

## Colorado SB 24-158

## LETTER OF OPPOSITION

April 30, 2024

### Colorado Assembly House Committee on Education

NetChoice respectfully asks that you **oppose SB 24-158**, legislation that would block access to valuable speech and impose age-verification for use of a social media platform. In practice, SB 24-158 would require that all users provide “ID for the internet.” Accordingly, the legislation would ultimately be struck down in court as unconstitutional.

SB 24-1583 suffers from significant constitutional flaws:

1. SB 24-158’s core provisions are unconstitutional under the First Amendment—and already being actively litigated in other states; and
2. SB 24-158 would put Colorado residents’ privacy and data at risk, leaving them vulnerable to breaches and crime.

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, but an unconstitutional law helps no one. 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 24-158 and instead use this bill to jumpstart a larger conversation about how best to protect minors online by constitutionally sound legislation.

## **1. SB 24-158’s core provisions are unconstitutional under the First Amendment—and are already being actively litigated in other states.**

SB 24-158 contains several constitutional defects. Chief among these defects is the requirement that social media companies perform age-verification for every user of its services. Laws containing similar defects as those in SB 24-158 have already been challenged in federal court. Laws from Arkansas,<sup>1</sup> California,<sup>2</sup> and Ohio<sup>3</sup> are currently enjoined. Similarly, Utah’s social media law is currently subject to legal challenge.<sup>4</sup>

### Restricting Access to Lawful Content

The internet has made information, discourse, and speech “as diverse as human thought” readily accessible.<sup>5</sup> And the First Amendment prohibits the government from restricting the ability to access, receive, or engage in online speech.<sup>6</sup> Indeed, the First Amendment’s protections are enjoyed by minors and adults alike.<sup>7</sup> When challenged, the Supreme Court has consistently reaffirmed this bedrock First Amendment principle.<sup>8</sup>

The fact that SB 24-158 covers the internet rather than books, television programs, or video games, does not change the First Amendment issue.<sup>9</sup> Social media websites provide access to speech on topics ranging from religious worship and political dialogue to sharing recipes and offering well-wishes. And the Supreme Court has made clear that the government lacks the “free-floating power to restrict the ideas to which children may be exposed.”<sup>10</sup>

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<sup>1</sup> *NetChoice v. Griffin*, 2023 WL 5660155 (W.D. Ark., Aug. 31, 2023) (enjoining Arkansas’s parental consent and age-verification law to access social media for violation of the First Amendment).

<sup>2</sup> *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal., Sep. 18, 2023) (enjoining California’s Age-Appropriate Design Code Act for violation of the First Amendment).

<sup>3</sup> *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio, Feb. 12, 2024) (enjoining Ohio’s parental consent for social media law as unconstitutional under the First Amendment).

<sup>4</sup> *NetChoice v. Reyes*, 2:23-cv-00911 (D. Utah).

<sup>5</sup> *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

<sup>6</sup> *See Bd. of Educ. v. Pico*, 4557 U.S. 853, 867 (1982).

<sup>7</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that minors enjoy First Amendment rights).

<sup>8</sup> *See e.g., Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021).

<sup>9</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 856 (1997) (holding that the First Amendment applies to the internet).

<sup>10</sup> *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 794 (2011).

If passed, SB 24-158 would violate minors' First Amendment rights by depriving anyone who refuses to comply with its age-verification requirements of access to the veritable panoply of protected speech available on social media sites. By prohibiting access to speech, the First Amendment applies.<sup>11</sup>

## Age-Verification

The Supreme Court has struck down online age-verification schemes because they infringe on access to broad swaths of speech and chill both potential speakers and willing listeners from entering the marketplace of ideas.<sup>12</sup> Similarly, the Supreme Court has also invalidated parental consent requirements because they impermissibly chill access to lawful speech.<sup>13</sup>

Parents, not governments, determine what languages their children learn,<sup>14</sup> what school to attend,<sup>15</sup> their religious upbringing,<sup>16</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. As Governor Polis has recognized, these decisions are for parents to make, not the government.<sup>17</sup> But SB 24-158 flips the script and puts the government in the driver's seat.

In fact, in certain respects, SB 24-158 resembles California's unconstitutional parental consent law for video games. The Supreme Court struck down California's law over a decade ago.

California restricted the sale of violent video games to minors and required parental consent before a minor could make the purchase. The Court struck down the law because it did not enforce parental authority. Instead, the law imposed *governmental authority* subject only to a parental veto.<sup>18</sup> Writing for the majority, Justice Scalia explained that because violence or violent content is protected expression under the First Amendment, the State could not restrict minors from accessing it.<sup>19</sup>

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<sup>11</sup> *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129, \*17 (S.D. Ohio, Feb. 12, 2024) (There is no "contract exception" to the First Amendment.").

