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Legal Sidebar

NetChoice v. Bonta and First Amendment Limits on Protecting Children Online

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On September 18, 2023, in *NetChoice v. Bonta*, the U.S. District Court for the Northern District of California preliminarily enjoined enforcement of the California Age-Appropriate Design Code Act (CAADCA). California enacted the CAADCA to "protect[] children when they are online." The court acknowledged that the law's purpose "clearly is important," but nonetheless held that it "likely violates the First Amendment." This Sidebar explains the court's decision and discusses some potential implications for similar legislation.

Online Child Protection and Free Speech

Since at least the Communications Decency Act of 1996, Congress has been enacting laws intended to make "[t]he information superhighway . . . safe for families and children." The resulting legislation includes privacy protections for children online and laws conditioning certain federal assistance for schools and libraries on the adoption of policies that protect children from exposure to harmful or obscene websites.

Over the same time period, the Supreme Court has issued multiple decisions holding that the internet is an important forum for speech. In 1997, the Court wrote that chat rooms allow "any person with a phone line [to] become a town crier." By 2017, the Court had described social media websites as "the modern public square." In decisions that address the intersection between the internet's role in facilitating speech and legislative efforts to protect children online, the Court has "repeatedly recognized the governmental interest in protecting children from harmful materials," but it has also held that some statutes aimed at increasing those protections online exceed the First Amendment's bounds.

Recent years have seen renewed calls to increase protections for children using the internet. The Children's Online Privacy Protection Act (COPPA), the primary federal law that creates privacy protections for children online, was enacted in 1998. Some lawmakers have argued that it is time for an update. In addition, states—which are also prohibited from abridging the freedom of speech—have added several new laws to the regulatory landscape in the past few years.

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The CAADCA

In 2022, California enacted the CAADCA after finding that "more needs to be done to create a safer online space for children to learn, explore, and play." California's law reaches beyond COPPA's federal protections in several ways. The CAADCA defines *child* as anyone under the age of eighteen, while COPPA defines *child* as anyone under the age of thirteen. The CAADCA applies to services "likely to be accessed by children," while COPPA regulates only services "directed to children" and operators who know they are collecting personal information from children. The CAADCA also includes prohibitions and mandates involving reports, risk assessments, and design limitations that do not appear in COPPA—while omitting any express safe harbor provision like the one incorporated into COPPA.

Specifically, businesses covered by the CAADCA may not

- use the personal information of any child in a way that the business knows, or has reason to know, is materially detrimental to the physical health, mental health, or well-being of a child;
- profile a child or collect geolocation information from a child by default unless certain criteria are met;
- collect, sell, share, or retain any personal information that is not necessary to provide an online service, product, or feature with which a child is actively and knowingly engaged;
- use personal information of a child—if collection was necessary to provide an online service, product, or feature, or to comply with other provisions of the CAADCA—for any reason other than a reason for which that personal information was collected; or
- use dark patterns to lead or encourage children to provide additional personal information, forgo privacy protections, or take an action detrimental to the child.

Covered businesses are required to

- complete a Data Protection Impact Assessment before any new online services, products, or features are offered to the public, which must identify the purpose of the online service, product, or feature, how it uses children's personal information, and the risks of material detriment to children that arise from the data management practices of the business, in addition to addressing eight specifically enumerated issues;
- provide certain information about completed Data Protection Impact Assessments to the California Attorney General upon request;
- either estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business, or apply the privacy and data protections afforded to children to all consumers;
- configure all default privacy settings provided to children by the online service, product, or feature to settings that offer a high level of privacy;
- provide privacy information, terms of service, policies, and community standards concisely, prominently, and using clear language suited to the age of children likely to access that online service, product, or feature;
- provide an obvious signal to the child if and when the online service, product, or feature allows the child's parent, guardian, or any other consumer to monitor the child's online activity or track the child's location;
- enforce the published terms, policies, and community standards established by the business; and

- provide prominent, accessible, and responsive tools to help children, or if applicable their parents or guardians, exercise their privacy rights and report concerns.

