

No. 23-2969

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NETCHOICE, LLC,

Plaintiff-Appellee,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 5:22-cv-08661-BLF
Hon. Beth Labson Freeman

**BRIEF OF *AMICI CURIAE* ELIZABETH DENHAM CBE AND
STEPHEN WOOD IN SUPPORT OF DEFENDANT-APPELLANT**

Linda Singer
David I. Ackerman (admission pending)
MOTLEY RICE LLC
401 9th Street NW, Suite 630
Washington, D.C. 20004
(202) 849-4962
lsinger@motleyrice.com
dackerman@motleyrice.com

*Attorneys for Amici Curiae
Elizabeth Denham CBE and Stephen Wood*

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SOURCE OF AUTHORITY TO FILE

All parties have consented to filing of this *amici curiae* brief.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* declare that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (3) Tech Justice Law Project contributed money that was intended to fund preparing or submitting the brief.

INTEREST OF *AMICI CURIAE*

Amicus curiae Elizabeth Denham CBE has over 15 years' experience as a data protection regulator in four jurisdictions and served as Information Commissioner for the United Kingdom from 2016-2021. *Amicus curiae* Stephen Wood worked for the United Kingdom Information Commissioner's Office for 15 years and served as Deputy Information Commissioner from 2016 to 2022. Ms. Denham and Mr. Wood had direct involvement in and oversight of the implementation of the original U.K. Age-Appropriate Design Code (the "Children's Code," 5-ER-457-503), upon which the California Age-Appropriate Design Code (the "AADC," codified at Cal. Civil Code §§ 1789.99.28-1798.99.40) is based, and have an interest in online children's privacy and the development of an internet that allows children to safely develop, learn, explore and play in a manner appropriate to their age. *Amici curiae* respectfully submit this brief, pursuant to Federal Rule of Appellate Procedure 29(a)(2), in opposition to the district court's decision that the AADC imposes unconstitutional restrictions on freedom of expression, in order to inform the Court of their experiences in implementing the Children's Code, which demonstrate that many of the district court's concerns are unfounded.

ARGUMENT

The California Legislature modeled the AADC after the U.K. Children’s Code. The enacting legislation states specifically: “It is the intent of the Legislature that businesses covered by the California Age-Appropriate Design Code may look to guidance and innovation in response to the Age-Appropriate Design Code established in the United Kingdom when developing online services, products, or features likely to be accessed by children.” 2021 Cal. Assemb. Bill No. 2273, §1(d) [ADD-13]. The legislature further created a “California Children’s Data Protection Working Group” to make biennial reports concerning implementation of the AADC, and directed that the working group “consider the guidance provided by the Information Commissioner’s Office in the United Kingdom when developing and reviewing best practices or other recommendations related to the [AADC].” *Id.* at §1(e).

We participated extensively in the implementation of the Children’s Code and developed much of the guidance referenced in the above statements. That experience and guidance demonstrate that, contrary to the district court’s findings, the AADC—like the Children’s Code—does not impermissibly interfere with protected speech. Rather, as companies operating in the United Kingdom (including many members of the plaintiff trade group) have recognized, the Children’s Code enables them to address concerns regarding children’s online

privacy while maintaining the flexibility and freedom necessary to operate in the commercial marketplace. This brief discusses our efforts and is intended to aid the Court in addressing the plaintiff's concerns.

I. BACKGROUND OF THE CHILDREN'S CODE IN THE UNITED KINGDOM

As detailed in the Declaration of Emily Keaney presented to the District Court, 3-ER-432-455, section 123(1) of the Data Protection Act 2018 directed the Information Commissioner's Office to establish a code of practice "on standards of age appropriate design of relevant Information Society Services which are likely to be accessed by children," 3-ER-437. The Information Commissioner's Office ("ICO") is a non-governmental public body comprised of officers and staff appointed by the Information Commissioner, and is the regulator for data protection, e-privacy, and other digital regulatory areas in the U.K. 3-ER-433. Even though it is an independent regulator, the Information Commissioner's Office remains accountable to the U.K. Parliament (and to the public) for its work. 3-ER-434.

