

**“THE PRE-1964 CIGARETTE” OF TODAY: SOCIAL MEDIA,
PREDATORY ONLINE PRACTICES, AND NEW ADVANCES IN
CHILDREN’S PRIVACY REGULATION**

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The Children’s Online Privacy Protection Act (“COPPA”) was passed in 1998 and has been the sole method by which children’s online privacy is regulated in the United States ever since. Until recently, efforts to strengthen children’s online privacy has either been slow-moving or failed altogether. However, California recently passed the Age-Appropriate Design Code Act, the most expansive children’s online privacy regulation the United States has seen to date.

As concern around data privacy becomes more pressing, it has become clear that lawmakers must take action to keep children safe from predatory online practices, both from companies and private individuals. Where COPPA primarily puts the responsibility to protect children online on parents, the Age-Appropriate Design Code Model places more responsibility in the hands of those most prepared to actually do something about it: the companies themselves.

This Article is meant to serve as a call to action for North Carolina lawmakers to adopt legislation similar to California’s Age-Appropriate Design Code Act before it is too late to protect an entire generation of North Carolina children from the predatory online practices currently employed by the companies interacting with children every day online.

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I. INTRODUCTION

Cigarettes, though now known to be poor for users’ physical health, were once commonly believed to be safe.¹ Cigarettes were used widely, often in common spaces like schools, restaurants, and even airplanes.² In fact, it wasn’t until 1964, when a report by the Surgeon General cited cigarette usage as a cause of the staggering

¹ U.S. DEP’T OF HEALTH AND HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014), <https://www.ncbi.nlm.nih.gov/books/NBK294310/> [https://perma.cc/JWB8-5HMR].

² *Id.*

rise in cancer, that public perception of nicotine habits changed.³ Over the ensuing fifty-plus years, cigarettes have been slowly—but steadily—declining in popularity.⁴ Jared Patterson, a Texas State House Representative, believes this same pattern in negative public perception is now equally applicable to social media, particularly the effects of social media on children.⁵ “Social media is the pre-1964 cigarette,” he said recently.⁶ He explained that, much like how cigarettes were discovered to have harmful effects on people’s health, studies now show that “social media access to minors has led to remarkable rises in self-harm, suicide, and mental health issues.”⁷ Today, there is more interest than ever in regulating social media and other online businesses that target children’s online data. In other words, if social media is the new cigarette, legislators have the opportunity to be the new Surgeon General.

Much has been written about children’s online privacy since the Children’s Online Privacy Protection Act (“COPPA”), the first federal regulation on children’s privacy, was enacted in 1998.⁸ Some articles have focused on the relationship between online businesses and children’s privacy,⁹ while others have focused on social media and its relationship to children’s privacy and mental health.¹⁰ This

³ *Id.*

⁴ *Current Cigarette Smoking Among Adults in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 7, 2022), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm [<https://perma.cc/MAA6-7UUE>].

⁵ Michael Murney, *Texas Lawmaker Introduces Bill to Ban Kids from Social Media*, GOV’T TECH. (Dec. 13, 2022), <https://www.govtech.com/policy/texas-lawmaker-introduces-bill-to-ban-kids-from-social-media#:~:text=The%20bill%20aims%20to%20block,removal%20of%20their%20kids'%20accounts> [<https://perma.cc/WES7-P6TK>].

⁶ *Id.*

⁷ *Id.*

⁸ See 15 U.S.C. §§ 6501–05 (West 1998).

⁹ See generally Rachael Malkin, *How the Children’s Online Privacy Protection Act Affects Online Businesses and Consumers of Today and Tomorrow*, 14 LOY. CONSUMER L. REV. 153 (2002). This article was written in 2002. We’ve learned a lot more about mental health and children’s online habits since then, but not much has been written on the topic since, at least not with a focus on the relevant law.

¹⁰ See generally Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017).

Article expands on this previous research, providing new insight based on current events and legislation being put forward by several states. With this added context, this Article proposes that North Carolina should adopt stringent regulations on children's privacy before the effects of children's online usage on their mental and physical health spread like a cancer.

Accordingly, Part II of this Article will introduce COPPA and the children's privacy space generally, focusing in particular on recent actions taken by both the Federal Trade Commission ("FTC") and private citizens. Part III will discuss some recent legislative action by various states, with special attention paid to California's new children's privacy law. Part IV will highlight the criticisms of California's new law and the children's privacy bills other states have proposed. Part V will contemplate whether the onus to protect children's online privacy should be on the government, parents, or the companies themselves. Finally, Part VI will, in light of these discussions, suggest the model of children's privacy law that North Carolina should adopt going forward.

II. COPPA AND MORE: A LOOK AT CURRENT CHILDREN'S PRIVACY PROTECTIONS

In 2013, Twitter had just introduced Vine, a video-sharing platform that would become the most downloaded app four months after its release.¹¹ "Selfie" was Oxford English Dictionary's word of the year,¹² and Grand Theft Auto V was the most popular video game in the United States.¹³ There have been numerous technological advances since then, but one technological relic of bygone days remains: COPPA.

¹¹ *Infographic: The Year in Social Media, A 2013 Recap*, MKTG. TECH. (Dec. 30, 2013, 9:00 AM), <https://martech.org/infographic-social-media-2013-recap/> [<https://perma.cc/CSG7-695X>].

¹² Silvia Killingsworth, *And the Word of the Year is . . .*, NEW YORKER (Nov. 19, 2013), <https://www.newyorker.com/culture/culture-desk/and-the-word-of-the-year-is#:~:text=Hold%20on%20to%20your%20monocles,used%20in%20002%2C%20in%20an> [<https://perma.cc/756R-VZQY>].

¹³ Shane Roberts, *The 13 Most Popular Video Games of 2013, As Purchased by You*, KOTAKU (Dec. 23, 2013), <https://kotaku.com/the-13-most-popular-video-games-of-2013-as-purchased-b-1487785780> [<https://perma.cc/LSC9-H6YU>].

COPPA was enacted in 1998 in an effort to protect privacy of children as technology advanced, and was most recently updated in 2013.¹⁴ COPPA imposes requirements on online apps, services, and websites that are directed at children, and it applies only to those aged thirteen years or younger.¹⁵ Such requirements include clearly displaying consent forms on the sites themselves, making reasonable efforts to provide privacy notices to parents of minors, and retaining personal information only “to the extent necessary.”¹⁶ Enforcement of COPPA is handled primarily by the FTC.¹⁷ Though it does serve an important function in creating liability for predatory online practices of companies, COPPA places the majority of responsibility on parents to regulate their children’s online usage.¹⁸ As explained by the FTC, “[t]he primary goal of COPPA is to place parents in control over what information is collected from their young children online.”¹⁹

The FTC also authorizes “Safe Harbors” for COPPA compliance.²⁰ One such Safe Harbor Program is the Children’s Advertising Review Unit (“CARU”), a subsidiary of the Better Business Bureau.²¹ Apart from administering decisions on whether a company’s advertising is compliant with COPPA, CARU also releases children’s advertising guidelines for companies.²² Notably, CARU scrutinizes “dark patterns” in marketing and advertising to children.²³ Dark patterns are features “designed to nudge user behavior toward choices he or she might not normally make if the

¹⁴ Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–05 (West 1998).

¹⁵ *Id.*

¹⁶ *Id.* § 6502.

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM’N (July 2020), <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions> [<https://perma.cc/93ZC-QDPX>].

²⁰ 15 U.S.C. § 6503.

²¹ *Children’s Advertising Review Unit*, BETTER BUS. BUREAU NAT’L PROGRAMS, <https://bbbprograms.org/programs/all-programs/children’s-advertising-review-unit> [<https://perma.cc/J35E-9GKW>] (last visited Mar. 3, 2023).

