

No. 23-2969

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IN THE  
**United States Court of Appeals for the Ninth Circuit**

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NETCHOICE, LLC,

*Plaintiff-Appellee,*

v.

ROB BONTA, in his official capacity as California Attorney General,

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Northern District of California  
No. 5:22-cv-08861-BLF (Hon. Beth Labson Freeman)

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**BRIEF OF AMICI CURIAE CHAMBER OF PROGRESS, CONSUMER  
TECHNOLOGY ASSOCIATION, FIRST AMENDMENT COALITION,  
INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION,  
IP JUSTICE, LGBT TECH, THE TREVOR PROJECT, AND WOODHULL  
FREEDOM FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE  
NETCHOICE, LLC**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record states that, as nonprofit entities organized under §§ 501(c)(3) or 501(c)(6) of the Internal Revenue Code, amici curiae Chamber of Progress, Consumer Technology Association, First Amendment Coalition, Information Technology and Innovation Foundation, IP Justice, LGBT Tech, The Trevor Project, and the Woodhull Freedom Foundation have issued no stock. Consequently, no parent corporation nor any publicly held corporation could or does own 10% or more of their stock.

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## STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)<sup>1</sup>

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

### AMICI'S IDENTITIES, INTERESTS, AND AUTHORITY TO FILE THIS BRIEF

Amici are nonprofit organizations committed to promoting a society in which all people benefit from technology and interconnectivity and all people enjoy the speech opportunities available through a safe, open, and equitable Internet.

**Chamber of Progress** is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, promote innovation and economic growth, and empower technology customers and users. In keeping with that mission, Chamber of Progress believes that allowing a diverse range of websites and philosophies to flourish will benefit everyone—consumers, store owners, and application developers.

Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over,

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<sup>1</sup> All parties have consented to amici filing this amicus brief. *See* Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.<sup>2</sup>

The **Consumer Technology Association** (“CTA”) represents the \$488 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. CTA’s membership is over 1,300 American companies—80% of which are small businesses and startups. CTA also owns and produces CES®, the world’s most powerful technology event.

The **First Amendment Coalition** (“FAC”) protects and promotes a free press, freedom of expression, and the people’s right to know. Nonpartisan and nonprofit, FAC believes that the broadest range of engaged and informed communities is essential to the health of our democracy—that the values expressed by the First Amendment provide a blueprint for an inclusive, equitable society and a responsive, accountable government. To that end, FAC educates, advocates, and litigates to advance government transparency and First Amendment protections for all. In particular, FAC has consistently opposed measures that deprive people of the right to read and learn, online or otherwise.

The **Information Technology and Innovation Foundation** is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute that has been recognized repeatedly as the world’s leading think tank for science and

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<sup>2</sup> Chamber of Progress’s partners include Airbnb, Amazon, Apple, Automattic, Chime, Circle, CLEAR, Coinbase, Creative Juice, Cruise, DoorDash, Earnin, Etsy, Google, Grayscale, Grubhub, Heirloom Carbon, Instacart, itselectric, Lyft, Midjourney, Paradigm, Pindrop, Ripple, SmileDirectClub, StubHub, Turo, Uber, Waymo, Zillow, and Zoox.

technology policy. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

**IP Justice** is an international 501(c)(3) nonprofit charitable organization based in the United States. IP Justice has been operating as an international technology rights and civil liberties organization since 2002. It promotes intellectual freedoms and advancement through Internet freedom, innovation policy, and a balance of intellectual property rights between content holders and users. IP Justice contends that a free and open Internet is a prerequisite for a robust democracy, promoting innovation, technological advancement, and economic growth.

Over the last two decades, IP Justice has selectively partnered with amici curiae to provide courts with unbiased insights on critical legal issues. Additionally, IP Justice participates in international policymaking forums, including the United Nations World Intellectual Property Organization, the United Nations Internet Governance Forum, and the Internet Corporation for Assigned Names and Numbers. IP Justice has held an accredited consultative status with the Economic and Social Council of the United Nations since 2003. The organization has been invited to testify before the U.S. Copyright Office as part of its rulemaking procedures under the Digital Millennium Copyright Act. IP Justice has authored numerous academic works on the interplay of technology and law, focusing on global issues affecting digital rights and Internet governance.