Similar to the AADC, the Children’s Code is a statutory code of practice that was laid in Parliament and approved under negative resolution procedures¹ in 2020. 3-ER-440. Development of the Children’s Code required balancing freedom of expression concerns similar to those found in the United States Constitution. “As in the United States, British citizens have the rights to freedom of expression.”² In the U.K., “freedom of expression has not been explicitly spelled out in a written constitution,” as with the First Amendment.³ Nevertheless, English courts long have recognized freedom of expression in the common law. *See, e.g., R v. Adv. Standards Authority Ltd, ex parte Vernons Org. Ltd* [1993] 2 All ER 202 (“[T]he expression of opinion and the conveyance of information will not be restrained by the courts, save on pressing grounds. Freedom of expression is as much a sinew of the common law as it is of the European Convention.”).

¹ The phrase “negative resolution procedure” refers to a procedure by which the statute becomes law when signed and remains law unless either House of Parliament agrees to a “motion” or “prayer” to reject the statute “within 40 sitting days.” *Negative procedure*, U.K. PARLIAMENT GLOSSARY, available at <https://www.parliament.uk/site-information/glossary/negative-procedure/> (last visited Dec. 18, 2023).

² Dr. JoAnne Sweeny, *Sexting & Freedom of Expression: A Comparative Approach*, 102 Ky. L.J. 103, 128 (2014).

³ Edward J. Sullivan & Alexia Solomou, *Public Regulation of Non-Commercial Speech in the United States & United Kingdom: A Comparison*, 49 Urb. Law. 415, 416 (2017).

In 1998, the United Kingdom incorporated into law the European Convention, which codifies the right to freedom of expression: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁴ Freedom of expression analyses under the First Amendment and the Human Rights Act of 1998 “often reach similar outcomes.”⁵ For instance, both systems provide little to no protection to categories of speech such as child pornography and violent threats. *Id.* And both systems are more accepting of time, place, and manner restrictions on speech than content-based restrictions. *Id.*

II. RELEVANT PROVISIONS OF THE CHILDREN’S CODE

The Children’s Code sets forth 15 standards of age appropriate design that companies must consider to ensure their services appropriately safeguard children’s personal data and process children’s personal data fairly. 3-ER-441-43. Not surprisingly, given the Legislature’s express directive to consider

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), E.T.A. 5, U.N.T.S. 221, https://www.echr.coe.int/documents/d/echr/convention_ENG.

⁵ Brittan Heller & Joris van Hoboken, *Freedom of Expression: A Comparative Summary of United States and European Law* at 7 (Transatlantic High Level Working Grp. May 3, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563882.

interpretation and guidance issued in connection with the Children’s Code, the Children’s Code contains many provisions that are similar to the AADC. For example, both the AADC and the Children’s Code are content neutral. Importantly, the ICO is not a content regulator. 3-ER-447. The Children’s Code, like the AADC, is focused on how the content is delivered through the processing of personal data, not the nature of the content. 3-ER-447. Content is a consideration only in connection with the principle that companies should not use data to deliver content that is detrimental to children (Standard 5). Similar provisions are found in the AADC, *see* § 1798.99.31(a)(1)(B)(i) [ADD-15], and are consistent with years of industry regulation in areas such as advertising (i.e., prohibiting advertising of tobacco products on children’s programs).

Both the Children’s Code and the AADC require that companies design their services while taking into account “the best interests of the children.” 3-ER-441; 4-ER-464-67; AADC § 1798.99.29(b) [ADD-14]. This flexible standard recognizes that that children have different needs at different ages, and permits companies to tailor their services appropriately. Considerations pertinent to a 13-year-old internet user may be different from those pertinent to a 16- or 17-year-old user.

Additionally, the Children’s Code, like the AADC, applies to any online service that was “likely to be accessed by children.” 3-ER-439-41; 4-ER-461-62 & 474. The “likely to be accessed by children” scope was a requirement from

Parliament, which recognized the realities of everyday internet usage and to address the challenges caused by laws that focused only on services specifically targeted or explicitly directed at children, 3-ER-437, which at least one commentator has described as “a major loophole that plagues COPPA enforcement.”⁶ The unfortunate reality of the internet landscape is that parents and their children are often flustered by complex and ever-changing technologies and interfaces. Privacy settings may be hidden in a menu of “settings,” or require extensive navigation to locate. Because the Children’s Code requires companies to consider “the best interests of the children,” the ICO required that companies subject to its terms must provide privacy to children by design and default. 3-ER-441-43. The AADC contains similar provisions. *See, e.g.*, § 1798.99.29 [ADD-14].

