

South Dakota Age Verification proposals

OPPOSITION TESTIMONY

Oct. 2, 2024

Members of the Study Committee on Artificial Intelligence and Regulation of Internet Access by Minors :

NetChoice respectfully asks that you **oppose** legislative proposals which would mandate age verification at the app store level. If enacted, such proposals would almost assuredly violate South Dakotans' First Amendment rights, weaken their privacy, and fail to keep kids safe online.

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 age verification proposals and instead use them as a way to jumpstart a larger conversation about how best to protect minors online and consider alternatives that do not raise constitutional issues.

1. Age Verification—whether at app store level, device or website—level raises constitutional issues—and is already being actively litigated in other states.

The Supreme Court and other federal courts have ruled that age verification mandates that block access to the exercise of First Amendment rights are unconstitutional. Age verification laws have recently failed to withstand legal scrutiny in California, Utah, Ohio, Arkansas, and Mississippi.¹ Implementing such a

¹ See *NetChoice v. Reyes*, D.Utah (2023), <https://netchoice.org/netchoice-v-reyes/>; *NetChoice v. Yost*, S.D. Ohio (2024), <https://netchoice.org/netchoice-v-yost/>.

measure in South Dakota would likely meet the same fight and lead to costly legal challenges without providing any real benefits to the state's residents.

While States may (and should) protect minors from harm, they lack, as Justice Scalia memorably put it, “a free-floating power to restrict the ideas to which children may be exposed.”² Indeed, the First Amendment’s protections are broad, even for minors. For example, it protects the right to speak—and to access lawful information.³ Information needn’t be high-brow to receive constitutional protection; mere data generated by pharmacies is protected speech (“information”) whose commercial dissemination is also constitutionally protected, for example.⁴

Because the First Amendment protects the right to disseminate⁵ and to access lawful information *no matter the lawful dissemination method or commercial nature* age-verification requirements are unconstitutional. Indeed, the First Amendment’s protections “do not go on leave when [new] media are involved.”⁶ “Like protected books, plays, and movies,” any lawful medium used to create, access, or “communicate ideas” are protected under the First Amendment, including the “devices and features distinctive to [their] medium.”⁷

Given that legal landscape, the proposals’ age-verification, parental-consent requirements, and data-related requirements cannot survive judicial review. Unlike regulating access to *physical products* no one has a constitutionally enumerated right to buy (cigarettes, alcohol), requiring ID (or similar “identity-based” burdens) for accessing lawful speech violates the First Amendment rights of adults, minors, and businesses alike. “Age-verification schemes,” a federal district court recently held in enjoining Arkansas’s similar age-verification requirements, “are not only an additional hassle, but they also require that website visitors forgo the anonymity otherwise available on the internet.

² *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 794 (2011) (citations omitted).

³ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁴ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)

⁵ The Supreme Court reaffirmed that “creation and dissemination of information are speech within the meaning of the First Amendment” no matter the “speech” (here, data) or purpose (here, commercial). *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”).

⁶ *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2394 (2024).

⁷ *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 790 (2011).

2. Age Verification proposals undermines traditional parental authority

Poorly designed age verification laws not only face legal challenges, but also encroach upon parents' long-established prerogatives in guiding their children's upbringing and online activities. Many online platforms have already implemented robust parental control features. For example, some online platforms have led the way with impressive suites of tools for parents and teens to better protect themselves. Additional parental controls are available at the device level. For example, iPhones and iPads empower parents to limit the amount of time their children can spend on the device, choose which applications (e.g., YouTube, Facebook, Snapchat, or Instagram) their children can use, set age-related content restrictions for those applications, filter online content, and control privacy settings. This market-driven approach encourages innovation and allows for diverse solutions that can cater to different needs and preferences.

Moreover, if onerous requirements are forced onto app stores or devices, users will likely shift their habits to browser-level engagement, potentially circumventing the very protections the law aims to establish. This highlights the ineffectiveness of device-level or app store-level verification as a comprehensive solution.

Simply put, a one-size-fits-all government mandate will give users a false sense of security and will flatten the offerings for youth safety that are currently provided by the private sector. It would stifle innovation in this space and potentially leave South Dakota's youth less protected as companies focus on compliance rather than developing more effective, tailored solutions.

2. Age Verification proposals would put South Dakota residents' privacy data at risk, leaving them vulnerable to breaches and crime.

From a privacy standpoint, implementing age verification could compromise user privacy. South Dakotans, like all Americans, value their privacy and the ability to use online services without unnecessary intrusion. Age verification systems would require collecting and storing sensitive personal data, potentially including government-issued IDs or biometric information. This not only contradicts the bipartisan aim of improving data security but also creates a new target for cybercriminals, potentially putting South Dakotans at risk of identity theft or other forms of fraud. As we know from recent

experience, any time there is a store of sensitive information it becomes a prime target for identity thieves and other nefarious individuals. Even government agencies have fallen victim to these attacks.

A quarter of minors become a victim of identity fraud or theft before their 18th birthday.⁸ The problem is especially pronounced for minors in the foster care and child welfare systems. This can effect a young person's ability to access a line of credit as they move into adulthood and permanently set them back on the path to financial stability. Age verification mandates stand to make this problem a catastrophe.

In conclusion, while age-verification proposals are well-intended, we strongly believe that the drawbacks far outweigh any potential benefits. We respectfully urge the committee to reject this unconstitutional and ineffective approach. Instead, we encourage fostering an environment where private sector innovation in parental controls and youth safety tools can flourish. NetChoice and its members remain committed to protecting minors online through empowering parents, educating users, and working with policymakers like yourselves to develop more effective and constitutional solutions to address concerns about underage access to sensitive content or services.

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.⁹

Sincerely,

Amy Bos
Director of State and Federal Affairs
NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.

⁸ 25 percent of kids will face identity theft before they're 18. Age verification will make it worse. R Street Institute (2024).

<https://www.rstreet.org/commentary/25-percent-of-kids-will-face-identity-theft-before-turning-18-age-verification-laws-will-make-this-worse/>

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