



Hon. Katie Hobbs
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Re: House Bill 2586

Honorable Governor Hobbs:

The ACLU of Arizona respectfully requests Governor Hobbs veto House Bill 2586 – Harmful Website Content; Age Verification (HB2586). HB2586 violates the First Amendment rights of Arizonans to access sensitive materials free of government censorship or surveillance, will not prevent minors from accessing adult materials on the internet, and ignores better alternatives that allow parents to prevent minors from accessing adult materials on the internet without infringing on the rights of others. The ACLU of Arizona respectfully requests Governor Hobbs veto.

HB2586 is government censorship that violates the First Amendment. Mandatory age verification, and with it, mandatory identity verification, is the wrong approach to protecting young people online. HB2586 would force adults to divulge specific details about themselves, including sexuality, to private companies and government censors to gain access to speech. Submitting an ID online for sensitive content is simply not the same as showing an ID at a checkout counter. The process is expensive, complicated and creates a digital record in which consumers would rightly fear the real risks of government surveillance, identity theft, and privacy invasion. HB2586 would require commercial entities to track and verify all users to their websites, eroding the privacy rights of adults in Arizona. In addition, thousands of Arizonans who do not possess government identification would lose access to websites they are legally entitled to view.

Federal courts have repeatedly struck down age verification laws as violations of the First Amendment. In *Reno v. American Civil Liberties Union*, the Supreme Court struck down a federal law that barred dissemination of speech “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs...” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871 (1997). The Supreme Court held that portions of the Communications Decency Act violated the First Amendment because its rules for minors would infringe on the free speech rights of adults. *Id.* at 871-76. The *Reno* court held that the First Amendment fully applies to the internet and emphasized parents, instead of government, have control over what minors’ view. *Id.* at 849-53.

Nearly 15 years ago, the Supreme Court invalidated a federal law that prohibited the publishing of material harmful to minors on the internet unless the website included extensive protections against minors accessing the materials, including age verification. In *Ashcroft v. ACLU*, the Supreme Court affirmed an injunction blocking enforcement of the Child Online Protection Act (COPA), a federal law that barred dissemination of material harmful to minors over the internet. 542 U.S. 656 (2004). COPA imposed “criminal penalties of a \$50,000 fine and six months in prison for the knowing posting, for ‘commercial purposes,’ of World Wide Web content that is ‘harmful to minors.’”



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The court in *Ashcroft* held that less restrictive alternatives existed to blocking the dissemination of sensitive content to minors over the internet that would not infringe on adults First Amendment right to access the content. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666–67. “When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.” *Id.* at 665. The Supreme Court held that “[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children’s access to materials harmful to them.” *Id.*

Recently, two federal courts enjoined laws in Arkansas and Texas that would have regulated access to speech online based on age. *NetChoice v. Griffin*, No. 23-cv-5105 (W.D. Ark. Aug. 31, 2023); *Free Speech Coalition v. Colmenero*, No. 23-cv-917 (W.D. Tex. Aug. 31, 2023). The decisions are instructive in consideration of bills that similarly use age verification to control access to sensitive content, social media, or other speech online. The Arkansas law would have required social media platforms to verify users’ ages using any “commercially reasonable age verification method” and to prohibit access by minors without parental consent. *NetChoice v. Griffin*, No. 23-cv-5105 (W.D. Ark. Aug. 31, 2023). The Texas law would have imposed similar requirements for websites that are one-third “sexual material harmful to minors.” *Free Speech Coalition v. Colmenero*, No. 23-cv-917 (W.D. Tex. Aug. 31, 2023). Both courts found that the laws unconstitutionally discriminated against protected speech and impermissibly placed speech behind age verification requirements for both minors and adults.

As the court in Texas recognized, the “Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech” by government censors. *Id.* The court was clear about the risks to consumers:

“By verifying information through government identification, the law will allow the government to peer into the most intimate and personal aspects of people’s lives. It runs the risk that the state can monitor when an adult views sexually explicit materials and what kind of websites they visit. In effect, the law risks forcing individuals to divulge specific details of their sexuality to the state government to gain access to certain speech. Such restrictions have a substantial chilling effect.” *Id.*

Even requirements that data not be retained or used for other purposes did not alleviate the chilling effect from the loss of privacy. The Texas court held:

“Defendant contests this, arguing that the chilling effect will be limited by age verification’s ease and deletion of information. This argument, however, assumes that consumers will (1) know that their data is required to be deleted and (2) trust that companies will actually delete it. Both premises are dubious, and so the speech will be chilled whether or not the deletion occurs. **In short, it is the deterrence that creates the injury, not the actual retention.**” *Id.*

The Arkansas court also recognized that the age verification requires adults and minors to surrender their anonymity, in violation of the First Amendment:

“Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and ‘discourage[s] users from accessing [the regulated] sites.’



