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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN JOSE DIVISION**

10 NETCHOICE, LLC, d/b/a NetChoice,
11 **Plaintiff,**
12
13 v.
14 ROB BONTA, ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, in his official
15 capacity,
16 **Defendant.**

Case No. 5:22-cv-08861-BLF
**AMICUS CURIAE BRIEF OF
COMMON SENSE MEDIA IN
SUPPORT OF DEFENDANT**
Hearing Date: January 23, 2025
Time: 9:00 a.m.
Dept: 3
Judge: Hon. Beth Labson Freeman
Action Filed: December 14, 2022

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1 **INTEREST OF *AMICUS CURIAE*¹**

2 Common Sense Media (“Common Sense”) is a nonpartisan, nonprofit organization
3 dedicated to improving the lives of kids and families by providing the trustworthy information,
4 education, and independent voice they need to thrive. Common Sense has been studying
5 children and teens’ relationships with social media and technology, and the impacts of such
6 relationships, for over a decade. For example, most recently Common Sense has detailed how
7 social media can amplify pressure and stress teens feel along a variety of metrics (e.g.
8 achievement, appearance, friendship), how children and teens struggle to set healthy boundaries
9 with technology (including missing sleep) given constant notifications from apps and the pull of
10 devices, and how more teens view features like location sharing and public accounts negatively
11 vs. positively. *See* Our Research Program, Common Sense Media,
12 <https://www.common sense media.org/research>. Common Sense has studied age assessment,
13 publishing a whitepaper this fall considering the current landscape of age assurance,
14 technologically, legislatively, and in industry practice, and examining ways to develop age
15 assurance practices and rules that are privacy protective, proportionate, fair, and equitable—and
16 that satisfy U.S. constitutional concerns. *See* Ariel Fox Johnson, *U.S. Age Assurance Is*
17 *Beginning to Come of Age: The Long Path Toward Protecting Children Online and*
18 *Safeguarding Access to the Internet*, Common Sense Media (2024),
19 [https://www.common sense media.org/sites/default/files/featured-content/files/2024-us-age-](https://www.common sense media.org/sites/default/files/featured-content/files/2024-us-age-
20 assurance-white-paper_final.pdf)

21 Common Sense has advocated for policy solutions at the state and federal level that
22 would help enable a digital world where all kids can thrive. Common Sense was a co-sponsor of
23 the California Age-Appropriate Design Code Act (CAADCA). *See* Cal. Sen. Jud. Comm.
24 Analysis, *The California Age-Appropriate Design Code Act* (2022),

25 _____
26 ¹ No counsel for a party authored any part of this brief. No entity or person, other than *amicus*, its
27 staff, or its counsel, contributed money to fund the preparation or submission of this brief.

1 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB2273.

2 Based on Common Sense’s years of experience, both in terms of understanding technology’s
3 effects on children and in developing legislative proposals to protect them online, *amicus*
4 believes that design codes like the CAADCA help ensure children are protected in the digital
5 world. And Common Sense believes that these codes, focused on product features and privacy
6 protections, and not on access to content and services, offer protective approaches consistent
7 with the First Amendment. This includes the CAADCA’s requirement to “[e]stimate the age of
8 child users with a reasonable level of certainty appropriate to the risks that arise from the data
9 management practices of the business or *apply the privacy and data protections afforded to*
10 *children to all consumers.*” Cal. Civ. Code § 1798.99.31(a)(5) (italics added).

11 Ultimately, Common Sense’s interest is ensuring that this Court’s judgment about the
12 CAADCA, and specifically the age estimation provisions, is based on a thorough understanding
13 of the current landscape of technology, regulation, and children’s experiences.