The Children’s Code does not require age verification, rather the Code promotes risk-based age assurance. 3-ER-444-45. This means that the level of certainty with which a company determines the age of its users is commensurate with the risks associated with the online content. Low-risk online services are permitted to rely on simple, straightforward information such as a user’s inputted information. For higher risk types of content, additional age assurance measures

⁶ *See, e.g.*, Catherine Ransom, “*The Pre-1964 Cigarette*” of Today: Social Media, Predatory Online Practices, and New Advances in Children’s Privacy Regulation, 24 N.C. J.L. & Tech. 103, 115 (Apr. 2023).

may be appropriate, all of which is consistent with the Code’s flexible approach to protecting children’s online privacy. Or alternatively age assurance is not needed if the privacy protections in the code are extended to all users.

Further, the Children’s Code, like the AADC, requires companies to prepare Data Protection Impact Assessments (“DPIAs”). 3-ER-441. These impact assessments—already required for high risk processing under the United Kingdom’s General Data Protection Regulation (“GDPR”)⁷—were not a new innovation. The concept originated at least 20 years ago with the United States Government. Section 208 of the E-Government Act of 2002, Public Law No. 107-347, directed federal agencies to “conduct a privacy impact assessment” when, among other things, the agency “initiat[ed] a new collection of information that . . . will be collected, maintained, or disseminated using information technology” E-Government Act of 2002, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921 (Dec. 17, 2002). Indeed, the recently released “Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence,” Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023), requires the use of “risk assessments” and expressly directs issuance of a Request for Information to

⁷ 3-ER-441 at n.10.

determine “how privacy impact assessments may be more effective at mitigating privacy risks,” *id.* at 75199 & 75217.

The Children’s Code’s DPIA requirement was not intended to be, nor has it functioned in practice as, an onerous provision. Rather, the “DPIA process is designed to be flexible and scalable” enabling regulated companies to “design a process that fits with [their] existing approach to design and development.” 4-ER-484-45. They are intended not as “a compliance exercise,” but rather as a risk-based tool to enable companies “to identify and fix problems at an early stage, designing data protection in from the start” and to “help [the company] avoid reputational damage later on.” *Id.* As noted below, the ICO worked with companies to provide significant guidance and templates regarding DPIA preparation.

Finally, both the Children’s Code and the AADC make clear that the requirements set forth therein are not intended to be punitive. Businesses in “substantial compliance” with the AADC are permitted a 90-day notice period to cure any violations. § 1798.99.35(b)(2) [ADD-19]. Nor is non-compliance an opening to private suits. Neither the Children’s Code nor the AADC permit private suits to enforce their provisions. 3-ER-440; § 1798.99.35(d) [ADD-19].

III. THE ICO WORKED WITH INDUSTRY TO DEVELOP GUIDANCE SURROUNDING THE CHILDREN’S CODE’S PROVISIONS, WHICH IS INSTRUCTIVE HERE

The ICO did not develop the Children’s Code in a vacuum. Nor did the ICO impose the Code in an adversarial manner upon industry. To the contrary, just as the Legislature directed the California Children’s Data Protection Working Group (which has not yet had the opportunity to undertake this process), the ICO consulted and engaged industry at nearly every step of the process, both during development and prior to implementation. The ICO’s efforts included: (1) issuing an open call for evidence before drafting the code; (2) releasing a draft of the AADC for open consultation; (3) holding 57 roundtable meetings with stakeholders (including an initially hostile sector of the U.K. media); and (4) socializing and explaining the code for major technology firms in Silicon Valley. The final version of the Children’s Code reflected significant changes to clarify issues of concern voiced during this process. 3-ER-444. And companies had a 12-month transition period to bring their services into compliance, which was important to permit businesses to consult with the ICO in the interim if they had questions regarding implementation. 3-ER-440, 45.

