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NETCHOICE, LLC d/b/a NetChoice

15
16 IN THE UNITED STATES DISTRICT COURT

17 THE NORTHERN DISTRICT OF CALIFORNIA

18 SAN JOSE DIVISION

19
20 NETCHOICE, LLC d/b/a NetChoice,

21 Plaintiff,

22 v.

23 ROB BONTA, ATTORNEY GENERAL

OF THE STATE OF CALIFORNIA,

24 in his official capacity,

25 Defendant.

Case No. 5:22-cv-8861

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

I. PRELIMINARY STATEMENT

1
2 1. Although styled as a privacy regulation to protect minors, the California Age-
3 Appropriate Design Code Act (AB 2273)¹ is a content-based restriction on speech that will subject
4 a global communications medium to state supervision and hobble a free and open resource for
5 “exploring the vast realms of human thought and knowledge.” *Packingham v. N. Carolina*, 137
6 S. Ct. 1730, 1737 (2017).

7 2. Among its many infirmities, AB 2273 presses companies to serve as roving censors
8 of speech on the Internet. The law imposes on private firms, big and small, the obligation to
9 identify and “mitigate” speech that is “harmful or potentially harmful” to users under 18 years old,
10 and to “prioritize” speech that promotes such users’ “well-being” and “best interests.” If firms
11 guess the meaning of these inherently subjective terms wrong—or simply reach different
12 conclusions than do government regulators—the State is empowered to impose crushing financial
13 penalties. The State can also impose such penalties if companies fail to enforce their content
14 moderation standards to the Attorney General’s satisfaction. AB 2273 does this without so much
15 as a nod to whether the law’s restrictions are necessary to serve a compelling state interest.

16 3. Rather than protect minors, AB 2273 will harm them, along with the Internet as a
17 whole. Faced with arbitrary application of AB 2273’s draconian penalties, online businesses will
18 face overwhelming pressure to over-moderate content to avoid the law’s penalties for content the
19 State deems harmful. Such over-moderation will restrict the availability of information for users
20 of all ages and stifle important resources, particularly for vulnerable youth who rely on the Internet
21 for life-saving information.² Separately, AB 2273 will require businesses to verify the ages of
22 their users, which—to the extent it can even be done to the State’s satisfaction—will frustrate
23 anonymous and casual browsing, magnify privacy concerns, and wrest control over minors’ online
24 activities from parents and their children.

25
26 ¹ AB 2273 as enacted is attached as Exhibit A and will be codified in relevant part beginning at Section 1798.99.28 to Part 4 of Division 3 of the California Civil Code.

27 ² See “Coalition Letter on Privacy and Free Expression Threats in Kids Online Safety Act” Regarding Opposition to
28 S. 3663 (Nov. 28, 2022) (“Online services would face substantial pressure to over-moderate, including from state Attorneys General seeking to make political points about what kind of information is appropriate for young people.”), available at <https://cdt.org/wp-content/uploads/2022/11/Coalition-letter-opposing-Kids-Online-Safety-Act-28-Nov-PM.pdf>.

4. For these and other reasons, AB 2273 is facially unconstitutional on at least four grounds and is preempted by two federal statutes: The Act on its face violates the First Amendment, Fourth Amendment, and the Due Process and Commerce Clauses of the United States Constitution; violates Article I, Sections 2(a) and 7(a) of the California Constitution; and is preempted by the Children’s Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501 *et seq.*, and the COPPA Rule, 16 C.F.R. § 312.1 *et seq.*, as well as Section 230 of the Communications Decency Act, 47 U.S.C. § 230. Plaintiff NetChoice, LLC accordingly seeks an order declaring AB 2273 invalid and enjoining its enforcement.

II. PARTIES AND STANDING

5. NetChoice is a non-profit entity organized under Section 501(c)(6) of the Internal Revenue Code created in and existing under the laws of the District of Columbia. NetChoice is a national trade association of online businesses that share the goal of promoting free speech and free enterprise on the Internet. A list of NetChoice’s members is available at <https://netchoice.org/about/>. For more than two decades, NetChoice has worked to promote online commerce and speech and to increase consumer access and options through the Internet. NetChoice’s members devote significant attention, time, and money to safeguard children online.

6. Most of NetChoice’s members are directly subject to and regulated by AB 2273 and could face serious legal consequences if they fail to comply with the Act’s directives. And NetChoice itself anticipates having to divert resources to address these consequences and support its members in connection with AB 2273’s demands.

7. NetChoice and its members will suffer irreparable harm—including infringement of their constitutional rights—if AB 2273 is not declared invalid and enjoined before it takes effect.