14 INTRODUCTION

15 The Supreme Court articulated a high bar for facial challenges under *Moody v.*
16 *Netchoice, LLC*, 144 S. Ct. 2383 (2024). Specifically, it required that courts evaluating facial
17 challenges must consider “a law’s full set of applications” which is a rigorous statute- and fact-
18 specific inquiry—especially in the age estimation context. *Id.* at 2394. The Ninth Circuit has
19 found that, “[a]s *Moody* clarified, a First Amendment facial challenge has two parts: first, the
20 courts must “assess the state laws’ scope”; and second, the courts must “decide which of the
21 laws’ applications violate the First Amendment, and . . . measure them against the rest.” *X*
22 *Corp v. Bonta*, 166 F.4th 888, 899 (9th Cir. 2024) (internal citations omitted). With respect to
23 age estimation, there must be a detailed record, and this record must address with specificity
24 different age estimation methods permitted or prescribed, the burdens they may impose on
25 users, and whether this would deter access to content and services.
26

1 Age estimation can take many forms and may be used for many purposes, not all of
2 which include limiting access to content. Age estimation for the purpose of providing higher
3 privacy does not in and of itself regulate speech. Rather, the question is whether going through
4 age estimation will impact speech or otherwise chill access. Ultimately, only after considering a
5 detailed factual record, can the Court consider whether the CAADCA and specifically its age
6 estimation provision “prohibits a substantial amount of speech relative to its plainly legitimate
7 sweep.” *Moody*, 144 S. Ct. at 2409. There is no such record offered here.

8 ARGUMENT

9 **I. The Ninth Circuit, following *Moody*, required Plaintiff to develop a factual record 10 before this Court can determine whether age estimation provisions are facially 11 unconstitutional**

12 Following *Moody*, the Ninth Circuit held that the record before this Court was
13 insufficient to determine whether the age estimation requirement of the CAADCA facially
14 violated the First Amendment. The Ninth Circuit noted that the age estimation provision, and
15 other provisions “on their face, do not necessarily impact protected speech in all or most
16 applications,” and that “[a]s in *Moody*, the record needs further development to allow the
17 district court to determine ‘the full range of activities the law covers.’” *Net Choice, LLC v.*
18 *Bonta*, 113 F.4th 1101, 1122-23 (9th Cir. 2024) (citations omitted). (Indeed, the Ninth Circuit
19 noted that even for the one remaining provision likely to trigger First Amendment scrutiny in
20 every application—providing policies in age-appropriate language—the record was
21 insufficient.) Under *Moody*, the Ninth Circuit found that focusing on only a few applications of
22 statutory provisions to a “subset” of covered businesses improperly “treat[ed] NetChoice’s
23 challenges ‘more like as-applied claims than like facial ones.’” *Id.* at 1123 (internal citations
24 omitted).

25 **II. Plaintiff has failed to develop any factual record, let alone a sufficient one, for its 26 facial challenge of the age estimation provisions**

1 As the Ninth Circuit noted, age estimation does not clearly trigger First Amendment
2 scrutiny in all or even most applications. *Id.* at 1222-23. NetChoice once again brings a facial
3 challenge against age estimation, and it once again has not provided any record that would
4 enable a court to properly assess this challenge, offering no specific applications of the standard
5 let alone the full scope of applications.

6 NetChoice asserts that “many... members...” would need to “require[] verification of
7 legal identity before the services can be assessed.” Cleland Decl. ¶ 20. This requirement to
8 “verify legal identity” is nowhere in the CAADCA (in contrast, there are numerous statutes
9 where legislatures have specifically required age or identify verification or specific high
10 certainty levels so the California Legislature could have easily written this in). *See*, e.g. Parental
11 Notification by Social Media Operators Act, Ohio Rev. Code § 1349.09(B)(1) (2023); Utah
12 Minor Protection in Social Media Act, Utah Code § 13-71-101 – 401 (2024) . NetChoice only
13 submits two declarations on behalf of two websites with its current motion. Both offer no new
14 specifics regarding how they may implement age estimation – if they implement age estimation
15 at all. The declarations merely claim that the CAADCA would require them to “collect far
16 more private data from its readers than it does now” or that the CAADCA would “inevitably
17 require the collection of private information.” Masnick Supp. Decl. ¶ 7, Paolucci Supp. Decl. ¶
18 6. Furthermore, past declarations from these companies, and the two others submitted with
19 Netchoice’s first preliminary injunction motion, state that they interpret the CAADCA as
20 requiring them to “sign up” users, “verify” users’ ages, or implement “account registration”----
21 without reference to any statutory section. E.g., Masnick Decl. ¶ 12-13, Cairella Decl. ¶ 12, 14,
22 Roin Decl. ¶ 20. Account registration and verification of ages are not requirements in the
23 CAADCA. These declarations failed to provide sufficient specifics before and provide no new
24 specificity now. Further, even were any of these declarations to offer specifics about their own
25 services and planned age estimation practices—which they do not—these declarations from
26 only a few sites would not be a sufficient record on which to facially invalidate the age
27 estimation provisions in their entirety. *See Moody*, 144 S. Ct. 2397-98 (criticizing parties for
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1 focusing on only a few applications of the statute and ignoring many other sites, services, and
2 applications).

