



February 20, 2025

Senate Committee on Institutions
Vermont Senate Chamber

Re: Future of Privacy Forum Comments on S. 69 (Vermont Age-Appropriate Design Code Act)

Chair Harrison, Vice Chair Plunkett, and members of the Committee, thank you for the opportunity to provide input today.

My name is Bailey Sanchez and I am Deputy Director for U.S. Legislation at the Future of Privacy Forum. FPF is a consumer privacy nonprofit focused on advancing principled data practices in support of emerging technology.¹ In my role, I closely monitor new legislative frameworks that impact youth privacy and online safety. I am here to neither support nor oppose S. 69 (the Vermont AADC) but to share my expertise on data privacy and online safety as the committee considers this bill.

I would like to make three key points:

1. First, Vermont is also considering a broad consumer data privacy bill (S. 71). Baseline consumer privacy laws provide important protections to all consumers, including children and teens, and this would be an essential step for addressing many risks to young people online and as they age into adulthood.
2. Second, much of the testimony this committee has received thus far has addressed the perceived harms of social media platforms. While some provisions of the Vermont AADC specifically address social media companies, the bill broadly applies to all online services reasonably likely to be accessed by individuals under 18—essentially every public-facing company. Understanding the full scope of services governed by S. 69 and how its passage would impact them is critical as the committee considers the proposal.
3. Finally, as part of my work analyzing new legislative frameworks, I have also closely monitored legal challenges to recently passed online safety legislation that have led to injunctions against laws across the nation. Two common themes from this litigation are constitutional concerns with regulating content and requiring age verification. This Vermont AADC has taken new steps that seek to avoid regulating access to lawful content; however, the bill appears to require age assurance and may raise constitutional questions.

1. Comprehensive privacy legislation

¹ <https://www.fpf.org>. The views expressed in this testimony are my own, and do not represent the views of FPF's supporters or Advisory Board. See Future of Privacy Forum, Advisory Board, <https://fpf.org/about/advisory-board/>; Supporters, <https://fpf.org/about/supporters/>.

Enacting a strong baseline consumer privacy law can address many, though not all, concerns with young people's online experiences. While the United States lacks a national data privacy regime that sets baseline rules for collecting, using, and sharing personal information, 19 states have passed comprehensive consumer privacy laws.² These laws apply broadly to *all* consumers, but notably, young people benefit from these frameworks and in many states, even receive extra protections for their data. Common elements of a consumer privacy law include consumer rights such as the ability to access, correct, and delete personal data, and business obligations such as transparency requirements about what data is collected and how it is used, as well as accountability mechanisms such as risk assessments. Additionally, these frameworks often classify minors' data as sensitive, prohibit the sale of sensitive data, and place restrictions on the processing of sensitive data without the informed consent of individuals.

In the case of Vermont S. 71, this framework would create additional protections specifically for minors.³ S. 71 requires controllers to use reasonable care to avoid any heightened risk of harm to minors caused by processing personal data while providing an online service, product, or feature, and it places a flat prohibition on selling a minor's data or processing data for targeted advertising. Although S. 71 is with a different Senate committee, we encourage you to consider what harms to children and teens online may be alleviated by a baseline privacy law that protects all Vermont residents.

Separately, we caution taking care to avoid any possibility for conflicting requirements, such as multiple “duties of care” to protect children, requiring multiple visible signals to minors when their geolocation data is being collected, or establishing conflicting standards for what data may be collected and how it can be used.

2. Scope of Vermont Age-Appropriate Design Code

The Vermont AADC applies to entities that conduct business in Vermont and whose online products, services, or features are reasonably likely to be accessed by individuals under 18. The bill lays out factors for assessing reasonably likely to be accessed, such as services that are “directed to children” or internal company research showing that at least 2% of the audience includes minors aged 2-17. Much of the testimony received so far has focused on social media, but critically, this bill applies to many more services beyond social media. Consider older teens and how their interests are likely to overlap with those of young adults – websites likely to be accessed by a 17-year-old would likely include most of the internet.

The bill includes a vital exemption for entities whose primary purpose is journalism but otherwise broadly includes many websites and apps that you or I are likely to browse. I encourage the

² *Key Dates for State Privacy Laws*, Future of Privacy Forum, (Jul. 29, 2024), <https://fpf.org/resource/key-dates-for-state-privacy-laws/>.

³ <https://legislature.vermont.gov/bill/status/2026/S.71>.

committee to keep the full range of services in scope of the bill in mind as you further consider this proposal. The requirements under the bill are likely to impact industries ranging from streaming services, video games, shopping sites, and health & fitness apps.

3. Constitutional questions with online safety legislation

Over the last few years, several other states have considered legislation to create protections for young people online. However, several passed bills have been subject to constitutional challenges, including the California Age-Appropriate Design Code (currently enjoined) and the Maryland Age-Appropriate Design Code, two laws from which this bill draws inspiration. Although litigation is ongoing in several states, including where courts have enjoined these laws, key insights can be gleaned from various court opinions so far.

In *NetChoice v. Bonta*, the Ninth Circuit affirmed a preliminary injunction preventing the risk assessments in the California AADC from going into effect.⁴ The risk assessment would have required companies to assess whether the product's design could harm children, including by exposing children to harmful or potentially harmful content, contacts, and conduct. Because these risk assessments required companies to opine on content-related harms and what content, or proxies for content, may be a “harm to children”, the Court held that this section was likely to fail strict scrutiny. To be clear, not all risk assessments are unconstitutional and risk assessments can be an important tool in privacy law, but in the case of California AADC, they were not focused on data use but rather on content. S. 69 takes the unusual step of not requiring companies to conduct any risk assessment. We also note that S. 69 clearly states that the content of the media viewed by a minor shall not establish emotional distress or compulsive use in the minimum duty of care owed to minors.

Another key insight from the online safety litigation landscape is generally, courts closely scrutinize frameworks requiring age verification. Notably, the Supreme Court heard oral arguments regarding an age verification for adult content law, and much of the oral argument was focused on the state of technology and whether it has sufficiently advanced since this topic was last heard at the Supreme Court over 20 years ago.⁵ While Courts may be open to age verification requirements targeted to specific types of online companies (such as adult content platforms), they have appeared more skeptical of requirements that would broadly require all online services to determine or estimate the age of users.

Requirements for age verification often aim to either restrict children from a particular service, or determine who is a child so the appropriate safeguards can be given to them. While the intended goal is to protect children, these requirements generally impact *all* users and may require *all* users to go through an age verification process. It is unclear whether the Vermont AADC

⁴ *NetChoice v. Bonta*, <https://cdn.ca9.uscourts.gov/datastore/opinions/2024/08/16/23-2969.pdf>.

⁵ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

affirmatively requires age verification. The bill defines a covered minor as one the business “actually knows” is a minor or labels as a minor in line with methods adopted by the Attorney General. The bill further provides several considerations for the Attorney General in promulgating rules regarding commercially reasonable methods for age verification. Clarifying the bill’s intent for the level of age assurance that regulated businesses should conduct would be helpful.

We appreciate that Vermont has taken care to create safeguards, such as implementing a review process for appealing age designations and prohibitions on using data collected for age verification for other purposes. Still, given the constitutional concerns surrounding age verification and the evolving state of the technology, we urge both specificity and caution on this topic.

Thank you for the invitation to provide testimony, and I look forward to hearing from you with any questions.

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