

North Dakota SB 2380 as Amended

OPPOSITION TESTIMONY

February 10, 2025

North Dakota Senate Industry and Business Committee

Dear Chair Barta, Vice-Chair Boehm, and members of the Senate Industry and Business Committee:

NetChoice respectfully asks that you **oppose** SB 2380 [as amended this morning](#). This bill would mandate age verification on the device and in app stores, and would require all online services and websites to block access to mature content. While well-intentioned, the legislation presents significant policy and legal concerns:

- Violates the First Amendment and other constitutional protections;
- All North Dakota adults would have to prove they were over 18 just to use the internet (apps like browsers, social media, TV streaming, etc.);
- Would be ineffective at preventing access to obscene material.

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 take teen safety seriously and have rolled out new features, settings, parental tools, and protections to better empower parents in monitoring their children's use of social media. We ask that you oppose SB 2380 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.

Age Verification—whether in app stores, devices or website— raises constitutional issues—and is already being 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 measure in North Dakota would likely meet the same fate and lead to costly legal challenges without providing any real benefits to the state's residents.

While states may (and should) protect minors, states 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, the First Amendment prohibits the government from restricting speech or access to 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, and device filtering 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

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/>.

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).

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.”

The bill's requirements would effectively create a barrier to constitutionally protected speech, as platforms would be required to verify age before allowing access to any content. This constitutes a prior restraint on speech, which courts have traditionally viewed with particular skepticism.

To summarize, here are the constitutional problems with SB 2380 as amended:

1. The bill is a content-based distinction triggering strict scrutiny because it regulates speech based on its content—here, so-called “mature” content. Although the state has a compelling interest in protecting minors from harm, it does not have a compelling interest in censoring lawful speech. Even if it did, less restrictive alternatives exist.
2. The bill compels speech, running afoul of the First Amendment. The state may not require warnings or other labels based on lawful content.
3. The bill is overbroad because it is not limited only to blocking obscenity, which is unlawful for minors. Instead it targets a broader range of protected speech.
4. Because it is overbroad it will chill constitutionally protected speech—silencing both websites’ and their users’ speech.
5. The bill is unconstitutionally vague by failing to give adequate notice of what is required and thus encouraging arbitrary and discriminatory enforcement. For example, the bill leaves core questions unanswered: how is a primary user determined? What makes content “known” to be mature?
6. It is a prior restraint because it requires prohibiting access to lawful content before viewing. While the Supreme Court may allow that for obscenity, this bill targets protected speech beyond unlawful obscenity for minors.

SB 2380 would impact North Dakotans of all ages seeking to use the Internet

As mentioned above, SB 2380 includes provisions that require "covered manufacturers" (those who produce devices, operating systems, or app stores) to implement age verification mechanisms. Specifically, these manufacturers would need to determine or estimate the age of the primary user upon activation of a device and provide a digital signal to websites, applications, and online services indicating whether the user is over 18 years old.

This would apply to all North Dakota users who use the internet, since it covers browser apps (Safari, Chrome, Mozilla, etc.) that are capable of viewing internet websites that might access any mature content.

It would apply to gaming consoles, and to smart TV appliances and streaming sticks, since these devices and apps let viewers access videos and trailers with mature content.

The bill provides for penalties of \$10,000 per violation by device makers (computers, laptops, tablets, phones, streaming sticks for TVs) app stores, social media platforms, and virtually every website in the world. While the bill allows device providers and app stores to rely on commercially reasonable means to assess the age of the user, there is no liability limit for penalties on websites, platforms, and streaming services if they fail to block access to all mature content on their service – even user-generated videos that are posted millions of times per day.

This could multiply to millions of dollars as lots of North Dakotans use their browser, smart TV, and any application or service that could access any mature content. This unlimited liability risk means that device providers, app stores, online services, and websites face two equally problematic scenarios:

First, they could choose to cease all sales and service to business and individual users in North Dakota. This would mean withdrawing device sales and service from North Dakota. Websites, online services, gaming sites, and streaming TV platforms might impose geo-fencing to block access from North Dakota IP addresses. Such a withdrawal would significantly impact adult users and businesses in North Dakota.

Alternatively, applications, websites, gaming platforms, social media sites, and streaming TV platforms would implement age-gated access restrictions *for all users* in North Dakota. That is, they would block access to all content unless they receive an “Adult” signal from the device.

Each communication point between devices and services creates potential security vulnerabilities, including opportunities for man-in-the-middle attacks to intercept or modify age signals. While the bill prohibits using the age data "for any other purpose," it's challenging to prevent services from storing or misusing these received age signals once they're broadcast. The system would also struggle to handle common scenarios like shared family devices or multiple users, potentially broadcasting incorrect age

information. To prove compliance, device providers would need to retain an audit trail to prove that they sent the “Adult signal” to every website and app used on the device.

This mandatory age verification framework fundamentally alters the privacy landscape of online interactions by making age data a required component of all internet activity, rather than limiting age verification to specific services where it's most relevant. The cumulative privacy impact could be substantial given the sheer volume of services that would receive this data, effectively creating a new form of mandatory user tracking that could potentially be more privacy-invasive than the mature content issue it aims to address. The scale of this data exposure, affecting virtually every online interaction, makes it particularly concerning from a privacy perspective.

SB 2380 would be ineffective at preventing access to obscene material

SB 2380 allows North Dakota’s Attorney General to prosecute websites and streaming services that don’t block access to mature content after receiving a signal that the user is under 18. But in reality, the AG cannot stop foreign websites and streaming services that choose to ignore the age signal. And many online platforms that host user-generated content will simply not be able to identify mature photos or videos among the millions that are uploaded by users every single day.

An awful but predictable side effect of SB 2380 is that the bill would create a false sense of security among North Dakota parents who would otherwise remain vigilant in supervising their children's online activity

There is a better approach

The problem SB 2380 seeks to tackle is not without constitutional and practical policy solutions. Florida and Virginia have passed laws requiring specific online and social media education in the classroom. This helps arm young people with the information they need to keep their data more secure, focused on age appropriate content, and away from bad actors who would do them harm. North Dakota could take steps to publicize the resources that are available to filter content or monitor and control screen time. Solutions for families and kids don’t need to come in the form of government mandates.

For these reasons, we respectfully ask you to **oppose SB 2380**. As ever, 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.⁸

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