3 Indeed, it is not even clear that the declarants are not already compliant with the
4 CAADCA’s alternative to assuring age proportionate to risks—which is to provide a high level
5 of default privacy to all users. Cal. Civ. Code § 1798.99.31(a)(5). For example, both TechDiret
6 and Dreamwidth support “anonymous” users on their sites and Paolucci explains that
7 Dreamwidth is “committed” “to respecting the privacy” of its users. Masnick Supp. Decl. ¶ 7,
8 Paolucci Supp. Decl. ¶ 6. Masnick additionally says Techdirt has a “deliberate practice to
9 minimize how much data we collect and retain about our readers.” Masnick Decl. ¶ 13. These
10 companies could already be compliant with CAADCA if they provide a high level of privacy
11 and data protections to all users, with no age assurance actions required.

12 As detailed below in Section III, age estimation may take many technical forms.
13 Multiple of these forms do not require the transmission or collection by a service of “private
14 information.” Further, under the CAADCA, age estimation does not on its own implicate
15 speech—it does not require companies who choose to assess age to block access to content or
16 services, for either children or adults. Companies may also choose not to implement age
17 assurance at all and instead might choose to apply strong “privacy and data protections” to
18 everyone—which also does not require blocking access to content or services for either children
19 or adults. Companies could even make strong privacy and data protections the default and then
20 allow adults, or those not estimated to be minors, to turn them off. Cal. Civ. Code §
21 1798.99.31(a)(5). That adults who receive strong privacy protections—because companies
22 choose to make that the default—are unlikely to access content or services is far from a given.
23 Here, the question is whether specific age estimation practices may deter adults from accessing
24 specific content or services. NetChoice fails to identify the full scope of specific age assurance
25 practices that sites and services would take. There is no record for this Court to analyze the full
26 scope of age estimation provisions under the CAADCA (step one in a First Amendment facial
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1 challenge), let alone which applications may violate the First Amendment and how those
2 measure up against the rest (step two). *See X Corp v. Bonta*, 166 F.4th at 899.

3 **III. Estimation can occur in a variety of ways, and whether it poses any constitutional**
4 **concerns is highly dependent on specific facts**

5 As the Ninth Circuit noted, the age estimation provisions in the CAADCA do not, on
6 their face, necessarily impact protected speech in all or even most applications. *NetChoice v.*
7 *Bonta*, 113 F.4th at 1222-24. If a user is determined to be of a certain age range, then certain
8 privacy and data management protections should apply. Age does not trigger a bar to access.

9 The question, then, is whether undergoing the age estimation method itself will have the
10 effect of substantially deterring access. This is a highly fact-specific question, based on the
11 nature of the age estimation used and the type of service itself. This requires considering the
12 current state of technology and the variety of means of assessing age, as well as the variety of
13 services users are accessing. Plaintiff does not offer evidence in this regard. Plaintiff merely
14 offers speculation that in this instance, going through age estimation will limit privacy and
15 thereby chill access to services. As discussed below, age estimation does not need to be privacy
16 invasive. Without a detailed factual record, it is impossible to evaluate whether age estimation
17 under the CAADCA will substantially deter access.

