

January 17, 2024

Office of Attorney General Rob Bonta  
Initiative Measures  
Electronically Delivered

**Re: Comment on Proposed Initiative No. 23-0035**

Dear Attorney General Bonta:

We write on behalf of the Electronic Frontier Foundation in opposition to proposed initiative No. 23-0035, which would require that online services pay statutory damages based on claims that they host content considered harmful to children.

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. With over 30,000 dues-paying members and over 500,000 supporters receiving our newsletters, EFF is a leading voice in promoting policies that benefit both creators and users of technology. Founded in 1990, EFF believes that as our uses of technology grow, our rights and freedoms should grow with them.

Initiative 23-0035 is a misguided and unconstitutional proposal that will restrict all Californians' access to online information. Should it become law, it will also be ineffective because a federal law preempts Californians' ability to hold online services civilly liable for harm caused by user-generated content.

The initiative would allow for plaintiffs suing online information providers to collect statutory damages of up to \$1 million dollars based on the vaguest of claims that the service violated "its responsibility of ordinary care and skill to a child." To be sure, children can be harmed online. Initiative 23-0035, however, takes a deeply flawed and punitive approach to protecting children that will disproportionately harm everyone's ability to speak and to access information online.

The heavy statutory damages imposed by Initiative 23-0035 will result in broad censorship via scores of lawsuits that may claim any given content online is harmful to any child. California should not enact a law that would be more harmful to children and will not be enforceable in any event.

**Initiative's Vague Standard Will Severely Limit Access To Important Online Discussions**

Californians do not agree, and have never agreed, about what types of content is "harmful," to children or adults. This is because that standard is incredibly subjective and depends on many factors, including the age of the child and the specific facts surrounding any claim of harm. Initiative 23-00035 seeks to transform these fact-specific issues into a generalized legal standard that imposes severe penalties on any service that gets it wrong.

The dangerous combination of the vague standard and statutory damages will result in greater censorship of a wide variety of content online.

Children’s health, safety, and sexuality are often the subject of widespread debate largely because there is no general consensus in California or otherwise about what is harmful to children. For example, elected officials in both California and other states have said that access to LGBTQ+ content harms children.<sup>1</sup> More than 20 states have passed recent laws that ban the provision of gender-affirming care to minors.<sup>2</sup> At the same time, the California Attorney General’s office actively supports LGBTQ+ rights and access to gender-affirming care. Initiative 23-0035 empowers anti-LGBTQ+ advocates to file lawsuits against services and to impose penalties on sites for speech about LGBTQ+ issues and rights that they find objectionable. Those lawsuits would likely push online services to restrict access to medical, health, and sexual information that many LGBTQ+ children need.

Americans also do not agree whether certain sports and activities are appropriate for, or could harm, children. A growing body of evidence shows that contact sports such as tackle football may cause severe and fatal brain trauma to young people.<sup>3</sup> Yet playing high school football is promoted, discussed, and celebrated in communities throughout the state, and is covered by hundreds of print and broadcast news outlets. Under Initiative 23-0035, does an online service that provides information about high school football, including permitting users to discuss games, violate the initiative’s legal standard by failing to protect children from harm?

Another example: technologies that many view as improving life, health, and culture, such as electronic bicycles, can also cause severe injuries and deaths among young people. Officials in one California county reported that nine out of 41 emergency responses to bicycle accidents between Oct. 10 and Nov. 10, 2023, involved e-bikes, and said that 71% of the 911 calls for riders ages 10 to 19 were related to e-bikes.<sup>4</sup> Under Initiative 23-0035, allowing online discussion of these higher-risk activities could lead to court-imposed penalties for the online information provider based on claims that discussing these activities online harmed a child.