²² *Id.*

²³ *Id.*

options were presented differently.”²⁴ For example, CARU looks for advertising that is hidden from the child, or advertising that appears to be so “native” to a game or app that a child might not even realize it is advertising.²⁵ Between COPPA itself and Safe Harbor Programs like CARU, companies are well aware of COPPA guidelines, and they have been given the tools to help them comply. The continued failure to do so—through, for example, impermissible mining of children’s data, predatory presets on privacy settings in apps and games, and other misconduct with children’s privacy—indicates that a change must be made in the ways these companies are regulated.

For twenty-five years, COPPA has done its job, but technology is an ever-advancing industry, and it has become apparent to government agencies and consumers alike that protecting privacy—particularly children’s privacy—as technology advances is a major issue. In his 2023 State of the Union address, President Biden acknowledged the need for updated children’s privacy regulations.²⁶ Though the call to amend children’s privacy was short, this speech marked the second State of the Union address in which President Biden has specifically mentioned the need to do more to protect children online, highlighting his administration’s ongoing interest in the issue.²⁷

In the meantime, regulators are making more of an effort to enforce COPPA rules strictly. For example, the FTC recently announced its renewed focus on children’s privacy.²⁸ In a May 2022

²⁴ John J. Rolecki, *Trends in Data Privacy: Dark Patterns*, NAT’L L. REV., (May 27, 2022), <https://www.natlawreview.com/article/trends-data-privacy-regulation-dark-patterns> [<https://perma.cc/DUN9-WWRD>].

²⁵ BETTER BUS. BUREAU NAT’L PROGRAMS, *supra* note 21.

²⁶ *Remarks of President Joe Biden—State of the Union Address as Prepared for Delivery*, WHITE HOUSE (Feb. 7, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/> [<https://perma.cc/XH7E-S9TP>] (“And it’s time to pass bipartisan legislation to stop Big Tech from Collecting personal data on kids and teenagers online, ban targeted advertising on children, and impose stricter limits on the personal data these companies collect on all of us.”).

²⁷ *Id.*

²⁸ *FTC to Crack Down on Companies that Illegally Surveil Children Learning Online*, FED. TRADE COMM’N. (May 19, 2022), <https://www.ftc.gov/news->

press release, the FTC focused specifically on education technology (“ed tech”) providers, stating that “it is against the law for companies to force parents and schools to surrender their children’s privacy rights in order to do schoolwork or attend class remotely.”²⁹ The press release reiterated several actions that ed tech companies are not allowed to take, such as mandating consent to data collection before granting children access to the platform or retaining children’s data for longer than necessary.³⁰

Though that press release exclusively addressed ed tech, it is now clear that the FTC is looking to crack down on companies beyond the education industry. For example, the FTC recently levied a half-billion dollar fine against Epic Games, which owns the popular video game Fortnite.³¹ The FTC complaint cites the company’s “privacy invasive default settings and deceptive interfaces that tricked Fortnite users, including teenagers and children,” as part of the reason for the hefty fine.³² The fine also included a “first-of-its-kind” provision that requires Epic to enforce stronger privacy default settings for its minor users.³³ It is the largest penalty the FTC has ever issued for violating any of its rules, and it applies to the mistreatment of both children’s and teens’ data, signaling the FTC’s increased interest in enforcing children’s privacy regulations and stretching the bounds of COPPA.³⁴

Importantly, COPPA has never been challenged in court; instead, the bounds of the statute have only ever been defined by the settlements with companies that have violated the statute according

events/news/press-releases/2022/05/ftc-crack-down-companies-illegally-surveil-children-learning-online [https://perma.cc/HD4V-G5X3]. Per this press release, the FTC issued a policy statement emphasizing the right that parents have to protect their children from unauthorized online surveillance at schools.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges*, FED. TRADE COMM’N (Dec. 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations> [https://perma.cc/M64C-Q9K2].

³² *Id.*

³³ *Id.*

³⁴ *Id.*

to the FTC.³⁵ For that reason, it is unclear what the exact bounds of COPPA are, or if the FTC has ever overreached in its enforcement authority. The fact that COPPA has never been challenged in court also implies that these companies do not think that questioning COPPA's reach is worth the cost of litigation.

Congress is also taking action to remedy this lag in protection, though that action is admittedly slow-going. In 2022, an amended version of COPPA, colloquially referred to as COPPA 2.0, was introduced in Congress.³⁶ This amended version would have expanded COPPA to cover teenagers as well as those thirteen and younger.³⁷ Though it did not pass, it is anticipated that a new version will be proposed in 2023 as well.³⁸ However, there is some concern about the length of time it is taking to get a new version pushed through. For reference, the first version of COPPA passed after just four months of debate, with bipartisan support, and has never been challenged.³⁹ In comparison, the effort to update COPPA has been ongoing for years. It seems that although both government agencies and consumers are asserting the need for updated privacy protections for children, Congress does not share this enthusiasm, as it has not given COPPA the level of momentum today that it had in 1998. Though the FTC has pushed in the past for a new version of the law to be passed, it now seems to be focusing more on stretching the bounds of COPPA and its general statute in an effort to reach a broader level of protection while waiting on an updated version of COPPA to pass in Congress.⁴⁰

However, Congress's decrease in momentum may not be from lack of trying; instead, it could be attributed to the fact that there are several proposed bills that could potentially take COPPA's place. At

³⁵ See *History of COPPA Violations*, PRIVO <https://www.privo.com/history-of-coppa-violations> [<https://perma.cc/5W8F-TTCN>] (last visited Mar. 30, 2023).

³⁶ See S. 1628, 117th Cong. (2022).

³⁷ *Id.*

³⁸ See Osano Staff, *What's Going on with the Children's Online Privacy Protection Act (COPPA)?*, OSANO (Nov. 7, 2022), <https://www.osano.com/articles/whats-new-coppa> [<https://perma.cc/G9BU-RZSC>].

³⁹ S. 2326, 105th Cong. (1998).

⁴⁰ This stretching of COPPA was indicated through the Epic Games fine, which broke ground both by being the biggest fine levied under COPPA and reaching to protect teens as well as those under thirteen years old.

least three bills could be contenders for replacing COPPA altogether: COPPA 2.0, the Kids Online Safety Act (“KOSA”), and the American Data Privacy and Protection Act (“ADPPA”).⁴¹ The ADPPA would serve as an omnibus bill that would protect all Americans’ data, regardless of age.⁴² Though the process of updating children’s privacy laws at the federal level is slow-going, the sheer amount of different legislation being brought forward indicates that this issue is at the forefront of many legislators’ minds.

While Congress moves toward strengthening children’s privacy at a glacial pace, law firms are taking matters into their own hands to combat the predatory online practices of companies via several class action lawsuits which focus on both the illegal use of children’s data and the repercussions that social media algorithms can have on children’s mental health.⁴³ An example of the former comes from the Ninth Circuit, which revived a class action lawsuit against Google and other companies in December 2022.⁴⁴ The argument in this action is that these companies allowed children-directed content providers, like Cartoon Network, to lure children over to their pages, where YouTube knew their information would be tracked.⁴⁵ The lawsuit itself alleges that these companies violated child privacy laws by monitoring the YouTube activity of children under thirteen without parental consent in order to send them targeted advertising.⁴⁶ Overruling the District Court’s dismissal, the Ninth Circuit determined that Congress did not intend

⁴¹ Osana Staff, *supra* note 38. KOSA is most analogous to the U.K.’s Age-Appropriate Design Code and is discussed in detail below. *See infra* pp. 10–11.

⁴² *Id.*

⁴³ See Avi Asher-Schapiro, *INSIGHT–Lawsuits Pile Up as U.S. Parents Take on Social Media Giants*, REUTERS (Feb. 8, 2023, 9:15 AM), <https://www.reuters.com/article/usa-socialmedia-lawsuits/insight-lawsuits-pile-up-as-u-s-parents-take-on-social-media-giants-idUSL8N32I056> [<https://perma.cc/4ARL-ET8U>].

⁴⁴ Jonathan Stempel, *Google, YouTube Content Providers Must Face U.S. Children’s Privacy Lawsuit*, REUTERS (Dec. 28, 2022, 3:25 PM), <https://www.reuters.com/technology/google-youtube-content-providers-must-face-us-childrens-privacy-lawsuit-2022-12-28/> [<https://perma.cc/PU3A-5MU7>].

