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NetChoice
Defending Free Speech and Free Enterprise Online

Maryland HB 901

OPPOSITION TESTIMONY

February 27, 2023

Maryland General Assembly
House Economic Matters Committee

Dear Chair Wilson and members of the committee:

We respectfully ask that you **oppose** HB 901. The bill's goal is laudable and one NetChoice supports. But its chosen means are unconstitutional by imposing prior restraints on online speech, erecting barriers to sharing and receiving constitutionally-protected speech, and by providing only vague notice to online businesses as to what the law prohibits. The Supreme Court struck down a similar law in 1996 after finding that "knowing…minors are likely to access a website—and therefore create liability for the website—would…[place] an unacceptably heavy burden on protected speech."[1]

NetChoice has an active First Amendment lawsuit against California for its nearly-identical Age-Appropriate Design Code (AB 2273) for these reasons.[2] To avoid unnecessary litigation, this committee should not advance HB 901 while this litigation is pending. HB 901:

1. Violates the First Amendment;
2. Litigation is already underway over an identical law in *NetChoice v Bonta;*
3. Comes with many other problems, as outlined in the attached slide deck.

HB 901 Imposes Prior Restraints on Speech

A prior restraint is a form of censorship that requires the government to approve First Amendment-protected expression before it is published.[3] Prior restraints are "the most serious and least tolerable infringement on First Amendment rights" which face a "heavy presumption against [their]

[1] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[2] Available at http://bit.ly/3ZjVMFs.
[3] *See generally Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).

constitutional validity."[4] HB 901's requirement that online services create "data protection impact assessments" "[b]efore" presenting speech in order to allow the government to develop plans to "mitigate or eliminate" speech that is "potentially harmful" is a prior restraint by definition.

HB 901's state-imposed barriers to accessing speech are also a form of prior restraint. In *ACLU v. Mukasey*, for example, the Third Circuit held invalid a law which prohibited online services from transmitting allegedly "harmful" speech to minors unless they age-verified users after finding the law would "deter[]" "many users" from sharing and accessing speech online and would cause "[w]ebsite owners" to "be deprived of the ability to provide this information to those users"; the court found the law was effectively a prior restraint.[5]

Further, as we explain in our preliminary injunction motion against California's version of this bill, age-gating the internet "restrains speech that both minors and adults are constitutionally entitled to receive. The government cannot "reduce the adult population … to reading only what is fit for children" to protect children from ostensibly inappropriate speech.[6] In *Reno v. ACLU*, the Supreme Court struck down a similar law, the Communications Decency Act of 1996, after finding that "knowing…minors are likely to access a website—and therefore create liability for the website—would surely burden communication among adults," placing an "unacceptably heavy burden on protected speech."[7] The Court wrote that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit" to children.[8] HB 901's requirements will be found unconstitutional by courts for the same reason.

HB 901 is Void for Vagueness

HB 901 is also unconstitutional because its operative provisions rests on standards and phrases that are impermissibly vague. Vague laws "trap the innocent by not providing fair warning" of proscribed conduct, and invite "arbitrary and discriminatory application" by placing compliance at the whim of "ad hoc and subjective" regulators.[9] A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[10] Laws regulating expression face an even "more

[4] *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976).
[5] 534 F.3d 181, 196-97 (3d Cir. 2008).
[6] *Butler v. Michigan*, 352 U.S. 380, 381, 383 (1957).
[7] *Reno v. ACLU*, 521 U.S. 844, 849 (1996).
[8] *Id.* at 885.
[9] *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).
[10] *United States v. Williams*, 553 U.S. 285, 304 (2008).

stringent" test because they cause speakers "to steer far wider of the unlawful zone."[11]

HB 901's "likely to be accessed by [minors]" standard fails to provide sufficient notice of which specific services and features are subject to the law; several of the "indicators" that define the standard are vague, subjective, and undefined. A service falls under the law, for example, if it is "determined, based on competent and reliable evidence regarding audience composition, to be routinely accessed by a significant number" of minors. But the law fails to define how many minors is "significant" and whether that number should be assessed in absolute terms or relative to the provider's user base.

