



## Age Verification: A Threat to the Free Speech and Privacy of Anyone Who Uses the Internet

### **What is age verification?**

Age verification is the most demanding method used to ascertain the age or age range of an individual before they are able to access digital content. Age assurance is the term used to encompass the different [methods](#)—including age verification—that can be used for this process. Those methods include:

- **Age Declaration:** An “age gate” asks the user to provide their birthdate but does not require supporting evidence. This method may also ask for parental consent or vouching.
- **Age Estimation:** Facial analysis software that places the user in an age threshold, such as under 13 or over 21. Other methods include AI analysis of browsing history, voice, or even signals from a VR game to estimate the age range of the user.
- **Age Verification:** Using facial recognition, an algorithm matches a live photo with a scan of a government-issued ID. Alternatively, a user can add verified credentials to a digital wallet app, creating a digital ID that is either stored in the cloud or on the device.

### **Why is age verification bad for free speech?**

Fundamental First Amendment activity takes place on social media, such as engaging in political expression or religious worship. Age verification requirements would completely block some users from online material if they do not have the necessary identification, including transgender and gender-nonconforming people whose identification might not match their true identity, or undocumented immigrants who are unable to obtain a driver’s license or a State ID. Users without an ID will be discouraged from seeking information online, in fear of compromising their digital privacy. Minors too are entitled to significant First Amendment protections, and parental consent to access and engage with online content [impermissibly burdens all users](#). If an adult does not have an ID, it subsequently limits the speech that *both* adults and children are able to view. Such age verification laws impose governmental authority on what speech young people can access, unless parents allow otherwise.

### **Why is age verification bad for privacy?**

Age verification removes the ability for individuals to browse the internet anonymously. Websites can limit the risk of using age assurance tools to verify a user’s age, such as by immediately deleting age-verification data. However, even if implemented, any user worried about the privacy and security of their data will be discouraged from using online platforms.

Age verification laws have the ability to suppress large amounts of speech online that adults have a constitutional right to view and engage with. Repeatedly, courts have held that age verification laws violate the First Amendment as they restrict access to protected speech, either directly by blocking individuals from accessing speech online, or indirectly by burdening the user through the age-verification process. By depriving individuals of their right to speak anonymously, age verification drastically undermines privacy online.

## Recent Court Decisions Underscore Constitutional Concerns of Bills Aimed at Children Online

### I | Barring Access to Speech Based on Age Is Presumptively Unconstitutional

Two federal courts recently enjoined laws in [Arkansas](#) and [Texas](#) that would have regulated access to speech online based on age.<sup>1</sup> The decisions are instructive in consideration of bills that similarly use age verification to control access to sexual 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. The Texas law would have imposed similar requirements for websites that are one-third "sexual material harmful to minors." The decisions found that the laws unconstitutionally discriminated against protected speech and impermissibly placed speech behind age verification requirements for both minors and adults.

The two decisions follow long-established protections for speech online. Social media's primary purpose is to allow users to speak, and "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." [Packingham v. North Carolina](#), 582 U.S. 98, 108 (2017). The Supreme Court has been adamant that children "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." [Brown v. Entertainment Merchants Ass'n](#), 564 U.S. 786, 794-95 (2011); accord [Tinker v. Des Moines Ind. Comm. School District](#), 393 U.S. 503 (1969). Thus, broad bars to accessing speech online based on age are likely unconstitutional.

As described below, regulating speech based on its "harm" or effect does not save the regulation, and those constitutional concerns are compounded by the privacy impacts of age verification.

### II | Even Discriminating Against "Distressing" Speech Is Unconstitutional

Some state bills attempt to evade First Amendment protections by regulating speech based on its *effect* or harm. However, regulating the effect of speech raises serious constitutional concerns. As the Arkansas court put it, even troubling content is constitutionally protected:

"[T]he State points to certain speech-related content on social media that it maintains is harmful for children to view. Some of this content is not constitutionally protected speech, **while other content, though potentially damaging or distressing, especially to younger minors, is likely protected nonetheless.** Examples of this type of speech include depictions and discussions of violence or self-harming, information about dieting, so-called 'bullying' speech, or speech targeting a speaker's physical appearance, race or ethnicity, sexual orientation, or gender."