⁴⁵ *Id.*

⁴⁶ *Jones v. Google LLC*, 56 F.4th 735, 740–41 (9th Cir. 2023).

for COPPA to bar the plaintiff's ability to bring claims based on state statutes that target the same patterns.⁴⁷

There is also pending class action litigation against Meta which focuses on the mental health of children who have become addicted to certain social media platforms through the use of predatory algorithms.⁴⁸ That complaint alleges that social media algorithms are defective products that have led to mental health issues and other negative effects on children.⁴⁹ A lead attorney on the case has likened Meta's behavior to that of tobacco companies in the 1990s "when whistleblowers leaked evidence that tobacco companies knew nicotine was addictive."⁵⁰ In other words, the (admittedly novel) legal theory is that Meta knowingly put a defective product—its algorithm—into the marketplace, and consumers were harmed as a result.

Issues involving protections of children's privacy are also garnering attention abroad. Last year, Meta was fined \$400 million by Ireland's Data Protection Commission under the General Data Protection Regulation ("GDPR")⁵¹ for its inappropriate collection of children's data.⁵² It is the largest fine ever to be levied under the GDPR, which signals that United Kingdom ("U.K.") officials are also prioritizing children's privacy more than ever.⁵³ New laws like the U.K.'s Age-Appropriate Design Code are discussed more fully below, and also work to show just how interested legislators—in the

⁴⁷ *Id.*

⁴⁸ Ruth Reader, *Social Media is a Defective Product, Lawsuit Contends*, POLITICO (Jan. 26, 2023, 4:30 AM), <https://www.politico.com/news/2023/01/26/social-media-lawsuit-mental-illness-00079515> [<https://perma.cc/Y5WX-3LT4>].

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The GDPR is the European Union's privacy and security law, which was passed in 2018 and applies to all organizations that target data from European Union citizens.

⁵² Adam Satariano, *Meta Fined \$400 Million for Treatment of Children's Data on Instagram*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/09/05/business/meta-children-data-protection-europe.html> [<https://perma.cc/6993-6X2A>].

⁵³ *Id.*

U.S. and abroad—are in strengthening children’s online privacy protections.⁵⁴

In this swell of public attention for children’s privacy, North Carolina has an opportunity to get ahead of the curve and do more to protect children’s online data; in fact, it is beginning to look like this change is going to happen whether North Carolina gets on board or not.

III. THE NEW MODEL: AGE-APPROPRIATE DESIGN CODE ACTS AND OTHER STATES’ PROPOSED LAWS

In 2020, the U.K. passed a children’s online privacy law that was much more expansive and comprehensive than COPPA.⁵⁵ The U.K.’s Age-Appropriate Design Code (“AADC”) went into effect in September 2021.⁵⁶ When it went into effect, some social media companies decided to apply some of the stricter privacy practices required by the Act globally, instead of just in the U.K.⁵⁷ The U.K.’s version is especially important—not just because it has incidentally led to some stricter privacy protections globally, but also because it is functioning as the new blueprint for other children’s privacy legislation. In other words, where COPPA once defined children’s privacy in the U.S., there are now two competing models for children’s privacy laws, and at least one state has already employed the U.K.’s version.

⁵⁴ See *infra* pp. 10–11.

⁵⁵ See *Safe Computing, History of Privacy Timeline*, U. MICHIGAN, <https://safecomputing.umich.edu/privacy/history-of-privacy-timeline#:~:text=COPPA%20Children’s%20Online%20Privacy,law%20on%20October%2021%2C%201998> [https://perma.cc/7564-LMG9] (last visited Mar. 4, 2023).

⁵⁶ Anna Blest et al., *UK Children’s Privacy Protection Comes of Age*, JD SUPRA (Oct. 12, 2022), <https://www.jdsupra.com/legalnews/uk-children-s-privacy-protection-comes-8133979/#:~:text=The%20Age%20Appropriate%20Design%20Code,year%20to%20observe%20its%20effects> [https://perma.cc/H6Z8-EA6H].

⁵⁷ See Alex Hern, *Social Media Giants Increase Global Child Safety after UK Regulations Introduced*, GUARDIAN (Sept. 5, 2021, 10:14 AM), <https://www.theguardian.com/media/2021/sep/05/social-media-giants-increase-global-child-safety-after-uk-regulations-introduced> [https://perma.cc/3CZM-H7S2].

A. The California Age-Appropriate Design Code Act

One such piece of legislation inspired by the U.K.'s AADC is the California Age-Appropriate Design Code Act ("CAADCA"), which was passed September 2022, in an effort to better police predatory practices on children's privacy.⁵⁸ The CAADCA is a bipartisan bill aimed to protect children's online safety and give California "the chance to lead the way in making the digital world safe for American children."⁵⁹ The CAADCA will affect all for-profit entities doing business in California that collect personal information of California residents and meet specific threshold criteria.⁶⁰ The goal is to ensure that companies that are likely to be accessed by children design their platforms with children in mind, and, "if a conflict arises between commercial interests and the best interest of children, companies should prioritize the privacy, safety, and well-being of children over commercial interests."⁶¹ The CAADCA will go into effect on July 1, 2024.⁶²

The CAADCA is more comprehensive than COPPA in several key ways. First, the CAADCA protects children under the age of eighteen, as opposed to only those thirteen and younger.⁶³ The law also lists five different categories within this broad age range to help companies comply with the "unique needs" of every age.⁶⁴ For example, ages zero to five constitute the "preliterate and early literacy" stage, while ages sixteen to seventeen are labeled as "approaching adulthood."⁶⁵ Presumably, these age ranges will

⁵⁸ TITLE 1.81.47, THE CALIFORNIA AGE-APPROPRIATE DESIGN CODE ACT, CAL. CIV. CODE §§ 1798.99.28-40 (West 2023).

⁵⁹ *We Need to Keep Kids Safe Online: California Has the Solution*, 5 RTS. FOUND., <https://californiaaadca.com/> [<https://perma.cc/K2SQ-VSQT>] (last visited Feb. 27, 2023).

⁶⁰ See CAL. CIV. CODE § 1798.140(d)(1) (West 2023).

⁶¹ *Id.* § 1798.99.29.

⁶² *Id.* § 1798.99.33.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* The other categories are: 6–9: "core primary school years"; 10–12: "transition years"; 13–15: "early teens."

provide companies with some leeway in how they manage user data, though it is still unclear how exactly that will work.⁶⁶

Second, the CAADCA applies to a broader range of businesses, including all online businesses with products, services, or features that are “*likely to be accessed by children*,”⁶⁷ whereas COPPA affects only online businesses that are “*directed to children*.”⁶⁸ This distinction is significant because it addresses a major loophole that plagues COPPA enforcement.⁶⁹ COPPA requires that companies have actual knowledge that kids are frequenting their platforms, or that the material on those platforms is harmful to children.⁷⁰ This standard allows companies to skirt liability if they can make a showing that they did not have actual knowledge that their platform was being directed at or being used by children.⁷¹ This loophole is why many companies, especially social media platforms, set their entry age to thirteen years or older.⁷² On the other hand, the CAADCA requires only constructive knowledge.⁷³ In other words, “*likely to be accessed*” is a much lower bar, and the CAADCA effectively requires only constructive knowledge that children are likely to access the platform.⁷⁴ These two changes may seem to be

⁶⁶ There are existing federal and state laws that protect classes of people according to their age that could work as models, such as the Age Discrimination in Employment Act or the Child Labor Provisions in the Fair Labor Standards Act. But it is unclear how the protections of the CAADCA will be altered based on such small age ranges, or if these ranges will even be workable enough to provide different protections without unduly subjecting the company to potential violations.

⁶⁷ CIV. § 1798.99.32 (emphasis added).

⁶⁸ 15 U.S.C. § 6502 (emphasis added).