Nor is it clear how frequent access must be—and over what time period—to be "routine[]." HB 901's vague terms leaves regulators boundless discretion to discriminate among services and to review and evaluate each service's practices without any disclosed criteria. This makes it constitutionally void by virtue of its lack of clarity.

* * *

For these reasons, we respectfully ask you to **oppose HB 901**. As ever, we offer ourselves as a resource to discuss any of these issues with you in further detail, and we appreciate the opportunity to provide the committee with our thoughts on this important matter.

Sincerely,

Carl Szabo
General Counsel
NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.

[11] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

California AB 2273

The wrong path for teens, parents, and states

Carl Szabo - Vice President & General Counsel NetChoice

What is Age Appropriate Design Code Act?

“so vaguely and broadly written that it will almost certainly lead to widespread use of invasive age verification techniques that subject children (and everyone else) to more surveillance while claiming to protect their privacy”

Evan Greer
Fight for the Future

Winners and Losers of AB 2273

Winners

- California Attorneys
- Plaintiffs Bar
- Companies looking to get notice of competitor's actions
- Data thieves

Losers

- Parents
- Teens
- At risk communities
- Privacy
- Rule of law
- Security

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Little Bit of History

Why is COPPA 13?

- Originally supposed to be 16yrs
- Turns out it came down to marginalized communities:
  - worried about stopping gay teens from learning more about themselves
  - worried teens who wanted to keep a child or consider other options

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Treating Everyone as a Child

- "business that provides an online service, product, or feature likely to be accessed by a child." "Child" is defined as under-18
- Government is getting between what a parent may want and their 17 year old
- Giving parents a false sense of security

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Collecting MORE information?

AB 2273 demands MORE data collection from every user

- Need to verify the age of every user or treat everyone one the internet like an infant
- Identity authentication functionally eliminates anonymous online activity
- Harming many communities, such as minorities concerned about revealing their identity (e.g., LGBTQ), pregnant women seeking information about abortions, and whistleblowers.
- Just think about protestors who must tell the government who they are.

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Loss of Anonymity

And a honey pot of PI

- Since the law has “might be” or “could be” for 17 year-olds, businesses must get confirmation of the user and their age
- This would require some yet unknown tools to verify the user is NOT under 18 - perhaps collecting a Driver’s license and more information?

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Does it have a PROA?

- "Nothing in this title shall be interpreted to serve as the basis for a private right of action under this title or any other law."
- BUT…California B&P 17200 allows for PRAs for any legal violation, including violations of other California statutes.

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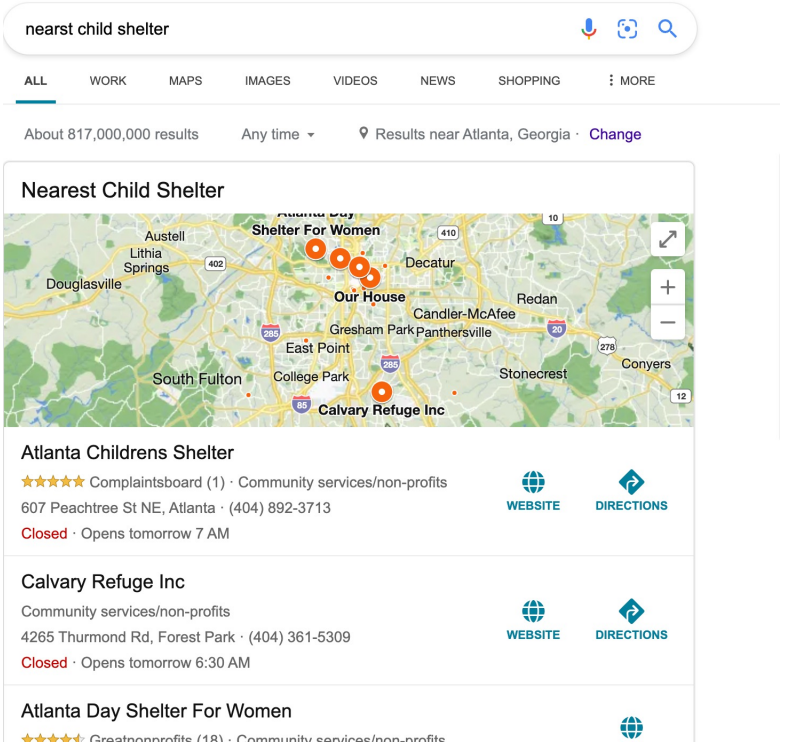
Test Case - Internet Search

