

No. 23-2969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NETCHOICE, LLC,

Plaintiff-Appellee,

v.

ROB BONTA, ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 22-CV-08861
Hon. Beth Labson Freeman (U.S.D.J.)

**BRIEF OF FAIRPLAY ET AL.
AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT AND
REVERSAL**

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici curiae each state that they have no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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TABLE OF CONTENTS

	Page
DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	3
ARGUMENT	7
I. The CAADCA's data protection impact assessment mandate does not regulate free speech but is instead a regulatory reporting requirement common in many other industries and benefits the public.	6
II. The CAADCA's age estimation provision is appropriately tailored to materially alleviate harm.	17
A. Age estimation creates no more friction than other commonly utilized tools.	18
B. Minimally invasive age estimation methods exist, and regulations can incentivize the development of innovative tools that protect users.	21
III. The CAADCA's child profiling provision is tailored to counteract harmful child profiling practices.	24
CONCLUSION	32
STATEMENT OF RELATED CASES	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
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12 U.S.C. § 5365.....	14
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15 U.S.C. § 2084.....	13, 16
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INTEREST OF THE AMICI CURIAE

Amici parties identified below are individuals and organizations who advocate for children’s safety and are in support of the CAADCA:

Fairplay, Inc., a 501(c)(3) nonprofit, is the leading independent watchdog of the children’s media and marketing industries. Fairplay’s advocacy is grounded in the overwhelming evidence that child-targeted online marketing—and the excessive screen time it encourages— undermines healthy child development.

Center for Digital Democracy is a public interest research and advocacy organization, established in 2001, which works on behalf of citizens, consumers, communities, and youth to protect and expand privacy, digital rights, and data justice.

Common Sense is a nonprofit organization giving kids, families, and teachers the tools to make informed choices about media and technology. Together with our partners, we advocate for laws and policies that help all families thrive.

Children’s Advocacy Institute is an academic, research, and advocacy organization at the University of San Diego School of Law seeking to improve the lives of children and youth.

5Rights Foundation develops new policy, creates innovative frameworks, develops technical standards, publishes research, challenges received narratives and ensures that children's rights and needs are recognized and prioritized in the digital world.

Accountable Tech is a non-profit organization working to bring about long-term structural reform to tackle the existential threat Big Tech companies pose to our information ecosystem and democracy.

Becca Schmill Foundation is a non-profit whose mission is to fund research, sponsor community programming, and advocate for policies that promote and safeguard the emotional wellbeing of adolescents and young adults.

Beyond the Screen is a non-profit organization that builds products and establishes processes to equalize the power between people and intangible technology. We work to build capacity across social media's ecosystem of accountability to incentivize building social platforms that bring out the best in us.

Children & Screens Institute of Digital Media and Child Development is dedicated to understanding and addressing questions regarding media's impact on child development through interdisciplinary dialogue, public information, and rigorous, objective scientific research bridging the medical, neuroscientific, social science, education, and academic communities.

Design It For Us is a youth-led coalition advocating for safer online platforms and social media.

Tyler Clementi Foundation is a 501(c)(3) non-profit organization working to end online and offline bullying, harassment and humiliation.

Arturo Béjar (Facebook whistleblower) is the former leader for Protect and Care of Facebook, and previously responsible for child safety at Facebook from a product and engineering perspective.

Frances Haugen (Facebook whistleblower) is an advocate for social media transparency and accountability. She is a data scientist and former algorithmic product manager at Google, Meta/Facebook, Pinterest, and Yelp.

All parties have consented to the filing of this brief.

In accordance with Rule 29, no party or party's counsel authored this brief nor contributed money to fund the preparation of this brief.

The Tech Justice Law Project, non-party, contributed funds for the preparation of this Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici write in support of the Attorney General seeking reversal of the District Court’s decision which preliminarily enjoined the California Age-Appropriate Design Code Act in its entirety (“the CAADCA”). *NetChoice v. Bonta*, No. 22-cv-08861-BLF (N.D. Cal. Sept. 18, 2023).

The CAADCA does not regulate commercial speech: it regulates data capitalism.¹ Under data capitalism, companies make profit by extracting personal data of individuals and selling data-driven services back to other individuals or corporations. NetChoice member companies, otherwise known as Big Tech, are in the business of extracting copious amounts of data from its users, and using the data either as an asset to develop other products or as a product itself to sell to other companies. More data means more profit. Advocates and whistleblowers have shown that Big Tech has prioritized profit over the well-being of the most vulnerable consumers in the market: children.

Across industries – from food, oil, baby products, to banking – regulations are in place to align market incentives with public policy. Where the market structure aggrandizes a few dominant players and exploits the most vulnerable

¹ See Sara Myers West, *Data Capitalism: Redefining the Logics of Surveillance and Privacy*, 58 BUSINESS & SOCIETY 20 (2019). See also Yeshimabeit Milner and Amy Traub, *Data Capitalism and Algorithmic Racism*, DATA FOR BLACK LIVES (May 17, 2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf.

consumers, the government is tasked with implementing safeguards. To that end, the CAADCA, was passed by the California legislature to address the safety of children, the internet users most affected by the absence of agency, choice, and safeguards in the realities of data capitalism.

In granting the preliminary injunction, the District Court fell for NetChoice’s misdirection: that the CAADCA regulates the free speech rights of companies. The acontextual insertion of free speech arguments fails to grasp the reality: Big Tech is not in the market of speech. It is in the business of extracting personal data from users’ interactions, expressions, and preferences and selling that data to various marketing and advertising companies. Characterizing the CAADCA’s purpose as speech regulation ignores the realities of the market, as the purpose of the CAADCA is to redistribute power from tech companies to consumers. As Law Professor Genevieve Lakier aptly observes, “[t]he strongly anti-redistributive cast of contemporary free speech law is not . . . primarily a consequence of how broadly the First Amendment applies . . . [but] the consequence of what courts today understand freedom of speech to mean and to require.”²

In this brief, *Amici* direct this Court’s attention to the realities of the market. Powerful social platforms’ targeting and profiling tools are designed not to

² Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1247 (2020).

advertise, but to hypnotize children. User engagement generates data; data collection brings in advertisers; ad space increases profits; and the cycle repeats. Numerous whistleblower reports, advocates for parents and children, and the platforms' own admissions have revealed that platforms cannot be entrusted with the task of protecting children from online harms. The platforms' opacity as to their data collection practices and product design decisions prevent consumers and users from making informed choices, leaving them with few options to control their online experience. Hence, many jurisdictions and industries have required companies to perform an impact assessment and report to public authorities. NetChoice members cannot show that they are an exception.