**The Texas court recognized that it has been long-established that sexual material is generally protected speech.** Moreover, regulating sexual speech based on its impact, such as by causing depression or anxiety, is still an unconstitutional regulation based on content:

"[R]egulations that focus on the direct impact of speech on its audience' are not properly analyzed [as time, place, and manner regulations]." [Boos v. Barry](#), 485 U.S. 312, 321 (1988); see also [ACLU v. Reno](#), 521 U.S. at 868 (same); [Forsyth County v. Nationalist Movement](#), 505 U.S. 123, 134 (1992) ('**Listeners' reaction to speech is not a content-neutral basis for regulation.**')"

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<sup>1</sup> [NetChoice v. Griffin, No. 23-cv-5105 \(W.D. Ark. Aug. 31, 2023\)](#); [Free Speech Coalition v. Colmenero, No. 23-cv-917 \(W.D. Tex. Aug. 31, 2023\)](#).

Moreover, as the Arkansas court determined, analogies to real world places like bars or casinos are unavailing, as—unlike a bar or casino—online spaces are primarily used for constitutionally protected speech and cannot be regulated in the same way:

“The State’s briefing analogized Act 689 to a restriction on minors entering a bar or a casino. But this analogy is weak. **After all, minors have no constitutional right to consume alcohol, and the primary purpose of a bar is to serve alcohol. By contrast, the primary purpose of a social media platform is to engage in speech**, and the State stipulated that social media platforms contain vast amounts of constitutionally protected speech for both adults and minors.”

### III | Age Gating Undermines Privacy and Raises Constitutional Concerns

The two decisions further recognize that the laws’ preferred regulation of speech online—age verification—places impermissible barriers between adult and minor users and the right to speak by undermining their privacy.

The Arkansas court recognized that age verification requires adults and minors to surrender their anonymity:

“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.’ [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’).”

The court found that this was true, even if the technology used was biometric age verification (like a facial scan) or the use of a governmental ID.

The Texas court expressly concluded that the evidence showed that age verification technology remains privacy intrusive, despite purported advances in the technology:

“First, the restriction is constitutionally problematic because it deters adults’ access to legal sexually explicit material, far beyond the interest of protecting minors. . . . People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers. . . . [the] **Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech.**” (internal question marks omitted)

Even requirements in the law that data not be retained or used for other purposes did not alleviate the chilling effect from a loss of anonymity. The Texas court said:

“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.**”

Thus, bills that implement age verification requirements raise serious constitutional questions in undermining user privacy.

## Court Precedent Prohibits the Use of Private Ratings as the Basis for Government Restrictions or Enforcement

Legislation that proposes to use private industry/entity definitions for its own content (e.g., rating systems or, more recently, a social media company's determination of "flagged content") as the basis for defining **government restrictions and/or enforcement** would run afoul of well-established court precedent. See:

- [Ent. Software Ass'n v. Hatch](#), 443 F. Supp. 2d 1065 (D. Minn. 2006): Struck down a law that barred minors from buying or renting games that the video game industry had voluntarily rated "Mature" or "Adults Only", aff'd sub nom. [Ent. Software Ass'n v. Swanson](#), 519 F.3d 768 (8th Cir. 2008).
- [Engdahl v. City of Kenosha](#), 317 F. Supp. 1133 (E.D. Wis. 1970): Enjoined the enforcement of an ordinance that used MPAA ratings to bar minors from accessing certain films.
- [MPAA v. Specter](#), 315 F. Supp. 824 (E.D. Pa. 1970): Enjoined the enforcement of a Pennsylvania statute that penalized exhibitors showing movies that the film industry's voluntary rating system deemed unsuitable for family or child viewing.
- [Swope v. Lubbers](#), 560 F. Supp. 1328 (W.D. Mich. 1983): Found that the motion picture rating system was an improper basis for determining constitutional protection.
- [Drive-In Theaters v. Huskey](#), 435 F.2d 228 (4th Cir. 1970): Enjoined the sheriff from prosecuting exhibitors for obscenity based on "R" or "X" rating.
- [Book People, Inc. v. Wong](#), 1:23-cv-00858-ADA (W.D. Tex. Sep. 18, 2023), and aff'd [No. 23-50668](#) (5th Cir. 2024): Found that the state may not mandate private ratings systems with government punishment.