- Collect, sell, or share any precise geolocation information of children by default unless the collection of that precise geolocation information is *strictly necessary* for the business to provide the service, product, or feature requested and then only for the limited time that the collection of precise geolocation information is necessary to provide the service, product, or feature.
- Directions to a halfway house
- “Phone number for Child Protective Services”



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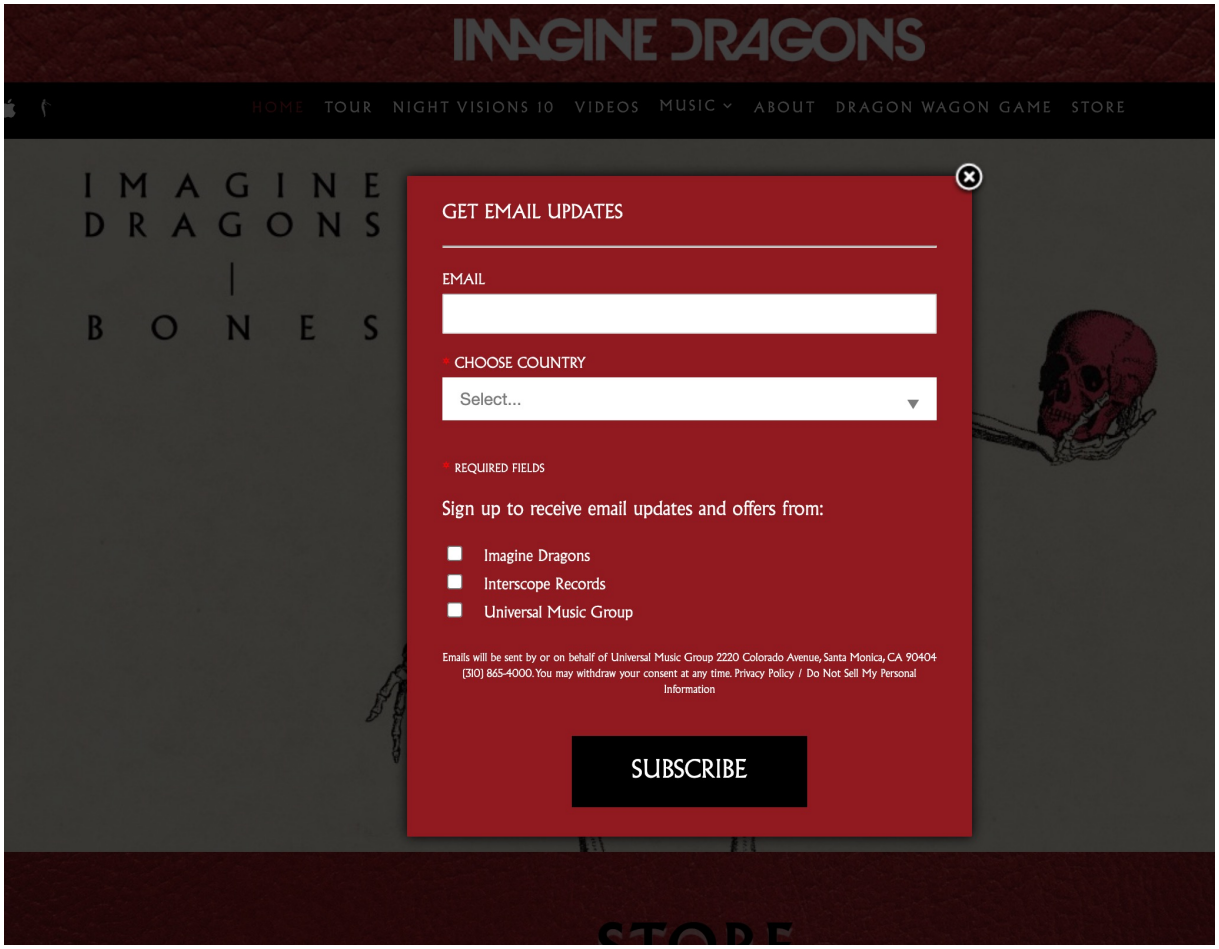
Test Case – ImagineDragons.com