Here, *Amici* write in support of Attorney General Bonta and the CAADCA. First, it supports the CAADCA's DPIA provision by providing numerous examples of federal regulations that require risk disclosures, adverse event reporting, and warning labels in a variety of sectors, such as banking, food safety, and environmental protection. Second, it supports the age-estimation and high privacy default setting provisions by providing examples of similar regulations for identity or consent verification that introduce minor friction and require minimal to no data collection. Third, it supports the child profiling provisions by elucidating the ways in which companies intentionally take advantage of young users' psychological and neurological state to extract more data, to the detriment of young users.

ARGUMENT

I. The CAADCA’s data protection impact assessment mandate does not regulate free speech but is instead a regulatory reporting requirement like those common in many other industries.

This Court should reverse the District Court’s finding that CAADCA’s data protection impact assessment (“DPIA”) provision would implicate free speech by “requir[ing] a business to express its ideas and analysis about likely harm.” *NetChoice*, No. 22-cv-08861-BLF, at *13.

A DPIA is a form of risk assessment designed to help organizations identify, analyze, and minimize the privacy risks associated with their data collection, use, retention, and disclosure practices. The DPIA is a familiar concept for organizations versed in the EU’s General Data Protection Regulation (GDPR), which requires DPIAs for any “high risk” processing as a part of the “privacy by design” principle.³ Similarly, states including California, Colorado, Connecticut,

³ *What Does Data Protection ‘By Design’ and ‘By Default’ Mean?*, EUROPEAN COMMISSION, https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/what-does-data-protection-design-and-default-mean_en (last visited Dec. 10, 2023); *When is a Data Protection Impact Assessment Required?*, EUROPEAN COMMISSION, https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/when-data-protection-impact-assessment-dpia-required_en (last visited Dec. 10, 2023).

and Virginia have enacted laws that require a privacy impact assessment.⁴ These laws have not been ruled to be unconstitutional restrictions on speech.

The District Court’s reference to the U.S. Supreme Court case, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) is ill-placed. While the Court in *Sorrell* held that a state statute that restricted the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors violated the First Amendment (*Id.* at 567-68), the U.S. Supreme Court recognized the Health Insurance Portability and Accountability Act (HIPAA) as “a more coherent policy” that would not violate the First Amendment by singling out particular viewpoints. *Id.* at 573. Like the CAADCA, HIPAA contains many restrictions on the use and disclosure of information as well as requirements for risk analysis, documentation, policies, training, vendor agreements, privacy notices, and more. *See* 45 CFR § 164.308(a)(1).⁵ The CAADCA’s DPIA mandate similar purposes while providing regulators with a better view into how often opaque corporations operate, which ultimately informs consumers.

Even if the DPIA requirement triggered First Amendment scrutiny, it would survive commercial speech scrutiny. Below is a non-exhaustive list of federal

⁴ *Key Steps for Meeting US State PIA Obligations*, IAPP (MAY 23, 2023), <https://iapp.org/news/a/understanding-us-state-law-pia-obligations/>.

⁵ *Breach Notification Rule*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/hipaa/for-professionals/breach-notification/index.html> (last updated July 26, 2013).

regulations that include reporting mandates akin to the purpose and means encompassed within the CAADCA. *See* Table 1.

Table 1: Federal Regulations with Reporting Mandates

	Report	Regulation	Disclosure Requirement
1	Form 10-K	Securities Exchange Act	Publicly traded companies must submit Form 10-K to the SEC on an annual basis. The form includes five sections: business, risk factors, selected financial data, management’s discussion and analysis, and financial statements and supplementary data. ⁶
2	Form 10-Q	Securities Exchange Act	Publicly traded companies must submit form 10-Q to the SEC on a quarterly basis to report performance and financial position. ⁷
3	Form 8-K	Securities Exchange Act	Companies must submit form 8-K to the SEC whenever it announces major events of which shareholders must be made aware, including sales, acquisitions, bankruptcies, departures, and other relevant events. ⁸
4	Forms 300A, 300, and 301	Occupational Safety and Health Act	Forms are submitted to OSHA annually. Employers must record all reportable injuries and illnesses that occur in the workplace, where and when they occur, the nature of the case, the name and job title of the employee injured or made sick,

⁶ *How to Read a 10-K*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.investor.gov/introduction-investing/getting-started/researching-investments/how-read-10-k> (last visited Dec. 10, 2023).

⁷ *Form 10-Q*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/files/form10-q.pdf> (last visited Dec. 15, 2023).

⁸ *Form 8-K*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/files/form8-k.pdf> (last visited Dec. 10, 2023).

			and the number of days away from work or on restricted or light duty. ⁹
5	Adverse Event Reporting	Food and Drug Administration Amendments Act	The FDA requires reporting of adverse events, such as medication errors and product quality complaints. ¹⁰ Healthcare professionals and consumers may voluntarily submit reports to the FDA or directly to the products' manufacturers. If a manufacturer receives a report from a healthcare professional or consumer, it is required to send the report to the FDA. ¹¹
6	Post-Marketing Safety Report	Food and Drug Administration Amendments Act	The FDA requires companies to submit periodic safety reports for approved drugs, including adverse events and other safety information. ¹²
7	EEO-1 Report	Equal Employment Opportunity Act	Employers with 100 or more employees, or federal contractors with 50 or more employees, must submit annual reports to the EEOC, providing demographic information about their workforce. ¹³
8	Toxics Release Inventory Program	Emergency Planning and Community	The EPA's TRI program mandates reporting of toxic chemical releases and tracks the industrial management of toxic

⁹ *Forms 300, 300A, 301 and Instructions*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, <https://www.osha.gov/sites/default/files/OSHA-RK-Forms-Package.pdf> (last visited Dec. 10, 2023).

¹⁰ *Questions and Answers on FDA's Adverse Event Reporting System (FAERS)*, U.S. FOOD & DRUG ADMINISTRATION (June 4, 2018), <https://fda.gov/drugs/surveillance/questions-and-answers-fdas-adverse-event-reporting-system-faers>.

