

The Vermont Kids Code: Legal

What about the NetChoice v. Bonta Lawsuit?

We have repeatedly seen how Big Tech will turn to the courts in an attempt to chill any oversight or regulation of their industry when they cannot stop proposed legislation through lobbying.¹ True to form, in September of 2023 NetChoice, a Big Tech trade association (whose members include Meta, TikTok, Google, and Amazon) filed suit to enjoin the unanimously passed California Kids Code. The District Court sided with industry, but the fight is far from over as the case has been appealed to the 9th Circuit. Sadly, *NetChoice v. Bonta* is just but one example of Big Tech's campaign to avoid accountability through an extreme distortion of the First Amendment.

Widespread outrage about the decision and how the District Court erred in its application of the law and understanding of the harms kids face resulted in more than 60 experts and advocacy groups - collectively representing more than 1.8 million Americans - submitting [amicus briefs](#) in support of the California AADC. In their briefs, the amici - which include the American Academy of Pediatrics, American Psychological Association, American Federation of Teachers, law professors, Meta whistleblowers Frances Haugen and Arturo Bejar, the Federal Trade Commission, and a bipartisan group of 21 state Attorneys General - warn of the far-reaching dangers of upholding a September 2023 [ruling](#) by the District Court.

Legislators need to remember that resolution of this case could take years and the time to protect youth is now. It is not the first time Judge Freeman of the Northern District of California has erroneously applied the law in a way that benefits Big Tech. Two of her previous rulings on kids' data privacy have been [invalidated](#) by the 9th Circuit, further suggesting that the *NetChoice v. Bonta* decision is unlikely to be upheld in its entirety.

Common Legal Questions

Shouldn't Vermont wait for the appellate court decision?

- No! The Vermont General Assembly has the duty and right to pass laws that regulate industries in ways that protect Vermont residents. Big Tech is attempting to circumvent this right through litigation and fear-mongering.
- The decision of a California District Court, and even the 9th Circuit Court of Appeal, is not binding on Vermont. Big Tech has deep pockets and intends for this litigation to go on for years. Vermont children are in desperate need of online protections now.

Doesn't this bill violate free speech protections?

- No! Big Tech is trying to confuse you. The Vermont Kids Code regulates data management practices and product design. It is **not** content-based regulation.
- Instead of prohibiting companies from showing children vaguely defined categories of content, the Kids Code regulates how companies collect, manage, and use children's data. It also requires companies to change their design of online features (e.g., autoplay) that have been shown to harm children - such features are also distinct from content.

¹ See *NetChoice v. Yost* (Ohio), *NetChoice v. Reyes* (Utah), *NetChoice v. Griffin* (Arkansas), *NetChoice & CCIA v. Moody* (Florida), *NetChoice & CCIA v. Paxton* (Texas), *Meta Platforms, Inc. v Federal Trade Commission*

- Data privacy laws have long been upheld as constitutional.

So it's not about content, but doesn't it still regulate speech?

- Since the Age Appropriate Design model code doesn't target any content online, or require tech companies to moderate content differently, it's not regulating protected speech under the First Amendment.
- It is possible, however, that the Appellate Court may rule that because the California AADC seeks to regulate online spaces, it has an impact on speech. The court may determine that requiring companies to determine what constitutes harmful design and/or use of data has an impact on protected speech.
- If the court decides that speech is targeted or impacted by the AADC, then the appropriate standard of review would be a lower, more deferential to the legislature level of review called intermediate scrutiny. The higher standard of scrutiny - that is the least deferential to the legislature - only applies if a regulation discriminates on the basis of viewpoint - i.e., a law that determines who gets to say what, and who doesn't. Neither the California AADC nor the model AADC does this. These bills are content-neutral and apply equally to all companies that meet the threshold of users and revenue in-state. So, at best, intermediate scrutiny applies here.
- When applying the intermediate scrutiny standard to the AADC, the AADC clearly prevails. The standard says that where speech is impacted, the law still is constitutional if two things are true: 1) it furthers an important state government interest, and 2) does not burden speech any greater than it needs to carry out its important state interest. States have a substantial government interest in protecting kid's data privacy and mandating design changes to keep kids safe online. The provisions of the AADC are narrowly drawn to achieve this substantial government interest - ensuring the Code passes this level of scrutiny if it is to be applied.

What about the federal Children's Online Privacy Protection Act (COPPA)? Can Vermont do more to protect kids online?

- Yes! Vermont can, and should, do more to protect kids online.
- COPPA sets the floor for protecting kids online - COPPA allows for states to adopt and enforce further protections for kids privacy, as long as such laws are not at odds with the provisions found in COPPA. Since the Kids Code does not conflict with COPPA it would be allowed.

For Further Information or To Get Involved

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