NetChoice's Challenge to the CAADCA

NetChoice is a national trade association of online businesses and the plaintiff in several recent lawsuits that challenge state regulations of internet companies. In December 2022, NetChoice sued the Attorney General of California seeking to enjoin enforcement of the CAADCA on several grounds. The complaint included allegations that the law violates the First Amendment because it is a content-based regulation of speech that does not survive heightened scrutiny. NetChoice also filed a motion for a preliminary injunction that raised the same argument.

Content-based regulations of expressive activity are ordinarily subject to a legal standard known as strict scrutiny if challenged in court. The Supreme Court has said that, when strict scrutiny applies, a law will be "presumptively unconstitutional and may be justified only if the government proves" the law is "narrowly tailored to serve compelling state interests." There is precedent for applying this level of scrutiny to regulations of internet content. The Supreme Court explained in *Reno v. ACLU*, for example, that a law "prohibit[ing] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age" is "a content-based blanket restriction on speech." After going on to hold that the statutory provisions challenged in the case were "not narrowly tailored," the Court concluded that the law abridged the First Amendment.

In its response to NetChoice's motion for a preliminary injunction, California contended that the CAADCA regulates only nonexpressive business practices related to the collection and use of data, so the law should not trigger strict scrutiny or any other level of First Amendment scrutiny. California also claimed that the CAADCA is content-, viewpoint-, and speaker-neutral, and strict scrutiny is therefore inappropriate even if the court thought the law regulates speech. Instead, California argued, the CAADCA affects, at most, commercial speech in content-neutral ways and should be subject to the more lenient intermediate scrutiny standard. As the Supreme Court has described intermediate scrutiny, regulations are permissible if they directly advance a substantial governmental interest and are not more extensive than is necessary to serve that interest. Although more lenient than strict scrutiny, intermediate scrutiny still necessitates a relatively robust judicial review, which laws do not always survive.

The Court's Decision

The Northern District of California decided that the CAADCA regulates protected expression and that, regardless of whether the Act is subject to strict scrutiny or intermediate scrutiny, NetChoice can likely show that it violates the First Amendment. (Because the court was deciding a motion for a preliminary injunction, the applicable legal standard was whether NetChoice is "likely to succeed on" its First Amendment claim.)

The court first explained why the CAADCA regulates expression. It reasoned that the Act's prohibitions restrict certain entities' collection, sale, and sharing of data. Pointing to the Supreme Court's decision in *Sorrell v. IMS Health*—which held that "the creation and dissemination of information are speech"—the district court concluded that "restrict[ing] the 'availability and use' of information by some speakers but not others, and for some purposes but not others, is a regulation of protected expression." With respect to the CAADCA's mandates, the court determined that the provisions requiring reports or disclosures would require the creation and dissemination of speech, while the provisions requiring certain default rules and policies would effectively require that companies censor or block access to certain expressive content. In either case, the court held, the mandates regulate expression.

The court next took up the question of what level of scrutiny should apply to the CAADCA. Rather than resolve the parties' disagreement on this point, it assumed for purposes of its analysis that the law reaches only commercial speech and is subject to intermediate scrutiny. Even analyzing the CAADCA under that more lenient standard, the court explained, the law should be preliminarily enjoined.

To survive intermediate scrutiny, California would have had to show that the CAADCA directly advanced a substantial governmental interest and was not more extensive than necessary. The court agreed with California that the state has a substantial interest in protecting children online. California presented evidence that children using the internet are harmed by lax data and privacy protections. Based on that evidence and on Supreme Court cases recognizing a compelling state interest in protecting the well-being of minors, the court concluded that California "satisfied its burden of showing a substantial interest."