**LGBT Tech** encourages the continued early adoption and use of cutting-edge, new and emerging technologies by providing information, education, and strategic

outreach for LGBTQ+ communities. LGBT Tech empowers LGBTQ+ communities and individuals, and ensures that media, telecom, and high technology issues of specific concern to LGBTQ+ communities are addressed in public policy conversations and engages in research, education, volunteerism, and partnerships to provide cutting-edge technology and resources to improve the lives of LGBTQ+ individuals. LGBT Tech strives to ensure that LGBTQ+ communities have safe and affirming spaces online. This law poses significant challenges and unintended consequences for LGBTQ+ individuals seeking crucial support and community online.

Founded in 1998, **The Trevor Project** is the nation's leading LGBTQ youth crisis intervention and suicide prevention organization. It is the only nationwide organization that offers accredited, free, and confidential phone, instant message, and text messaging crisis intervention services with an exclusive focus on LGBTQ youth. Tens of thousands of individuals use these services every month. In Fiscal Year 2023, The Trevor Project's services reached over 500,000 LGBTQ crisis contacts. By monitoring, analyzing, and evaluating data obtained from these services, The Trevor Project produces innovative research and insights that bring new knowledge, with clinical implications, on issues affecting LGBTQ youth.

**Woodhull Freedom Foundation** is a nonprofit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull is particularly concerned with governmental attempts to censor or burden access to online speech, as sexual expression is often a target of such efforts. Woodhull believes that if the Court upholds the constitutionality of the challenged

law, other jurisdictions will be motivated to pass similar statutes threatening the ability of its members to effectively advocate for sexual freedom and communicate about sexually oriented topics online.

Amici support the development of features to keep kids safe online, such as applications that exclude age-inappropriate content and tools that permit parental supervision. But amici are concerned about California's Age-Appropriate Design Code Act ("AADC") because it restricts websites from exercising their First Amendment rights to moderate content. That, in turn, jeopardizes healthy and safe online communities, particularly those home to marginalized voices. Amici therefore submit this brief in support of Appellee NetChoice.

## INTRODUCTION

The Internet has flourished under the strong First Amendment protections affirmed in *Reno v. ACLU*, 521 U.S. 844 (1997). Websites today publish an endless multitude of content, offering diverse perspectives and ideas, shining in technicolor for anyone to access at the click of a button or tap of a screen. Starting from a young age, people use websites to express themselves, connect with others, and learn about a world beyond what they experience in their everyday lives. Websites are the "principal sources for" everything from learning about "current events" to "speaking and listening in the modern public square" to "otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017).

California's AADC would completely upend this bustling marketplace of ideas. Although characterized as a privacy statute, the AADC fundamentally

regulates speech. It would impose an arbitrary system of prior restraints and restrict speech based on content, viewpoint, and speaker, forcing websites to ban and block any content that someone might consider inappropriate for children. Websites would also be forced to employ privacy-invasive age-verification methods, creating a major privacy risk at odds with California’s purported aims. And upholding the law would invite other states to adopt speech-based restrictions on websites, fracturing the Internet as each state pursues its own agenda regarding what is considered “safe” for children. Equally concerning is the potential for a single state to be left to dictate national Internet policy in an effort to resolve this fractured array of state laws.

The AADC is likely to lead to substantially more harm than it prevents, disproportionately harming marginalized groups like women, communities of color, LGBTQ+ individuals, and religious minorities. For example, discussion of or access to reproductive and sexual health information may be blocked as being potentially harmful. Californians—and potentially other Americans—will need to wait until their 18th birthday to access vast amounts of information available to other American minors, and even then, they will have access conditioned on compliance with invasive age-verification measures. The AADC’s vague standards will also dampen diverse content, denying marginalized groups an effective voice and access to critical resources. And the AADC’s privacy harms will most acutely affect marginalized groups, who often rely on websites’ strong privacy and speech protections.

Although protecting children’s online privacy is a crucial policy goal, that does not give states license to adopt sweeping measures that run roughshod over the



First Amendment. To maintain the Internet's vibrancy and diversity, the Court should affirm.

## ARGUMENT

### **I. The AADC Reaches Far Beyond Privacy, Targeting Online Speech and Violating the First Amendment.**

Although California styles the AADC as a data privacy law, Appellant's Br. 3-10, the AADC goes far beyond data protection. It restricts speech by prohibiting websites from publishing lawful content, intruding upon websites' speech rights, and trampling users' speech rights in the process. And the AADC explicitly differentiates based on viewpoint, content, and speaker, underscoring that it is fundamentally a speech regulation. However well-intentioned, California's law is untenable under the First Amendment.

