

## California AB 1949

## OPPOSITION TESTIMONY

April 2, 2024

NetChoice respectfully asks that you **oppose** AB 1949, legislation that would chill lawful speech online and violates the US and California State Constitutions.<sup>1</sup>

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 HB 603 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.

### High-level Takeaways:

1. AB 1949 imposes unconstitutional age-verification requirements;
2. The Supreme Court and lower courts have consistently held that age-verification for accessing lawful speech online unconstitutional; and
3. Age-verification presents heightened threats to privacy and undermines the state's interest in protecting the privacy of minors.

### Background: Age-Verification and the Internet

The First Amendment provides robust protection for speech, and the Supreme Court is highly skeptical of any regulation, however nobly intended, that would impose barriers to accessing, receiving, or engaging in speech. See *generally 303 Creative v. Elenis*, 600 U.S. 570 (2023) (invalidating the application of Colorado's antidiscrimination law to website designer because website design is expressive activity). And the Court is particularly skeptical of regulations of online speech fora because they are home to "a wide array of protected First Amendment activity on topics as diverse as human thought." *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017) (internal quotations omitted).

---

<sup>1</sup> *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal.).

In particular, the Supreme Court has struck down online age-verification schemes because they limit access to broad swaths of protected speech and chill potential speakers and willing listeners from entering the marketplace of ideas. *See Reno v. ACLU*, 521 U.S. 844, 855-857 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004). Similarly, the Supreme Court also invalidated parental consent requirements when they impermissibly chill access to lawful speech. *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011).

In short, laws requiring websites and other speech providers to treat minors differently and impose either parental consent or age-verification mandates to access lawful speech have invariably failed under any version of First Amendment scrutiny. *See, e.g., NetChoice v. Griffin*, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark.) (Aug. 31, 2023) (invalidating parental consent and age-verification requirements for social media under intermediate scrutiny); *NetChoice v. Bonta*, 2023 U.S. Dist. LEXIS 165500 (N.D. Cal.) (Sep. 18, 2023) (invalidating age assurance requirements under First Amendment scrutiny); *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129 (invalidating parental consent requirements under strict scrutiny).<sup>2</sup>

### **Assessing AB 1949’s Age-Verification Requirement**

AB 1949 explicitly requires businesses to engage in age-verification. *E.g.*, Section 1798.185(e)(2) (providing for the promulgation of regulations regarding age-verification). Indeed, various provisions of AB 1949 would require websites to treat adults differently from minors and even require different treatment for different groups of minors. *E.g.*, Section 1798.100(g) (creating a parental consent requirement for users under 13 and consumer consent for users aged 13 to 18).

The requirements imposed by AB 1949 pose the same constitutional problems as those presented in the recent *Bonta*, *Griffin*, and *Yost* decisions. AB 1949 would require that websites perform age-verification before collecting any data on a user to determine whether they need to procure parental consent (for users under 13), consumer consent (for users between ages 13 and 17), or whether they can proceed without obtaining express consent (for users 18 and up). Accordingly, AB 1949 thwarts access to protected speech and would chill speech for users unable or unwilling to provide the materials necessary to verify their identities. *Griffin*, 2023 U.S. Dist. LEXIS 154571, \*48-49.

What’s more, AB 1949’s tiered age-verification approach violates the First Amendment several times over. In *Brown v. Entertainment Merchants Association*, the Supreme Court emphatically rejected California’s attempt to apply a “variable obscenity” standard to restrict minors’ access to “violent” video games. 564 U.S. 786 (2011). The Court found no historical evidence supporting age-based restrictions on such speech, reaffirming that “‘minors are entitled to a significant measure of First Amendment protection’” and the government cannot create new categories of unprotected speech simply because it believes the speech is unsuitable for youth. *Id.* At 794-95 (quoting *Erznoznick v. Jacksonville*, 422 U.S. 205, 212-13 (1975)).

---

<sup>2</sup> To the extent there is any remaining ambiguity in the law, such ambiguities only exist when considering the validity of age-verification for unprotected speech (i.e., speech that is obscene as to minors). *See e.g. Free Speech Coalition v. Paxton*, \_\_\_ F.4th \_\_\_ (5th Cir. 2024). Because AB 1949 does not involve unprotected speech, this memo addresses only the constitutional issues presented when age-verification is required to access protected speech.

Just like California’s unconstitutional age-restriction in *Brown*, AB 1949 impermissibly seeks to vary the First Amendment’s protection of speech based on age. Even worse, it chills far more speech than at issue in *Brown*. By requiring websites to group users into buckets—under 13, 13-17, over 17—it creates a censorship-by-proxy regime like California’s Age-Appropriate Design Code: websites must subject all users to privacy-invasive measures and then tailor their online experience accordingly. AB 1949’s variable treatment of minors—especially compounded by burdening adults’ constitutional rights with added friction to access content—serves only to underscore the law’s constitutional infirmities.