18 **A. Age estimation for purposes of protecting privacy does not necessarily**
19 **implicate speech**

20 The CAADCA is a content-neutral privacy and design law. It is therefore distinct from
21 laws that use age estimation to allow or disallow access to content and services. Most cases
22 involving age estimation have been different—specifically about using age estimation for
23 access to content like social media or pornography. References to *Reno v. ACLU*, 521 U.S. 844
24 (1997) and *Ashcroft v. ACLU*, 542 U.S. 656 (2004) are not on point, as they do not squarely
25 address or consider whether and when age assurance in a content-neutral law constitutes a
26 constitutional burden. (They were also decided on detailed factual records involving the state of
27 technology over 20 years ago; age assurance technologies, and the internet as a whole, have
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1 changed dramatically since that time.) It is inappropriate and disingenuous for NetChoice to
2 repeatedly use *Reno* and related decisions “to attack content-neutral privacy and design laws
3 that rely on age assurance.” Brief of Amicus Curiae Electronic Privacy Information Center in
4 Support of Neither Party, *Free Speech Coalition, Inc. v. Paxton*, No. 23-1122 (Sep. 23, 2024),
5 <https://www.supremecourt.gov/docket/docketfiles/html/public/23-1122.html>.

6 Further, under the CAADCA, if companies do not wish to assess age, they do not need
7 to. The statute requires that sites and services covered must: “Estimate the age of child users
8 with a reasonable level of certainty appropriate to the risks that arise from the data management
9 practices of the business or apply the privacy and data protections afforded to children to all
10 consumers.” Cal. Civ. Code § 1798.99.31(a)(5). If companies do not wish to assess age, they
11 can afford all users privacy protections. Typically, companies resist protecting privacy for all
12 audiences across the board because they believe that less privacy protective features lead to
13 more profits. It is up to the company.

14 Giving users privacy and data protection does not require “censoring” content or
15 restricting the availability of information. “Privacy” and “data protections” are widely used
16 terms in law; the CAADCA is itself an effort to further privacy under the California Consumer
17 Privacy Act of 2018, as amended by the California Privacy Rights Act of 2020. A.B. 2273,
18 2021-2022 Leg., Reg. Sess. (Cal. 2022) (§1 (9-10)). Privacy here addresses how businesses
19 collect, use, and share personal information about individuals. California Consumer Privacy Act
20 (CCPA), Office of the Att’y Gen., <https://oag.ca.gov/privacy/ccpa> (Mar. 13, 2024). The term
21 “data protection”, which is used often internationally, encompasses the similar concept about
22 protection of an individuals’ “personal data.”² (That the Ninth Circuit determined one provision
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24 ² The European Union General Data Protection Regulation “lays down rules relating to the
25 protection of natural persons with regard to the processing of personal data.” Regulation (EU)
26 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of
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1 of the CAADCA, the Data Protection Impact Assessment (DPIA), should be enjoined, because
2 it required an assessment of certain content, does not mean the other duties under the CAADCA
3 like estimating age or providing privacy by default implicate content.)

4 **B. Age estimation can occur in a multitude of ways**

5
6 Age estimation can and will occur in a variety of ways, especially given the variety of
7 sites and services that exist, each with their unique and different data practices. Whether age-
8 based rules for privacy implicate speech is highly dependent on the specific age estimation tools
9 used, the entity doing the age estimation, services’ pre-existing data practices and information
10 about their users, and the purpose of age estimation. The CAADCA is not overly prescriptive in
11 its age assessment requirements. It states that “[a]ge assurance shall be proportionate to the
12 risks and data practice of an online service, product, or feature” and that companies undertaking
13 it should “estimate the age of child users with a reasonable level of certainty appropriate to the
14 risks.” Cal. Civ. Code § 1798.99.31(a)(5), (b)(8).