#### **A. Websites Engage in Speech by Publishing Their Own Content and Through Content Moderation, Which Is a Form of Editorial Discretion.**

Like print newspapers and magazines, websites publish their own content and content created by others. Indeed, the distinction is blurred today between traditional print media and online media, as print media companies commonly run websites with millions of digital users. *See, e.g.*, About the Los Angeles Times, L.A. TIMES, <https://lat.ms/3SS9U8E> (noting 40 million unique latimes.com visitors monthly); Our Strategy, N.Y. TIMES, <https://bit.ly/3HVRkpN> (noting more than 100 million registered accounts).

The publishing process for both print and online media requires editorial discretion, involving decisions about what kind of content to allow, what content to

prioritize, and how to display this content. *See* Herbert J. Gans, DECIDING WHAT’S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME 5 (2004). For websites, this kind of editorial discretion is also known as “content moderation.” Website creators decide on general rules about what material to publish and rely on a mix of chosen algorithms and human oversight to promote material consistent with the website’s values. *See* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH 191, 194-95 (2021).

In this way, a website shapes its identity, creating a brand and attracting an audience. For example, Facebook provides a space for people to engage with their friends and larger communities to discuss many topics, from baking recipes to political memes. Its popularity is based on striking a balance between limiting content that could be dangerous while supporting an array of voices engaging in conversations about difficult topics, from a terminal cancer diagnosis to the Israel-Hamas conflict.

The Supreme Court has wisely held that editorial discretion is sacred speech under the First Amendment. *Mia. Herald Publ’g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”); *see also* *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) (affirming *Tornillo*).

**B. Websites Also Provide Crucial Venues for Speech To Occur in the Modern Age.**

“It is ‘no exaggeration to conclude that the content on the Internet is as diverse as human thought.’” *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). “This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.” *Id.*

Today, the Internet is the place people turn to be heard and to hear from others. Websites are perhaps the most “important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.” *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). “[A]ny person . . . can become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno*, 521 U.S. at 870.

On X, formerly Twitter, journalists, academics, politicians, students, and people from all walks of life join in a global dialogue about hot topics in the news. Reddit houses forums dedicated to innumerable topics, from admiring airport

carpets<sup>3</sup> to abortion rights<sup>4</sup> to struggles with mental health and addiction.<sup>5</sup> Publications like the *New York Times* and *Los Angeles Times* have online comment sections where readers can connect with each other about the papers' stories. The Comments Section, N.Y. TIMES, <https://nyti.ms/3STHOtr>; Deirdre Edgar, *Latimes.com Launches New Platform for Comments*, L.A. TIMES (Apr. 1, 2017), <https://lat.ms/3IfK5tb>.

### **C. The AADC Curtails Speech by Imposing a System of Prior Restraints and Telling Websites How To Moderate Content.**

The AADC imposes a system of prior restraints in the form of “Data Protection Impact Assessments” (“DPIAs”), which websites must create and make available for state inspection on demand before publishing any “online service, product, or feature” that is “likely to be accessed by” a user under the age of 18. The AADC describes a DPIA as a “systematic survey to assess and mitigate risks that arise from the data management practices of the business to children,” although the surveys require much more. Cal. Civ. Code § 1798.99.30(b)(2). Based on these assessments, websites must make “timed plan[s] to mitigate or eliminate the risk”

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<sup>3</sup> *r/CarpetsForAirports*, Reddit, <https://bit.ly/3uFVnTZ> (last visited Jan. 29, 2024).

<sup>4</sup> *r/ProLife*, Reddit, <https://bit.ly/3sU10xk> (last visited Jan. 29, 2024); *r/ProChoice*, Reddit, <https://bit.ly/47J8OBc> (last visited Jan. 29, 2024); *r/AbortionDebate*, Reddit, <https://bit.ly/46H9plt> (last visited Jan. 29, 2024); *r/AuntieNetwork*, Reddit, <https://bit.ly/3T5JrVt> (last visited Jan. 29, 2024); *see also* Megan Burbank, *Abortion Activists Rely on Social Media More Than Ever After Roe—and That Has Risks*, THE NEW REPUBLIC (Sept. 29, 2022), <https://bit.ly/49TFPw1>.

