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NetChoice
Defending Free Speech and Free Enterprise Online

# Vermont S289, an act relating to age-appropriate design code

**OPPOSITION TESTIMONY**

February 27, 2024

**Vermont Senate Economic Development, Housing, and General Affairs Committee.**

NetChoice respectfully asks that you **oppose** S289 as it:

> - Fails to protect a single citizen from harm
> - Requires websites to collect more information from children and adults
> - Violates the 1st Amendment of the US Constitution;

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 S289 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.

**S289 will not protect a single citizen from harm**. That is because an unconstitutional law will protect zero children. Rather than head down this path, NetChoice asks that we work together to create real solutions that will not be thrown out in court.

## S289's core provisions are unconstitutional under the First Amendment.

We already know that this law is unconstitutional as seen in the court decisions in California and Arkansas. S289 largely mirrors California's AB 2273, Age Appropriate Design Code legislation passed in California in 2022, which in turn is based on the British age-appropriate design code. In September, the United States District Court for the Northern District of California granted NetChoice's motion for a

preliminary injunction enjoining the enforcement of AB 2273. The court, after reviewing ten of the Act's provisions, held that all ten likely violated the First Amendment.

## Vermont's AADC is similarly likely to run afoul of the First Amendment

Vermont's AADC is similarly likely to run afoul of the First Amendment due to its strong inducement for online platforms to over-censor content in order to avoid being penalized under the law's vague concept of what might be harmful to minors. Under the legislation, every digital service is required to file a Data Protection Impact Assessment before introducing any new service that minors might conceivably access, which requires them to list even hypothetical risks "of material detriment to children" and to "mitigate or eliminate the risk before the online product is made available to children." Under threat of massive fines for misjudging what may be considered "potentially harmful" to children, many platforms will certainly default to taking down all content on entire subjects, which is likely to remove beneficial, constitutionally protected material along with anything genuinely harmful.

Make no mistake, we are talking about the government banning speech online. That is why the New York Times sided with NetChoice against the state of California's anti-speech law.

Additionally, S289 imposes on websites an age-assurance requirement. Regulated businesses would be required to estimate the age of their users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business, or in the alternative, they must apply those privacy and data protections to all consumers. In other words, businesses must choose between assuring the age of all users (both minors and adults alike) or redesigning all of their online features to treat adults as though they are children.

## Age assurance requires masseuse collection of sensitive personal information like identification document

Age assurance requires children and adults alike to share—with virtually every website visited—sensitive personal information like identification documents or face scans that, should they fall into the wrong hands, can be used for identity theft and other nefarious purposes. As Judge Freeman noted in granting a preliminary injunction in California, the law compromises privacy, writing that it is "actually likely to exacerbate the problem by inducing covered businesses to require consumers, including children, to divulge additional personal information." [1]

Beyond its First Amendment violations, S289 is unconstitutional under the Dormant Commerce Clause because it regulates behavior and activities that take place outside of Vermont. The law also imposes requirements on websites for the use, tracking, and storage of information about their users who are under the age of 18. These requirements conflict with COPPA, a federal law that governs how websites handle minors' data. Therefore, S289 also violates the Constitution's Supremacy Clause.

[1] See *NetChoice vs Bonta, 2023*
*https://netchoice.org/wp-content/uploads/2023/09/NETCHOICE-v-BONTA-PRELIMINARY-INJUNCTION-GRANTED.pdf*

On the policy front this legislation requires a data collection on virtually every Vermont resident on a scale never before seen. Age verification for those under 18 mandates age-verification for those over 18. If enacted websites would be required to collect the most sensitive information about Vermont adults trying to use the internet. We're talking passports, drivers licenses, Social Security numbers, and more to prove the person behind the keyboard is who they say they are and are as old as they claim to be. And this is not just large operators but any website that might be accessed by a 17-year old.

## An Approach that Actually Works

Rather than enact clearly unconditional laws banning the free speech of Vermont residents, Vermont would be better served enacting laws that help the citizens and are legal. NetChoice is working with lawmakers from across the country to achieve such ends.

### Requiring Digital Education in Schools

By redoubling its legislative efforts to improve digital literacy for its citizens. We believe educating citizens about the electoral and voting processes and how to spot deceptive statements regarding elections is better and more effective than heavy handed government bans on free speech.
This approach will not only reach children where they are, but will help arm them to become better digital citizens.

### Updating Child Abuse Laws for AI

Today, child abusers are able to use artificial intelligence to create images and escape justice under exiting Child Sexual Abuse Material (CSAM) laws. This is because existing CSAM laws require real images of the abuse, rather than AI generated ones. NetChoice is working with lawmakers to create laws that fill the gaps in existing CSAM laws to protect children from such abuses.

### Empowering law enforcement to arrest child abusers

Today less than 1% of all reports of child abuse are even investigated. That means that 99% of reports of child abuse go unheard. This is because law enforcement doesn't have the resources it needs to investigate and prosecute child abusers. NetChoice supports giving law enforcement the resources it needs to put child abusers behind bars.

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Again, we respectfully ask you to **oppose S289**. 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.[2]

Sincerely,

Amy Bos

[2] The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.

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