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<sup>1</sup> “Chino Valley Unified School District set to ban LGBTQ+ books,” Los Angeles Blade, Nov. 17, 2023. <https://www.losangelesblade.com/2023/11/17/chino-valley-unified-school-district-set-to-ban-lgbtq-books/>

<sup>2</sup> Human Rights Campaign, map and data available at: <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map>

<sup>3</sup> “They started playing football as young as six. They died in their teens and twenties with C.T.E.”, *The New York Times*, Nov. 16, 2023. <https://www.nytimes.com/interactive/2023/11/16/us/cte-youth-football.html>

<sup>4</sup> “Marin officials sound alarm on e-bike risks,” *Marin Independent Journal*, November 22, 2023. <https://www.marinij.com/2023/11/22/marin-officials-sound-alarm-on-e-bike-risks/>

That’s a big problem for every Californian’s ability to access information online. It’s also a First Amendment violation. Requiring platforms to apply the vague standard of “ordinary care and skill” is subjective and depends on many factors. The state cannot enact a law that forces online services to steer clear of conversations about controversial or benign topics such as LGBTQ+ youth or high school football, the overwhelming majority of which will be protected speech. Relatedly, the state cannot set up a legal regime that allows anyone to seek to censor speech they disagree with or view as dangerous.

Because Initiative 23-0035 provides for so much variance in how people could enforce it, the liability will inevitably lead services to steer clear of even remotely controversial topics. Platforms will react to censorship penalties like this initiative by limiting access to information to anything that could plausibly be deemed “harmful to children” by a potential plaintiff. The chilling effect would be to remove discussion of any difficult or sensitive topic. Topics like substance abuse, mental health, or domestic violence are likely to be blocked or harshly moderated by platforms that fear penalties in court.

### **Initiative Could Lead To Harmful Age Verification Requirements**

The platforms that do not block or moderate spaces where certain topics are discussed will likely instead attempt to age-verify users, in order to shield minors from allegedly harmful conversations, and to serve as a defense in lawsuits. As EFF has explained in other contexts, mandatory online age verification is itself a bad idea.<sup>5</sup>

As age verification requirements spread, Californians will be required to hand over much more private data simply to access online information. Mandatory online age verification invariably harms adults’ rights to speak anonymously or to access lawful speech online. Further, age verification that relies on government-issued identification harms the tens of millions of Americans, already vulnerable and often low-income, who do not have an ID. Age verification induced by Initiative 23-0035 could cause these Californians to lose access to basic online information and services, such as the ability to seek housing and employment.

### **The Initiative is Preempted by Federal Law**

Should Initiative 23-0035 become law, it will be largely ineffective because it directly conflicts with a federal law that immunizes online services for some legal claims based on user-generated content. 47 U.S.C. § 230 (“Section 230”) generally prohibits civil claims against online services when the legal theory is based on harm flowing from

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<sup>5</sup> See “Age Verification Would Undermine Anonymity Online,” Jason Kelley and Adam Schwartz, March 10, 2023, at <https://www.eff.org/deeplinks/2023/03/age-verification-mandates-would-undermine-anonymity-online>.

another user’s speech. Section 230 stands for the principle that we should all be responsible for our own actions and statements online, but generally not those of others. The law establishes a national standard for claims against online services and explicitly states that “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>6</sup> To the extent that Initiative 23-0035 creates liability based on user-generated content that the plaintiff believes is harmful to minors, it would be barred by Section 230. Thus, separate and apart from the First Amendment problems described above, the initiative is unlikely to be enforced when the claim is based on user-generated content.

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Californians should be concerned about the various ways children are harmed online, and should be exploring ways to prevent those harms. This includes enacting legislation that protects everyone’s privacy online, including children.<sup>7</sup> Those proposals have the benefit of reducing many online harms and being constitutional. Initiative 23-0035 unfortunately will not reduce online harms to children and will likely be struck down as unconstitutional.

Thank you for considering these comments.

Sincerely,

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<sup>6</sup> 47 U.S.C. § 230(e)(3), <https://www.law.cornell.edu/uscode/text/47/230>

<sup>7</sup> Corynne McSherry, Mario Trujillo, Cindy Cohn, and Thorin Klosowski, Privacy First: A Better Way to Address Online Harms, EFF White Paper (Nov. 14, 2023), <https://www.eff.org/wp/privacy-first-better-way-address-online-harms>