<sup>5</sup> *r/stopdrinking*, Reddit, <https://bit.ly/3T8spGj> (last visited Jan. 29, 2024); *r/mentalhealth*, Reddit, <https://bit.ly/411J4x7> (last visited Jan. 29, 2024); *r/EatingDisorders*, Reddit, <https://bit.ly/3T4lTk0> (last visited Jan. 29, 2024).

that the product or feature might harm children. Cal. Civ. Code § 1798.99.31(a)(2). The AADC subjects any violators to injunctive relief and civil penalties. Cal. Civ. Code § 1798.99.35(a).

Importantly, the DPIA requirements concern far more than data protection matters, making the AADC much more a restriction on speech than a “privacy” law. The AADC lists eight items for DPIAs to address, but only one of these refers to the website’s policies for “collect[ing] and process[ing] sensitive personal information of children.” Cal. Civ. Code § 1798.99.31(a)(1)(B)(viii). Other items refer to a website’s contents, such as whether the “design of a product, service, or feature” might “expose[] children to harmful, or potentially harmful, content,” might “lead to children experiencing or being targeted by harmful, or potentially harmful, contacts,” or “permit children to witness, participate in, or be subject to harmful, or potentially harmful, conduct.” Cal. Civ. Code § 1798.99.31(a)(1)(B)(i)-(iii).

These requirements also rely on ill-defined terminology, such as failing to define “harm” or “harmful,” essentially forcing websites to adopt extreme positions for fear of violating the law. To comport with the First and Fourteenth Amendments, a law must give “fair notice of what is prohibited” and may not be “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). Vague content-based statutes present “special First Amendment concerns because of [their] obvious chilling effect on free speech.” *Reno*, 521 U.S. at 872. Logically, the government should not be permitted to instill “timidity” in businesses that “tend[s] to restrict the public’s access to forms

of the printed word which the State could not constitutionally suppress directly.” *Smith v. California*, 361 U.S. 147, 153-54 (1959).

The AADC’s vague language enables California to do just this, violating the First Amendment even if California has good intentions. The state can review a website’s DPIA and decide at its discretion whether the website’s speech, in the form of publishing decisions, is satisfactory. For example, the vague, undefined term “dark patterns” enables California to decide what platform designs are acceptable and will lead platforms to avoid any design features that might be construed this way, including features intended to help users find the content for which they are looking. Similarly, several provisions of the AADC require websites to “consider the best interests of children” without explaining more. *See* Cal. Civ. Code §§ 1798.99.31(a)(6), (b)(2)(B)(ii), (b)(3), and (b)(4); 1798.99.32(d)(1). With similar laws, any state could install a regime allowing it to decide whether websites have moderated content to its satisfaction. The result would be a deep digital winter, with websites removing any content that could present controversy.

It is also important to note that the AADC unconstitutionally limits speech based on viewpoint, content, and speaker. For example, the statute singles out websites “directed to children” and websites with “games, cartoons, music, and celebrities who appeal to children.” Cal. Civ. Code § 1798.99.30(b)(4). “Content-based regulations are presumptively invalid,” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and “[v]iewpoint discrimination is . . . an egregious form of content discrimination,” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819,

829 (1995). These features show further how the AADC restricts speech at its core, despite being referred to as a data protection law.

## **II. Upholding the AADC Would Be Harmful to Internet Users, Especially Youth and Marginalized Communities.**

### **A. The AADC Will Strip Online Discourse of Its Vibrancy and Diversity.**

The AADC compels websites to self-censor rather than risk astronomical civil penalties for failing to follow the statute's ill-defined DPIA requirements described above. This self-censorship will have dystopian effects, stripping the Internet of content that risks any controversy and walling off youth from critical resources until their 18th birthday. For example, content concerning LGBTQ+ issues may be blocked or otherwise limited, despite many of such concerns being as applicable to members of the LGBTQ+ community who are under 18 as they are to members who are 18 or older. These sorts of harms will fall disproportionately on marginalized groups, including women, communities of color, LGBTQ+ people, and religious minorities.

To illustrate, the AADC puts websites under extreme financial pressure. Any Californian under age 18 is made effectively radioactive because any violation of the AADC's vague standards could yield penalties up to \$7,500 per child affected, adding up to more than \$1,000,000 for even 150 children. Cal. Civ. Code § 1798.99.35(a). Thus, websites will need to transform what and how they publish, given these high numbers, the vague standards explained above, and the

“limitation[s] in the amount of . . . material with which [websites] c[an] familiarize [themselves].” *See Smith v. California*, 361 U.S. 147, 154 (1959).

