

Request for Veto: SB 571 and HB 603 the Maryland Kids Code Act

VETO REQUEST

April 8, 2024

Dear Governor Moore:

We respectfully urge you to **veto** SB 571/HB 603, the Maryland Kids Code, as the legislation would chill lawful speech online and negatively impact Maryland's vibrant small business community. Indeed, similar Data Privacy Impact Assessment (DPIA) requirements that are similar to the one contemplated in this bill have already been challenged and are currently enjoined.¹

While well-intentioned, SB 571/HB 603 has significant flaws:

- The legislation's DPIA will chill online speech
- The legislation violates the 1st Amendment of the US Constitution;
- Fails to protect a single citizen from harm

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that internet business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression.

We share the sponsor's goal to better protect minors from harmful content online. NetChoice members have taken issues of teen safety seriously and in recent years have rolled out numerous new features, settings, parental tools, and protections to better empower parents and assist in monitoring their children's use of social media. We ask that you oppose SB 571/HB 603 and instead use this bill as a way to jumpstart a larger conversation about how best to protect minors online and consider alternatives that do not raise constitutional issues.

¹ *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal.).

1. SB 571/HB 603's DPIA Requirements will chill constitutionally protected speech.

The legislation contains several constitutional defects. Chief among them is the requirement that “covered entities” (i.e., websites) produce a Data Privacy Impact Assessment (DPIA) and outline the potential negative impacts of their services and features—which must be made available to the government upon request. These requirements will necessarily chill websites’ lawful speech by discouraging them from innovating new ways to disseminate and communicate information.

DPIAs Violate the First Amendment and Chill Speech

As a general matter, the government may not compel speech or force someone to espouse a view on a subject.² Indeed, the Court has only permitted the government to compel speech in exceedingly narrow circumstances. Such cases must involve: 1) commercial advertisements that are, 2) inherently false or misleading. In such cases, the court may compel speech about *purely factual and non-controversial* information to eliminate the deception.³

Yet, SB 571/HB 603’s DPIA requirements do not concern commercial advertisements nor do they compel “purely factual and non-controversial information.” Rather, the DPIA’s require websites to speculate about the potential harms of their websites, features, products, and designs. But the features, designs, and services of websites are *speech*. In other words, the DPIA provision demands that websites speculate about the potential harms of their own speech and the dissemination thereof.⁴

In 2021, California passed its own Age-Appropriate Design Code. And, like this proposal, California’s AADC required websites to create DPIAs. When challenged, the district court struck down the AADC, including the DPIA requirement, and found that by requiring websites to speculate about the harms of their *designs* (i.e., content) the law impermissibly compelled speech.⁵ Indeed, the district court found that the DPIA did not advance the state’s interest in securing minor privacy because the DPIA concerned the potential harms of being exposed to certain *content* rather than from actual data management practices.

² *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down a requirement to display the state’s preferred message); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (striking down requirements to profess the State’s desired message).

³ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

⁴ *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (the dissemination of information is speech for purposes of the First Amendment); *see also 303 Creative v. Elenis*, 600 U.S. 570 (2023)

⁵ *See NetChoice v. Bonta*, 2023 WL 6135551*, *20-21 (N.D. Cal.). (compelling speech about website designs violates the First Amendment).

Further, by requiring websites to turn over the DPIAs about their new and existing services and how they measure up to the “best interests of children standard” to the government on demand, websites will be disincentivized from innovating. Indeed, the looming specter of government review and inspection of a website’s features will discourage the offering of new features (which would then be subject to review) and thereby chills the dissemination of speech.

In its attempt to protect Marylanders online, the legislature has proposed something that is unconstitutional. But an unconstitutional law won’t keep anyone safe or keep them better informed. While they might make people feel good or like they “did something,” unconstitutional laws don’t address important concerns and, indeed, by prolonging the arrival of real solutions, an unconstitutional law only makes everyone worse off.

A Better Approach

Rather than enact clearly unconditional laws banning the free speech of Maryland residents, the state would be better served enacting laws that help the citizens and are legal. NetChoice is working with lawmakers from across the country to achieve such ends.

Requiring Digital Education in Schools

Education is one of the best, most readily available tools at the government’s disposal to protect minors and adults from online deception. Maryland should redouble its legislative efforts to improve digital literacy for its citizens. We believe educating citizens about the electoral and voting processes and how to spot deceptive statements regarding elections is better and more effective than heavy handed government bans on free speech.

This approach will not only reach children where they are, but will help arm them to become better digital citizens.

Updating Child Abuse Laws for AI

Today, child abusers are able to use artificial intelligence to create images and escape justice under existing Child Sexual Abuse Material (CSAM) laws. This is because existing CSAM laws require real images of the abuse, rather than AI generated ones. NetChoice is working with lawmakers to create laws that fill the gaps in existing CSAM laws to protect children from such abuses.

Empowering law enforcement to arrest child abusers

Today less than 1% of all reports of child abuse are even investigated. That means that 99% of reports of child abuse go unheard. This is because law enforcement doesn't have the resources it needs to investigate and prosecute child abusers. NetChoice supports giving law enforcement the resources it needs to put child abusers behind bars.

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In conclusion, NetChoice shares lawmakers' desire to better protect young people online. To that end, we believe there are better, more effective ways to achieve these goals. Given the legislation's clear constitutional problems, we ask you to **veto** this bill and adopt measures capable of achieving both outcomes without violating the Constitution.

As always, we offer ourselves as a resource to discuss these issues in further detail. We appreciate your attention to this matter.⁶

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

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

⁶ The views of NetChoice expressed here do not necessarily represent the views of NetChoice members