⁶⁹ See Alyssa Blake, *Getting Children's Privacy Right Requires Opening Your Eyes*, AD EXCHANGER (Apr. 15, 2022 12:45 AM), <https://www.adexchanger.com/data-exchanges/getting-childrens-privacy-right-requires-opening-your-eyes/> [<https://perma.cc/NMR2-WYDX>].

⁷⁰ 15 U.S.C. § 6502(a)(1).

⁷¹ See Blake, *supra* note 69.

⁷² *Id.*

⁷³ Chloe Altieri et al., *Policy Brief: Comparing the UK and California Age-Appropriate Design Codes*, FUTURE OF PRIV. F. (Dec. 2022), <https://fpf.org/wp-content/uploads/2022/11/FPF-Comparative-Analysis-of-CA-UK-Codes-of-Conduct-R3.pdf> [<https://perma.cc/T7SX-DJPN>].

⁷⁴ Chloe Altieri & Kewa Jiang, *California Age-Appropriate Design Code Aims to Address Growing Concern About Children's Online Privacy and Safety*,

semantics to the layperson, but they come with a tremendous effect: the CAADCA greatly increases the number of companies that can be reached for predatory online practices.⁷⁵

The CAADCA will also require privacy by default for minor users, meaning that children will have a higher degree of privacy protection than majority-age users by default, rather than having to go and turn on those protections after they have already accessed the platform.⁷⁶ A company can only lower this default protection if it gives a “compelling reason” that using a lower setting would be in the best interest of children.⁷⁷ To date, there is no indication how much default privacy is enough to comply with the CAADCA, but the U.K. ADCA guidelines explain that “only the minimum amount of personal data should be collected and retained, children’s data should not usually be shared, and geolocation services should be turned off.”⁷⁸

The CAADCA gives companies two options when determining children’s ages. The company can: (1) adopt the same privacy settings for all of its users; or (2) estimate minority users’ ages with a “reasonable level of certainty appropriate to the risks that arise from the data management practices of the business.”⁷⁹ It is unclear exactly how companies will be expected to estimate their users’ ages or what a “reasonable level of certainty” will be for purposes of this section. The Information Commissioner’s Office (“ICO”), which has enforcement authority over the U.K.’s Design Code, provides some clarification on this matter, explaining that ages can be estimated by using artificial intelligence or holding onto personal data for the sole purpose of verifying ages.⁸⁰

FUTURE OF PRIV. F. (June 28, 2022), <https://fpf.org/blog/california-age-appropriate-design-code-aims-to-address-growing-concern-about-childrens-online-privacy-and-safety/> [<https://perma.cc/237Y-VMFN>].

⁷⁵ *Id.*

⁷⁶ CAL. CIV. CODE § 1798.99.32 (2023).

⁷⁷ *Id.*

⁷⁸ Altieri et al., *supra* note 73, at 3.

⁷⁹ *Id.* at 8.

⁸⁰ INFORMATION COMMISSIONER’S OFFICE, AGE-APPROPRIATE DESIGN: A CODE OF PRACTICE FOR ONLINE SERVICES, REPORT, (2021) (UK).

The CAADCA also requires that companies complete and maintain a Data Protection Impact Assessment on any products, features, or services likely to be accessed by children.⁸¹ This assessment is a “systematic survey to assess and mitigate risks that arise from the data management practices of the business to children who are reasonably likely to access the online service, product, or feature at issue.”⁸² The assessment must be completed before the product or feature hits the market and be kept up to date for as long as the product or feature is operational.⁸³ Other requirements include using child-friendly language on privacy policies and terms of service information and alerting children when parental monitoring features are being used on their accounts.⁸⁴

The CAADCA would allow for enforcement of children’s privacy regulations at the state level,⁸⁵ relying predominately on the Attorney General’s Office to do so.⁸⁶ The law gives the Attorney General power to pursue action against companies even if they are in “substantial compliance.”⁸⁷ In those situations, the Attorney General must give the company a written notice, and the company will have ninety days to comply before being penalized.⁸⁸ Additionally, the law creates a Working Group that will be established no later than April 2023.⁸⁹ The Working Group, consisting of “Californians with knowledge in privacy, physical health, mental health, well-being, technology, and children’s rights,” will be responsible for disseminating compliance information and advice to companies.⁹⁰ Though the Working Group will not have enforcement authority, it will have a great deal of influence in how the law is enforced by releasing its guidelines.⁹¹

⁸¹ CAL. CIV. CODE § 1798.99.30 (2023).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* § 1798.99.35.

⁸⁷ CAL. CIV. CODE § 1798.99.35 (2023).

⁸⁸ *Id.* § 1798.99.32.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Finally, the CAADCA addresses an ongoing concern about COPPA. As mentioned previously, the CAADCA eliminates the controversial actual knowledge standard COPPA uses. Where the enforcement of COPPA, rather than the statute itself, has shifted in recent years to focus on “dark patterns,” those patterns are targeted specifically in the Age-Appropriate Design Code Act models. And, while the definition of dark patterns for the purpose of CAADCA compliance is still ambiguous, it is anticipated that regulations released by the Working Group and Attorney General in California will clarify the scope of those practices in the coming months.⁹²

B. Other States’ Proposed Children’s Privacy Bills

The CAADCA has been heralded as the “first-of-its-kind” in the United States, but it likely will not be the last.⁹³ In fact, New York, New Jersey, Oregon, Texas, Virginia, and West Virginia all have similar proposed legislation on their dockets. To be concise, and because many of these bills have similar requirements, this Article will briefly discuss only three of these new models: New York, Virginia, and Texas.

1. New York

New York’s proposed bill is strikingly similar to the CAADCA.⁹⁴ Like California’s version, it would impose data protection impact assessments and cover children up to eighteen years old.⁹⁵ However, in many ways this proposed bill places even more responsibility on companies to design their platforms with children in mind. For example, the bill would also include a blanket ban on targeted advertising against children altogether.⁹⁶ It includes provisions that would give parents of children who have suffered harm as a result of data mining misconduct options for help.⁹⁷ This

⁹² *See id.*

⁹³ Kari Paul, *First-of-its-kind Legislation Will Keep California’s Children Safer While Online*, GUARDIAN (Aug. 20, 2022), <https://www.theguardian.com/technology/2022/aug/30/california-protect-children-online-privacy> [<https://perma.cc/S78S-7N37>].

⁹⁴ S.B. S3281, 2023 Leg., 2023–2024 Reg. Sess. (N.Y. 2023).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

provision would require companies to provide parents with a way of notifying a company in case of emergency, such as harassment, cyber-bullying, or other harmful speech being directed at the child.⁹⁸

2. *Virginia*

The proposed Virginia bill is also similar to the CAADCA in that it would require businesses to verify parental consent before registering a minor for products and services.⁹⁹ However, it too would go further than the CAADCA by also entirely banning targeted advertising for minors or selling their data to third parties.¹⁰⁰ Like the CAADCA and New York's proposed bill, it would increase the protected age from thirteen to eighteen.¹⁰¹ If passed, the bill would provide for a major shift in the state's current children's privacy legislation, which merely requires that companies comply with COPPA's looser regulations.

3. *Texas*

The Texas bill is by far the most stringent of the newly proposed laws. The bill, which was proposed by State Representative Jared Patterson, would block anyone in Texas under the age of eighteen from creating social media profiles on TikTok, Facebook, and Twitter,¹⁰² and it would require the use of photo identification as a means of verifying prospective users' ages.¹⁰³ Moreover, it would give parents the right to request the removal of their childrens' accounts and would grant enforcement power to the Office of the

⁹⁸ *Id.* at line 49.

⁹⁹ David McGarry, *How Can Businesses Comply with Virginia's Proposal to Protect Children's Data? The Bill Doesn't Say.*, REASON (Jan. 20, 2023, 12:55 PM), <https://reason.com/2023/01/20/how-can-businesses-comply-with-virginias-proposal-to-protect-childrens-data-the-bill-doesnt-say/> [<https://perma.cc/AR7H-RB6W>]. For example, in December 2022, Governor Greg Abbott "banned all Texas state employees from TikTok."

