

## Utah SB 194 (1st Substitute)

## OPPOSITION TESTIMONY

Feb. 14, 2024

### Utah Senate Senate Business and Labor Standing Committee

NetChoice respectfully asks that you **oppose SB 194**, legislation which would block access to valuable speech and require age-assurance for the use of a social media platform.

Like its predecessor, SB 194 has significant constitutional flaws:

1. SB 194's core provisions are unconstitutional under the First Amendment—and already being actively litigated in other states; and

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that internet business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression.

We share the sponsor's goal to better protect minors from harmful content online. NetChoice members have taken issues of teen safety seriously and in recent years have rolled out numerous new features, settings, parental tools, and protections to better empower parents and assist in monitoring their children's use of social media. We ask that you oppose SB 194 and instead use this bill as a way to jumpstart a larger conversation about how best to protect minors online and consider alternatives that do not raise constitutional issues.

### **1. SB 194's core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.**

SB 194 contains several constitutional defects. Chief among them is the requirement that social media companies perform age-assurance to identify users' ages. Laws containing similar defects as those in SB

194 have already been challenged in federal court. Laws from Arkansas, California, and Ohio are currently enjoined.<sup>1</sup>

### Restricting Access to Lawful Content

The First Amendment prohibits the government from restricting an individual’s ability to access lawful speech, engage in discourse, express opinions, and more. Indeed, the right of free speech is enjoyed by minors and adults alike.<sup>2</sup> When challenged, the Supreme Court has consistently reaffirmed this bedrock First Amendment principle.<sup>3</sup>

Like its predecessor, SB 194 would violate First Amendment rights by chilling access to constitutionally protected speech and precluding minors and adults alike from accessing speech if they refuse to submit to state-imposed age-assurance. In practice, age-assurance measures are de facto age-verification requirements and present the same constitutional problems under the First Amendment.

The fact that SB 194 covers the internet rather than books, television programs, or video games, does not change the First Amendment issue.<sup>4</sup> To the contrary, social media allows users to “engage in a wide array of . . . activity on topics ‘as diverse as human thought’”---all “protected by the First Amendment” from government interference.”<sup>5</sup> These wide array of activities and topics can include religious worship, political dialogue, sharing recipes, and more.

In fact, in certain respects, SB 194 also resembles California’s unconstitutional parental consent law for video games. The Supreme Court struck down California’s law over a decade ago. As Justice Scalia explained, the government does not have the “free-floating power to restrict the ideas to which children may be exposed.”<sup>6</sup> Because SB 194 purports to exercise precisely this free-floating power to restrict ideas, it is unconstitutional and, if enacted, would be swiftly struck down. Indeed, the recent district

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<sup>1</sup> *NetChoice v. Bonta*, 2023 WL 6135551 (enjoining California’s Age-Appropriate Design Code Act for violation of the First Amendment); *NetChoice v. Griffin*, 2023 WL 5660155 (enjoining Arkansas’s parental consent and age-verification law to access social media for violation of the First Amendment). *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio, Feb. 12, 2024), available at:

[https://netchoice.org/wp-content/uploads/2024/02/2024.02.12\\_NetChoice-v-Yost\\_ORDER-Granting-PI.pdf](https://netchoice.org/wp-content/uploads/2024/02/2024.02.12_NetChoice-v-Yost_ORDER-Granting-PI.pdf)

<sup>2</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that minors enjoy First Amendment rights).

<sup>3</sup> See e.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021).

<sup>4</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997) (holding that the First Amendment applies to the internet).

<sup>5</sup> *NetChoice v. Griffin*, 2023 WL 5660155 at \*5 quoting *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

<sup>6</sup> *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 794 (2011) (cleaned up).

court rulings from Arkansas, California, and Ohio make clear that the government may not impose roadblocks to access of lawful speech.

### Age-Assurance and Age-Verification

Parents, not governments, should guide their children's upbringing. Parents have the ability to determine what language their children learn,<sup>7</sup> what school to attend,<sup>8</sup> their religious upbringing,<sup>9</sup> and so forth.

Parents are responsible not only for these high-level decisions, but also the granular ones down to what vegetable their child should have with dinner. The government, in short, may not substitute its judgment of "good parenting" in place of the judgment of individual parents. As discussed above, SB 194 substitutes a parent's view of acceptable parenting for the view held by the government.

But SB 194 actually goes further than merely usurping the role of parents. The bill would also curtail the speech rights of *adults* because *all* would be required to submit to age-assurance. Indeed, as the various district courts have found, placing restrictions through age-assurance, age-verification, or parental consent impermissibly burdens access to lawful speech.

Requiring age-assurance cuts to the heart of another core First Amendment protection: anonymity. The framers understood this point and valued anonymity. It is not an exaggeration to say that we owe the existence of our constitutional system to anonymous speech.<sup>10</sup> The Supreme Court has explicitly affirmed that the First Amendment covers the right to speak anonymously<sup>11</sup> and has repeatedly struck down age-verification schemes<sup>12</sup> finding that they would force users to "forgo the anonymity otherwise available on the internet."<sup>13</sup>

By restricting access to valuable speech, requiring users to submit to age-assurance, and further requiring that such verification be performed by a third-party, SB 194 violates the Constitution's protection against government interference in the access to speech.

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<sup>7</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>8</sup> *Pierce v. Society of Sisters*, 269 U.S. 510 (1925).

<sup>9</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>10</sup> See ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter, 2003); THE ANTI-FEDERALIST PAPERS (Ralph Louis Ketcham, 2003). The essays supporting and opposing ratification of the Constitution in these papers were published pseudonymously.

<sup>11</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (internal citations omitted).

<sup>12</sup> E.g. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 662, 667 (2004); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997); see also *NetChoice v. Griffin*, 2023 WL 5660155, at \*17.

<sup>13</sup> *Id.* quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).

Whether it's age-assurance, age-verification, or parental consent, such impediments are unconstitutional. Unconstitutional laws protect no one. So, despite the bill's intentions, SB 194 will not protect Utah's minors or anyone else because it will be struck down. Rather than pursue such unlawful efforts, Utahns would be better served by pursuing efforts to improve digital literacy for minors, making parents aware of the tools available to them to navigate their child's social media usage, and investing in curricula that could be made available to minors and adults alike. We believe educating students and adults about how to use social media in a safe and responsible manner, and avoiding heavy handed government mandates is the best path forward.

Again, we respectfully **ask you to oppose SB 194**. As always 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.<sup>14</sup>

Sincerely,

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

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<sup>14</sup> The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.