The upshot is that websites face two alternatives: ban content that is conceivably inappropriate for persons under 18 or ban people under 18.

**1. Websites might ban all content that could be deemed inappropriate for children.**

As the district court noted, the first option for websites is to publish only content that is clearly appropriate for children, within the meaning of the state’s arbitrary standards. 1-ER-25 (quoting *Butler v. Michigan*, 352 U.S. 380, 381, 383 (1957) (“[I]f a business chooses not to estimate age but instead to apply broad privacy and data protections to all consumers, it appears that the inevitable effect will be to impermissibly ‘reduce the adult population . . . to reading only what is fit for children.’”). Because of the risk that people under 18 people will access content, and the privacy problems involved in banning all children effectively,<sup>6</sup> this option may prove most common. Websites would need to consider banning any sensitive topics, ranging from sharing serious medical diagnoses to political debates. Instagram has already removed sexual education content to make “content . . . appropriate for [its] youngest members.” Abigail Moss, *‘Such a Backwards Step’: Instagram Is Now Censoring Sex Education Accounts*, VICE NEWS (Jan. 8, 2021), <https://bit.ly/3P2IT1d>.

Marginalized communities would be harmed the most. What is appropriate for minors is increasingly contested in American society, and these debates almost

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<sup>6</sup> We discuss these privacy concerns in the next subsection of this brief.



always put minority groups under attack, denying their struggles or mere existence. Florida’s “Don’t Say Gay” and “Stop WOKE” bills restrict discussion of race, gender, and sexuality in schools, even for high school seniors and college students. *See, e.g.,* Solcyré Burga, *What to Know About Florida’s New ‘Don’t Say Gay’ Rule That Bans Discussion of Gender for All Students*, TIME (Apr. 20, 2023), <https://bit.ly/49bCNCv>; Andrew Atterbury, *‘Positively dystopian’: Florida judge blocks DeSantis’ anti-woke law for colleges*, POLITICO (Nov. 17, 2022), <https://politi.co/3SDPXRw>. Many other states have passed or are contemplating similar laws, *see* Jo Yurcaba, *Over 30 new LGBTQ education laws are in effect as students go back to school*, NBC NEWS (Aug. 30, 2023), <https://nbcnews.to/48ckgof>, which rely on hateful, dehumanizing tropes that consider LGBTQ+ people “groomers” and “pedophiles.” *See* Matt Lavietes, *‘Groomer,’ ‘pro-pedophile’: Old tropes find new life in anti-LGBTQ movement*, NBC NEWS (Apr. 12, 2022), <https://nbcnews.to/49zQPh7>.

For fear of losing their license or facing other penalties, LGBTQ+ teachers are unsure whether to acknowledge in passing details as simple as a spouse’s gender. Madeleine Carlisle, *LGBTQ Teachers Struggle to Navigate Florida’s So-Called ‘Don’t Say Gay’ Law*, TIME (Aug. 25, 2022), <https://bit.ly/3SSgRqi>; Matt Lavietes, *‘I cannot teach in Florida’: LGBTQ educators fear fallout from new school law*, NBC NEWS (Apr. 1, 2022), <https://nbcnews.to/3UA1iEM>; Ileana Najarro, *With Their Licenses in Jeopardy, Florida Teachers Unsure How the ‘Don’t Say Gay’ Law Will Be Applied*, EDUCATION WEEK (Oct. 27, 2022), <https://bit.ly/491vMnD>.

As part of the same phenomenon, book bans increased by 33% in the 2022-23 school year in the United States, “[o]verwhelmingly . . . targeting books on race or racism or featuring characters of color” and “LGBTQ+ characters,” as well as books involving “physical abuse, health and well-being, and themes of grief and death.” Kasey Meehan et al., *Banned in the USA: The Mounting Pressure to Censor*, Pen America, <https://bit.ly/3SB9vGn>. These bans arise from “state laws, coupled with pressure from vocal citizens and local and national groups,” which “create[] difficult dilemmas for school districts, forcing them to either restrict access to books or risk penalties for educators and librarians.” *Id.*