The AADC requires a similar process. The legislation directs the formation of a “California Children’s Data Protection Working Group” that is tasked “to deliver a report to the Legislature . . . regarding best practices for the

implementation of” the AADC. 2021 Cal. Assemb. Bill No. 2273, at § 1798.99.32(a) [ADD-17]. As in the United Kingdom, the Working Group “shall take input from a broad range of stakeholders, including from academia, consumer advocacy groups, and *small, medium, and large businesses affected by data privacy policies*” and then deliver its recommendations. *Id.* at § 1798.99.32(d) [ADD-18]. As with the Children’s Code, key provisions of the AADC were not set to become effective until July 1, 2024, permitting businesses the same opportunity to consult with regulators during the transition period. AADC § 1798.99.31(d) [ADD-17]; § 1798.99.33(b) [ADD-18].

This is precisely the process followed in the United Kingdom that resulted in successful and cooperative implementation of the Children’s Code. The ICO consulted on and issued extensive guidance concerning its provisions. 3-ER-444-47. The guidance documents are comprehensive in scope and include issues described in the district court’s opinion, including age assurance and the preparation of DPIAs. The California Legislature directed explicitly that the California Working Group “consider the guidance provided by the Information Commissioner’s Office in the United Kingdom when developing and reviewing best practices or other recommendations related to the California Age-Appropriate Design Code.” 2021 Cal. Assemb. Bill No. 2273 at § 1(e).

The ICO’s guidance sit alongside the Children’s Code to assist businesses’ compliance efforts. 3-ER-446. For example, when media organizations raised questions regarding the effect of implementation on their services, the ICO developed a “Frequently Asked Questions” document that eased their concerns.⁸ That document confirmed that traditional “digital news media” were “not a core concern for children online.” *Id.* at 1. Thus, “the general level of risk for this industry . . . will be low,” and “existing safeguards” were likely already sufficient to protect children’s interests. *Id.* at 2. In other words, distribution of news content was not sufficiently detrimental in design or in practice to require major changes in the privacy protections already used by the digital news media.

The ICO met with organizations who expressed concerns regarding the preparation of DPIAs and thereafter created tools and templates for the organizations to follow, including another “Frequently Asked Questions” document that has been well-received among industry. 3-ER-446-47; 4-ER-504-86. The ICO’s DPIA templates applied to industries that were more likely to implement products requiring fulfillment of a DPIA, including the gaming industry

⁸ See Information Comm’r’s Office, *Age appropriate design code – frequently asked questions for the news media*, <https://ico.org.uk/media/about-the-ico/documents/2616997/faqs-age-appropriate-design-code.pdf> (last visited Dec. 18, 2023).

(4-ER-506-27), sellers of online children’s toys (4-ER-530-56) and manufacturers of internet connected toys (4-ER-559-86). The ICO created a self-assessment tool for companies to carry out their own risk assessments and issued design guidance for industry that was so well-received it won the Design for Good award 2022 from the Institute of Designers Ireland. 3-ER-446. Additionally, the ICO developed a best interest framework to help business conduct a balancing test on risks and opportunities of their online service to determine if they are in compliance with the Children’s Code standards.

All of this guidance has been well received by industry and is available both to the California Working Group and to companies seeking information regarding compliance with the AADC.

IV. THE ICO’S EFFORTS WERE SUCCESSFUL AND DEMONSTRATE THAT COMPANIES WILL NOT LEAVE THE MARKETPLACE

The district court predicated its decision, in part, on the fear that the AADC “is likely to cause at least some covered businesses to prohibit children from accessing their services and products altogether.” 1-ER-26. The district court further found generally that the AADC, if implemented, would impermissibly quell expression. *See, e.g.*, 1-ER-19-35. However, these results did not occur in the United Kingdom following implementation of the Children’s Code and are unlikely to result in the United States. Indeed, no business in the United Kingdom—including NetChoice members who do business there—challenged the

Children’s Code in court asserting that the Code violated their freedom of expression. 3-ER-451-54.