<sup>12</sup> See *Reno v. ACLU*, 521 U.S. 844, 855-857 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

<sup>13</sup> *Pico* at 867.

<sup>14</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>15</sup> *Pierce v. Society of Sisters*, 269 U.S. 510 (1925).

<sup>16</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>17</sup> Sarah Fortinsky, *Colorado governor says responsibility of social media restrictions 'belongs with parents not the government'*, THE HILL, Dec. 31, 2023, <https://thehill.com/policy/technology/4383195-colorado-governor-says-responsibility-of-social-media-restrictions-belongs-with-parents-not-the-government/>.

<sup>18</sup> *Brown* at 795, fn. 3.

Indeed, SB 24-158 is *more* troubling than the California scheme because its scope is not limited merely to “violent” content but applies to “social media companies” which offer a range of content including religious services, educational videos, advice on navigating mental health struggles and more.

Federal courts have already had occasion to pass on three different attempts to restrict access to the internet (and social media companies specifically) through age-verification and parental consent requirements. In every case, the court struck down the law as unconstitutional under the First Amendment.

The closest analogue to SB 24-158 is Arkansas’ Act 689. Like SB 24-158, the Arkansas law imposed age-verification requirements for social media companies. Yet, even in Arkansas the First Amendment injury was more limited than the one SB 24-158 proposes. Arkansas would have required companies complete age-verification only for *new* accounts. The district court found that age-verification unconstitutionally restricted lawful speech and would chill speech on the social media website by discouraging access.<sup>20</sup> Because SB 24-158 goes further than Arkansas’ law and would require age-verification for *all* users (new and existing), it would certainly be struck down as unconstitutional.

Of course, Arkansas is not the only example here. California’s Age-Appropriate Design Code required websites to conduct “age assurance” and was enjoined for violating the First Amendment.<sup>21</sup> Similarly, Ohio attempted to avoid the First Amendment by disclaiming that its law only required parental consent (but not age-verification). When challenged, the court enjoined Ohio’s law as well.<sup>22</sup>

Age-verification cuts to the heart of another core First Amendment protection: anonymity. The framers understood this point and valued anonymity as a tool for political engagement. It is not an exaggeration to say that we owe the existence of our constitutional system to anonymous speech.<sup>23</sup> The Supreme Court has explicitly affirmed that the First Amendment covers the right to speak anonymously<sup>24</sup> and has repeatedly struck down age-verification schemes finding that they would force users to “forgo the

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<sup>19</sup> *Id.* at 802 quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975) (explaining that the First Amendment does not permit the government to penalize third parties from disseminating speech just in case the parents disapprove of the speech).

<sup>20</sup> *NetChoice v. Griffin*, 2023 WL 5660155, \*38-40, \*47-49 (W.D. Ark., Aug. 31, 2023).

<sup>21</sup> *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal., Sep. 18, 2023).

<sup>22</sup> *NetChoice v. Yost*, 2024 U.S. Dist. LEXIS 24129, \*17 (S.D. Ohio, Feb. 12, 2024)

<sup>23</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>24</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (internal citations omitted).

anonymity otherwise available on the internet.”<sup>25</sup> SB 24-158 would, therefore, face the same fate as the Arkansas law.

## **2. SB 24-158 would put Colorado residents’ privacy data at risk, leaving them vulnerable to breaches and crime.**

Any scheme for online age-verification presents serious privacy concerns. To comply with any such scheme, websites will necessarily collect sensitive information from their users in order to treat minors as the law requires. This necessary collection will make social media websites a prime target for identity thieves, hackers, and other bad actors.

Requirements that data be deleted or only used for certain purposes will not alleviate these concerns because websites will need to be able to verify to the government that they are following the age-verification requirements. Accordingly, a website will need to provide the collected information to confirm its compliance to the government. In other words, websites will need to store this sensitive information and produce it at the government’s request—a hacker’s dream.

Despite the desire to protect minors online, if passed, SB 24-158 would create more dangers for Colorado’s youth.

By restricting access to valuable speech, requiring age-verification, and necessitating the collection of sensitive data, SB 24-158 violates the Constitution and sets up Coloradans for significant security risks.

Ultimately, Colorado would be better served by exploring legislative efforts to improve online literacy for its citizens as Florida and Virginia have done. 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 24-158**. 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>26</sup>

Sincerely,

Carl Szabo

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<sup>25</sup> *Griffin* at \*51 quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003).

<sup>26</sup> The views of NetChoice expressed here do not necessarily represent the views of NetChoice members.

Vice President & General Counsel, NetChoice

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