Under the AADC, this pattern will have disproportionately large impacts on “viewpoints of communities of color, women, LGBTQ+ communities, and religious minorities.” Ángel Díaz & Laura Hecht-Felella, *Double Standards in Social Media Content Moderation*, Brennan Center for Justice at 3 (2021), <https://bit.ly/497xuUH>. As the Brennan Center for Justice explains, content policies, especially ones that are “imprecise and broad,” easily become “applied against marginalized communities, yet narrowly drafted and interpreted when it concerns dominant groups,” which “leav[es] marginalized communities simultaneously at risk of removal and over-exposed to a number of harms.” *Id.*; see also *LGBTQ Young People of Color in Online Spaces*, The Trevor Project (July 19, 2023), <https://bit.ly/49zZj7X> (“Feeling safe and understood in at least one online space is associated with lower suicide risk and lower rates of recent anxiety for all LGBTQ young people, and for LGBTQ young people of color in particular.”).

For example, under the AADC, racial minorities may find that their speech is quashed because it is deemed hate speech, harassment, or abuse. See Maarten Sap et al., *The Risk of Racial Bias in Hate Speech Detection*, Proceedings of the 57th Annual Meeting of the Association for Computational Linguistics, 1668, 1671 (2019), <https://bit.ly/3ODPs8S>. Women may struggle under the AADC to access information about sexual assault, reproductive healthcare, and other issues due to how their bodies have been sexualized. See Savannah Kuchar, *When social media censorship gets it wrong: The struggle of breast cancer content creators*, USA TODAY (Sept. 12, 2023), <https://bit.ly/49sRReA>. Women have also been banned from social media for sharing their stories about workplace sexual harassment and abuse. Samuel Gibbs, *Facebook Bans Women for Posting ‘Men Are Scum’ After Harassment Scandals*, THE GUARDIAN (Dec. 5, 2017), <https://bit.ly/49sRWio>.

Similarly, vague rules around disorderly, lewd, or inappropriate content have been historically used to harass, arrest, and imprison LGBTQ+ people. Ari Ezra Waldman, *Disorderly Content*, 97 WASH. L. REV. 907 (2022). Today, many organizations consider any form of LGBTQ+ content age-inappropriate, and social media platforms have already engaged in practices that reduce LGBTQ+ content.<sup>7</sup>

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<sup>7</sup> For example, one more major video platform hid LGBTQ+ content in “restricted mode” after stating that “child safety has been and remains” the company’s #1 priority. Matthew S. Schwartz, *Advertisers Abandon YouTube Over Concerns That Pedophiles Lurk in Comments Section*, NPR (Feb. 22, 2019), <https://n.pr/49yXCrl>. Transgender users reportedly have had their content disproportionately removed on one social media platform where moderation algorithms appear to flag certain LGBTQ+ content more than non-LGBTQ+ content. Alexander Cheves, *The Dangerous Trend of LGBTQ Censorship on the Internet*, Out (Dec. 6, 2018), <https://bit.ly/3SEg7Un>.

See, e.g., Jared Eckert & Makenna McCoy, *Young Children Are Being Targeted With Sexual Content. The Equality Act Would Make It Worse*, The Heritage Foundation (June 11, 2021), <https://herit.ag/49v3aD7>; Tom Tapp, *GOP Senators Call For Warning Label On “Disturbing” LGBTQ Content In Kids’ TV Shows*, DEADLINE (Mar. 6, 2022), <https://bit.ly/3wk58Yu>. This is often because the content is considered too “adult.” Oliver L. Haimson et al., *Tumblr was a trans technology: the meaning, importance, history, and future of trans technologies*, 21 FEMINIST MEDIA STUDIES 345, 354-62 (2019). Removing this content has dire consequences because it restricts people from accessing resources and leaves people “perpetually erased in the cultural and institutional world.” Viviane Namaste, *INVISIBLE LIVES: THE ERASURE OF TRANSEXUAL AND TRANSGENDERED PEOPLE*, at 2 (2000). Thus, people are left to feel socially invalidated and impeded from sharing their stories with the mainstream public—harms that will especially affect young people during a vulnerable time in their lives when they are coming to understand their own identities.