¹¹ *Id.*

¹² *Postmarketing Adverse Event Reporting Compliance Program*, U.S. FOOD & DRUG ADMINISTRATION (May 5, 2020), <https://www.fda.gov/drugs/surveillance/postmarketing-adverse-event-reporting-compliance-program>.

¹³ *EEO Data Collections*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/data/eo-data-collections> (last visited Dec. 15, 2023).

		Right-to-Know Act	chemicals that may cause harm to human health and the environment. ¹⁴
9	Discharge Monitoring Report	Clean Water Act	All point source dischargers to waters protected under the CWA must obtain a National Pollution Discharge Elimination System permit and many permittees are required to file DMRs to the EPA. ¹⁵
10	Hazardous Substance Release Notifications	Comprehensive Environmental Response, Compensation, and Liability Act	Vessel or facility must immediately notify the EPA's National Response Center whenever a reportable quantity or more of a CERCLA hazardous substance is released in any 24-hour period, unless the release is federally permitted. ¹⁶
11	Biennial Report on Hazardous Waste Generation and Management	Resource Conservation and Recovery Act	The Act requires large quantity generators to submit a biennial report to the EPA regarding the nature, quantities, and disposition of hazardous waste generated at their facility. ¹⁷
12	Consumer Confidence Report	Safe Drinking Water Act	The Act requires all community Public Water Systems (PWS) to submit an annual report to the EPA on the quality of their drinking water as well as a letter of certification. ¹⁸
13	Facility	Oil Pollution Act	The FRP rule requires certain facilities

¹⁴ *Toxics Release Inventory (TRI) Program*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/toxics-release-inventory-tri-program> (last updated Dec. 5, 2023).

¹⁵ *NPDES Permit Basics*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/npdes/npdes-permit-basics> (last updated Dec. 11, 2023).

¹⁶ *Emergency Release Notifications: EPCRA Section 304 and CERCLA Section 103*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/epcra/emergency-release-notifications> (last updated Nov. 13, 2023).

¹⁷ *Biennial Hazardous Waste Report*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/hwgenerators/biennial-hazardous-waste-report> (last updated Oct. 3, 2023).

¹⁸ *Consumer Confidence Reports: Required Information*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/sites/default/files/documents/CCR_Required_Info_Summary.pdf (last visited Dec. 9, 2023).

	Response Plan		that store and use oil to prepare and submit an FRP to the EPA, which demonstrates a facility's preparedness to respond to a worst-case oil discharge. ¹⁹
14	Form 499-A	Communications Act of 1934	The FCC requires telecommunications companies to submit Form 499-A annually to report actual revenue billed during the prior calendar year. ²⁰
15	Form 5500	Employee Retirement Income Security Act	Employers offering certain employee benefits plans are required to file Form 5500 annually with the IRS and Employee Benefits Security Administration of the Department of Labor. ²¹
16	Form 990	Internal Revenue Code	The IRS requires tax-exempt organizations to file annual information returns or notices. ²² The form shares information with the public, particularly tax-exempt organizations' programs. ²³
17	Clinic Trials Reporting	Food and Drug Administration Amendments Act	Sponsors of clinical trials must register and report summary results on NIH's public database. ²⁴
18	LM-10 Report	Labor-Management	The NLRB requires employers to report certain financial transactions with labor

¹⁹ *Facility Response Plan (FRP) Overview*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/facility-response-plan-frp-overview> (last updated Dec. 1, 2023).

²⁰ *2023 FCC Form 499-A and 499-Q Public Notice*, FEDERAL COMMUNICATIONS COMMISSION (Oct. 14, 2022), <https://www.fcc.gov/document/2023-fcc-form-499-and-499-q-public-notice>.

²¹ *Form 5500 Corner*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/retirement-plans/form-5500-corner> (last updated Nov. 8, 2023).

²² *Form 990 Resources and Tools*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools> (last updated Dec. 4, 2023).

²³ *Id.*

²⁴ *FDAAA 801 and the Final Rule*, U.S. NATIONAL LIBRARY OF MEDICINE, <https://classic.clinicaltrials.gov/ct2/manage-recs/fdaaa#WhoIsResponsibleForRegistering> (Last updated Aug. 2023).

		Reporting and Disclosure Act	organizations and their officials. ²⁵
19	Anti-Money Laundering Reporting	Bank Secrecy Act	Financial institutions are required to report suspicious activities to the FinCEN. ²⁶
20	FINRA Rule 4530 Reporting	FINRA Rule 4530	Rule requires firms to report specified events; quarterly statistical and summary information regarding written customer complaints; and copies of specified criminal and civil actions. Events requiring a report to FINRA include violations of securities laws and FINRA rules, written customer complaints, disciplinary actions the firm takes and certain internal conclusions of violations. ²⁷
21	Consumer Product Safety Commission Incident Report	Consumer Product Safety Act	The CPSC requires manufacturers, distributors, and retailers to report information on products that may pose a substantial hazard. ²⁸
22	FR Y-9C	Regulation Y and the Bank Holding	The FR Y-9C is required for bank holding companies with total consolidated assets of \$1 billion or more. Federal Reserve

²⁵ *Employer and Consultant Reporting*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/olms/compliance-assistance/employer-consultant-reporting> (last updated Dec. 6, 2023).

²⁶ *FinCEN Suspicious Activity Report: Electronic Filing Instructions*, FINANCIAL CRIMES ENFORCEMENT NETWORK (Oct. 2012), <https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf>.

²⁷ *Regulatory Events Reporting*, FINRA, <https://www.finra.org/rules-guidance/guidance/reports/2023-finras-examination-and-risk-monitoring-program/regulatory-events-reporting> (last visited Dec. 8, 2023).

²⁸ *Duty to Report to CPSC: Rights and Responsibilities of Businesses*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, <https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/Duty-to-Report-to-the-CPSC-Your-Rights-and-Responsibilities> (last visited Dec. 15, 2023); *For Consumers Contacted by a CPSC Investigator*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, <https://cpsc.gov/About-CPSC/Division-of-Field-Operations/FAQs-For-Consumers> (last visited Dec. 8, 2023).

