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Utah Division of Consumer Protection

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Salt Lake City, UT 84111

Taxpayers Protection Alliance Comments

Proposed Rule Implementing the Utah Social Media Regulation Act

The Taxpayers Protection Alliance (TPA) is a non-profit, nonpartisan organization dedicated to educating the public through the research, analysis, and dissemination of information on the government's effects on the economy.

On behalf of the millions of taxpayers and consumers it represents, TPA is pleased to submit comments regarding the State of Utah's proposed rule implementing the Utah Social Media Regulation Act.^{1,2} The act and its implementation have significant adverse implications for both the constitutional rights and financial well-being of Utahns.

Background

The emergence of the internet and social media have presented citizens and policy makers with myriad novel challenges. Protecting children is a very different task in digital environments than in the physical world. Online, children can stumble into unhealthy social dynamics, inappropriate content, or predators' clutches. This can occur within their parents' literal eyesight yet remain hidden behind screens and remain undetected. Simply put, the traditional rules and constraints of the offline world don't always apply in the digital one.

In the Utah Social Media Regulation Act (passed in 2023), the State of Utah sought to lessen social media's negative impacts on children. Utah's strategy includes a requirement that covered social media platforms must verify the ages of all users and obtain parental consent for all underage users. The two mandates go hand-in-hand, since online platforms cannot determine for whom they must obtain parental consent without first learning the age of all users to determine which users are minors.

TPA will not address whether such a policy is desirable insofar as it is likely to create the most beneficial outcomes. Instead, TPA must note the fact that courts have consistently found these sorts of policies to be unconstitutional. These repeated judicial rebukes reflect age-verification

¹ <https://le.utah.gov/xcode/Title13/Chapter63/13-63.html>

² <https://socialmedia.utah.gov/wp-content/uploads/2023/10/Social-Media-Regulation-Act-Proposed-Rule.pdf>

technologies' demonstrated impingement on user privacy and anonymity. This is a problem that, as noted, affects every prospective user (not just minors) subject to such a requirement as found in the Utah Social Media Regulation Act.

Certainly, any private social media platform may decide to verify its users' ages, and users are free to complete such verification or discontinue using that platform. The Bill of Rights does not bind private entities. Whenever government mandates a policy, however, constitutional considerations immediately appear and demand consideration.

Asserting that a policy may yield some societal benefits is not a "get-out-the-Constitution-free" card. TPA is declining here to discuss the potential public policy merits and drawbacks of parental consent or age verification mandates. These considerations must, as a legal matter, take a back seat to the fact that such mandates violate citizens' constitutional rights. Indeed, the Constitution's guarantee that the individual rights of the people, which the Founders believed preexisted human governments, shall not be infringed even in furtherance of otherwise beneficial policy goals (absent extenuating circumstances that can surmount rigorous standards of legal scrutiny) is something that makes America exceptional among the international community.

In short, policy makers must find some way to address the dangers minors face online that does not violate the Constitution. The alternative is a costly and doomed legal battle that can end only in an injunction. This would fruitlessly spend taxpayer dollars and squander time and political energy that could have been dedicated to constructing a constitutional and prudent public policy solution.

Courts Have Held Repeatedly That Age-Verification Mandates Violate the First Amendment

For decades, courts have ruled that parental consent mandates, age verification mandates, and similar policies violate the First Amendment. These decisions – from district judges, courts of appeals, and the Supreme Court itself – are unequivocal. For example, last year courts ruled against *de jure* and *de facto* age verification mandates in Texas, Arkansas, and California.^{3,4,5} The Utah Social Media Regulation Act seems destined for the same fate. Trade group NetChoice and the Foundation for Individual Rights and Expression (FIRE) have already challenged the statute in court.^{6,7}

³ <https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172751222/gov.uscourts.txwd.1172751222.36.0.pdf>

⁴ https://www.aclu.org/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file=https://www.aclu.org/wp-content/uploads/2023/07/NetChoice-v.-Griffin-W.D.-Ark.-Opinion.pdf&attachment_id=0&dButton=true&pButton=true&oButton=false&sButton=true#zoom=page-width&pagemode=none&_wpnonce=5467c0b6f5

⁵ <https://netchoice.org/wp-content/uploads/2023/09/NETCHOICE-v-BONTA-PRELIMINARY-INJUNCTION-GRANTED.pdf>

⁶ https://netchoice.org/wp-content/uploads/2023/12/NetChoice-v-Reyes_Official-Complaint_FINAL-Filed.pdf

⁷ <https://www.thefire.org/news/lawsuit-utahs-clumsy-attempt-childproof-social-media-unconstitutional-mess>

Effecting age verification requires the collection of sensitive, personally identifiable information from users.⁸ These data generally take the form either of copies of government-issued identification documents or biometric data. As noted above, social media platforms subject to a mandate perform must verify the ages of *all* users, irrespective of age. There are, consequently, two avenues to explore such mandates' constitutional deficiencies – their implications for children, and for adults.

Parental-Consent Mandates Enforce the Will of Regulators, Not Parents

The Supreme Court (and one of the great originalist justices, no less) has ruled that minors enjoy speech rights. Justice Antonin Scalia asserted as much in his majority opinion in *Brown v. Entertainment Merchants Association* (2011), a case in which the Supreme Court overturned a California statute that sought to prevent children from accessing violent video games.⁹

Justice Scalia wrote:

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

(Citations and quotation marks omitted.)