15 Current methods of assuring age include attestation (where a user or parent provides
16 their own age or age range), approximating (where companies use data points to approximate a
17 user’s age), and age verification (which typically verifies a user’s age against an ID or hard
18 identifier). These methods carry different privacy implications and provide different levels of
19 friction. Attestation is well known. Approximation is in the middle and can be done based on
20 data a service already holds (such as a user’s online behavior on the platform, or their social
21 graph on social media) or may be done by cross-referencing other data such as transactional
22 data. Fox Johnson, *supra*, at 7. It may also be done via biometric information, such as facial or
23 voice assessments. Fox Johnson, *supra*, at 8. See Kayee Hanaoka et al., *Face Analysis*

24 _____
25 Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of
26 Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), L 119/1
27 O.J. (2016).

1 *Technology Evaluation: Age Estimation and Verification*, National Institute of Standards and
2 Technology 43 (2024), <https://nvlpubs.nist.gov/nistpubs/ir/2024/NIST.IR.8525.pdf>. Sarah
3 Forland, Nat Meysenburg & Erika Solis, *Age Verification: The Complicated Effort to Protect*
4 *Youth Online*, New America Foundation Open Technology Institute, 10-12 (2024). Techniques
5 like facial scans typically place a user in an approximate age range using their facial features,
6 they do not determine exact age (nor do they typically determine identify or process sufficient
7 information to do so). And verification—which is on a spectrum next to approximation and may
8 also include verification via banking or credit card details—typically uses a hard identifier like a
9 government ID. Fox Johnson, *supra*, at 10.

10 Age assurance, either attestation, approximation, or verification, may make use of a
11 third-party verifier. Using a third-party verifier is a privacy-protective recommendation of
12 France’s data protection agency. Egelman Decl. ¶ 53. A third-party verifier could be a private
13 entity, a state or federal entity, or an independent, quasi-governmental, or non-profit
14 organization established for this purpose. It could be a device or app store that has received an
15 attestation of age. Third-party verifiers can pass information on to the site or service that
16 requires age assurance—this information may be very limited, including through “zero
17 knowledge proofs” that do not do anything other than indicate to the service requesting the
18 verification that the user is confirmed to meet or not meet the age criteria. “Zero knowledge
19 proofs” is “a concept of cryptography that has been well-known for almost 40 years.” Egelman
20 Decl. ¶ 54. *See also* Noah Apthorpe, Brett M. Frischmann & Yan Shvartzshnaider, *Online Age*
21 *Gating: An Interdisciplinary Evaluation*, 24-26 (Aug. 1, 2024),
22 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4937328 (discussing how unlinkability is a
23 privacy-preserving feature in third-party age assurance mechanisms). By limiting information
24 passed to companies and websites to just whether a user meets an age criteria or not, such
25 methods minimize the data privacy risk by minimizing the amount of data stored and disclosed.

1 Another way privacy can be enhanced when conducting age assurance is by having the
2 age assurance take place on-device or in-browser. These methods will not expose users to the
3 same privacy or security risks as assurance that takes place on a vendors’ servers.

4 Ultimately, there are a variety of different ways age assurance can take place. Age
5 assurance methods can be burdensome, or not at all. They could implicate privacy in large
6 ways, or in very little ways. As demonstrated above, it is entirely possible that the service
7 estimating age under the CAADCA receives no information from the user other than that a
8 user’s age is ok or not ok; that no “private” information needs to leave a user’s device; or that a
9 user can use one third party verifier and never again take another action because that verifier
10 will signal age and nothing more through zero-knowledge proofs, and one age assessment can
11 be used across the web.

12 **C. The only relevant question here is whether services’ implementation**
13 **of age estimation under the CAADCA will substantially deter access,**
14 **which is impossible to evaluate given the paucity of the record**

15 NetChoice does not provide any specifics about how any services would implement age
16 estimation under CAADCA, let alone provide a full set of applications of age estimation that
17 would be required for this Court to make a determination about the constitutionality of such
18 measures. Plaintiff simply makes broad, speculative statements – for example that services may
19 respond by “requiring even adults to relinquish personal information.” Mot. at 20.