Rather than flee the marketplace or forgo offering their services to children, businesses in the United Kingdom have lauded the Children’s Code and its implementing guidance. 3-ER-451-54. In October 2021, the head of TikTok’s Public Policy for the Americas advised the U.S. Senate Subcommittee on Consumer Protection, Product Safety and Data Security that TikTok “ha[s] voluntarily implemented much of the Age-Appropriate Design Code here in the United States” and that TikTok “strongly and enthusiastically support[s] that kind of child safety law.”⁹ At the same hearing, the Vice President of Global Public Policy at Snap advised that the company was “looking actively at the [Children’s] Code to see how we can apply it to outside the UK market and apply it to many of our other markets.”¹⁰

Corporate officials have lauded both the Children’s Code and the ICO’s efforts to work with industry to ensure children’s safety. Meta has noted its work

⁹ *Hearing on Protecting Kids Online: Snapchat, TikTok, and YouTube Before the S. Comm. on Consumer Protection, Product Safety, & Data Security*, Oct. 26, 2021 (testimony of Michael Beckerman), <https://www.c-span.org/video/?515533-1/online-protection-children> (last visited Dec. 18, 2023).

¹⁰ *Id.* (testimony of Jennifer Stout).

with the ICO in seeking to implement the Children’s Code’s provisions.¹¹ The Director of Government Affairs and Public Policy at Google UK advised Parliament in May 2022 that the Children’s Code “has helped us determine new ways to keep our users safe.”¹² And Google’s President of Global Affairs has stated in a public post that “[g]ood legislative models – like those based on age-appropriate design principles – can help hold companies responsible for promoting safety and privacy, while enabling access to richer experiences for children and teens.”¹³ Roblox announced in a press release touting its support of the AADC that “[t]he UK’s [Children’s] Code” and the AADC “represent strong templates for policymakers and for companies acting in the best interest of young people.”¹⁴

These comments are consistent with our experience working with companies to incorporate the Children’s Code design principles into their operations.

¹¹ Louise Eccles, *My journey into the metaverse – already a home to sex predators*, SUNDAY TIMES, Jan. 22, 2022), <https://www.thetimes.co.uk/article/my-journey-into-the-metaverse-already-a-home-to-sex-predators-sdkms5nd3> (last visited Dec. 18, 2023).

¹² House of Commons, Online Safety Bill (Second sitting) (May 24, 2022), <https://www.parliament.co.uk/debate/2022-05-24/commons/public-bill-committees/online-safety-bill-second-sitting>.

¹³ Kent Walker, *Public Policy: A policy framework to protect children and teens online*, Oct. 16, 2023, <https://blog.google/outreach-initiatives/public-policy/google-legislation-framework-children-teens-safety/> (last visited Dec. 18, 2023).

¹⁴ Roblox, *Roblox Supports Introduction of Landmark Online Child Safety Legislation in U.S.*, <https://corp.roblox.com/wp-content/assets/pdfs/CA-Design-Code-Public-Policy.pdf> (last visited Dec. 18, 2023).

Numerous global companies based in the U.K. have made important changes as the result of the Code that protected children’s privacy with no resulting effect on freedom of expression. 3-ER-451-52. By way of example, Google pledged to turn location history off for all users under the age of 18, Twitter now requires users to enter their date of birth, and gaming companies like Epic Games or Roblox have introduced new parental controls and simplified transparency information. *Id.* Indeed, research conducted by the ICO found that “[v]ery few businesses find it difficult to conform with the Children’s Code it tends to be perceived as integrated into the general data protection conformance of the business.” 3-ER-453-54.

In summary, the experience in the United Kingdom demonstrates that the Children’s Code is best assessed in light of the collaborative process undertaken in the United Kingdom and the companies’ nearly universal acceptance and embrace of its provisions. The Legislature directed that the AADC undergo a similar process that will undoubtedly yield similar results and acceptance among the business community. There is no evidence that the changes resulting from the Code’s implementation have undermined freedom of expression. But evidence does support that those changes have made a meaningful difference to children’s privacy online. We are hopeful that our experience in the United Kingdom may inform the Court’s decision and serve as evidence that the AADC, once implemented in consultation with industry, will not impact freedom of expression.

CONCLUSION

For the foregoing reasons, *amici curiae* Elizabeth Denham CBE and Steven Wood respectfully request that this Court reverse the district court's order.

Date: December 20, 2023

MOTLEY RICE LLC

/s/ Linda Singer _____

Linda Singer

David I. Ackerman (admission pending)

Motley Rice LLC

401 9th Street NW, Suite 630

Washington, D.C. 20004

(202) 849-4962

lsinger@motleyrice.com

dackerman@motleyrice.com

Attorneys for Amici Curiae

Elizabeth Denham CBE and Steven Wood

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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