A popular policy proposal among advocates of stringent social-media regulation (and the one adopted by Utah) is to ban minors *by default* from accessing large swaths of online content (i.e., constitutionally protected speech). This approach is often advanced in the name of “empowering” parents, yet courts have rejected it.

As Justice Scalia wrote in *Brown*, default bans do not bolster parental prerogatives – they substitute the state’s judgement for the parent’s, subject to a parental option to opt-out. “While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want,” Justice Scalia argued. Parents have broad authority to control their children’s lives, an authority policy makers may rightfully reinforce, Scalia wrote. Yet, “it does not follow that the state has the power to prevent children from hearing or saying anything without their parents’ prior consent.”

Age-Verification Mandates Violate Everybody’s Right to Anonymous Speech

⁸ <https://www.rstreet.org/commentary/the-technology-to-verify-your-age-without-violating-your-privacy-does-not-exist/>

⁹ <https://www.oyez.org/cases/2010/08-1448>

As noted above, the process of age verification almost invariably requires each user to submit data that in effect identifies him – or leaves a trail of digital breadcrumbs back to his identity. However, the Supreme Court has ruled that the First Amendment protects Americans’ right to speak anonymously. This right that has been exercised throughout U.S. history. For example, Alexander Hamilton, James Madison, and John Jay, collectively, wrote possibly the most important American work of political science, *The Federalist Papers*, under the pseudonym “Publius.” Justice John Paul Stevens summarized the American stance on this issue when he wrote for the Court in *McIntyre v. Ohio Elections Commission* (1995).¹⁰ “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent,” Justice Stevens reasoned.

Meanwhile, concurring in the judgement, Justice Clarence Thomas conducted a historical review of the question. “After reviewing the weight of the historical evidence,” Justice Thomas concluded, “it seems that the Framers understood the First Amendment to protect an author’s right to express his thoughts on political candidates or issues in an anonymous fashion.”¹¹

Mandated Age Verification Is an Impermissible Deterrent to Speech

Age-verification mandates also unduly burden those seeking to exercise their speech rights. Referring to recent decisions striking down age-verification mandates is instructive on this issue.

District Judge Timothy L. Brooks’ decision blocking a 2023 Arkansas age-verification mandate provides insight. Citing *Reno v. ACLU* (1997), which struck down the Communications Decency Act, Judge Brooks writes, “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.’”^{12,13} According to ample caselaw, this sort of “discourage[ment]” itself unconstitutionally burdens adult users seeking to make use of their speech rights. “It is likely that many adults who otherwise would be interested in becoming account holders on regulated social media platforms will be deterred – and their speech chilled – as a result of the age-verification requirements,” Judge Brooks continues.

A common trope offered in defense of age-verification mandates is that technology has progressed so far as to eliminate the concerns which once rendered such mandates unconstitutional. This is mistaken, as recognized by European policy makers and U.S. courts.¹⁴

¹⁰ <https://www.oyez.org/cases/1994/93-986>

¹¹ <https://supreme.justia.com/cases/federal/us/514/334/#tab-opinion-1959672>

¹² <https://www.oyez.org/cases/1996/96-511>

¹³ https://www.aclu.org/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file=https://www.aclu.org/wp-content/uploads/2023/07/NetChoice-v.-Griffin-W.D.-Ark.-Opinion.pdf&attachment_id=0&dButton=true&pButton=true&oButton=false&sButton=true#zoom=page-width&pagemode=none&_wpnonce=5467c0b6f5

¹⁴ <https://www.rstreet.org/commentary/the-technology-to-verify-your-age-without-violating-your-privacy-does-not-exist/>

For example, the Commission Nationale de l'Informatique et des Libertés (the French data-protection agency) found that “there is currently no solution that satisfactorily meets...three requirements [i.e., accuracy, wide usability, and respect for privacy].”¹⁵

In a 2023 decision striking down a Texas statute requiring age verification for pornographic sites, District Judge David Alan Ezra concluded that “while the internet has changed since 2004, privacy concerns have not.”¹⁶ Judge Ezra added that, today, the “risks of compelled digital verification are just as large, if not greater, than those in *ACLU v. Ashcroft*,” a case that blocked another age-verification regime, the Children’s Online Protection Act (COPA).¹⁷

Don’t Waste Taxpayer Funds on Doomed Court Battles

Opposing wasteful spending of taxpayer funds is at the core of TPA’s mission. TPA would caution Utah against expending massive funds litigating a law that, as shown above, very likely violates the Constitution. Lighting Utah taxpayers’ money aflame only for courts (entirely predictably) to throw cold water all over the state’s arguments would be an act of supreme fiscal irresponsibility.

Conclusion

Utah’s parental-consent and age-verification mandates are unconstitutional, and judges have consistently halted such policies over the course of decades. These policies violate not only the speech rights of children and subvert the will of parents, but they violate adults’ First Amendment right to anonymous speech. They place an unconscionable deterrence on adults’ access to constitutionally protected speech.

As such, Utah should not squander taxpayer dollars fighting fruitless legal battles in an already-lost constitutional war.

TPA appreciates this opportunity to weigh in on the proposed guidance for the Utah Social Media Regulation Act. The constitutional and fiscal issues at hand have great import for taxpayers in the State of Utah.

It is imperative that children and governments must do more to protect children online. But these efforts must be furthered in a manner that is consistent with the Constitution’s requirements.

¹⁵ <https://www.cnil.fr/en/online-age-verification-balancing-privacy-and-protection-minors>

¹⁶ <https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172751222/gov.uscourts.txwd.1172751222.36.0.pdf>

¹⁷ <https://www.eff.org/deeplinks/2009/01/copa>