NetChoice

LEGISLATIVE ANALYSIS: Vermont's S.69

To: Members of the House Commerce and Economic Development Committee

From: NetChoice Litigation Center

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This memorandum details the continued constitutional problems presented by Vermont's S.69 including infringements on the First Amendment rights of websites and their users, as well as vagueness issues plaguing the statute.

Vermont is proposing an "Age-Appropriate Design Code" of the internet. California enacted a similar statute which has now been enjoined. In attempting to adjust its proposal to account for the ruling in *NetChoice v. Bonta*, 2025 U.S. Dist. LEXIS 46406 (N.D. Cal, March 13, 2025), the proposed legislation introduces new constitutional problems that have already been enjoined in other jurisdictions and fails to address the fundamental First Amendment flaws inherent in any "design" regulation of the internet. Namely, the proposed legislation continues to propose regulation of *speech* and constitutionally protected *expression*.

Rather than pursue paths that Courts across the country have consistently found to be unconstitutional, Vermont should reassess its legislative framework, or at the very least, wait to enact legislation until the current litigation has conclusively resolved.

The amended S.69 continues to impose restrictions that violate the speech rights of users and websites. Significantly, the legislation seeks to impose restrictions that were held unconstitutional in *Moody v. NetChoice, NetChoice v. Reyes*, *NetChoice v. Bonta I* (AADC), and *NetChoice v. Bonta II* (personalized feeds).

High-level Takeaways:

- The amended S.69 retains the content-based restrictions on speech present in earlier versions.
- The amended S.69 continues to impose barriers on the ability of users to communicate online.
- The amended S. 69 continues to infringe on websites' ability to provide their "distinct expressive offerings" by restricting their editorial choices.
- The amended S.69 continues to impose unconstitutionally vague obligations on websites
- The imposition of age-restrictions is independently unconstitutional.

\Vermont's S.69 Presents Many First Amendment Problems

As amended, S.69 continues to present several First Amendment problems. First, the bill continues to use content-based language and definition in describing its scope and application. Terms like "covered business" and "social media platform" use content-based terms like "reasonably likely to be accessed by a minor" or "allow a user to socially interact." These content-based distinctions infect all of the law's substantive provisions.
Accordingly, if S.69 were enacted, it would have to withstand strict scrutiny. It cannot.

S.69 is a content-based regulation of speech. As detailed in the March 20 memorandum, S.69, regulates websites "reasonably likely to be accessed" by minors. When assessing a nearly identical definition, the Northern District of California found that the California's AADC was "content-based in every application" because businesses that are "'likely to be accessed by children' are subject to heightened regulation, while other businesses are not." *NetChoice v. Bonta*, 2025 U.S. Dist. LEXIS 46406, *26 (N.D. Cal. 2025) (*Bonta I*).

As the *Bonta* court recognized, strict scrutiny applied to the California AADC. And the State failed to carry its burden to justify its infringements on First Amendment activity. *Id*. at *43-*50. There, as here, the law infringed on a website's ability to disseminate speech to willing listeners without satisfying the State's conditions first. Such burdens unconstitutionally infringed on the rights of the websites and their users. *Sorrell v. IMS Health Inc*., 564 U.S. 552, 566 (2011) (holding that both "burdens" and "bans" are subject to the same First Amendment inquiry). These pervasive content-based definitions and exceptions confirm that the law itself is content-based and subject to strict scrutiny which it cannot survive.

S.69 would directly infringe on a website's editorial discretion rights. Under Section 2449f(a)(4), websites would be prohibited from recommending or prioritizing content for their users to view unless that content is "express[ly] and unambiguous[ly]" searched for or categorized broadly as "breaking news" or "cat videos."

These restrictions would prevent websites from excluding, organizing, and prioritizing the vast amounts of content available on their services. In effect, it would eliminate the "distinct expressive offering" that is the compilation of third-party content curated by social media websites. *Moody v. NetChoice*, 603 U.S. 707, 738 (2024). That is a restriction the government may not impose. Vermont may not require all websites to function alike. They cannot transform social media into a search engine any more than it could compel The History Channel to transform into Cartoon Network. Yet, S.69 attempts to do just that and more.

S.69 would prevent speech between users. S.69 would prevent users from speaking to one another unless they do so in precisely the manner approved by the State (see Section 2449d (preventing the display of users' content and interaction between users). Further it would prevent websites from communicating to their users when important or interesting updates arise (*see id*. at (a)(1)(H) (preventing notifications)). Similar provisions have already been enjoined. *NetChoice v. Reyes*, 748 F.Supp.3d 1108 (D. Utah 2024) (enjoining provisions that limit the

ability to speak to “connected” accounts); *NetChoice v. Bonta*, 2024 U.S. Dist. LEXIS 234919, *50 (N.D. Cal. 2024) (*Bonta II*) (enjoining restrictions on sending notifications).

S.69 imposes vague obligations on websites that will chill their speech. S.69 imposes a “duty of care” on websites to prevent the use of their services that “materially disrupts” certain activities such as sleeping. Yet, in its recent ruling, the Northern District of California found substantially similar requirements unconstitutionally vague because “covered businesses will not have notice of what conduct is proscribed and what conduct is permitted.” *Bonta I*, at *77.

Age-Assurance requirements would place unconstitutional hurdles on access to constitutionally protected speech. S.69 imposes burdens on platforms when they “know or should have known” a user is a minor and separately makes room for the Attorney General to promulgate rules related to age-assurance. Yet, to overcome the burdens placed on the dissemination of speech by S.69, websites would necessarily be required to undertake measures to perform age-assurance to the Attorney General’s satisfaction or face liability.

Yet, such restrictions on the ability to freely disseminate lawful speech are *unconstitutional in all applications*. *Id.* at 70-71 (“because all applications of [the AADC’s age-estimation requirements] will impose barriers to protected speech, the provision has no legitimate sweep.”) Indeed, it is not just the Northern District of California that has reached this conclusion. Courts across the country have uniformly determined that similar provisions restricting access to constitutionally protected speech are unconstitutional. *See e.g., NetChoice v. Yost*, 2025 U.S. Dist. LEXIS 72372 (S.D. Ohio, Apr. 16, 2025) (permanently enjoining parental consent law); *NetChoice v. Griffin*, 2025 U.S. Dist. LEXIS 61278 (W.D. Ark. Mar. 31, 2025) (permanently enjoining parental consent and age-verification law); *NetChoice v. Reyes*, 2024 WL 4135626 (D. Utah Sept. 10, 2024) (enjoining age-assurance and parental consent for social media).

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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 you with our thoughts on this important matter.