¹⁰⁰ *Id.*

¹⁰¹ H.B. 1688, 2023 Leg., 2023 Reg. Sess. (Va. 2023).

¹⁰² Zachary Rogers, *Proposed Texas Bill Seeks to Ban All Kids from Social Media*, CBS AUSTIN (Dec. 9, 2022), <https://cbsaustin.com/news/local/proposed-texas-bill-seeks-to-ban-all-kids-from-social-media-children-facebook-instagram-tiktok-twitter-jared-patterson-self-harm-suicide> [<https://perma.cc/5BF2-HH97>].

¹⁰³ *Id.*

Attorney General.¹⁰⁴ The proposal cites an uptick in teen mental health issues and self-harm as the main catalyst behind the bill,¹⁰⁵ but importantly, it comes on the heels of other Texas policies aimed at decreasing the influence of Big Tech.¹⁰⁶

* * *

The CAADCA represents a major turning point in how data privacy will be regulated in the United States. Though the CAADCA only applies to California, similar state bills are being proposed in both red and blue states. As this type of legislation garners more traction, North Carolina should propose its Age Appropriate Design Code specifically designed to protect North Carolinian children.

IV. CRITICISMS OF THE CAADCA AND OTHER PROPOSED LAWS

The most popular criticism of these laws centers around the potential for economic fallout. NetChoice, an industry group that represents Big Tech companies like Meta, TikTok, and Google,¹⁰⁷ is a staunch critic of the CAADCA, suggesting that legislation like the CAADCA is unworkable for these companies and could result in a “brain drain” out of the states in which they are enacted.¹⁰⁸ Moreover, it argues that the laws could hinder innovation, though it does not elaborate on how exactly that might be the case.¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Michael Murney, *Texas Lawmaker Introduces Bill to Ban Kids from Social Media*, HOUSTON CHRON. (Dec. 13, 2022), <https://www.govtech.com/policy/texas-lawmaker-introduces-bill-to-ban-kids-from-social-media#:~:text=The%20bill%20aims%20to%20block,removal%20of%20their%20kids'%20accounts> [https://perma.cc/5GSZ-N3D9].

¹⁰⁷ *About Us, Association Members*, NETCHOICE, <https://netchoice.org/about/> [https://perma.cc/A88L-A9GK] (last visited Mar. 22, 2023).

¹⁰⁸ Vallari Sanzgiri, *Businesses to Brace Themselves for California's Age-Appropriate Design Code*, MEDIANAMA (Oct. 11, 2022), <https://www.medianama.com/2022/10/223-summary-california-age-appropriate-design-code> [https://perma.cc/8FDL-2DM2].

¹⁰⁹ Krista Chavez, *NetChoice Sues California to Protect Families & Free Speech Online*, NETCHOICE (Dec. 14, 2022), <https://netchoice.org/netchoice->

Another concern is that these laws are counterproductive, in that they could actually lead to decreased data privacy for everyone, including children.¹¹⁰ Critics argue that regulations like photo age verification could lead to companies having an actual need to hold onto sensitive data for longer while they are attempting to verify users' ages.¹¹¹ NetChoice, for example, argues that the law will "forc[e] all websites to track and store information on both children and adults" regardless of how secure they are.¹¹² Allegedly, this means that users will need to turn over more information than usually required "just to visit a webpage," and this information can then be targeted by "child predators and hackers."¹¹³

More fatalistic critics have also suggested that type of legislation will ultimately lead to the internet being practically unusable for everyone.¹¹⁴ This argument claims that the inconvenience of providing age verification information every time someone visits a website will result in more hassle than necessary and will make people less willing to interact with companies online.¹¹⁵ There is also concern from NetChoice that the laws could "stifle important resources, particularly for vulnerable youth who rely on the internet for lifesaving information."¹¹⁶

Another complaint is that these laws are overly vague, and it is unclear how they will be enforced.¹¹⁷ The term "likely to be accessed

sues-california-to-protect-families-free-speech-online [https://perma.cc/3HKM-QXVW].

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Eric Goldman, *Op-Ed: The Plan to Blow Up the Internet, Ostensibly to Protect Kids Online (Regarding AB 2273)*, TECH. & MKTG. L. BLOG (Aug. 22, 2022), <https://blog.ericgoldman.org/archives/2022/08/op-ed-the-plan-to-blow-up-the-internet-ostensibly-to-protect-kids-online-regarding-ab-2273.htm> [https://perma.cc/445V-YYZE].

¹¹⁵ *Id.*

¹¹⁶ Natasha Singer, *Tech Trade Group Sues California to Halt Children's Online Safety Law*, N.Y. TIMES (Dec. 14, 2022), <https://www.nytimes.com/2022/12/14/technology/netchoice-lawsuit-children-online-safety.html?searchResultPosition=3> [https://perma.cc/YZ2N-9YMN].

¹¹⁷ Mengting Xu, *Lawsuit Challenges Constitutionality of California Age-Appropriate Design Code*, CAL. LAWS. ASS'N, <https://calawyers.org/privacy->

by children” no doubt accounts for a lot of that ambiguity, especially when that “child” can be up to eighteen years old. For example, even sites that target adults, such as porn or gambling sites, could “likely” be accessed by children. The result, the common criticism goes, is that laws modeled after the CAADCA will effectively change how all online platforms operate, even those that were never intended for children.¹¹⁸

This criticism is not without its merits—many terms in the CAADCA are ambiguous. However, as mentioned previously, several of these companies have already had experience with the U.K.’s Design Code Act, upon which the CAADCA was modeled. While it is true that, comparatively, California’s version of the act leaves more ambiguity than its European counterpart, companies looking to comply—regardless of whether they operate internationally or solely within the United States—can probably safely rely on the U.K. model and its enforcement to determine best practices under the law.¹¹⁹ There is no reason to believe that these companies, many of which are already complying with the U.K.’s law, would be unable to similarly comply with these laws on behalf of the privacy of American children. Moreover, the CAADCA’s Working Group will be administering compliance guidelines in the coming months, and it will continue to do so at least every two years moving forward.¹²⁰

The good news for these companies is that, because the CAADCA does not take effect until July of 2024, California still has plenty of time to clarify the terms of the bill, thus making it easier for them to comply.¹²¹ Moreover, as stated previously, enforcement lies with the California Attorney General, and that office can release

law/lawsuit-challenges-constitutionality-of-california-age-appropriate-design-code [<https://perma.cc/4N5H-WW2V>] (last visited Mar. 9, 2023).

¹¹⁸ Omer Tene, *Crystal Ball Privacy in 2023: US States, Kids and AI*, IAPP (Jan. 5, 2023), <https://iapp.org/news/a/crystal-ball-privacy-in-2023-us-states-kids-and-ai> [<https://perma.cc/4EL4-75PQ>].

¹¹⁹ Altieri et al., *supra* note 73.

¹²⁰ CAL. CIV. CODE § 1798.99.32(e) (2023).

¹²¹ *Id.* § 1798.99.33.

guidelines making compliance easier.¹²² There also is no private right of action, so liability for non-compliant companies is limited in that way.¹²³

Despite these criticisms, the issue of children's privacy is a bipartisan one. The CAADCA received support from both sides of the aisle, and the new version of COPPA was introduced to Congress last year by both Democratic and Republican members.¹²⁴ Some Democratic supporters of the new bills have explained that they want to prioritize children's mental health over Big Tech's profits.¹²⁵ Similarly, some Republican supporters have explained that the issue is important to them because of the negative physical and psychological impact children are exhibiting as a result of social media and video game use.¹²⁶ In a hotly divisive Congress such as the current one, achieving bipartisan support for tech policy is rare, and it indicates that this change is coming regardless of what critics might have to say about them.¹²⁷ Moreover, if the Ninth Circuit's decision in *Jones* is any indication, it seems unlikely that the courts will be willing to overrule laws that cover similar conduct as COPPA, at least under a preemption challenge.¹²⁸

While it is true that the CAADCA and its counterparts are imperfect, the bottom line is that these types of laws are the best options for mitigating harm to children done by predatory online

¹²² *An Overview of the California Age-Appropriate Design Code Act (ADCA)*, SECURITI (Sept. 22, 2022), <https://securiti.ai/california-age-appropriate-design-code-act/#:~:text=The%20Act%20mandates%20that%20by,have%20three%20months%20to%20comply> [https://perma.cc/9U2Q-2VYS].

