

## Comments related to proposed initiative 23-0035, “The Common Sense Initiative to Protect California Kids Online”

### Comments

Jan. 14, 2023

NetChoice raises the following concerns and outlines the following flaws in initiative 23-0035, “The Common Sense Initiative to Protect California Kids Online.”

1. This type of effort has already been found unconstitutional;
2. Common Sense Media and Mr. Steyer have already been responsible for California legislation that lost at the US Supreme Court, and
3. The policy perspective fails to follow science and evidence.

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide to American consumers. NetChoice has worked for over two decades to make the internet safe for free enterprise and free expression. We also work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

We are writing this comment in response to a recently submitted proposed ballot initiative for the 2024 California state election cycle. Authored by Mr. Jim Steyer and Common Sense Media, the initiative aims to hold technology firms liable for certain types of content viewed by California minors.

The initiative is unconstitutional on its face and closely mirrors California’s AB 2733, a law this office has already failed to defend from our own legal challenge. It is disappointing to see California’s ballot initiative process continue to be misappropriated by entities that know their effort violates the constitution but have the money and connections necessary to force it onto ballots. NetChoice is hopeful that California voters will reject this proposed degradation of their First Amendment rights and embrace more proven and effective ways to keep kids safe online.

### Already Proven Unconstitutional

The proposed ballot initiative is an attempt by Mr. Steyer and “Common Sense” Media to sell Californians a false bill of goods. The initiative promises voters that their children will be better protected from online harms by forcing technology companies to design their products in particular ways and

restricting certain types of speech from them. While NetChoice disagrees with the initiative authors that such a regime would improve outcomes for minors, it is inarguable that it would fail in that effort given its unconstitutionality. In short, the initiative authors are providing the voters of California an opportunity to vote on a measure that stands no chance of becoming law whether they approve of it or not.

California's AB 2733 is the most analogous to the proposed initiative in question. The legislation became law in 2022 and was then challenged by NetChoice. AB 2733 requires covered companies to withhold types of content from minors and adults, requires large amounts of personal data to be harvested and stored, and generally supplants state authority with the traditional role of parents.

NetChoice brought suit against Attorney General Bonta on First and Fourth Amendment grounds, arguing that the bill represents an unconstitutional power grab by the state to regulate speech as well as a violation of the privacy rights of California children and adults. The judge agreed with us and prevented the law from going into effect, stating AB 2733 very likely violates the First Amendment and is a direct threat to childrens' privacy.

Other states have since followed California's unconstitutional lead and attempted to enact their own versions of age verification, age-gating, and content policing. NetChoice has sued Arkansas, Utah, and Ohio, in addition to California, for these violations of the Constitution.

The proposed initiative would be even worse because of its catastrophically vague terms. The state attaching massive liability to the potential viewing of constitutionally protected speech would necessarily chill speech across the internet. These not-so-clever attempts to circumvent the First Amendment are doomed to fail.

## **California Won't Get Fooled Again by Mr. Steyer and Common Sense Media**

Mr. Steyer and Common Sense Media are no strangers to unconstitutional legislation. They championed a 2005 California bill that restricted the sale of certain video games in the state.<sup>1</sup> At that time, Mr. Steyer had attached his moral outrage machine to that pet issue. With no data to back it up, Common Sense Media, directed by Mr. Steyer, endorsed the position that violence in video games was responsible for a broad swath of real-world harms. The data does not bear this out and never did.<sup>2</sup>

---

*Mr. Steyer and Common Sense Media previously championed an unconstitutional 2005 California bill that restricted the sale of certain video games in the state - struck down by the US Supreme Court.*

---

<sup>1</sup> Alex Pham, *Video game industry's public enemy No. 1*, L.A. Times (Nov. 2 2010)

<sup>2</sup> Dupee, et. a., *Stanford researchers scoured every reputable study for the link between video games and gun violence that politicians point to. Here's what the review found*, Fortune (May 2, 2023) (citing Stanford Brainstorm Labs).

In 2011 the Supreme Court struck down the Steyer-backed video game bill in *Brown v. Entertainment Merchants Association*. This came after the federal district court and the Ninth Circuit Court had already ruled the law unconstitutional. The court appropriately recognized that minors enjoy First Amendment rights, that what the government finds offensive isn't an excuse to bypass constitutional protections, and that the connection between video games and harm was not sufficiently established for such overbroad legislation. Many parallels exist between this case and the inevitable legal challenge the proposed initiative would invite.

## Missing the Data

The proposed initiative is predicated on the serious accusation that much of the digital world is inherently harmful to children. Common sense would dictate that these claims be thoroughly fleshed out and illuminated by exhaustive research and consistent findings. Unfortunately, that is not the case. Much like Mr. Steyer's previous conflict with the First Amendment and video games, there is little data available to support his ideology.

Opponents of online services and social media in particular have politicized the recent U.S. Surgeon General's report, citing it to suggest the government is justified in restricting access to constitutionally protected expression across the internet. What is ignored is the data inside both that report and the American Psychological Association's 2023 report showing that a majority of young people benefit from their use of the internet. Oxford, Pew Research, and the Journal of Pediatrics all have research that points to the fact that the internet is a powerful tool for young people and that no causal link exists between it and negative mental health outcomes.<sup>3</sup>

---

*The American Psychological Association's 2023 report shows that a majority of young people benefit from their use of the internet.*

*Oxford, Pew Research, and the Journal of Pediatrics all have research that points to the fact that the internet is a powerful tool for young people and that no causal link exists between it and negative mental health outcomes.*

---

That does not dismiss those instances where real harm does occur, or when a child's unique circumstances are especially vulnerable to particular online scenarios and environments. Not every kid is the same, and what is good for one may not be appropriate for another. The reality, however, is that the state of California is not qualified to make those distinctions, and is not prepared to coherently legislate them. Parents are in the best position to know their children and set rules that align with their needs. This requires a tremendous amount of effort, there is no denying that.

---

<sup>3</sup> Techdirt, *Leading 'Save The Kids!' Advocate Pushing Absolutely Dangerous 'Protect The California' Ballot Initiative That Will Do Real Harm To Children*, 2023

It may at times also require parents to be strict, to withhold devices and services their children want to maintain access to – no simple thing. But families empowering themselves to protect their children is entirely preferable to the government empowering itself to restrict speech and privacy rights of Californians.

The Surgeon General’s report is careful to recognize that sufficient research into the questions of child online safety simply doesn’t exist yet. Not comprehensively anyway. That may not be ideal, but it demands legislative restraint and doing the hard work of answering questions before enacting damaging legislation.

## Summary

There is no doubt that Mr. Steyer is passionate about this topic, and NetChoice accepts that he is well meaning in his intent. However, his brother’s wealth and a fleet of political connections does not qualify him to remove major decisions from California parents and place them in the hands of the state.

Beyond Mr. Steyer’s desire to influence California’s political process is the right of Californians to speak and express themselves freely on the internet and the right of California parents to raise their children in line with the dictates of their conscience.

NetChoice hopes that, should Mr. Steyer and Common Sense Media meet the necessary thresholds to place their proposed initiative on the ballot in 2024, **it will be soundly rejected by California voters**. The First Amendment still has friends in The Golden State.<sup>4</sup>

Sincerely,

Carl Szabo  
Vice President & General Counsel, NetChoice

*NetChoice is a trade association that works to protect free expression and promote free enterprise online.*

---

<sup>4</sup> The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.