- Likely to be accessed by a 17 year-old?
- Can't have the Email popup
- Perhaps can't link to Twitter



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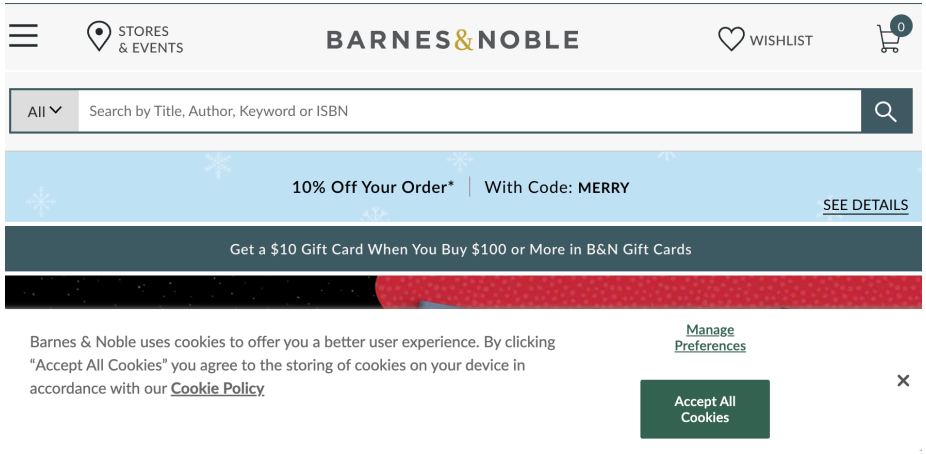
Test Case - Barnes & Noble

- Collect, sell, share, or retain any personal information that is not necessary to provide an online service…unless the business can demonstrate a compelling reason that … retaining … is in the best interests of children

- Retain past book purchases…or make recommendations based on past views or orders



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Illegal

- Preempted by Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501
- Violates First Amendment
- Violates Due Process

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COPPA collision

- Preempted by Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501
- COPPA expressly preempts state regulations "inconsistent with the treatment of those activities or actions under this" framework. Id. at § 6502(d).
- *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (invalidating New Mexico online child pornography law partly because it "subjects the use of the Internet to inconsistent regulations");
- *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (New York online sexual exploitation law "unconstitutionally subjects interstate use of the internet to inconsistent regulations");

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First Amendment Problems

- Don't know what is or is illegal *Smith v. People of the State of California*, 361 U.S. 147, 153 (1959) (holding invalid an ordinance prohibiting booksellers from possessing "obscene or indecent" writings because it would "impose a severe limitation on the public's access to constitutionally protected matter"). Applying Smith, courts have held that "any statute that chills the exercise of First Amendment rights must contain a knowledge element." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005).

- Prohibits covered businesses from exercising their own discretion as to which viewpoints they deem worth sharing with their audiences. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) *Reno v. ACLU*, 521 U.S. 844, 870, 874 (1997).

Violates Due Process

Void for Vagueness

- There are colorable arguments that parts of AB 2273 are unconstitutionally vague, as they do not define key terms or requirements and leave regulators with unbridled discretion to impose massive penalties on businesses.
- The void-for-vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes" and "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018); see also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)
- Section 1798.99.31(a)(5):
  - a *reasonable level of certainty appropriate to the risks* that arise from the data management practices of the business
- Section 1798.99.31(a)(6):
  - *concisely*, prominently, and using *clear* language *suited to the age of children likely to access that online service*, product, or feature
- Section 1798.99.31(b)(1):
  - has reason to know, *is materially detrimental to the physical health, mental health, or well-being of a child*
- Section 1798.99.31(b)(7):
  - Same as above

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Better Path

- Help teens and parents navigate this, don't try to take over
- Educational Campaign
- Genius Bar for Parents
- Florida SB 52 - Burgess
  - Requires education in schools on social media

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10 for Tech

- Ways to make your state ready for tech bit.ly/10fortech

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