents and others, teachers for example, who have… primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*, 390 U.S. at 639. Given the pressing need to address the deleterious effects of certain applications on children and the careful crafting of this law, the ACLJ fully endorses H.B. 226 and encourages the members of this committee to pass the Bill.

Very respectfully,

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