Overview of Contested Youth Privacy & Safety Provisions in Pending State Law Litigation

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Since September 2022, eight U.S. states have enacted laws intended to address online youth privacy and safety. Six of these laws are currently subject to litigation, often on First Amendment grounds. In some cases, preliminary injunctions have already halted the laws from going into effect. These initial district court rulings provide a first look at what types of youth privacy and safety provisions present the greatest legal challenges, such as age assurance, parental consent requirements, and defining the scope of an act's liability. The initial wave of court decisions may inform what regulatory approaches will be most problematic for future legislation as well as other avenues to promote age-appropriate online experiences for children and teens.

Key Issues Being Litigated

This resource includes court findings about key provisions currently at issue in youth privacy state law litigation cases.

Age Assurance

- Requiring businesses to engage in age estimation (e.g., using personal information to estimate a user's age or age range) may be "likely to exacerbate," rather than alleviate, the harm of insufficient data and privacy protections for children by requiring them, and adult consumers, to divulge additional personal information. *NetChoice v. Bonta* (California Age-Appropriate Design Code Act).
- Requiring businesses to use an age verification system that uses a government ID or a "commercially reasonable method that relies on public or private transactional data" may be unjustifiably broad without defining "commercially reasonable," and when the law targets "websites as a whole, rather than at the level of the individual page or subdomain." *Free Speech Coal., Inc. v. Colmenero* (Texas HB 1181).
- "Age-verification requirements are more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information." The court found that these age-verification requirements may burden adults' and minors' access to constitutionally protected speech and are not narrowly tailored to protect minors from materials or interactions that could harm them online. *Netchoice, LLC v. Griffin* (Arkansas Social Media Safety Act).

Dark Patterns

- Prohibitions on using "dark patterns" (described as design features that "nudge" individuals into making certain decisions, such as spending more time on an application) to "take any action that the business knows, or has reason to know, is materially detrimental" to a child's well-being, to encourage children to provide excessive personal information, or to forego privacy protections must justifiably alleviate "real harm." The dark patterns prohibition lacks specificity because of the "has reason to know" language in the Act. It may cover "any" action a business knows or should know is materially detrimental to a child's well-being. *NetChoice v. Bonta* (California Age-Appropriate Design Code Act).

Data Protection Impact Assessments (DPIA)

- A DPIA reporting requirement may not address the harms it aims to protect if DPIAs address the risks arising from data management practices rather than product designs. Additionally, the Court took issue with the fact that the California law contained no requirement that covered businesses adhere to DPIA plans. *NetChoice v. Bonta* (California Age-Appropriate Design Code Act).
    - As noted in FPF's AADC policy brief last year, the DPIAs required under the AADC are broader in scope than what is typically seen in comprehensive privacy laws. The California AADC does not define the terms "material detriment," "harm," or "harmful." This ambiguity provides the Attorney General with discretion to "deem any type of asserted harm . . . as constituting a "risk of material detriment" that must be documented."

Data Use

- Restricting businesses from "collecting, selling, sharing, and retaining children's personal information," "using a child's personal information for any reason other than the reason for which it was collected," or "knowingly harmful use of children's personal information," may not be reasonably tailored to the State's interest of preventing harm to children. These provisions could restrict children from accessing beneficial or neutral content, and some businesses might bar all minors from accessing online services, thus burdening substantially more speech than is necessary to achieve the government's interest. *NetChoice v. Bonta* (California Age-Appropriate Design Code Act).

Definitions & Scope

- Definitions of "minors" and "patently offensive" may not be narrowly tailored if there is no guidance on the appropriate age group to consider when deciding whether content is "offensive." Additionally, the court found that the law did not articulate "when material may have educational, cultural, or scientific value 'for minors' which will likewise vary greatly between 5-year-olds and 17-year-olds." *Free Speech Coal., Inc. v. Colmenero* (Texas HB 1181).
- An act may be unconstitutionally vague if it fails to define "which entities are subject to its requirement" adequately. Defining or providing guidelines to determine an online platform's "primary purpose" is critical to determining which entities fall within the act's scope. *Netchoice, LLC v. Griffin* (Arkansas Social Media Safety Act).