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Reno v. American Civil Liberties Union, 521 U.S. 844, 856 (1997). Age-verification schemes like those contemplated by Act 689 ‘are not only an additional hassle,’ but ‘they also require that website visitors forgo the anonymity otherwise available on the internet.’ *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003); *see also ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to ‘relinquish their anonymity to access protected speech’).” *NetChoice v. Griffin*, No. 23-cv-5105 (W.D. Ark. Aug. 31, 2023); *Free Speech Coalition v. Colmenero*, No. 23-cv-917 (W.D. Tex. Aug. 31, 2023).

Both the Texas and Arkansas courts recognized age verification laws force adults to surrender their privacy to government censors and private companies and that those policies discriminated against and chilled access to constitutionally protected materials. Further, for persons who do not have government issued ID, HB2586 acts as a complete prohibition on visiting certain websites on the internet. And for persons with government issued ID, HB2586 erodes their privacy, exposes them to private and government surveillance, and chills their access to constitutionally protected speech.

A previous Arizona law that barred dissemination of material harmful to minors over the internet was also held to violate the First Amendment. *ACLU v. Napolitano*, Civ. No. 00-0505 (D. Ariz. June 14, 2002). The statute was later amended but the court still held that it was still unconstitutional and issued a permanent injunction. *ACLU v. Goddard*, 2004 WL 3770439 (D. Ariz. Apr. 23, 2004) (statute as amended in 2003 permanently enjoined). Indeed, courts have repeatedly struck down state laws that restrict access to materials distributed over the internet on First Amendment grounds:

- *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004) (holding statute limiting dissemination of material harmful to minors over the internet was not narrowly tailored);
- *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003) (holding Alaska statute criminalizing knowing distribution of obscene material to a minor violated First Amendment);
- *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (enjoined amendments to Michigan statute which added criminal prohibitions against using computers or the internet to disseminate sexually explicit materials to minors);
- *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (holding statute violated First Amendment by burdening otherwise protected adult communication on internet);
- *Southeast Booksellers v. McMaster*, 282 F. Supp. 2d 1180 (D.S.C. 2003) (South Carolina statute barring dissemination of materials harmful to minors over internet violated First Amendment);
- *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. Oct. 26, 2010) (“Plaintiffs have demonstrated, without question, that the 2010 amendments to §§ 28 and 31 violate the First Amendment”);
- *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011) (holding statute criminalizing dissemination of obscene materials to minors violated First Amendment);
- *Garden District Book Shop v. Stewart*, 2016 WL 1734093 (M.D. La., Apr. 29, 2016) (holding statute criminalizing the publication of “material harmful to minors” on the internet violated First Amendment).



In addition to the clear case law demonstrating HB2586 is unconstitutional, the Governor’s office should veto HB2586 for a clear policy reason as well – it won’t work. HB2586 will NOT prevent minors from accessing sensitive content on the internet. There are several websites, including Google, Reddit and X, that host sensitive content but whose total sensitive information fall beneath the 33% threshold as proposed in the bill. Failing to restrict access to high-profile websites that contain the same sexually explicit content of adult-oriented websites defeats the stated purpose of the bill. Additionally, websites outside the jurisdiction of the United States and websites that host pirated material have no incentive to comply with state law. The ease by which consumers would still be able to access adult content without having to submit to age verification raises questions as to whether HB2586 truly addresses any real concerns.

Finally, minors will be able to easily circumvent the prohibitions. Government ID works because a human person can verify whether the person in the identification matches the person in front of them. Under an automated system, nothing ensures that the person’s ID accurately matches their identity. Minors who wish to access adult content could still do so by using their parent or older sibling’s ID or by simply installing a free VPN¹ that will mask their location.

As the Supreme Court stressed in *Reno v. ACLU* and again in *Aschcroft v. ACLU*, the burdens posed by online age verification unnecessarily suppress access to protected speech, and that “less restrictive alternatives” — such as parental filters — are as effective, if not better, at barring minors from seeing adult materials. Since the *Reno* ruling, these filters have only improved and they have proliferated the market. These filters can be placed on our phones, tablets, laptops, computers and wi-fi networks. Many games and chat apps also come with built-in parental controls. These filters are incapable of being evaded by VPN, unlike government censorship attempts.

HB2586 is unconstitutional. It invades the privacy of adults, won’t work to keep minors from accessing adult content, and better alternatives already exist. HB2586 is a threat to Arizonans’ privacy, and with-it freedom of speech on the internet.

We urge Governor Hobbs to veto this harmful and unconstitutional legislation.

Sincerely,
s/Darrell Hill
Policy Director
ACLU of Arizona

¹ <https://www.pcmag.com/picks/the-best-free-vpns>