¹²³ Arsen Kourinian et al., *What California's Child Online Safety Bill Means for Businesses*, BLOOMBERG L. (Sept. 7, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/what-californias-child-online-safety-bill-means-for-businesses> [https://perma.cc/8W5Z-DCRH].

¹²⁴ S. 1628, 117th Cong. (2022).

¹²⁵ Cristiano Lima, *Maryland is the Latest State to Weigh Online Safety Rules for Kids*, WASH. POST (Feb. 13, 2023, 9:00 AM), <https://www.washingtonpost.com/politics/2023/02/13/maryland-is-latest-state-weigh-online-safety-rules-kids> [https://perma.cc/N94W-DJLR].

¹²⁶ Rogers, *supra* note 102.

¹²⁷ Ashley Gold, *Bipartisan Lawmakers Make New Push to Protect Kids Online*, AXIOS (Feb. 14, 2023), <https://www.axios.com/2023/02/14/congress-kids-online-safety> [https://perma.cc/TXN5-HEC4].

¹²⁸ *Jones v. Google LLC*, 56 F.4th 735, 740–41 (9th Cir. 2023).

practices. Any type of legislation reeling in data privacy—a relatively new issue in and of itself—is bound to experience growing pains as companies, consumers, and enforcers of the law grow more comfortable with it. As the law develops around this type of legislation, the criticisms of the law are bound to dissipate considerably.

V. WHOSE BURDEN? PARENTS, GOVERNMENTS, OR PRIVATE COMPANIES

Though the law has never been challenged in court, concerns about the scope and burden assignment under COPPA have been around almost as long as the law itself. There does not seem to be an agreement in Congress about who should be covered or what standard of protection is best, which is likely part of the reason why the push for an updated version of COPPA has stalled. However, one major issue at the heart of these questions is who should bear the brunt of responsibility.

A. COPPA: Parental Responsibility Alone

As mentioned previously, the responsibility of children's privacy under COPPA currently rests almost exclusively on parents.¹²⁹ COPPA is effectively the only children's privacy law in most states, including North Carolina. The state acknowledges its commitment to complying with COPPA both on its websites and its social media platforms, but it issues no additional protection beyond COPPA.¹³⁰ In other words, parents are left to be the sole monitors for their children's online presence.¹³¹ Additionally, there are no means of enforcing COPPA or any other guidelines at the state level.¹³² As explained previously, while there should certainly be some responsibility on the parents, it has become clear that parents

¹²⁹ FED. TRADE COMM'N, *supra* note 19.

¹³⁰ *Privacy Policy*, STATE OF N.C., <https://www.nc.gov/privacy#:~:text=The%20Children's%20Online%20Privacy%20Protection,a%20child%20under%20age%2013> [https://perma.cc/GQ3P-XFUD] (last updated Aug. 19, 2021).

¹³¹ *Id.*

¹³² In contrast, states with proposed Age-Appropriate Design Code Acts have assigned a state level of enforcement, which typically is placed with the state's respective Attorney General.

alone cannot handle the immense and overwhelming changes that have happened to technology since they were teenagers. Most parents simply lack the knowledge and/or the power to adequately protect their children.

Focusing solely on the impacts of social media is enough to indicate how much has changed over the course of a few decades. The average age that children gain access to their own social media accounts is twelve and a half.¹³³ More than forty percent of Instagram users are younger than twenty-two years old.¹³⁴ In 2020, thirty-two percent of teen girls reported that Instagram exacerbated pre-existing negative feelings about their bodies.¹³⁵ Some studies posit that social media has generally led to “unrealistic expectations about body image and sources of popularity, normalization of risk-taking behaviors, and can be detrimental to mental health.”¹³⁶ This data does not even account for other platforms or video games, which have also proven to be harmful for children, especially when overused.¹³⁷ These companies are taking advantage of both parents and children by engaging in dark patterns and using inaccessible or confusing privacy disclosures, and parents cannot adequately protect their children from what they (very reasonably) cannot understand. When faced with these statistics and heartbreaking stories, it is difficult to argue that only parents should continue to be

¹³³ *Is Social Media Threatening Teens' Mental Health and Well-being?*, COLUM. U. IRVING MED. CTR. (May 20, 2021), <https://www.cuimc.columbia.edu/news/social-media-threatening-teens-mental-health-and-well-being> [https://perma.cc/C5LK-K9QF].

¹³⁴ Georgia Wells et al., *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7 [https://perma.cc/5X9Q-8VKS].

¹³⁵ *Id.*

¹³⁶ Claude Mellins, *Just How Harmful is Social Media? Our Experts Weigh-In.*, COLUM. U. MAILMAN SCH. PUB. HEALTH (Sept. 27, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/just-how-harmful-social-media-our-experts-weigh> [https://perma.cc/T6JJ-XR3B].

¹³⁷ Elana Pearl Ben-Joseph, *Are Video Games Bad for Me?*, NEMOURS CHILDS. HEALTH (Aug. 2022), <https://kidshealth.org/en/kids/video-gaming.html#:~:text=But%20too%20much%20video%20game,a%20kid%20does%20in%20school> [https://perma.cc/NGX#-2USR].

solely responsible for their children's online usage. That model simply is not working.

Those opposed to the CAADCA and similar bills, including NetChoice, argue, however, that the responsibility of monitoring children's privacy should remain primarily with parents.¹³⁸ The solution to the problems associated with parental burdens, in their opinion, is to provide better education to parents and children about online privacy.¹³⁹ However, it is rare to find a parent or child (or anyone, for that matter) who is not in some way reliant upon the internet and the services that technology companies provide in 2023. Nearly everyone has hastily scrolled through the terms and conditions of an app, almost trying *not* to read a single word before clicking "I agree." Though the danger of not taking responsibility for data privacy is well documented in the news and in popular culture, there still seems to be a lack of understanding about what that danger really entails, or what regulations the government has in place to protect people.¹⁴⁰ And while people today do generally have a higher level of tech savviness than previous generations, it is unreasonable to expect parents to stay on top of every single app, game, or website their children might access all the time. Even the most involved parents simply cannot monitor their children to that extent. The continued inability of parents to effectively protect vulnerable children on the internet is unlikely to be mitigated with more education, because no amount of education could result in the ability to become a 24/7 surveillance system. There is simply no way for parents to teach their children how not to fall for Big Tech's predatory practices.

¹³⁸ Complaint for Declaratory and Injunctive Relief, NetChoice, LLC v. Bonta, no. 5:22-cv-8861 (N. D. Cal. Dec. 14, 2022), <https://cdn.arstechnica.net/wp-content/uploads/2022/12/Netchoice-v-Bonta-Complaint-12-13-2022.pdf> [<https://perma.cc/6P29-7S2L>].

¹³⁹ *Id.*

¹⁴⁰ Brooke Auxier et al., *Americans' Attitudes and Experiences with Privacy Policies and Laws*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws> [<https://perma.cc/RS7T-GMN6>] ("Nearly two-thirds (63%) of adults say they do not understand the laws and regulations that are currently in place to protect their data privacy.").

Moreover, there is also a policy-based issue with COPPA's assignment of responsibility: COPPA's model presumes that every child comes from parents or guardians that are capable of making good faith efforts to protect their children from privacy risks online. Of course, this simply is not the case. Today, 2.5 million children are struggling with homelessness in the U.S. alone.¹⁴¹ It is estimated that five million children are food-insecure.¹⁴² When parents are concerned about fulfilling their children's basic needs, online privacy is justifiably far down on the list of concerns. By placing more responsibility on companies, the government can help secure strong online protections for these vulnerable children.