    - Similarly, a law may be unconstitutionally vague if it purports to apply to operators that "target[] children" or are "reasonably anticipated to be accessed by children." This language is too ambiguous to determine which operators fall within the act's scope. (The Act provides an eleven-factor list to determine if a site is covered that includes considerations like "[d]esign elements" and "[l]anguage," but these terms are undefined. *Netchoice, LLC v. Yost* (Ohio Parental Notification by Social Media Operators Act).
- Defining "social media platform" vaguely potentially regulates services beyond a law's intended scope. The Act defines the platform as a service connecting users for social interaction but excludes private messaging. However, "substantial function" and "predominant" lack clear definitions, leaving platforms unsure if they're regulated. *Netchoice, LLC v. Griffin* (Arkansas Social Media Safety Act).
- A law may place a burden on minors' access to constitutionally protected speech if it fails to establish how the majority of content available on social media platforms was harmful to children to justifiably require a permissible ban on all social media use. The law was not narrowly tailored because it failed to pass the *Brown v. Entertainment Merchants Association* framework. (The Court found that the law did not cover entities that posed similar risks to children, reasoning that video platforms, gaming sites, and video chat applications are exempted under the Act but have been recognized as platforms that may pose risks to minors.) *Netchoice, LLC v. Griffin* (Arkansas Social Media Safety Act).

Parental Consent

- If requiring the "express consent" of a parent or legal guardian for a child to access an online product or service or establish an account, the law must define the sufficient proof required to demonstrate such consent. *Netchoice, LLC v. Griffin* (Arkansas Social Media Safety Act).
- A provision may not be narrowly tailored if it requires verifiable parental consent "before minors under the age of sixteen enter into contracts with the operators to which the Act applies," including creating or using an account. This provision may be so broad that it unnecessarily limits access to entire sites and, thus, unconstitutionally restricts access to protected speech. (This argument also relied on the *Brown v. Entertainment Merchants Association* framework.) *Netchoice, LLC v. Yost* (Ohio Parental Notification by Social Media Operators Act).

Profiling & Personalization

- Prohibitions on profiling children by default (e.g., automated processing of personal information to evaluate certain aspects relating to a natural person, including their previous behavior, browsing history, or assumptions of their similarity to others) may not be reasonably tailored because some profiling and targeting content can be beneficial to minors, especially those in vulnerable populations (highlighting access to resources for LGBTQ+ youth as an example). Furthermore, allowing profiling when done "in the best interest of children" may not sufficiently narrow the provision if there is no objective

standard to assess best interests. *NetChoice v. Bonta* (California Age-Appropriate Design Code Act).

Citations to Cases

- **Arkansas Social Media Safety Act** (Act 689): *Netchoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 U.S. Dist. LEXIS 154571, at *43-44 (W.D. Ark. Aug. 31, 2023).
- **California Age-Appropriate Design Code Act** (AB 2273): *NetChoice, LLC v. Bonta*, No. 22-cv-08861-BLF, ECF No. 29 at 20 (N.D. Cal. Sept. 18, 2023).
- **Ohio Parental Notification by Social Media Operators Act** (HB 33): *Netchoice, LLC v. Yost*, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 6349, at *20 (S.D. Ohio Jan. 9, 2024).
- **Texas** (HB 1181): *Free Speech Coal., Inc. v. Colmenero*, No. 1:23-CV-917-DAE, 2023 U.S. Dist. LEXIS 154065 31-33 (W.D. Tex. Aug. 31, 2023).

For more information or to learn how to become involved with FPF's Youth Privacy Legislation, Litigation, and Age-Appropriate Design efforts, please contact Chloe Altieri at caltieri@fpf.org or Bailey Sanchez at bsanchez@fpf.org.