# 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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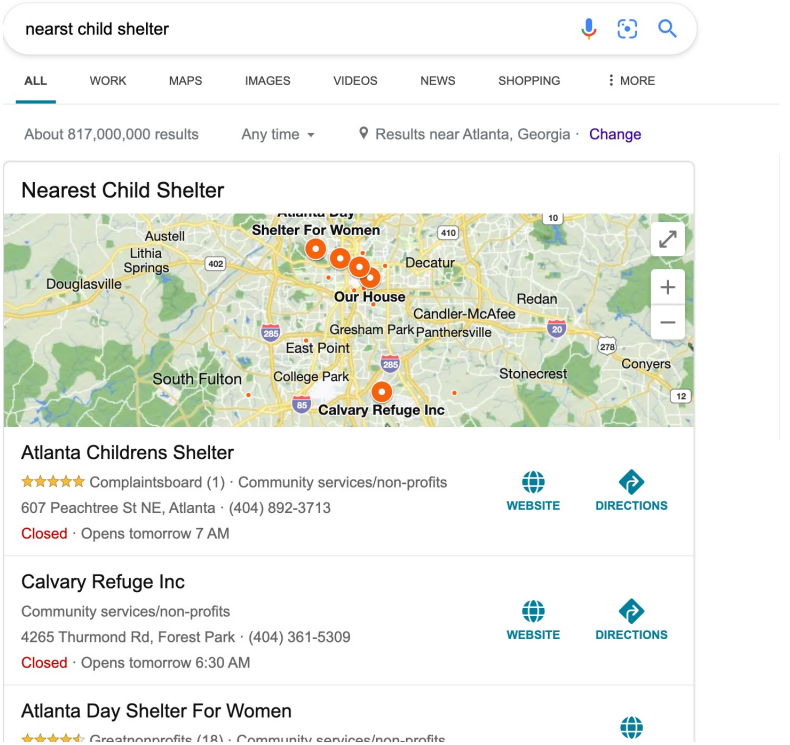
# Test Case - Internet Search

- 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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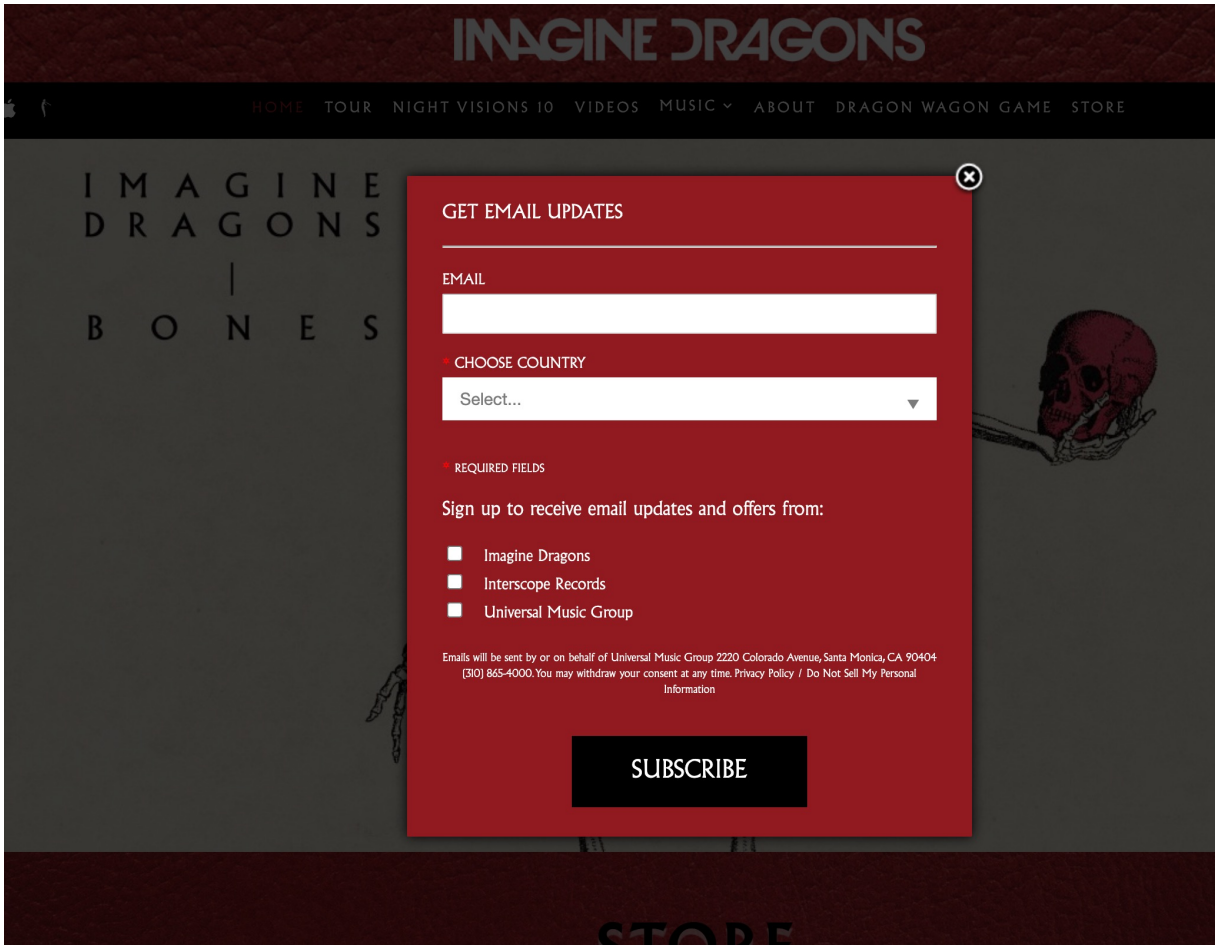
## Test Case – ImagineDragons.com

- 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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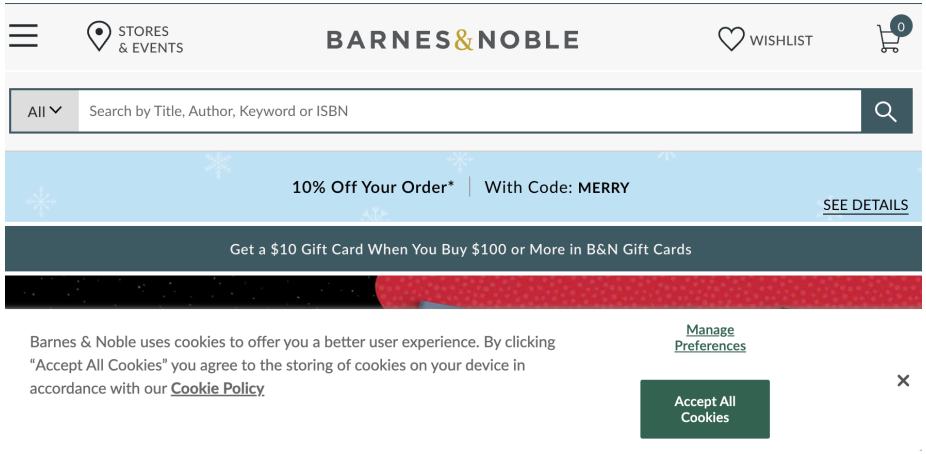
# Test Case - Barnes & Noble

- 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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