B. Age-Appropriate Design Code Acts: A Shared Responsibility

Though there is something to be said for parents having some degree of responsibility for their children's online practices, the model of sole responsibility on the parents is simply not effective. For that reason, some states have begun to look at Age-Appropriate Design Code Acts as a means of placing more responsibility on the companies to design their apps, games, or websites with children in mind.¹⁴³ In addition to this shift in responsibility, the Acts would also allow the state government more control in enforcing children's privacy laws.¹⁴⁴ To be clear, these laws do not absolve parents of the responsibility of protecting their children's online practices; rather, it merely distributes that responsibility more evenly amongst parents, the government, and companies. Instead, the new proposed legislation would shift the burden of protecting children's online privacy from parents to companies. The CAADCA, for example, has clear and strict regulations that companies will have to follow. This liability in court expands COPPA's level of liability, which relies on the FTC to issue fines when a company is out of compliance.

¹⁴¹ *Child Homelessness: A Growing Crisis*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/child-homelessness-growing-crisis> [https://perma.cc/UNY9-VBQX] (last updated Apr. 6, 2022).

¹⁴² Olivia Hampton, *The Hidden Faces of Hunger in America*, NAT'L PUB. RADIO (Oct. 2, 2022, 10:20 AM), <https://www.npr.org/2022/10/02/1125571699/hunger-poverty-us-dc-food-pantry> [https://perma.cc/3495-238B].

¹⁴³ CAL. CIV. CODE § 1798.99.29(a) (2023).

¹⁴⁴ *Id.* § 1798.99.35.

Ultimately, all of the proposed laws give the government power to enforce compliance through the judiciary. No such liability was ever imposed on parents under COPPA.

To relieve this overwhelming responsibility on parents, companies should start pulling their own weight and ensure that children are using their online platforms safely—after all, these companies are in a better position to ensure their platforms are compliant with children’s privacy regulations than parents, who generally have a limited understanding of data privacy or the methods involved in each individual platform. Under these new models, the initial burden would be placed on companies that are likely to be accessed by children to design their platforms with children in mind.¹⁴⁵

Power to enforce the bills has mostly been granted to the respective state’s attorney general.¹⁴⁶ If the attorney general finds a company to be noncompliant, the government would be responsible for enforcing sanctions or other punishments on that company. The CAADCA’s model of using a Working Group to issue compliance information would also be a helpful means of ensuring that companies can get their compliance questions answered before getting into legal trouble.¹⁴⁷ Again, the purpose of these statutes is to protect children, not play “gotcha” with companies. Parents are still responsible for monitoring their children, but they no longer bear the entirety of that responsibility.

The conclusion that many legislators have come to is that the traditional means of protecting children online—by assigning the majority of the responsibility on parents—is not enough. NetChoice’s suggestion that the issue could be better resolved by better education of parents and children on how to safely use the internet is not sufficient, nor would it incentivize companies to use best practices.¹⁴⁸ By creating more strict regulations for companies, legislatures are trying to ensure that these companies have some skin

¹⁴⁵ *Id.* § 1798.99.29.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See* Chavez, *supra* note 109.

in the game and work harder to design their platforms with children in mind.

VI. WHAT MODEL, IF ANY, SHOULD NORTH CAROLINA ADOPT?

When considering the criticisms of these new laws, it is understandable why legislatures would drag their feet in proposing a bill of this type. However, this is not an issue that the state of North Carolina can afford to ignore, especially because the few states that will take action to enact these laws now will likely be making decisions for the rest of the U.S. Between the increased federal attention and new state laws, it is entirely possible that these companies will enact universal data protection regulations for children.¹⁴⁹ Nonetheless, many questions regarding state legislation still remain. For example, would it be cheaper for companies—given the steep cost of litigation and fines paid to regulatory agencies like the FTC—to enact the same rules for every state? Moreover, if an increasing number of states are proposing bills like the CAADCA, at what point does it become more of a burden on a company to keep special rules for the few states that are *not* at least considering these laws?

A. *Why North Carolina Needs to Act*

North Carolina has developed a national reputation of being a center for technology.¹⁵⁰ The Research Triangle Park (“RTP”), which stretches from Raleigh to Durham, is the largest research park in North America,¹⁵¹ and currently houses major technology powerhouses such as IBM and Epic Games.¹⁵² In fact, tech giants Apple and Google will soon be joining the list of companies with offices in the RTP,¹⁵³ and Meta and Amazon have also recently

¹⁴⁹ See Hern, *supra* note 57.

¹⁵⁰ *A Hub of Research and Development*, RSCH. TRIANGLE REG’L P’SHP, <https://www.researchtriangle.org/counties/rtp/> [https://perma.cc/C8AS-5NS3] (last visited Mar. 3, 2023).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Zachery Eanes, *Meta Could Join Tech Giants’ Growth in the Triangle*, AXIOS RALEIGH (June 8, 2022), <https://www.axios.com/local/raleigh/2022/>

announced that they are opening offices in the area.¹⁵⁴ In short, North Carolina's position as a major technology hub gives the state an opportunity to lead by example and enact meaningful legislation that will protect children and teenagers for generations to come.

When considering the costs associated with changing these laws, and critics' position that doing so would have a chilling effect on the growth of technology (both on the advancement of technology and in the way users interact with one another and companies online) in states that enact this type of legislation, it is understandable why state legislatures might vote against these laws.¹⁵⁵ But if there is anything more important than financial growth, it is the health and safety of our children. If even one child is protected by enacting this legislation, it is worth the limited economic repercussions that might occur.

Moreover, because most North Carolina companies operate outside of North Carolina as well, they will have to implement protections meeting the requirements of states in which they operate that have more stringent laws already; it will likely be far easier for them to simply implement the protections universally. For example, the CAADCA is requiring compliance of all companies that do business in California, not just those headquartered or incorporated there.¹⁵⁶ In fact, even if states are unsuccessful in passing laws similar to the CAADCA, it is entirely possible that new regulations from the federal government will be coming soon.¹⁵⁷ Further, the stricter regulations in other countries, such as the U.K.'s Age-Appropriate Design Code, have already led some companies to enact universal privacy protections for children in other countries.¹⁵⁸

06/08/meta-possible-expansion-raleigh-north-carolina [https://perma.cc/AY37-LJFW].

¹⁵⁴ *Id.*

¹⁵⁵ Eric Goldman, *The Plan to Blow up the Internet, Ostensibly to Protect Kids Online*, CAPITOL WKLY. (Aug. 18, 2022), <https://capitolweekly.net/the-plan-to-blow-up-the-internet-ostensibly-to-protect-kids-online/> [https://perma.cc/KT59-7M8H].

¹⁵⁶ CAL. CIV. CODE § 1798.140(d)(1) (2023).

¹⁵⁷ Osano Staff, *supra* note 38.

¹⁵⁸ Hern, *supra* note 57.

In sum, these changes are coming whether North Carolina chooses to act or not, so the state might as well proactively set up its own regulations. The sooner North Carolina gets on board with this change, the sooner the state can start working on its own version of the law, and hopefully help pave the way towards more comprehensive privacy protections for children in the United States.

B. A Proposed Model for North Carolina

The question of what model North Carolina should follow, however, is less obvious. Laws like the Texas bill would be the most stringent, but they may not be the best for children and teenagers. Because children are generally more technology-savvy than older generations, it is unclear how enforceable the law could be, especially when some of the people the bill is designed to protect would likely try to find ways to circumvent it.¹⁵⁹ Simply put, laws like this one are likely too rigid, and would impose restrictions that a generation like Gen Z would try to avoid.

Then, there is the issue of constitutionality. Children, even as minors, have First Amendment rights.¹⁶⁰ While those rights may be subjugated when they conflict with the fundamental rights of parents, the United States Supreme Court has ruled that this is not always the case.¹⁶¹ Because it is difficult to say that one proposed model is better than others—particularly when none have gone into effect yet—this Section will focus instead on some of the most important issues addressed by these proposed bills, and then suggest solutions that North Carolina should adopt.