The court nonetheless held that every challenged provision of the CAADCA failed intermediate scrutiny. According to the court, California did not establish that many of the CAADCA's provisions—for example, requiring that businesses prepare Data Protection Impact Assessments and estimate users' ages, requiring that policies be in age-appropriate language, and requiring that children's personal information be used only for the reason for which it was collected—would in fact alleviate harm to children. Creating reports about risks, the court explained, does not necessarily reduce any harm from the risks. Requiring that businesses estimate users' ages could, in the court's view, "actually . . . exacerbate the problem" by requiring businesses to increase collection of personal information. Other provisions chilled too much speech: the court found that the restriction on profiling children prohibits practices that may benefit children and that requiring heightened default privacy settings for children could result in businesses prohibiting children from accessing services altogether. For similar reasons, the court held that the CAADCA's prohibitions on using information or dark patterns in ways that are materially detrimental to children were not sufficiently tailored. Here, the court credited evidence that, if required to evaluate whether a wide range of content is detrimental to anyone from an infant to a person just shy of eighteen, websites would not be certain what content might expose them to liability and might therefore bar children from accessing more content than necessary to prevent harm.

After deciding that the remainder of the CAADCA could not be severed from the provisions that likely violate the First Amendment, the court preliminarily enjoined the law's enforcement.

Considerations for Congress

The CAADCA was modeled on the United Kingdom's Age-Appropriate Design Code (UK AADC). Supporters of that law have touted its role in prompting changes to the product designs, default settings, and data practices used by some major internet-based services. As the *NetChoice v. Bonta* ruling illustrates, internet regulations imported from the UK, which has no equivalent to the First Amendment, will not necessarily survive scrutiny from United States courts. Still, state legislatures in Maryland and Minnesota have, like California, introduced bills that track the UK AADC.

Websites' designs, defaults, and data use are often targets of proposed federal legislative reforms. For example, the Clean Slate for Kids Online Act of 2023 (S. 395), the Children and Teens' Online Privacy Protection Act (S. 1418), the Kids Online Safety Act (S. 1409), the Protecting Kids on Social Media Act (S. 1291), the Social Media Child Protection Act (H.R. 821), and Sammy's Law of 2023 (H.R. 5778) have all been introduced in the 118th Congress. Like the CAADCA, all seek to protect children from harm online. All would regulate how websites and online services use data and information or design and offer products accessed by children. Other recent bills, such as the Digital Platform Commission Act of 2023 (S. 1671), the Algorithmic Justice and Online Platform Transparency Act (S. 2325/H.R. 4624), the DETOUR Act (S. 2708), and the Online Privacy Act of 2023 (H.R. 2701), would regulate websites and online services regardless of users' ages.

NetChoice v. Bonta shows that restrictions on websites' data use, default settings, and designs can raise First Amendment concerns. The *NetChoice* court held that restrictions on collecting, selling, sharing, or retaining personal information "limit the 'availability and use' of information . . . and thus regulate protected speech." The court said that other CAADCA provisions "require businesses to affirmatively provide information to users, and by requiring speech necessarily regulate it." Much of what online services do can be characterized as collecting, providing, using, or making available data and information. As a result, many regulations directed at online services may be subject to the types of First Amendment arguments NetChoice raised against the CAADCA.

Regulations are least vulnerable to First Amendment scrutiny when they are narrowly tailored to serve a compelling governmental interest. When applying this standard, courts have looked at whether a legislature had evidence of and "specifically identif[ied] an 'actual problem' in need of solving." To evaluate how well tailored a law is, courts have reviewed the extent to which the law sweeps too broadly, silencing protected, non-harmful speech, and whether there are "plausible, less restrictive alternatives" to accomplish the legislative purposes.

This is, however, an evolving area of law. Legislatures continue to reform the online legal landscape, and courts continue to decide challenges to new laws. The *NetChoice v. Bonta* case itself may see further developments: California is appealing the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. The Supreme Court, meanwhile, took up cases this term from the Fifth and Eleventh Circuits, also initiated by NetChoice, that raise questions about First Amendment protections for websites' editorial choices. More judicial decisions that provide guidance on the First Amendment's application to laws regulating online services are likely forthcoming.

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