		Company Act	uses the report to assess and monitor the financial condition of holding companies. ²⁹
23	Living Will (Resolution Plan)	Section 165(d) of the Dodd-Frank Act	The Dodd-Frank Act requires large banking organizations and certain other firms to periodically submit resolution plans (including response strategy to material financial distress or failure) to the Federal Reserve and the Federal Deposit Insurance Corporation. ³⁰
24	Tarmac Delay Report	Airline Safety and Federal Aviation Administration Extension Act	The DOT requires commuter air carriers that operate at least one aircraft having an original manufacturer's design capacity of 30 seats or more to report tarmac delay (> 3 hours) data for all passenger operations. ³¹

Exemplified above, the reporting requirements mandate disclosure of harms—both realized and potential—to government agencies, which is the preliminary step for generating a mitigation strategy. Every three years, specific banking firms³² are required to submit resolution plans to the Federal Reserve and Federal

²⁹ *FR Y-9C: Consolidated Financial Statements for Holding Companies*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, https://federalreserve.gov/apps/reportingforms/Report/Index/FR_Y-9C (last updated Sept. 29, 2023).

³⁰ *Living Wills (or Resolution Plans)*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, <https://www.federalreserve.gov/supervisionreg/resolution-plans.htm> (last updated Mar. 14, 2022).

³¹ *Tarmac Delays*, U.S. DEPARTMENT OF TRANSPORTATION, <https://www.transportation.gov/individuals/aviation-consumer-protection/tarmac-delays> (last updated Oct. 6, 2021).

³² The eight firms required to submit resolution plans are (1) Bank of America Corporation; (2) The Bank of New York Mellon Corporation; (3) Citigroup Inc.; (4) The Goldman Sachs Group, Inc.; (5) JPMorgan Chase & Co.; (6) Morgan Stanley; (7) State Street Corporation; and (8) Wells Fargo & Company. *SR 14-1*:

Deposit Insurance Corporation, primarily to ensure these large financial institutions are prepared for the worst crises and can minimize the impact on the greater market.³³

In addition, many regulatory reports require ad-hoc disclosures when adverse events or organizational changes occur. Form 8-K, for example, must be submitted to the SEC whenever it announces major events of which shareholders must be made aware, including sales acquisitions, bankruptcies, departures, and other relevant events.³⁴ Similarly, OSHA requires employers to submit Form 300 as workplace injuries and illnesses arise.³⁵ The FDA also requires the reporting of adverse events, even allowing healthcare professionals and consumers to voluntarily report errors and complaints.³⁶ FINRA Rule 4530 also requires firms to

Heightened Supervisory Expectations for Recovery and Resolution Preparedness for Certain Large Bank Holding Companies - Supplemental Guidance on Consolidated Supervision Framework for Large Financial Institutions (SR letter 12-17/CA letter 12-14), BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (January 24, 2014),

<https://www.federalreserve.gov/supervisionreg/srletters/SR1401.htm>.

³³ *Objectives of the Resolution Planning Process*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, <https://www.federalreserve.gov/bankinforeg/2016-objectives-of-the-resolution-planning-process.html> (last updated June 30, 2016).

³⁴ *Form 8-K*, *supra* note 8.

³⁵ *Forms 300, 300A, 301 and Instructions*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, <https://www.osha.gov/sites/default/files/OSHA-RK-Forms-Package.pdf> (last visited Dec. 10, 2023).

³⁶ *Questions and Answers on FDA's Adverse Event Reporting System (FAERS)*, U.S. FOOD & DRUG ADMINISTRATION (June 4, 2018), <https://fda.gov/drugs/surveillance/questions-and-answers-fdas-adverse-event-reporting-system-faers>.

report customer complaints in addition to other covered events, such as criminal and civil actions.³⁷

Moreover, the District Court’s expansionist First Amendment rationale could be used to swallow up nutrition labels on food products, warnings for use of products, and financial reporting requirements.

Table 2: Federal Regulations with Labeling and Warning Mandates

	Label / Warning	Disclosure Requirement
1	FDA Labeling Requirements	The FDA requires companies to provide accurate and clear information on product labels, including ingredients, nutritional information, and any relevant warnings or precautions, such as allergens. ³⁸
2	Product Labelling Requirements	The CPSC establishes safety standards for consumer products, including toys and electronics. Products subject to CPSC regulations often require warning labels to inform consumers about potential hazards and proper usage. ³⁹
3	Pesticide Labeling	The EPA regulates the labeling of pesticides to ensure proper use and to protect human health and the environment. Pesticide products must have clear labels that include instructions for use, safety precautions, and warnings. ⁴⁰
4	Hazard	OSHA's Hazard Communication Standard requires

³⁷ *Rule 4530 Reporting Requirements*, FINRA, <https://www.finra.org/filing-reporting/regulatory-filing-systems/rule-4530-reporting-requirements> (last visited Dec. 15, 2023).

³⁸ *Food Allergies*, U.S. FOOD & DRUG ADMINISTRATION (Jan. 10, 2023), <https://www.fda.gov/food/food-labeling-nutrition/food-allergies>.

³⁹ *Toy Safety Business Guidance & Small Entity Compliance Guide*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, <https://www.cpsc.gov/Business--Manufacturing/Business-Education/Toy-Safety-Business-Guidance-and-Small-Entity-Compliance-Guide> (last visited Dec. 11, 2023).

⁴⁰ *Labeling Requirements*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/pesticide-registration/labeling-requirements> (last updated May 11, 2023).

	Communication Standard	employers to inform employees about the hazards of chemicals in the workplace. This includes the use of labels on containers of hazardous chemicals, as well as safety data sheets that provide detailed information about the chemicals. ⁴¹
5	Mandatory Labelling Requirements	TTB, a bureau of the Department of the Treasury, regulates the labeling and advertising of alcoholic beverages. Covered companies must comply with labeling requirements, including information about alcohol content, health warnings, and other mandatory disclosures. ⁴²
6	Textile Fiber Products Identification	The FTC regulates the labeling and advertising of textile fiber products. The Act requires accurate and informative labels on textiles, disclosing fiber content and care instructions. ⁴³
7	Hazardous Materials Regulations Reporting	The DOT's HMR govern the transportation of hazardous materials in commerce. Products classified as hazardous materials must have proper labeling to communicate potential risks and provide information for safe handling and transportation. ⁴⁴
8	Organic Labeling	The USDA's National Organic Program regulates the labeling of organic agricultural products. Products labeled as "organic" must meet specific criteria, and the labeling must accurately reflect the organic status of the product. ⁴⁵
9	Mortgage	The CFPB oversees regulations related to mortgage

⁴¹ *Hazard Communication Standard: Labels and Pictograms*, OSHA BRIEF, <https://www.osha.gov/sites/default/files/publications/OSHA3636.pdf>.

