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State of Utah
House Judiciary Committee

February 3, 2023

Re: **Opposition to Utah HB 311**

Dear Chair Hawkins and members of the committee:

We respectfully ask that you **oppose** HB 311. The bill's goal—to protect children from harmful content—is laudable and one NetChoice supports. But the bill's chosen means are **unconstitutional** and will require businesses to collect sensitive information about children, **counterproductively putting children at risk**. First, the bill is unconstitutional because it infringes on adults' lawful access to constitutional speech—a regulation Congress already tried and the Supreme Court already repudiated. Second, profligate sharing of children's personally identifiable information (PII) increases the risks that it will be captured and misused by malefactors. HB 311 purports to protect children, but instead it puts their sensitive data at greater privacy and security risks.

HB 311 Violates the First Amendment

Requiring identity authentication of all users will add barriers to using web services, reducing people's willingness to share First Amendment-protected speech. Mandatory identity verification prevents anonymous or pseudonymous browsing—something that's critical for political minorities to share speech.¹ Likewise, identity authentication also discourages people from sharing criticism, such as negative consumer reviews, or whistleblowing about wrongful conduct.

Laws that burden speech in this way are presumptively unconstitutional. In *Reno v. ACLU*, the Supreme Court struck down a similar law, the Communications Decency Act of 1996, after finding that “knowing...minors are likely to access a website—and therefore create liability for the website—would surely burden communication among adults,” placing an “unacceptably heavy burden on protected speech.”² The Court wrote that “the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit” to children.³

¹ See, e.g. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

² *Reno v. ACLU*, 521 U.S. 844, 849 (1996).

³ *Id.* at 885.

For this reason, NetChoice is currently suing⁴ California over its similar law, the Age-Appropriate Design Code.⁵ To avoid unnecessary First Amendment litigation, this committee should at least wait until this lawsuit is resolved to advance HB 311.

HB 311 Puts Minor's Sensitive Data at Risk

HB 311 was ostensibly introduced to protect children but instead it puts children's sensitive data at *greater* privacy and security risks. For social media companies to comply with HB 311's command "to verify the age of Utah residents," they must force every user to to turn over extremely sensitive PII. "Acceptable form[s] of identification" under HB 311 include: "(a) a currently valid driver license; (b) a birth certificate; " or "(c) a currently valid passport." Yet large-scale mandatory collection of this data increases the risks that it will be captured and misused.

In evaluating HB 311, this committee should recall the data breach Utah's Child Protection Registry suffered in 2006. The Utah agency in charge of policing Web-based purveyors of pornography, alcohol, tobacco and gambling accidentally divulged children's sensitive information; information the state expressly promised to safeguard. With this legislation, Utah is forgetting the failures of the past, and unlike just email addresses of minors, the data that's being amassed under HB 311 is some of the most sensitive and potentially dangerous possible.

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For these reasons, we respectfully ask you to oppose HB 311. 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.

⁴ Available at <https://bit.ly/3jiMhXy>.

⁵ Available at <https://bit.ly/3RkErh2>.

The Salt Lake Tribune

E-mail guardians let guard down

BY LINDA FANTIN
THE SALT LAKE TRIBUNE

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The Utah agency in charge of policing Web-based purveyors of pornography, alcohol, tobacco and gambling told some parents Thursday it divulged the e-mail addresses of their children - information the state is supposed to safeguard.

The breach of Utah's Child Protection Registry program is a major faux pas for the Utah Division of Consumer Protection. It also could pose a credibility problem for Unspam Technologies Inc., the private company that created the system and is pushing other states to adopt it.

Utah Department of Commerce Director Francine Giani said Thursday that a new consumer protection employee neglected to redact four e-mail addresses from citations obtained through a routine open-records request. Giani learned of the mistake, which occurred Oct. 3, from court papers filed Thursday by a California adult-industry trade group challenging the constitutionality of the controversial registry.

"A fair amount of trust has been placed with us and this is not a good thing," Giani said. "I'm sick about it."

Giani emphasized her department, not Unspam, was responsible.

But that didn't stop the Free Speech Coalition from arguing the entire program is far from foolproof. The breach underscores one of the issues the Federal Trade Commission highlighted in its review of e-mail registries - that the benefits are outweighed by the risk of compromise, said coalition attorney Jerome Mooney.

"It's a substantial failure of a program that's barely one year old," Mooney said. "And it's not like anyone was probing the system to look for weaknesses."

The breach involves citations issued last month to four companies for violating a new law that requires

adult-oriented Web sites to screen out the e-mail addresses of minors who appear on the state registry.

Named in the citations were DOS Media Now, an Encinitas, Calif., online gambling site; Golden Arch Casinos, of Overland Park, Kan.; Smoothbeer.com, a United Kingdom beer company; and SoftestGirls.com, a Singapore company that sent pornographic e-mails to Utah minors.

After reports of the crackdown appeared in the media, Justin Weiss of the E-mail Service Provider Coalition requested copies of the citations. The state promptly complied but neglected to redact the e-mail addresses of the children in question.

Weiss, whose trade group is supporting the coalition's legal challenge, alerted state officials to the security breach Oct. 3 and urged them to inform the individuals whose personal information was compromised, according to court filings.

Just two weeks earlier, Matthew Prince, president and CEO of UnSpam, claimed it was impossible for anyone to get their hands on the e-mail addresses on the registry.

"Even if ordered by a court or held at gunpoint, there is no feasible way that I, any Unspam employee, or any state official could provide you even a single address that has been submitted for compliance by any sender," Prince said in an affidavit.

That a state employee got the names and divulged them makes a mockery of Prince's comments, the Free Speech Coalition suggests in court papers. But Brent Hatch, an attorney for Unspam, points out that Prince was speaking only of e-mail lists submitted to his company. The state got the e-mails it divulged from parents who complained that their children were receiving illegal solicitations.

"This has nothing to do with the registry. The registry is completely secure," Hatch said. "The Free Speech Coalition got it flat wrong. We stand behind Mr. Prince's statement."

Utah and Michigan are the only states to adopt the registry created by Unspam. The company charges a half-cent for each address that is removed. The

registry is free for schools, parents and other guardians of minors to use.

Commercial e-mailers argue that the registry's time and cost are an unfair burden. U.S. District Judge Dale Kimball has set a Nov. 9 hearing on the coalition's motion for an injunction, and the state's request to dismiss the coalition's lawsuit.

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