

STATE PRIVACY & SECURITY COALITION

February 09, 2024

Chair Pamela G. Beidle
Vice Chair Katherine A. Klausmeier
Senate Finance Committee
Miller Senate Office Building
11 Bladen Street
Annapolis, MD 21401

Re: Age Appropriate Design Code (SB 571) - Unfavorable

Dear Chair Beidle, Vice Chair Klausmeier, and Members of the Committee,

The State Privacy & Security Coalition (SPSC), a coalition of over 30 companies and six trade associations in the retail, technology, telecom, payment card, and healthcare sectors, writes to respectfully request an unfavorable report of SB 571. Although this bill's language has been modified from last year's version, the significant constitutional and privacy issues remain. SPSC continues to be willing to find a path forward that mitigates these issues while still providing strong protections for children's online privacy.

While some provisions of the bill have changed, the singular threshold of 18 years has not, and while there is a new provision stating that businesses shall not be required to use age verification, this is meaningless given the rest of the bill's requirements. In practice, age verification will necessarily continue to be the main way that businesses will be able to comply with the act; alternatively, they will need to censor *all* content on the internet.

Put another way: how would a company comply with a law that establishes distinct standards and compliance requirements for individuals under 18 years of age without knowing if its users are under 18 years of age?

As the Court in *Bonta* noted about age verification methods:

“Even the evidence cited by the State about the supposedly minimally invasive tools indicates that consumers might have to permit a face scan, or that businesses might use ‘locally-analyzed and stored biometric information’ to signal whether the user is a child or not...Further...age estimation in practice is quite similar to age verification, and – unless a company relies on user self-reporting of age, which provides little reliability – generally requires either documentary evidence of age or automated estimation based on facial recognition.”¹

Importantly, this is not an issue where there is a clear divide between the business community's and numerous civil society organizations' positions – to the contrary, many civil society

¹ *NetChoice LLC v. Bonta* (N.D. Cal 2023), pages 22-23, available at <https://law.justia.com/cases/federal/district-courts/california/candce/5:2022cv08861/406140/74>.

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organizations agree that this bill’s unintended consequences and constitutional vulnerabilities – which will lead to prolonged litigation before the bill will go into effect – outweigh the bill’s benefits. Do not take our word for it – here are the words of these groups themselves:

“We believe very strongly that young people, especially LGBTQ young people...need safer standards to protect them on the internet, but with due respect...we do not believe this is the way to do this...we fear that loose definitions such as “best interests of the child,” would open up especially LGBTQ content or conduct from being accessible to young, queer and trans people who are in desperate need.” -Marshall Martinez, Executive Director of Equality New Mexico.²

“We cannot support this bill in its current form. We’re concerned that by design, this bill gives a lot of discretion to the AG to determine what is and is not harmful content, as well as some of the broad language and ...and the incentives that that might create for platforms to restrict access to platforms that is constitutionally protected.” - Naomi Valdez, Director of Public Policy at ACLU New Mexico.³

Groups such as GLAAD, the ACLU, National Center for Lesbian Rights, the Human Trafficking Project, and over 80 others have signed onto a letter⁴ from the Center for Democracy and Technology opposing the federal Kids Online Safety Act, which suffers from many of the same issues. The letter states in part:

“KOSA would require online services to ‘prevent’ a set of harms to minors, which is effectively an instruction to employ broad content filtering to limit minors’ access to certain online content. Content filtering is notoriously imprecise; filtering used by schools and libraries...has curtailed access to critical information such as sex education or resources for LGBTQ+ youth.”

Finally, the bill continues to discriminate among speakers without any stated rationale. In *Bonta*, the court noted that the State’s argument was weakened by the “clear targeting of certain speakers – i.e., a segment of for-profit companies but not governmental or non-profit entities.”⁵ The same issue appears in this bill.

We continue to be interested in finding a constitutional path forward that can provide protections for children without impermissibly infringing on speech, or creating anti-privacy incentives for data collection. We would also be very willing to engage in stakeholder discussions to accomplish our shared goal of increasing protections for children in online spaces.

² <https://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20240207/-1/74572> (New Mexico Senate Committee on Tax, Business, and Transportation, January 29 hearing.

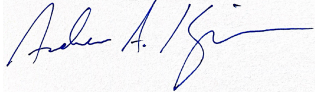
³ *Id.*

⁴ <https://cdt.org/press/more-than-90-human-rights-and-lgbtq-groups-sign-letter-opposing-kosa/>

⁵ *Bonta* at 15.

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Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Andrew A. Kingman", is written over a light gray rectangular background.

Andrew Kingman
Counsel, State Privacy & Security Coalition