⁴² *Alcohol Beverage Labeling and Advertising*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov/consumer/alcohol-beverage-labeling-and-advertising> (last updated Apr. 19, 2019).

⁴³ *Textile Fiber Rule*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/legal-library/browse/rules/textile-fiber-rule> (last visited Dec. 11, 2023).

⁴⁴ *How to Comply with Federal Hazardous Materials Regulations*, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, <https://www.fmcsa.dot.gov/regulations/hazardous-materials/how-comply-federal-hazardous-materials-regulations> (last updated July 18, 2022).

⁴⁵ *Labeling Organic Products*, AGRICULTURAL MARKETING SERVICE, <https://www.ams.usda.gov/rules-regulations/organic/labeling> (last visited Dec. 11, 2023).

	Disclosure Requirements	disclosures. Lenders are required to provide consumers with clear and comprehensive information about mortgage terms and costs, helping borrowers make informed decisions about home loans. ⁴⁶
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The regulatory reporting requirements do not trigger a First Amendment analysis, and where they have, Courts have applied the holding of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) more expansively in favor of upholding regulation.⁴⁷ *See also No on E v. Chiu*, 62 F.4th 529, 533 (9th Cir. 2023) (holding that a city's disclaimer requirement for certain campaign ads was likely constitutional). If affirmed, the District Court's overly expansive and arbitrary interpretation of the First Amendment could be used to decimate existing regulations that require corporate disclosures for transparency and accountability.

II. The CAADCA's age estimation provision is appropriately tailored to materially alleviate harm.

The District Court also erred in concluding that the privacy protection based on age estimation, CAADCA § 31(a)(5), does not promote the State's substantial interest in increasing the privacy protections of children. *NetChoice*, No. 22-cv-

⁴⁶ *TILA-RESPA Integrated Disclosure: Guide to the Loan Estimate and Closing Disclosure Forms*, CONSUMER FINANCIAL PROTECTION BUREAU (Dec. 2017), https://files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-to-loan-estimate-and-closing-disclosure-forms_v2.0.pdf.

⁴⁷ Nigel Barrella, *First Amendment Limits on Compulsory Speech*, 71 FOOD & DRUG L.J. 519, 520 (2016) (“Courts have read *Zauderer* more expansively . . . consistent with existing, familiar labeling requirement, and a narrow reading of *Zauderer* limited to its facts would rest on a slippery slope to abolishing many accepted and historically unquestioned labeling requirements.”)

08861-BLF, at *23. First, the District Court concluded that the age estimation process would cause friction for both children and adult users, which would impede the “availability and use” of information and accordingly regulate speech. *NetChoice*, No. 22-cv-08861-BLF, at *15 (citing Goldman Am. Br. 4-7; NYT Am. Br. 6). Second, the District Court concluded that the age estimation tools at hand might require users to “exacerbate the problem [that it seeks to solve] by inducing covered businesses to require consumers, including children, to divulge additional personal information” or biometric information such as a face scan. *NetChoice*, No. 22-cv-08861-BLF, at *22. The District Court’s conclusion is based on speculative evidence, and should be reversed.

A. Age estimation creates no more friction than other commonly utilized tools.

The District Court relies on speculation to conclude that age estimation tools will create friction causing users to navigate away from certain websites and thereby impact the “availability and use” of information. Yet, we cannot assume that any friction would limit access to information in violation of the First Amendment because numerous existing regulations require “friction” tools such as cookie consent and online banking tools, and businesses utilize “friction” features for other purposes.

At present, countless websites and platforms prompt users to accept or decline cookie policies in compliance with the GDPR. *See* Regulation 2016/679 of

the European Parliament and of the Council of Apr. 27, 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 4, 2016 O.J. (L 119) 33 (EU) (requiring prior and explicit consent to be obtained before any activation of cookies).

Similarly, in compliance with Customer Identification Programs, Anti-money laundering programs, and other regulations, banks frequently rely on identity verification tools which may cause friction for users to access their banking information or funds. *E.g.*, 31 U.S.C. § 5318(h); 12 U.S.C. § 1818(s); 12 U.S.C. § 1786(q)(1). Examples include multifactor authentication or one-time passwords banks use to combat fraud on their websites or online banking apps. These additional security measures may require additional steps for the user to navigate before they can access their own funds, but their purpose is to protect customers.

Another example of friction on websites –implemented by NetChoice members– are human identity verification processes that often require users to perform tasks, such as identifying objects such as bikes or bridges in a CAPTCHA, before granting users access to online content. Using CAPTCHA prompts, platforms can filter “bots” and use the user’s input to train its self-driving AI

models.⁴⁸ When it serves their benefit, the companies know they can implement tools without losing users on their platform.

Many online video sharing and social media platforms, such as YouTube, force users to watch video ads—often without the option to skip the video—before they can enjoy the video they clicked on. This feature does little to benefit the user but allows the platform to generate ad revenue. Despite these video ads acting as a barrier to access the content users want, NetChoice companies actively and intentionally deploy these design features for their own profit. While these video ads negatively impact the user experience, users remain on platforms like YouTube and access the content they intended to.

Given the examples provided above, NetChoice members voluntarily impose “friction” in users’ access in order to obtain information about the user and reap profits from video advertisements. Hence, their argument that the CAADCA provisions would unconstitutionally limit access to content is manufactured and hypocritical.

B. Minimally invasive age estimation methods exist, and regulations can incentivize the development of innovative tools that protect users.

⁴⁸ Mark Healy, *Captcha If You Can*, CEROS, <https://www.ceros.com/inspire/originals/recaptcha-waymo-future-of-self-driving-cars/> (last visited Dec. 10, 2023).