The State may not avoid the First Amendment by reclassifying its regulations as targeting something else. Arkansas attempted to classify its unconstitutional speech access restriction as a law regulating *where* minors could *go*. *Griffin*, U.S. Dist. LEXIS 154571, \*36-37. Ohio justified its law as a regulation of “contract.” *Yost*, 2024 U.S. Dist. LEXIS 24129, \*17. And California classified its restrictions as regulations of *conduct*. *Bonta*, 2023 U.S. Dist. LEXIS 165500, \*20-22. All three failed under First Amendment scrutiny. Because AB 1949 would place burdens on access to vast swaths of protected speech, the First Amendment is implicated. Because AB 1949 restricts access to vast swaths of speech, the government may not claim that its regulations of speech are “merely incidental.” *National Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2373-74 (2017); *see also Griffin*, U.S. Dist. LEXIS 154571.

AB 1949’s age-verification regime is inextricably intertwined with speech. Indeed, its entire purpose and effect is to limit minors’ ability to access and receive constitutionally protected speech online unless they pay the state’s privacy tax—to access lawful content, give up your privacy. Even if the law’s purpose and effect weren’t so unconstitutional on their face, the Supreme Court has long recognized that restrictions on allegedly “economic conduct” violate the First Amendment when such restrictions unduly burden speech. Consider, for example, the Supreme Court’s decision in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), which struck down a Vermont law prohibiting the sale of certain pharmacy records revealing doctors’ prescribing practices. The Court found that the law’s effect was to unconstitutionally burden *speech* by preventing pharmaceutical marketers from communicating information (*conduct*). *Id.* at 564, 577-78.

### **Age-Verification Requirements Undermine Privacy**

California is rightly concerned about protecting minors’ privacy online. Yet, by imposing age-verification requirements on websites, AB 1949 would actively undermine that interest.

Age-verification requires the collection and storage of sensitive information. Some states that have experimented with age-verification have required the collection of a government ID card, credit card number, or biometric information to ensure the website is complying with the law. But by requiring the collection (and then, implicitly, the storage) of this sensitive information, age-verification requirements make websites the perfect target for hackers, identity thieves, and other bad actors.

As we have seen, no number of safeguards can ensure against data breaches. According to Child Identity Fraud Reports from Javelin Strategy and Research, nearly 2 million children were victims of identity theft in 2022.<sup>3</sup> Meanwhile, the 2019 hack of Pearson (a school technology provider) exposed information of thousands of children, including their names, birthdates, and email addresses.<sup>4</sup> Even government agencies responsible for storing personal information have been subject to massive data leaks.<sup>5</sup> Mandating that websites or services collect sensitive personal data on minors as a precondition for accessing vast swaths of online speech substantially increases these risks. They also make websites juicier targets for hackers.

By mandating age verification, AB 1949 perversely undermines minors' and users' privacy in the name of protecting it. Just like with the Age-Appropriate Design Code, AB 1949 would leave California's minors at greater risk of identity theft. Any data security breach would disproportionately hurt children and teens, compounding the already heightened risks the legislature has identified them as facing. Lawmakers shouldn't lose sight of this predictable—and preventable—consequence.

Accordingly, state legislatures should evaluate whether their proposed policies would advance privacy protections or simply subject minors and adults to greater vulnerability in their online lives.

\* \* \*

Given the constitutional problems presented by age-verification, as reinforced by recent decisions in *Bonta*, *Griffin*, and *Yost*, NetChoice urges you to oppose AB 1949 to avoid identical constitutional pitfalls.

As always, we offer ourselves as a resource to discuss any of these issues with you in more detail. We appreciate the opportunity to engage with you on this important matter.

Protecting minors online is important, but an unconstitutional law protects no one. Instead, California should enact legislation with a real chance of making a difference for its citizens—adults and minors alike. Online safety and data protection are important, to achieve these goals, we recommend adopting educational models like those passed in Florida and Virginia. We believe educating students and adults about how to use the internet in a safe and responsible manner, and avoiding heavy handed government mandates is the best path forward.<sup>6</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>3</sup> Javelin, *1.7 Million U.S. Children Fell Victim to Data Breaches According to Javelin's 2022 Child Identity Fraud Study*, (Oct. 26, 2022) (last visited Mar. 22, 2024),

<https://javelinstrategy.com/press-release/17-million-us-children-fell-victim-data-breaches-according-javelins-2022-child>.

<sup>4</sup> Lindsay McKenzie, *Pearson Hack Exposes Thousands of Students' Data*, INSIDE HIGHER ED (Aug. 4, 2019),

<https://www.insidehighered.com/quicktakes/2019/08/05/pearson-hack-exposes-thousands-students%E2%80%99-data>.

<sup>5</sup> Sean Lyngaas, *Millions of Americans' personal data exposed in global hack*, CNN POLITICS, June 16, 2023,

<https://www.cnn.com/2023/06/16/politics/cyberattack-us-government/index.html>.

<sup>6</sup> The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.