

NetChoice Testimony Opposing CA AB 3080

OPPOSITION

April 8, 2024

Committee on Privacy and Consumer Protection California State Assembly

NetChoice respectfully urges you to **oppose AB 3080**, the California Age Verification for Internet Websites Containing Obscene and Indecent Material Act. While well-intentioned, AB 3080 has significant constitutional flaws that would negatively impact the free speech rights of Californians and lead to unintended consequences for California citizens and businesses.

While well-intentioned, AB 3080 has significant flaws:

- The legislation will chill online speech and essentially ban access to information
- The legislation violates the 1st Amendment of the US Constitution;
- Fails to protect a single citizen from harm.

Clear Constitutional Failures

AB 3080's age verification requirements for websites hosting any "obscene" or "indecent" material raise serious First Amendment concerns. The bill's broad definitions of "obscene" and "indecent" material would likely encompass a wide swath of constitutionally protected speech. By requiring age verification for access to such material, AB 3080 would chill the free speech rights of adults and minors alike.

The Supreme Court has repeatedly affirmed that the First Amendment protects a wide range of speech, including material that some may find offensive or indecent. In *Reno v. ACLU*,¹ the Court struck down provisions of the Communications Decency Act that criminalized the online transmission of "indecent" and "patently offensive" material to minors, holding that such content-based restrictions on speech are

¹ *Reno v. ACLU*, 521 U.S. 844 (1997).

presumptively unconstitutional. The Court emphasized that the law "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."

Similarly, in *Ashcroft v. ACLU*,² the Supreme Court invalidated the Child Online Protection Act's requirement that online publishers of "material harmful to minors" restrict access by minors, finding it was not the least restrictive means of achieving the government's interest. More recently, in *Packingham v. North Carolina*,³ the Court struck down a law prohibiting registered sex offenders from accessing social media, with Justice Kennedy writing that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."

The Ninth Circuit has also consistently protected online speech. In *Prager University v. Google LLC*,⁴ the court rejected claims that YouTube violated the First Amendment by allegedly censoring conservative content, holding that private online platforms are not state actors subject to First Amendment constraints. And in *Enigma Software v. Malwarebytes*,⁵ the Ninth Circuit found that an anti-malware provider's blocking of a competitor's program was protected speech and affirmed that "restrictions on protected expression are distinct from restrictions on economic activity or conduct."

Indeed, because its definitions are so broad, AB 3080 runs headlong into the problems identified by courts across the country—age verification for social media is unconstitutional under the First Amendment because it chills access to so much protected speech. Courts from Arkansas,⁶ California,⁷ and Ohio⁸ have enjoined similar laws seeking to require age verification (or parental consent) to access social media.

Under this precedent, AB 3080 is unconstitutional because it imposes content-based restrictions on a broad range of online speech by requiring age verification for material deemed "obscene" or "indecent." The bill fails strict scrutiny because it is not narrowly tailored to the government's interest in protecting minors from harmful content and it is not the least restrictive means of achieving that goal.

² *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

³ *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).

⁴ *Prager University v. Google LLC* (9th Cir. 2020).

⁵ *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F. 3d 1040 (9th Cir. 2019).

⁶ *NetChoice v. Griffin*, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark.) (Aug. 31, 2023).

⁷ *NetChoice v. Bonta*, 2023 U.S. Dist. LEXIS 165500 (N.D. Cal.) (Sep. 18, 2023).

⁸ *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio) (Feb. 12, 2024).

Harm to California Citizens

Beyond the constitutional defects, AB 3080 would lead to unintended consequences for Californians:

The bill's age verification mandate would force websites to collect sensitive personal information from users, increasing risks of data breaches, identity theft, and privacy violations. This undermines California's strong consumer data protection laws.

Many websites, especially those run by small businesses, non-profits, and community organizations, would find the costs of implementing age verification systems prohibitive. This would decrease the diversity and accessibility of online content and services available to Californians.

Minors may resort to using VPNs, lying about their age, or accessing material on the dark web to circumvent age verification, undermining the bill's goal of enhancing child safety.

By effectively banning minors from accessing a broad range of online content, AB 3080 would hinder their intellectual freedom, access to information, and digital literacy skills needed to be responsible digital citizens.

A Better Approach

Rather than enact clearly unconstitutional laws and undermining the privacy of all Californians, the state 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

Education is one of the best, most readily available tools at the government's disposal to protect minors and adults from online deception. California should redouble 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 existing 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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There are more effective ways to protect minors online that avoid these constitutional pitfalls and unintended consequences. We encourage you to explore increased funding for digital literacy programs in schools, modernizing child exploitation laws to address new threats like AI-generated abuse material, and empowering law enforcement to investigate and prosecute online crimes against children.

While AB 3080 has admirable goals, its constitutional flaws and negative unintended consequences for Californians are too severe to ignore. We respectfully ask you to **oppose** this bill and work with stakeholders on alternative approaches that protect kids, uphold free speech, and preserve the vibrancy of the internet.

As always, we offer ourselves as a resource to discuss these issues in further detail. We appreciate your attention to this matter.⁹

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.

⁹ The views of NetChoice expressed here do not necessarily represent the views of NetChoice members