The District Court erroneously concluded that the CAADCA’s age estimation provisions might require businesses to “exacerbate the problem [that it seeks to solve] by inducing covered businesses to require consumers, including children, to divulge additional personal information” or biometric information such as a face scan. *NetChoice*, No. 22-cv-08861-BLF, at *22. Yet, here again, the court relies on speculative arguments. The issue of the CAADCA’s age estimation provision hinges on how different technologies work, including their availability, cost, and feasibility.

While the District Court focuses on age estimation tools that exist in the current market that seek to collect more data such as biometric information and face scans, existing research demonstrates the feasibility of minimally invasive tools that could estimate age. For example, the record below included the Declaration of Serge Egelman, Ph.D., introducing a method called zero-knowledge proof authentication. Egelman Decl. at 23, *NetChoice*, No. 22-cv-08861-BLF.⁴⁹ This method, first presented in the 1980s, is a cryptographic protocol that allows one person to convince another that a particular claim is true without revealing any

⁴⁹ See Jérôme Gorin, Martin Biéri and Côme Brocas, *Demonstration of a Privacy-Preserving Age Verification Process*, FRENCH DATA PROTECTION AUTHORITY (CNIL) (June 23, 2022), <https://linc.cnil.fr/demonstration-privacy-preserving-age-verification-process>.

information other than the claim's veracity.⁵⁰ It is thus feasible that zero-knowledge proof technique can be applied to age estimation or verification, allowing users to verify their age without exposing sensitive information, including their age. As such, the District Court's myopic focus on invasive age estimation tools and its speculation-based conclusion undermines the existing research that demonstrates the availability of privacy protective age estimation tools.

Moreover, setting forth regulations that require privacy-protective age estimation tools will incentivize companies and experts to develop innovative tools. There are several historical examples where U.S. regulations played a role in fostering innovation in various industries. The Clean Air Act, for example, aimed to reduce air pollution and set emission standards for vehicles and industrial facilities. The emission standards forced the automotive industry to invest in research and development of cleaner technologies, resulting in innovations such as catalytic converters and more fuel-efficient engines. Similarly, HIPAA introduced regulations to protect the privacy and security of patients' health information. The emphasis on data security and privacy in healthcare spurred the development of innovative solutions in health information technology, including electronic health records and secure communication platforms, to comply with the regulatory

⁵⁰ Shafi Goldwasser, Silvio Micali, Charles Rackoff, *The Knowledge Complexity of Interactive Proof Systems*, 18 SOCIETY FOR INDUSTRIAL AND APPLIED MATHEMATICS 186-208 (1989).

requirements. The age estimation provision in the CAADCA can likewise incentivize technological development to address children’s safety without negatively impacting users’ privacy, access, and overall experience.

Lastly, companies that already develop and use highly targeted advertising tools and campaigns for children cannot simultaneously claim that they would need to further collect invasive information to estimate the age of child users. NetChoice companies claim that the age estimation provision would require collecting more invasive data. *NetChoice*, No. 22-cv-08861-BLF, at *22. But the NetChoice companies currently possess the data and tools—which they already use—to estimate and target children by age. Compl. at 108, *State Attorneys General v. Meta, et al.*, No. 23-CV-05448 (N.D. Cal. Oct. 24, 2023) (Meta’s internal presentation containing a chart depicting Instagram’s Monthly Active People Penetration, which shows approximately 20 to 60 percent penetration in the 11- to 13-year-old age cohorts). Specifically, these actors rely on brand safety measures to protect brands’ reputations while minimizing their digital media liability with respect to displaying inappropriate content to young users and viewers.⁵¹ To that end, both advertisers and platforms have agreed to follow content guidelines and

⁵¹ *E.g.*, Patrick Kulp, *Disney, Nestle and Fortnite Publisher Pull YouTube Ads Following Child Predator Controversy*, ADWEEK (Feb. 20, 2019), <https://www.adweek.com/programmatic/fortnite-publisher-pulls-pre-roll-ads-on-youtube-following-child-exploitation-controversy/>.

suitability standards.⁵² Furthermore, a combination of artificial intelligence and human content moderators are used to identify content that may be inappropriate for children.⁵³ In other words, NetChoice member companies have developed the infrastructure, partnerships, and capabilities necessary to estimate the age of its users, but opt to use their resources for revenue generation and reputation management than genuine safety for their most vulnerable users. NetChoice members' advertising business model renders its argument in this Court disingenuous.

III. The CAADCA's child profiling provision is tailored to counteract harmful child profiling practices.

CAADCA § 31(b)(2) prevents a business from profiling children unless it “can demonstrate it has appropriate safeguards in place to protect children,” the

⁵² *E.g.*, *Brand Safety and Suitability*, META, <https://www.facebook.com/business/brand-safety-and-suitability> (last visited Dec. 14, 2023); *Brand Safety at TikTok: Keeping Our Community Safe*, TIKTOK (Jan. 17, 2022), <https://www.tiktok.com/business/en-US/blog/brand-safety-tiktok-keeping-our-community-safe>; *Self-Regulatory Guidelines for Children's Advertising*, BETTER BUSINESS BUREAU (2021), https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/caru/caru_advertisingguidelines.pdf; *Understanding Brand Safety & Brand Suitability in a Contemporary Media Landscape*, INTERACTIVE ADVERTISING BUREAU (Dec. 2020), <https://www.iab.com/wp-content/uploads/2020/12/IAB-Brand-Safety-and-Suitability-Guide-2020-12.pdf>.

⁵³ Marian-Andrei Rizoiu and Philipp Schneider, *Can Human Moderators Ever Really Rein in Harmful Online Content? New Research Says Yes*, THE CONVERSATION (Aug. 14, 2023), <https://theconversation.com/can-human-moderators-ever-really-rein-in-harmful-online-content-new-research-says-yes-209882>; Patrick Coffee, *AI Fuels New Brand-Safety Worries, and Would-Be Solutions, for Marketers*, WALL STREET JOURNAL (Aug. 29, 2023), <https://www.wsj.com/articles/ai-fuels-new-brand-safety-worries-and-would-be-solutions-for-marketers-50342971>.

profiling is “necessary,” or the business can “demonstrate a compelling reason that profiling is in the best interests of children.” The District Court again ignored the reality of the market when it erroneously held that the “State has not met its burden of establishing that the profiling provision directly advances the State’s interest in protecting children’s well-being.” *NetChoice*, No. 22-cv-08861-BLF, at *30.