**2. Websites might also block people from accessing enormous amounts of online content until their 18th birthday.**

The second option for websites is to wall off all users until they turn 18. This would be despite there being—at worst—only weak evidence of the harmful effects of social media for children and teenagers, which needs to be assessed against the growing body of evidence finding no harms or positive benefits:

- A large survey by Pew Research Center found that, for a majority of teens, social media was far more helpful than harmful. Monica Anderson et al., *Connection, Creativity and Drama: Teen Life on Social Media in 2022*, Pew

Research Center (Nov. 16, 2022), <https://pewrsr.ch/3whSY2z> (“Eight-in-ten teens say that what they see on social media makes them feel more connected to what’s going on in their friends’ lives[;] . . . 71% say it makes them feel like they have a place where they can show their creative side[;] . . . 67% say these platforms make them feel as if they have people who can support them through tough times[;] . . . a majority [] say the same for feeling more accepted. These positive sentiments are expressed by teens across demographic groups”).

- In a study of Facebook adoptions by nearly 1 million individuals in 72 countries, researchers from Oxford University “found no evidence suggesting that the global penetration of social media is associated with widespread psychological harm.” Matti Vuorre & Andrew K. Przybylski, *Estimating the association between Facebook adoption and well-being in 72 countries*, 10 ROYAL SOCIETY OPEN SCIENCE 221451 (Aug. 9, 2023).
- “Using data from the Adolescent Brain Cognitive Development (ABCD) Study, the largest long-term study of brain development and child health in the United States,” researchers from several universities found “no evidence . . . to show that screen time impacted [children’s] brain function or well-being.” Press Release, Oxford Internet Institute, *No evidence screen time is negative for children’s cognitive development and well-being: Oxford Study* (Nov. 17, 2023), <https://bit.ly/3IfUZz7>.

Excluding minors would disproportionately harm marginalized communities.

Young people rely on the Internet to find communities where they can engage in open dialogue in ways that may not be possible offline. For example, LGBTQ+ youth find solace in online spaces, reducing feelings of isolation, anxiety, and suicidal ideation. Ashley Austin et al., *It’s My Safe Space: The Life-Saving Role of the Internet in the Lives of Transgender and Gender Diverse Youth*, 21 INT’L J. OF TRANSGENDER HEALTH 33 (2020); *see also 2023 LGBTQ+ Youth Report*, Human Rights Campaign Foundation (Aug. 2023), <https://bit.ly/3UCHIYO> (“Over 8 in 10 . . . LGBTQ+ youth have ever used the internet to seek out LGBTQ+ specific sexual health and behavior information, and well over 9 in 10 . . . have used the

internet to seek out information about LGBTQ+ identities, and their own identity as an LGBTQ+ person . . .”).

Moreover, if websites comply by removing all access for minors, this approach will make the Internet harder to use as a whole, frustrating users and thwarting online innovation. *See* Eric Goldman, *The Plan to Blow Up the Internet, Ostensibly to Protect Kids Online*, CAPITOL WKLY. (Aug. 18, 2022), <https://bit.ly/3Uv76Q2>. People move “seamlessly” across the Internet today, but under the AADC, “users will first be required to prove their age before they can visit any new site – even if they just plan to visit for a second, and even if they never plan to return.” *Id.* For example, Louisiana requires websites with adult content to use “reasonable age verification methods,” which the statute says include checking state identification cards. Jonathan Franklin, *Looking to watch porn in Louisiana? Expect to hand over your ID*, NPR (Jan 5, 2023), <https://n.pr/3UEbCM2>; *see also* Lisa Guernsey, *Welcome to the World Wide Web. Passport, Please?*, N.Y. TIMES (Mar. 15, 2001), <https://nyti.ms/3Rw2NlK>. Similar to how websites now require IDs for Louisianans to access adult content, post-AADC, websites may require IDs to access anything remotely adult, creating “an unwanted hassle” that will stop users “clicking around as freely,” draining the Internet of its dynamism. Goldman, *supra*.

### **B. The AADC Jeopardizes Privacy by Forcing Websites To Adopt Age Verification Measures.**

The AADC’s vague requirements and severe penalties also pressure companies to adopt rigorous age-verification processes.<sup>8</sup> This compounds the

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<sup>8</sup> Although California argues that platforms already must comply with COPPA,

frustrations discussed above, generating serious problems for maintaining users' privacy, with marginalized groups again facing the greatest risk of harm.

