March 2, 2023
The Honorable Spencer J. Cox
350 N. State Street
Suite 200
P.O. Box 142220
Salt Lake City, UT 84114

NetChoice

RE: Request for Veto: HB 311 (Social Media Usage) and SB 152 (Social Media Regulation)

Dear Governor Cox,

We respectfully urge you to **veto** both HB 311 and SB 152.

These bills' shared goal to protect children from harmful content is laudable and one NetChoice supports. But their chosen means are unconstitutional and will require businesses to collect sensitive information about children, counterproductively putting children at risk. Further, both bills are unconstitutional because they infringe on adults' lawful access to constitutional speech—a regulation Congress already tried and the Supreme Court already repudiated.

HB 311:

We ask that you veto HB 311 because it:

- Violates the First Amendment by banning anonymous speech;
- Violates the First Amendment by infringing on adults' lawful access to constitutional speech;
- Endangers children by requiring them to share their sensitive personally identifiable information, which creates risks that it will be captured and misused by malefactors.

NetChoice is currently suing California over its similar law, the Age-Appropriate Design Code (AB 2273). To avoid unnecessary First Amendment litigation, the legislature should at least wait until this lawsuit is resolved to advance HB 311.

Like California's AADC, HB 311 Violates the First Amendment

Requiring identity authentication of all users adds several unconstitutional barriers to sharing and accessing First Amendment-protected online speech. First, HB 311's mandatory identity verification requirements prevent anonymous and pseudonymous browsing. Second, HB 311 unconstitutionally restricts both adults' and minors' access to First Amendment-protected content.

Laws that chill and restrict Americans' speech in this way are unconstitutional under the First Amendment unless they pass strict scrutiny; a stringent test HB 311 will surely fail.[1] Third, HB 311 violates online services' well-established First Amendment right to editorial discretion.

First, HB 311's requirement for online services to collect PII of anyone who visits their websites functionally eliminates all unattributed activity and content on the Internet. This would hurt many communities, such as political minorities concerned about revealing their identity. The Supreme Court has repeatedly affirmed the First Amendment provides robust protection for anonymous speech as " . . . a shield from the tyranny of the majority. . . . It exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society."[2] HB 311 violates this principle.

Second, HB 311 unconstitutionally restricts Utahns' access to digital content on account of their age. In *Reno v. ACLU*, the Supreme Court struck down a similar law to HB 311, 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."[3] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[4] For this reason, NetChoice is currently suing[5] California over its similar law, the Age-Appropriate Design Code.[6]

Laws that restrict Americans' access to digital content on account of age are unconstitutional under the First Amendment unless they pass strict scrutiny.[7] To survive strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest.[8] The government nearly always fails this test—in state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors.[9] HB 311 will be no different.

While the Supreme Court has acknowledged that the government has an important interest in children's welfare[10], Utah "must specifically identify an 'actual problem' in need of solving" to

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[1] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[2] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).
[3] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[4] *Id.* at 885.
[5] Available at https://bit.ly/3jjMhXy.
[6] Available at https://bit.ly/3RkFrh2.
[7] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[8] *Reno*, 521 U.S. at 874.
[9] *See, e.g.*, *American Booksellers Foundation v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011); *American Booksellers Foundation v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004).
[10] *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (identifying "the need to protect children from exposure to patently offensive sex-related material" as an interest "this Court has often found compelling").

establish a "compelling interest."[11] In *Brown v. Entertainment Merchants' Ass'n*, the Supreme Court invalidated California's ban on the sale of violent video games to minors. The Court held that California failed strict scrutiny because (1) violent video games are constitutionally protected speech and (2) the state's "predictive judgments" that such games cause aggression in minors was not aimed at an actual problem. Indeed, the State's interest was not compelling because "without direct proof of a causal link" between video games and aggression, the State was merely speculating about a potential problem.

Nor is HB 311 narrowly tailored. For example, a federal district court enjoined Louisiana's attempt to block minors from accessing "harmful" content as substantially overbroad..[12] Compliance with HB 311 also violates First Amendment-protected editorial discretion. Covered entities may have community standards that allow for anonymous browsing or posting; policies which fall squarely within the First Amendment's protection.[13] Many online services have policies against collecting data from users. Yet those that place a premium on privacy must violate their principles by forcing users—including adults—to prove their identity before accessing digital content, and retain that PII however Utah rulemakers prefer.

Third, HB 311 violates First Amendment-protected editorial discretion by imposing liability on covered entities when their "practice, design, or feature" causes "a Utah minor account holder to become addicted to the social media platform." Indeed, under the current version of HB 311, users may sue to recover damages for any self-reported "financial, physical, or emotional harm suffered as a consequence of using or having an account on the social media company's social media platform." Because covered entities have the First Amendment right to decide which messages to host, how to curate those messages, and how to disseminate them, HB 311 provision allowing lawsuits against them for doing just this violates the First Amendment.[14]

HB 311 Puts Minors' 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. The Utah Division of Consumer Protection is charged with determining "acceptable form[s] of identification." Documents which conclusively establish users' birthdates are likely to be

[11] *Brown v. Entertainment Merchants' Ass'n*, 564 U.S. 786, 799 (2011) (invalidating California's attempt to ban minors from accessing "violent" video games because violent video games are protected speech).
[12] *Garden Dist. Book Shop, Inc. v. Stewart*, 184 F. Supp. 3d 331, 339 (M.D. La. 2016) ("The Supreme Court held that content-filtering was less restrictive and more effective than COPA and, under the facts presented here, this Court is compelled to reach the same conclusion.").
[13] *See generally, Netchoice v. Moody*, No. 21-12355 (11th Cir. May 23, 2022).
[14] *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974) ("[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."

government-issued. Large-scale mandatory collection of highly sensitive government identification 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.

SB 152:

We respectfully ask that you veto SB 152 because it:

- Violates the First Amendment and
- Puts children's sensitive data at greater privacy and security risks.

SB 152 Violates the First Amendment

Like HB 311, SB 152 requires identity authentication of all users and will add barriers to using web services, reducing people's willingness to share First Amendment-protected speech. This discourages Utahns 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."[15] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[16]

SB 152 Puts Minors' Sensitive Data at Risk

SB 152 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 SB 152'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 SB 152 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.

[15] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[16] *Id.* at 885.

In evaluating SB 152, the legislature 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 SB 152 is some of the most sensitive and potentially dangerous possible.

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Given their unconstitutionality and risks to children's data privacy that these bills pose, we ask you to veto both HB 311 and SB 152. As ever, we offer ourselves as a resource to discuss any of these issues with you in further detail and appreciate the opportunity to provide the committee with our thoughts on this important matter.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

The Salt Lake Tribune

E-mail guardians let guard down

BY LINDA FANTIN
THE SALT LAKE TRIBUNE

PUBLISHED OCTOBER 13, 2006 2:03 AM

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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