Children and adolescents are viewed by platforms, marketers, publishers and advertisers as “digital natives”—a highly desirable and economically rewarding market. Once harvested, children’s data can be used in ways that would impact their lives without their consent. For example, it is known that children’s data is used for automated decisions and prediction algorithms such as to predict educational outcomes,⁵⁴ screen out post-graduate opportunities which impact future job prospects and other essential opportunities in a person’s life cycle.⁵⁵ As discussed in this section, without regulations such as the CAADCA, profiling equips companies with information about users to knowingly develop harmful products that impose social, emotional, physical, and financial harms to vulnerable users.

⁵⁴ Todd Feathers, *False Alarm: How Wisconsin Uses Race and Income to Label Students “High Risk,”* THE MARKUP (Apr. 27, 2023), <https://themarkup.org/machine-learning/2023/04/27/false-alarm-how-wisconsin-uses-race-and-income-to-label-students-high-risk>.

⁵⁵ Colin Lecher and Ross Teixeira, *Facebook Watches Teens Online As They Prep for College,* THE MARKUP (Nov. 22, 2023), <https://themarkup.org/pixel-hunt/2023/11/22/facebook-watches-teens-online-as-they-prep-for-college>.

The value and importance of children’s data to popular social media platforms is well-documented. For example, the unsealed complaint filed by 33 State Attorneys General relies on internal records showing that Instagram for years “coveted and pursued the under-13 Instagram user demographic,” and Meta implemented strategies to amplify children’s screen time by studying how people “fall into rabbit-holes.” Compl. at 108, 178, *Meta*, No. 23-CV-05448. In 2021, spending on digital advertising to children stood at \$2.9 billion worldwide.⁵⁶ North America was the largest market, accounting for 37 percent of the total spending, or \$1.08 billion.⁵⁷ A study conducted by MediaRadar found that U.S. ad investments in children’s content and programming grew by nearly 50 percent to \$1.6 billion in 2022, “driven primarily by digital video, including ad-supported streaming.”⁵⁸ According to demographer and social researcher Mark McCrindle, by the end of

⁵⁶ *Spending on Digital Advertising to Children Worldwide from 2021 to 2031*, STATISTA (July 3, 2023), <https://www.statista.com/statistics/1326893/children-digital-advertising-spending-worldwide/>.

⁵⁷ *Spending on Digital Advertising to Children Worldwide in 2021, by Region*, STATISTA (July 3, 2023), <https://www.statista.com/statistics/1326908/children-digital-advertising-spending-region-worldwide/>.

⁵⁸ Jennifer D’Alessandro, *How Advertisers Are Unlocking the Potential for Kids-Themed Content on CTV*, DIGIDAY (Mar. 16, 2023), <https://digiday.com/sponsored/how-advertisers-are-unlocking-the-potential-of-kids-themed-content-on-ctv/>; Karlene Lukovitz, *Ad Spend In Kids’ Content/Media Leapt Nearly 50% in 2022, Driven By Digital Video*, MEDIAPOST (Jan. 19, 2023), <https://www.mediapost.com/publications/article/381723/ad-spend-in-kids-contentmedia-leapt-nearly-50-i.html>.

2024, more than \$5.39 trillion will be spent on child-targeted advertising worldwide.⁵⁹

Online platforms have developed multiple ways to specifically measure and assess how young people use their platforms—in part to monetize them more effectively. For example, Nielsen analyzes how young people ages 2 to 17 use streaming platforms, such as Netflix, YouTube, and Hulu.⁶⁰ Digital measurement companies increasingly provide “granular” and integrated “cross-platform” data about online users, which can be supplemented with household-level demographic insights such as age, gender, race, ethnicity, presence of children, size, income and educational level.⁶¹ There are numerous data and online measurement firms providing information that identifies young people in a household, community, and geographic location—information used by the online marketing industry all the time.⁶² Online marketing also uses “neuromarketing,” involving “the measurement

⁵⁹ *The Business Case for Understanding Generation Alpha*, HARVARD BUSINESS REVIEW (2023), <https://hbr.org/resources/pdfs/comm/journey/TheBusinessCaseForUnderstandingGenerationAlpha.pdf>.

⁶⁰ *Navigating the Evolving Media Landscape*, NIELSEN (Oct. 24, 2023), https://thearf-org-unified-admin.s3.amazonaws.com/ARF%20Member%20Only%20Events/2023.10.24_OT/10.24.23_Furher%20Brian%20Streaming%20Reached%20Equilibriu.pdf.

⁶¹ Alison Weissbrot, *Tubi Taps TransUnion For a Better View Inside the Home*, ADEXCHANGER (Apr. 15, 2020), <https://www.adexchanger.com/tv-2/tubi-taps-transunion-for-a-better-view-inside-the-home/>.

⁶² See e.g., *About Location Targeting*, META BUSINESS HELP CENTER, <https://www.facebook.com/business/help/202297959811696?id=176276233019487> (last visited Dec. 15, 2023); *How Location Targeting Works*, SNAP BUSINESS HELP CENTER, <https://businesshelp.snapchat.com/s/article/location->

of physiological and neural signals to gain insight into customers’ motivations, preferences, and decisions.”⁶³ This approach renders young users with little control over the advertisements or contents they see.

The District Court erroneously relied upon NetChoice’s argument that such data collection is justifiable because there are instances of beneficial profiling. However, the CAADCA does not prevent profiling that is in the child’s best interest. Instead, it specifically addresses harmful profiling and its impact, such as friend recommendation features that foster inappropriate adult-minor contact and leave teens vulnerable to unwanted sexual advances from strangers and adults, a problem which is more prevalent among LGBTQIA+ teens.⁶⁴

Whistleblowers and internal investigations have brought to light that the targeted profiling of children is at odds with children’s safety and well-being and

[targeting?language=en_US](#) (last visited Dec. 15, 2023); *Target Ads to Geographic Locations*, GOOGLE ADS HELP, <https://support.google.com/google-ads/answer/1722043?hl=en> (last visited Dec. 15, 2023).