The most ideal solution would be to simply take the best parts of the other proposed bills and create a new, North Carolina-specific bill. For example, since there have already been genuine concerns about the safety of photo identification for age verification, that

¹⁵⁹ Katie Goldstein, *I'm a Mom and a Children's Privacy Lawyer: Here's What I Do and Don't Post About My Kid Online*, PARENTS (May 17, 2022), <https://www.parents.com/kids/safety/internet/im-a-mom-and-childrens-privacy-lawyer-what-i-do-and-dont-post-online/> [<https://perma.cc/L6BU-8KMT>].

¹⁶⁰ Chavez, *supra* note 109.

¹⁶¹ See *Kirkpatrick v. Eighth Jud. Dist. Ct.*, 64 P.3d 1056 (Nev. 2003) (holding that, where children and their parents' fundamental constitutional rights conflict, parental rights are not absolute).

method might be taken out and rewritten into a new, more workable standard. Instead of requiring a photo, companies could ask for the contact information of a parent or legal guardian. They could then require that parent or guardian to certify consent through his or her own account. While this strategy would likely lead to more children slipping through the age verification process, it would at least quell fears that photo identification data would be misused. Then, companies would have more independence to come up with stricter regulations for reporting potential underage users.

Giving parents access to their children's feeds upon request is another term that could be written into a proposed bill. This solution would allow parents to make sure the posts being suggested in their children's algorithms are appropriate. In conjunction with this increased access, having a report system dedicated exclusively to screening out harmful or inappropriate content could allow parents more control over curating their children's feeds to something that is safer and kid-friendly. While many kids—and certainly many teenagers—would likely balk at the prospect of their parents having access to their feeds, this could serve as a compromise between governments and companies. Since the photo identification age verification requirement in the CAADCA and outright banning social media for minors as in Texas' bill are clearly more stringent versions meant to accomplish a similar goal, it is possible that companies could see the value in acquiescing to this more flexible type of regulation instead. And while this type of regulation might be subject to other ethical or policy-based issues, it is at least a start in considering alternatives that balance the responsibility of children's privacy between parents, companies, and the government.

Another simple solution that may help to balance the responsibility is requiring shorter terms and conditions with more accessible language, like the CAADCA requirement.¹⁶² Everyone who has ever used an app or created a social media account knows that the terms and conditions for those companies are pages long, written in fine print, and generally doused in legalese. By requiring companies to be more transparent about their terms and conditions, companies could help parents have a better understanding of how

¹⁶² CAL. CIV. CODE § 1798.99.30 (2023).

they are using children's data. Moreover, by requiring blatant terms for parents, this requirement would help ensure that companies are not doing anything nefarious with the data they are collecting.

Ultimately, it would be in North Carolina's best interest to adopt a law at least loosely modeled after the CAADCA. While the CAADCA has some gray areas, it does try to strike a balance between protecting children while being minimally invasive into their rights and the rights of companies. The fact that the CAADCA was modeled after the U.K.'s Age-Appropriate Design Code shows that it is in fact more workable than its critics will admit.¹⁶³ Unlike COPPA, the Age-Appropriate Design Code model considers actual harm done to children by companies, and requires companies to design their platforms with children in mind.¹⁶⁴ Considering the extent of those harms, the predatory acts of companies that cause those harms, and the inability of COPPA to adequately protect children from those harms, a higher degree of protection is necessary. However, because these Age-Appropriate Design Code models are so new, it is difficult to predict what provisions would best serve North Carolina's interests. As new guidelines are released from California's Working Group, the ICO, and other states that will be passing these bills, it will become clearer what model North Carolina should enact, if not a combination of them.

VII. CONCLUSION

In recent years, children's privacy has had a number of "firsts." The FTC and GDPR's largest fines ever were released in relation to children's privacy.¹⁶⁵ State legislation like the CAADCA is growing in numbers, and it is anticipated that a new version of COPPA will be introduced in Congress in 2023.¹⁶⁶ The issue of children's privacy has garnered support from both sides of the aisle¹⁶⁷ because this type of regulation—and the concern driving it—is only going to become more prevalent as technology advances. As the "firsts" keep

¹⁶³ Hern, *supra* note 57.

¹⁶⁴ CIV. § 1798.99.29.

¹⁶⁵ Satariano, *supra* note 52.

¹⁶⁶ Osano Staff, *supra* note 38.

¹⁶⁷ Gold, *supra* note 127.

coming, it is imperative that technology powerhouses like North Carolina be proactive and work to set the right example.

For decades, COPPA has acted as protection for young children against predatory online practices. However, as the internet—and the way we interact with it—evolves, it is imperative that legislation continues to evolve with it. Through the surge in class actions, hefty fines, and “first-of-its-kind” legislation, it is clear that children’s privacy is on the forefront of many people’s minds. The CAADCA is poised to become the new model for children’s privacy regulation by the states. Its broader age range and language, stricter expectations, and general emphasis on the companies’ responsibility to manage children’s safety make it vastly different and more protective than COPPA.¹⁶⁸ Similar proposed legislation from other states has altered the CAADCA’s model slightly, but the overwhelming trend leans towards vastly more expansive protections for children’s online privacy.

Criticism of these new bills centers primarily on their supposed unconstitutionality.¹⁶⁹ A lawsuit filed by NetChoice in response to the CAADCA cites numerous constitutional issues, and in particular, problems invoking the First, Fourth, and Fourteenth Amendments.¹⁷⁰ Critics also claim that laws like the CAADCA will negatively affect commerce in the states where they are enacted and may ultimately lead to a brain drain out of those states.¹⁷¹ However, no matter how staunchly against these bills these organizations are, the bottom line is even they cannot deny that the safety of children is of the utmost importance.¹⁷²

It is difficult to say what model of state law would best suit North Carolina—that question is better answered by the state legislature. However, the CAADCA and other proposed bills do provide some ideas for best practices. A smart solution would be to observe the enforcement of the U.K. Design Code, the updated guidance released by California’s Working Group, and any movement made

¹⁶⁸ Altieri et al., *supra* note 73.

¹⁶⁹ Chavez, *supra* note 109.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Complaint, *supra* note 138.

on children's privacy laws federally. By doing so, North Carolina state officials can then patch together the most effective parts of each bill and its enforcement to create a bill that is both functional and adequately protective for North Carolinians and the companies that operate within the state.

In some ways, this Article is limited by the novelty of these Age-Appropriate Design Code Acts. There is not quite enough information on them or how they will be enforced. Some of the terms are still ambiguous and regulatory bodies have not yet released helpful guidelines, which are anticipated in the coming months. As this statutory scheme matures, and as more regulatory information is released about them, it will be interesting to take a deep dive into the two different models of children's privacy laws: COPPA versus ADCAs.

Changing the way companies interact with children online through strict regulation is just one way to protect children from harm done online. The internet has become a bigger part of everyone's lives than the original COPPA drafters could have foreseen in 1998. In 2023, the internet has become a virtually equal playing field where people can—to a certain extent—do, say, and be who they want. Though this Article focuses on strengthening online regulations with respect to how companies specifically interact with children, there is a broader conversation to be had about how these companies interact with *everyone* online. And though regulating companies online will not be enough to protect children from the harassment or predatory practices of private actors on these platforms, setting up more stringent expectations for these companies—and shifting more of the burden to them to protect children—is the best way to start developing more comprehensive protections.

Like cigarettes, it is virtually impossible for the harms of social media, video games, or other online platforms that are likely to be accessed by children to disappear entirely. But the impact that the CAADCA and other impending laws like it will have is difficult to imagine, in part because it will reshape the way companies interact with children—and, maybe, with *everyone*—online. The main purpose of these new laws is to shift the primary focus of children's

privacy legislation from the interests of tech companies to the interests of children who are adversely affected by the tech companies' predatory practices. In the end, states will likely have to make a choice whether it is more important to protect Big Tech's financial interests or children's lives—the gravity of which is difficult to overstate and the answer to which is a simple one.