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NetChoice
Defending Free Speech and Free Enterprise Online

Request for Veto: SB 289 the Age-Appropriate Design Code

VETO REQUEST

May 13, 2024

Dear Governor Scott:

We respectfully urge you to **veto** SB 289, the so-called "Age-Appropriate Design Code," as the legislation would chill lawful speech online and negatively impact Vermont's vibrant small business community. Indeed, similar requirements that are similar to the one contemplated in this bill have already been challenged and are currently enjoined.[1]

While well-intentioned, SB 289 has significant flaws:

- Violates the First Amendment by banning anonymous speech;
- Violates the First Amendment by infringing on adults' lawful access to constitutional speech;
- Endangers children by requiring them to share their sensitive personally identifiable information, which creates risks that it will be captured and misused by malefactors.
- Fails to protect a single citizen from harm

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 289 and instead use this bill as a way to

[1] *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal.).

jumpstart a larger conversation about how best to protect minors online and consider alternatives that do not raise constitutional issues.

NetChoice is currently suing California over its similar law, the Age-Appropriate Design Code (AB 2273). To avoid unnecessary First Amendment litigation, you should veto SB 289 and instruct the legislature to wait until the lawsuit is resolved to advance SB 289 or similar legislation.

Like California's AADC, SB 289 Violates the First Amendment

Requiring identity authentication of all users adds several unconstitutional barriers to sharing and accessing First Amendment-protected online speech. First, SB 289's in-effect identity verification requirements prevent anonymous and pseudonymous browsing. Second, SB 289 unconstitutionally restricts both adults' and minors' access to First Amendment-protected content. Laws that chill and restrict Americans' speech in this way are unconstitutional under the First Amendment unless they pass strict scrutiny; a stringent test SB 289 will surely fail.[2] Third, SB 289 violates online services' well-established First Amendment right to editorial discretion.

First, SB 289's requirement for online services to engage in "minimum duty of care" of minors creates a de facto age-verification requirement for anyone who visits their websites. This functionally eliminates all unattributed activity and content on the Internet. This would hurt many communities, such as political minorities concerned about revealing their identity. The Supreme Court has repeatedly affirmed the First Amendment provides robust protection for anonymous speech as " . . . a shield from the tyranny of the majority. . . . It exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society."[3] SB 289 violates this principle.

Second, SB 289 unconstitutionally restricts Vermont minors from accessing digital content on account of their age. In *Reno v. ACLU*, the Supreme Court struck down a similar law to SB 289, the Communications Decency Act of 1996, after finding that "knowing…minors are likely to access a website—and therefore create liability for the website—would surely burden communication among adults," placing an "unacceptably heavy burden on protected speech."[4] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to

[2] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[3] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).
[4] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).

children.[5] For this reason, NetChoice sued[6] over (and secured an injunction against)[7] California's similar law, the Age-Appropriate Design Code.[8]

Laws that restrict Americans' access to digital content on account of age are unconstitutional under the First Amendment unless they pass strict scrutiny.[9] To survive strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest.[10] The government nearly always fails this test—in state after state, courts have invalidated restrictions on internet communications or content deemed harmful to minors.[11] SB 289 will be no different.

While the Supreme Court has acknowledged that the government has an important interest in children's welfare[12], Vermont "must specifically identify an 'actual problem' in need of solving" to establish a "compelling interest."[13] In *Brown v. Entertainment Merchants' Ass'n*, the Supreme Court invalidated California's ban on the sale of violent video games to minors. The Court held that California failed strict scrutiny because (1) violent video games are constitutionally protected speech and (2) the state's "predictive judgments" that such games cause aggression in minors was not aimed at an actual problem. Indeed, the State's interest was not compelling because "without direct proof of a causal link" between video games and aggression, the State was merely speculating about a potential problem.

Nor is SB 289 narrowly tailored. For example, a federal district court enjoined Louisiana's attempt to block minors from accessing "harmful" content as substantially overbroad.[14] Compliance with SB 289 also violates First Amendment-protected editorial discretion. Covered entities may have community standards that allow for anonymous browsing or posting; policies which fall squarely within the First Amendment's protection.[15] Many online services have policies against collecting data from users. Yet

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[5] *Id.* at 885.
[6] Available at https://bit.ly/3jjMhXy.
[7] *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal.).
[8] Available at https://bit.ly/3RkFrh2.
[9] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).
[10] *Reno*, 521 U.S. at 874.
[11] *See, e.g.*, *American Booksellers Foundation v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011); *American Booksellers Foundation v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004).
[12] *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (identifying "the need to protect children from exposure to patently offensive sex-related material" as an interest "this Court has often found compelling").
[13] *Brown v. Entertainment Merchants' Ass'n*, 564 U.S. 786, 799 (2011) (invalidating California's attempt to ban minors from accessing "violent" video games because violent video games are protected speech).
[14] *Garden Dist. Book Shop, Inc. v. Stewart*, 184 F. Supp. 3d 331, 339 (M.D. La. 2016) ("The Supreme Court held that content-filtering was less restrictive and more effective than COPA and, under the facts presented here, this Court is compelled to reach the same conclusion.").
[15] *See generally, Netchoice v. Moody*, No. 21-12355 (11th Cir. May 23, 2022).

those that place a premium on privacy must violate their principles by forcing users—including adults—to prove their identity before accessing digital content, and retain that PII however Vermont rulemakers prefer.

Third, SB 289 violates First Amendment-protected editorial discretion by imposing liability on covered entities when their "use of personal data" causes "the encouragement of excessive or compulsive use of the online service, product, or feature by a minor consumer." Because covered entities have the First Amendment right to decide which messages to host, how to curate those messages, and how to disseminate them, SB 289 provision allowing lawsuits against them for doing just this violates the First Amendment.[16]

SB 289 Puts Minors' Sensitive Data at Risk

SB 289 was ostensibly introduced to protect children but instead it puts children's sensitive data at greater privacy and security risks. For social media companies to comply with SB 289's command for "age-appropriate" actions, they must force every user to to turn over extremely sensitive PII. Documents which conclusively establish users' birthdates are likely to be government-issued. Large-scale mandatory collection of highly sensitive government identification data increases the risks that it will be captured and misused.

A Better Approach

Rather than enact clearly unconditional laws banning the free speech of Vermont residents, 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. Vermont 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.

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[16] *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974) ("[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."

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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In conclusion, NetChoice shares lawmakers' desire to better protect young people online. To that end, we believe there are better, more effective ways to achieve these goals. Given the legislation's clear constitutional problems, we ask you to **veto** this bill and adopt measures capable of achieving both outcomes without violating the Constitution.

As always, we offer ourselves as a resource to discuss these issues in further detail. We appreciate your attention to this matter. [17]

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.

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