



April 2, 2024

Governor Katie Hobbs
Office of the Governor
1700 W. Washington St.
Phoenix, AZ 85007

RE: Constitutional Defects in HB 2586

Governor Hobbs,

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit dedicated to protecting free speech rights for all Americans. For more than two decades, FIRE has defended the expressive rights of individuals from across the political spectrum.

We write today to express FIRE's grave concern about the age verification provision in HB 2586. **Based on well-established Supreme Court precedent, HB 2586 will violate the First Amendment rights of Arizonans and will not survive judicial review. We urge you to veto this legislation.**

The Supreme Court Has Already Held Online Age Verification Requirements for Adult Content Online to be Unconstitutional

HB 2586 would require every person in Arizona — including every adult — to verify their age before they can access constitutionally protected adult content online.

Content-based restrictions on speech like HB 2586 are subject to strict scrutiny, meaning they will not survive judicial review unless the government can prove the restriction is narrowly tailored to serve a compelling interest and is the least restrictive means of serving that interest.¹

Lawmakers have justified age verification requirements for adult online content on the grounds that minors must be protected from the harms of the content — in other words, that there is a compelling interest at stake. But under strict scrutiny, it is not enough to have a compelling state interest; the particular approach the legislature chooses to serve that interest must be both narrowly tailored and the least restrictive means of doing so.

In practice, this means that although the government may restrict some speech to minors that it cannot restrict to adults, this authority is very narrow. In addition, the legislature

¹ *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

must still tailor the regulation to avoid burdening adults' speech more than necessary. On this basis, courts have consistently invalidated laws like HB 2586 due largely to the burden such verification imposes on all users, not only minors.

In *Reno v. ACLU*, the Supreme Court struck down provisions in the Communications Decency Act which criminalized the distribution of "indecent" or "patently offensive" material on the internet if it could be viewed by a minor.² The law included affirmative defenses for using age verification or for taking "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. The Court recognized the CDA suppressed "a large amount of speech that adults have a constitutional right to receive," and ultimately found it unconstitutional because there were less restrictive alternatives to achieve Congress' goal of limiting minors' access to this content.³

In response to *Reno*, Congress passed the Child Online Protection Act, which greatly narrowed the scope of the restricted content. COPA included an affirmative defense if the distributor restricted minors' access to content by taking measures like requiring a credit card, a "digital certificate that verifies age," or "any other reasonable measures that are feasible under available technology."

Despite its narrower scope, COPA still did not survive judicial scrutiny. After lower courts enjoined the legislation, the Supreme Court in *Ashcroft v. ACLU* upheld the injunction on grounds that the government was unlikely to be able to show COPA was "the least restrictive means among available, effective alternatives" to effectuate Congress's interest in preventing minors from accessing harmful content online.⁴ The Court noted Congress' promotion of voluntary filtering technology may be a less restrictive means that would allow "adults without children [to] gain access to speech they have a right to see without having to identify themselves or provide their credit card information."⁵ **The availability of less-restrictive means would similarly be fatal to the age verification provision of HB 2586.**

Free Speech Includes the Right to Anonymous Speech

We reiterate the Court's position not only because it speaks directly to the unconstitutionality of HB 2586, but also because it embodies an important principle: The right to freedom of speech necessarily includes the right to speak anonymously.⁶

² 521 U.S. 844 (1997).

³ *Reno* at 879.

⁴ 542 U.S. 656, 666 (2004).

⁵ *Ashcroft* at 667. On remand, the Third Circuit invalidated COPA on First Amendment grounds, and the Supreme Court denied *certiorari*. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007); *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

⁶ The Supreme Court has made clear "speakers ordinarily have the right to keep their identities private. In fact, the right to remain nameless is 'an aspect of the freedom of speech protected by the First Amendment' and a component of 'a respected tradition of anonymity in the advocacy of political causes.'" *Calzone v. Summers*, 942 F.3d 415, 425 (8th Cir. 2019) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995)).

Anonymous speech was of crucial importance to our country's founding. Anonymous pamphleteers urged their fellow colonists to break away from England, and later advocated for adoption of the Constitution and the Bill of Rights. In 1960, the Supreme Court emphasized the importance of anonymous speech in *Talley v. California*.⁷ The Court examined a Los Angeles ordinance which required printed flyers to include the author's name and address. The Court found the ordinance unconstitutional, writing: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."⁸

Today, the right to speak anonymously extends to the online space, where "any person . . . can become a town crier" and the speech "is as diverse as human thought."⁹

Requirements for age verification online — because they ultimately require *identity* verification — violate the right to anonymous speech. They chill the use of websites by security- and privacy-conscious people,¹⁰ and they pressure websites to shut down entirely.¹¹

These requirements also penalize those who do comply with the requirement by creating the risk that their browsing history — which could reveal their sexual orientation or preferences — will be leaked or stolen. Although HB 2586 requires the age verification company to eventually delete the users' data, this does not eliminate the risk of misuse by employees of the company itself or the cybersecurity risks from malicious third parties.

Some may claim the anonymous speech at issue in HB 2586 is distinguishable from other kinds of protected speech because it involves adult content. But in our free society, it is the right of the people, not the government, to decide which speech is socially valuable. Our history is riddled with attempts by elected officials to censor speech they sincerely believed to be worthless or harmful. If those officials had the authority to decide on the people's behalf which speech is useful to them — and restrict the rest — they would have suppressed many important ideas, writings, and works of art.

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⁷ 362 U.S. 60 (1960).

⁸ *Talley* at 64.

⁹ *Reno*, 521 U.S. at 870.

¹⁰ "As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely[.]" *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

¹¹ See Jeremiah Poff, Texas shows age verification for pornography work, *Opinion*, Washington Examiner (March 15, 2024), <https://www.washingtonexaminer.com/opinion/beltway-confidential/2922835/texas-shows-age-verification-for-pornography-sites-works/> ("Shutting down Pornhub in their state is a win no matter what. They should keep that in mind when worrying about the enforcement mechanisms in each bill and whether or not they work.").

Requiring every person to verify their age and, therefore, reveal their identity before accessing lawful, fully protected online content imposes significant burdens on the exercise of First Amendment rights. FIRE urges you to stand up for free speech and veto HB 2586.

If you have any questions, you can reach us at (215) 717-3473 or carolyn.iodice@thefire.org. Thank you for your time and consideration.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Carolyn Iodice". The signature is fluid and cursive, with the first name "Carolyn" written in a larger, more prominent script than the last name "Iodice".

Carolyn Iodice
Legislative & Policy Director

A handwritten signature in dark ink, appearing to read "Greg Y. Gonzalez". The signature is fluid and cursive, with the first name "Greg" written in a larger, more prominent script than the last name "Gonzalez".

Greg Y. Gonzalez
Legislative Counsel