⁶³ Eben Harrell, *Neuromarketing: What You Need to Know*, HARVARD BUSINESS REVIEW (Jan. 23, 2019), <https://hbr.org/2019/01/neuromarketing-what-you-need-to-know>.

⁶⁴ *Unfair Impacts: How LGBTQIA+ Youth are Disproportionately Harmed by Online Platform Design Decisions*, FAIRPLAY (June 2023), <https://fairplayforkids.org/wp-content/uploads/2023/06/unfairimpacts.pdf>. Fairplay found that 35 percent of teens who do not identify as LGBTQ+ and 43 percent of teens who do identify as LGBTQ+ receive a recommendation or request to “friend” someone who they do not know multiple times per day. An additional 20 percent of teens in each group said they receive these recommendations daily.

that tech companies use sophisticated neuroscience techniques to extend user time online.⁶⁵ Facebook’s first president Sean Parker has explained:

“How do we consume as much of your time and conscious attention as possible? . . . It’s a social-validation feedback loop . . . exactly the kind of thing that a hacker like myself would come up with, because you’re exploiting a vulnerability in human psychology. The inventors, creators . . . understood this consciously. And we did it anyway.”⁶⁶

Furthermore, when young people put their phones down, tech companies reel them back in—sending them notifications constantly throughout the day and night—with users between the ages of 11 and 17 receiving over 237 notifications on their phone on a typical day, according to a study conducted by Common Sense and University of Michigan C.S. Mott Children’s Hospital.⁶⁷ In fact, over two-thirds of these 11- to 17-year olds said they “sometimes” or “often” find it difficult to stop using technology and that they miss sleep due to being on their phone or the internet late at night.⁶⁸

⁶⁵ Nir Eyal, *The Hook Model: How to Manufacture Desire in 4 Steps*, NIR AND FAR, <https://www.nirandfar.com/how-to-manufacture-desire/> (last visited Dec. 15, 2023) (“Variable schedules of reward are one of the most powerful tools that companies use to hook users.”).

⁶⁶ Mike Allen, *Sean Parker Unloads on Facebook: “God Only Knows What It’s Doing to Our Children’s Brains”*, AXIOS (Nov. 9, 2017), <https://www.axios.com/2017/12/15/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-1513306792>.

⁶⁷ *Constant Companion: A Week in the Life of a Young Person’s Smartphone Use*, COMMON SENSE MEDIA (2023), https://www.commonsensemedia.org/sites/default/files/research/report/2023-cs-smartphone-research-report_final-for-web.pdf.

⁶⁸ *Id.*

As evidenced by tech companies' business practices, today's market incentives are aligned with profit, and at odds with safety. The reports of whistleblowers, investigative journalists, and NetChoice members' own admissions demonstrate that online safety for children cannot be left to the companies and that regulation is necessary.

For example, it was recently revealed that when Meta employees developed internal initiatives to improve the well-being of teens on Facebook and Instagram, CEO Mark Zuckerberg "personally and repeatedly thwarted" those initiatives.⁶⁹ Meta whistleblower Frances Haugen shared damning documents showing that the company refused to address major problems despite well-documented pleas from employees.⁷⁰ Haugen has alerted the public of how Zuckerberg pits freedom of speech against promotion of safety, while resisting change in Meta's management system and algorithms that continue to harm children.⁷¹

It has also been revealed that companies profile, target, and prey upon users in psychologically vulnerable states. For example, Facebook documents revealed that Facebook's algorithms can determine, and allow advertisers to pinpoint teen

⁶⁹ Brian Fung, *Mark Zuckerberg Personally Rejected Meta's Proposals to Improve Teen Mental Health, Court Documents Allege*, CNN (Nov. 10, 2023), <https://www.cnn.com/2023/11/08/tech/meta-facebook-instagram-teen-safety/index.html>.

⁷⁰ Steven Levy, *Frances Haugen Says We Need a 'Free Mark' Movement*, WIRED (June 14, 2023), <https://www.wired.com/story/frances-haugen-book-the-power-of-one-interview/>.

⁷¹ *Id.*

emotional states, such as “worthless,” “insecure,” “defeated,” “anxious,” “silly,” “stressed,” and gain insight into when and how younger Facebook users express themselves.⁷² According to Facebook, “earlier in the week, teens post more about ‘anticipatory emotions’ and ‘building confidence,’ while weekend teen posts contain more ‘reflective emotions’ and ‘achievement broadcasting.’”⁷³ As another example of online platforms obtaining data to profile children in particular states of mind, in 2019, a joint investigation by the Guardian and the Danish Broadcasting Corporation discovered that Facebook had categorized 740,000 children as “interested in” gambling, and 940,000 were flagged as being interested in alcohol.⁷⁴

Arturo Béjar, Former Director of Engineering for Protect and Care at Facebook, testified before the Senate Subcommittee,

This is a company guided by data. Once Meta establishes metrics for anything, employees are given concrete incentives to drive those metrics in the direction the company deems useful and valuable.⁷⁵

⁷² Sam Machkovech, *Report: Facebook Helped Advertisers Target Teens Who Feel “Worthless,”* ARS TECHNICA (May 1, 2017), <https://arstechnica.com/information-technology/2017/05/facebook-helped-advertisers-target-teens-who-feel-worthless/>.

⁷³ *Id.*

⁷⁴ Alex Hern and Frederik Hugo Ledegaard, *Children ‘Interested in’ Gambling and Alcohol, According to Facebook,* THE GUARDIAN (Oct. 9, 2019), <https://www.theguardian.com/technology/2019/oct/09/children-interested-in-gambling-and-alcohol-facebook>.

⁷⁵ *Social Media and the Teen Mental Health Crisis, Hearing Before the Subcommittee on Privacy, Technology, and the Law, 118th Cong. 6 (2023)* (statement of Arturo Béjar, Former Director of Engineering for Protect and Care, Facebook).

In this context, the CAADCA's child profiling mandate will advance the aim of ensuring that safety, not profit metrics, guide companies' data collection and targeted profiling practices.

CONCLUSION

For the foregoing reasons, the order granting the preliminary injunction of the district court should be reversed.

Date: December 20, 2023

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CERTIFICATE OF SERVICE

I certify that on December 20, 2023, I served the foregoing Brief as *Amici Curiae* in Support of Defendant-Appellant via the Court's ECF system upon all counsel.

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