20 In addition to providing no evidence about what types of age estimations will be used,
21 NetChoice also offers no evidence that going through such unspecified age estimation will chill
22 access to services and implicate the First Amendment. Even if NetChoice were to make an as
23 applied challenge—again, it is not clear what the application would be—there is insufficient
24 evidence in the record.

25 It is possible to assess age in ways that preserve privacy and minimize data collection.
26 And, with the CAADCA, the Legislature intentionally set up such a privacy-preserving system.
27 First, the CAADCA is explicitly not a statute that requires “age verification” (the word
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1 verification does not appear, and “establish,” which was in the originally introduced bill was
2 later replaced with “estimate”), rather, it speaks of “estimation” and “assurance.” *Compare* A.B.
3 2273, 2021-2022 Leg., Reg. Sess. (Cal. 2022) (as introduced on Feb. 16, 2022) with Cal. Civ.
4 Code § 1798.99.31(a)(5). In addition, it is a proportional rule—tying the certainty of the
5 assessment to the risks inherent in the company’s existing data practices. Cal. Civ. Code §
6 1798.99.31(b)(8). This demonstrates that the Legislature does not want companies to use
7 privacy invading technologies, and that, in the tradeoff between privacy and certainty, the
8 Legislature clearly wants companies to choose privacy at the expense of certainty. Third, the
9 Legislature additionally sought to ensure privacy was respected in the text of the CAADCA, by
10 providing that data collected for age estimation may not be retained any longer than necessary
11 to determine age and may not be used for any other purposes. Cal. Civ. Code §
12 1798.99.31(b)(8). Companies should therefore not be subjecting users to privacy risks for age
13 assurance purposes if those risks are beyond the risks companies’ data practices already present
14 to users. If use of an age assurance method presented heightened privacy risks compared to the
15 privacy risks from that companies’ existing data practices, in order to be compliant with the
16 CAADCA the company should not be using this age assurance method—the method would not
17 be appropriate considering the baseline level of risk. Many companies already collect a vast
18 amount of data on their users, so if the company can already assess age based on existing data,
19 then that is how the company should assess age. If a company poses extremely low privacy
20 risks, and they know nothing about their users, then they should use an extremely minimal form
21 of age estimation. The fact that the certainty level of estimation should increase with the risk of
22 the underlying data practices shows the Legislature’s understanding that the more data a
23 company collects about users, the more likely they are to be able to estimate age to a greater
24 level of certainty based on that data to begin with. What age assurance method is appropriate is
25 entirely dependent on each company’s data practices, and so it is impossible to assess any
26 application of the age assurance provision without information about a specific company’s data
27 practices.

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1 Lastly, in general and as discussed above, age estimation can be designed in ways such that
2 any personal information remains on a user’s device, and that all that is sent to a service like
3 one of NetChoice’s members is a signal of an age, or a signal that a user meets a given age
4 threshold. NetChoice’s members need not collect any further data about users and can maintain
5 anonymity on those sites that have “anonymous” users. (And NetChoice’s social media
6 members can still separately maintain all the other personal information, including age, and
7 sometimes already government ID, that they have about users.)
8

9 **IV. Plaintiff has not met its burden to qualify for a preliminary injunction on the age**
10 **estimation provisions**

11 The Supreme Court has stated that “claims of facial invalidity often rest on speculation”
12 and cautioned that “facial challenges threaten to short circuit the democratic process by
13 preventing duly enacted laws from being implemented in constitutional ways.” *Moody*, 144 S.
14 Ct. at 2397 (internal citations omitted). In an era when parents and caregivers are clamoring for
15 more protections for young people online, the California Legislature duly enacted a law that can
16 be implemented in constitutional ways. NetChoice’s speculation should not short circuit this
17 democratic process.
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CONCLUSION

For the foregoing reasons, Common Sense asks this Court to deny Plaintiff’s request for a preliminary injunction.

Dated: December 13, 2024

Respectfully submitted,

By: /s/ Jason Harrow

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