8. Defendant Rob Bonta is the Attorney General of the State of California. Defendant is responsible for enforcing the provisions of AB 2273 challenged by this action, including because the Act authorizes the Attorney General to bring a “civil action ... in the name of the people of the State of California.” § 1798.99.35(a).

III. JURISDICTION

9. This action arises under the United States Constitution, particularly the Commerce

1 Clause, art. I, § 8, cl. 3, and Supremacy Clause, art. VI, and the First, Fourth, and Fourteenth
2 Amendments, as well as the California Constitution, art. I, §§ 2(a) and 7(a). It also arises under
3 the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988, the Communications Decency Act, 47 U.S.C.
4 § 230, and COPPA, 15 U.S.C. §§ 6501 *et seq.*

5 10. This Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331,
6 1343(a), and 1367(a) because NetChoice's claims either arise under federal law or else share a
7 common nucleus of operative fact with claims that arise under federal law.

8 11. This Court has authority under the Declaratory Judgment Act, 28 U.S.C. § 2201(a),
9 to decide this dispute and award relief because it presents an actual case or controversy within the
10 Court's jurisdiction.

11 IV. VENUE

12 12. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) & (2) because
13 Defendant performs his duties and thus resides in this District, and because the injuries giving rise
14 to this action have been and will continue to be suffered by NetChoice and its members in Santa
15 Clara County, California.

16 V. DIVISIONAL ASSIGNMENT

17 13. Assignment to the San Jose Division is proper under Local Civil Rule 3-2(c) & (e)
18 because the injuries giving rise to this action have been and will continue to be suffered by
19 NetChoice and its members in Santa Clara County, California.

20 VI. FACTUAL ALLEGATIONS

21 A. Online Businesses and Website Architecture

22 14. Online businesses interact with users in different ways. Most have universally
23 accessible areas, in which a user can view product listings, preview services, and read reviews
24 without creating or logging into an account. Many online businesses also have features that are
25 optimized and available only for individuals who create an account or sign up for membership.
26 Some social media services, for example, permit non-members to view public portions of a user's
27 profile, but not to view each post in detail. Similarly, many online businesses require users to
28 create accounts before they can use or purchase an online service.

1 15. Some businesses opt for a free account-based model, where access to online
2 services is provided without charge, but users must provide certain information and create accounts
3 to access those services. Other businesses use a subscription-based model requiring users to create
4 accounts and pay fees to use the online service. Irrespective of model, many online businesses
5 rely on advertisements to earn a significant share of—and in some cases, *all* of—the revenue that
6 supports the content and services they provide.

7 16. Many online businesses that are principally ad-supported publish and deliver
8 content to users, who engage with particular content by, for example, writing a review, reading a
9 news article, downloading a movie, streaming an album, “liking” a post, or purchasing books based
10 on author or genre. This engagement, in turn, enables online businesses to serve users with
11 advertisements or marketing targeted to their expressed interests.³ Ads can appear alongside
12 hosted content, in promoted search results, or in email marketing or newsletters. At its core,
13 targeted advertising leverages technology to improve commercial speech and makes possible a
14 wide range of protected *non-commercial* speech. Advertisers pay a premium for the ability to
15 reach a more specific audience; users benefit from subsidized access to content and more relevant
16 advertisements; and online business operators—including smaller niche bloggers and individual
17 “influencers” who use larger services—are able earn a living by monetizing their talents for
18 creating, curating, and publishing popular and interesting content.⁴

19 17. Even independently of advertising, content promotion is a key service that online
20 businesses offer—and often a key source of revenue. An online service’s ability to suggest a new
21 release based on the user’s browsing history, for example, creates value for the user, generates
22 business for the service, and connects content creators with an audience. This is true across
23 industry—music, movies, television shows, social media posts, and anything else an Internet user
24 might be interested in purchasing, reading, hearing, or viewing.

25
26 ³ See generally David S. Evans, “The Economics of the Online Advertising Industry,” 7 REV. OF NETWORK ECON. 3
27 (2008), available at <https://doi.org/10.2202/1446-9022.1154>.

28 ⁴ See, e.g., Joel Matthew, “Understanding Influencer Marketing And Why It Is So Effective,” FORBES (July 30, 2018),
available at <https://tinyurl.com/3fr7zban>; Jacob Goldenberg *et al.*, “The Research Behind Influencer Marketing,” J.
OF MARKETING RESEARCH (Feb. 2021), available at <https://tinyurl.com/2j2863m5>.

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