Under the AADC, websites must “[e]stimate the age of child users with a reasonable level of certainty,” but the statute does not specify this level, leaving websites uncertain about what measures are necessary or “reasonable.” Cal. Civ. Code § 1798.99.31(a)(5), (b)(8). At the same time, the law imposes high penalties for each child affected, meaning websites cannot afford to risk being found in violation. This dilemma forces companies to pursue methods that verify users' age with certainty, endangering user privacy. *See* Emma Roth, *Online Age Verification Is Coming, and Privacy Is on the Chopping Block*, THE VERGE (May 15, 2023), <https://bit.ly/3NdMKq9>.

At a minimum, verification procedures would require websites to collect more personal information than they otherwise would need (or want) to collect. California's brief suggests that companies should rely on third parties to collect and process data, Appellant's Br. 38, which would increase the risk that personal data becomes compromised by spreading it among more parties. Further, left with so few options, websites may rely on facial scanning software, which depending on how it is managed, could create additional privacy issues and opportunities for third-party supply chain attacks.

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Appellant's Br. 39, COPPA's liability framework is focused on when the website is directed to users younger than age 13 or when the website operator has “actual knowledge” that the user is younger than age 13. The AADC does not have such restrictions.

These privacy risks disproportionately threaten marginalized groups, such as women, LGBTQ+ individuals, and people with sensitive health issues or disabilities that they wish to keep private. These groups often rely on the Internet’s anonymity to access information that they cannot get in their everyday lives without others finding out and violating their sphere of personal privacy. *See* Goldman, *supra*. For example, women who have experienced sexual harassment or abuse may wish to obtain information anonymously, for fear of workplace repercussions or domestic violence. The AADC would take that option away by requiring users to associate identifying information with their Internet activity. Even with assurances that this information will remain protected, users will fear the consequences of a leak, impeding them from accessing vital online resources when most in need.

### **III. Upholding the AADC Would Fragment the Internet, Harming Internet Users Even Further.**

Permitting the AADC to take effect is likely to result in a patchwork of Internet regulations that balkanize the Internet as we know it. *See* Mike Masnick, *State Legislators Are Demanding Websites Moderate Less AND Moderate More; Federal Law Prohibits Both*, TECHDIRT (Apr. 8, 2022), <https://bit.ly/46KYOFW>; Tyler B. Valeska, *Speech Balkanization*, 65 B.C. L. REV. (forthcoming 2024); *see also* Mark A. Lemley, *The Splinternet*, 70 DUKE L.J. 1397 (2021). For example, if some states adopt requirements for child-safe design and others impose “must-carry” requirements for user-generated content (such as the laws at issue in the NetChoice litigation before the Supreme Court of the United States), websites may be unable to be designed in a way that fulfills both sets of obligations. This harm, caused by



individual states regulating conduct far beyond their borders, is wholly inconsistent with the Commerce Clause and would be a disaster for Internet users. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid.”).

These kinds of dilemmas will force websites to pursue undesirable solutions. To comply with conflicting laws, websites would need to somehow tailor their content moderation practices by geolocating users. Such precision may not be technically feasible, especially in scenarios involving contiguous states with conflicting laws or users that travel, use multiple devices, or use software or a service that masks a device’s location (such as a virtual private network). Developing and implementing these capabilities would also likely require privacy-invasive tools and the collection of additional personal data, raising new tensions and conflicts with data protection laws and compounding the privacy issues discussed above.

As a result, websites might be forced to eliminate access in one or more of the conflicting jurisdictions (or all of them). This would limit speech because users’ reach and access to content would be geographically constrained. Some startups may decide that it is not even worth entering a fractured Internet marketplace with ever-evolving regulations.

If the AADC alone does not pressure websites to make all of their content suitable for children, its combination with other state laws may have this effect. Websites might respond to conflicting legal obligations by eliminating any discussion that could be perceived as controversial for children. This, too, would

limit speech because certain topics would be wholly foreclosed from discussion on the websites.

And even with no new conflicts between different state laws, speech (and its reach) may still be encumbered. For example, websites may have practically no choice but to adopt a nationwide compliance regime that follows the most restrictive speech regulations adopted by any state. *See Valeska, supra*. This means that a single state, like Texas, Florida, or California, could effectively dictate Internet policy nationwide.

## CONCLUSION

To ensure the Internet's continued vibrancy and diversity for all users, the panel should affirm.

Respectfully submitted,

Dated: February 14, 2024

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,903 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the tpestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word for Office 365 in Times New Roman 14-point font.

Dated: February 14, 2024

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 14, 2024. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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