February 13, 2024

Senate Committee on Commerce and Consumer Protection
Senate Committee on Energy, Economic Development, and Tourism
415 South Beretania Street
Honolulu, HI 96813

RE: SB 2012 - "RELATING TO ONLINE PRIVACY FOR CHILDREN." (Oppose)

Dear Chairs Keohokalole and DeCoite and Members of the Senate Committees on Commerce and Consumer Protection and on Energy, Economic Development, and Tourism:

On behalf of the Computer & Communications Industry Association (CCIA), I write to respectfully oppose SB 2012 in advance of the Joint Committees hearing on February 13, 2024.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.[1] Proposed regulations on the interstate provision of digital services therefore can have a significant impact on CCIA members. In recent sessions, there has been a notable surge in state legislation concerning children's online safety. Acknowledging policymakers' valid concerns about the online privacy of young individuals, it is imperative to prioritize the establishment of a comprehensive data privacy law applicable to all consumers. This law should incorporate safeguards for sensitive data, specifically addressing information commonly linked to younger users.

CCIA holds a firm conviction that children are entitled to a higher level of security and privacy in their online experiences. Presently, our members are actively engaged in various initiatives to integrate robust protective design features into their websites and platforms.[2] CCIA's members have been leading the effort to implement settings and parental tools to individually tailor younger users' online use to the content and services that are suited to their unique lived experience and developmental needs. For example, various services allow parents to set time limits, provide enhanced privacy protections by default for known child users, and other tools to allow parents to block specific sites entirely.[3]

This is also why CCIA supports the implementation of digital citizenship curriculum in schools, to not only educate children on proper social media use but also help educate parents on what mechanisms presently exist that they can use now to protect their children the way they see fit and based on their family's lived experiences.[4] In fact, the Hawaii Legislature is currently considering two proposals, HB 79 in the House and SB 914 in the Senate, that would advance informed digital citizenship in Hawaii's public education system by empowering school complexes to incorporate media literacy into standards-based curriculum.

[1] For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.
[2] Jordan Rodell, *Why Implementing Education is a Logical Starting Point for Children's Safety Online*, Disruptive Competition Project (Feb. 7, 2023), https://www.project-disco.org/privacy/020723-why-implementing-education-is-a-logical-starting-point-for-childrens-safety-online/.
[3] Competitive Enterprise Institute, *Children Online Safety Tools*, https://cei.org/children-online-safety-tools/.
[4] *See supra* note 2.

It should also be recognized that protecting children from harm online does not include a generalized power to restrict ideas to which one may be exposed. Speech that is neither obscene to young people nor subject to other legitimate laws cannot be suppressed solely to protect young online users from ideas or images that a legislative body disfavors. Proposals to keep children safe online should be established through a risk-based approach to developing protections for different ages of users and by focusing on tangible harm. While CCIA shares the goal of increasing online safety, this bill presents the following concerns.

1. The bill lacks narrowly tailored definitions.

As currently written, the bill defines a child as anyone under 18. Due to the nuanced ways in which children under the age of 18 use the internet, it is imperative to appropriately tailor such treatments to respective age groups. For example, if a 16-year-old is conducting research for a school project, it is expected that they would come across, learn from, and discern from a wider array of materials than a 7-year-old on the internet playing video games. We suggest changing the definition of "child" to a user under the age of 13 to align with the federal Children's Online Privacy Protection Act (COPPA) standard. This would also allow for those over 13, who use the internet much differently than their younger peers, to continue to benefit from its resources. The definition of "likely to be accessed by children" is also ambiguous. CCIA recommends narrowly tailoring this definition to content intentionally targeted at or branded for children when they are using the internet.

The bill would also require businesses to provide any privacy information, terms of service, policies, and community standards concisely, prominently, and using "clear language suited to the age of children likely to access that online service, product, or feature". The definition of "clear language suited to the age of children likely to access online services" is not defined and leaves room for significant subjective interpretation. If a child is defined as anyone under 18, one could expect a wide variation of reading comprehension skills across such a wide age group — a 17-year-old would presumably have better reading comprehension skills than that of a 5-year-old. Without "clear language" being defined, the bill would be difficult to comply with.

2. The bill does not provide how a user's age will be estimated and how penalties for those who do not abide by the law will be enforced.

In order to achieve meaningful children's safety protections, it is imperative for businesses to have a roadmap of how to properly comply and avoid unintentional violations.[5] This measure provides broad strokes of *what* is expected of businesses but does not portend *how* businesses may achieve those objectives. Instead, businesses are expected to estimate ages to a "reasonable level of certainty". CCIA suggests clarifying how businesses are expected to estimate the age of users online. Without a proper mechanism in place, it is difficult for businesses to discern the age of every individual user which could lead to unintended violations.

CCIA cautions against conflating concepts regarding estimating the age of users.[6] For example, when a website asks a user to make a self-attestation of their age, such as on a website for alcohol products, the owner of that website is not held liable if that user chooses to mischaracterize their identity. Similar self-attestation measures are currently in place for social media platforms and other digital services, and the burden is on the consumer to be forthcoming and honest about the age and birth date they enter. This, however, would change under SB 2012 — if online services were to rely on self-attestation for estimates but

[5] Digital Trust & Safety Partnership, *Age Assurance: Guiding Principles and Best Practices* (Sept. 2023), https://dtspartnership.org/wp-content/uploads/2023/09/DTSP_Age-Assurance-Best-Practices.pdf.
[6] Khara Boender, *Children and Social Media: Differences and Dynamics Surrounding Age Attestation, Estimation, and Verification*, Disruptive Competition Project (May 10, 2023), https://www.project-disco.org/privacy/children-and-social-media-differences-and-dynamics-surrounding-age-attestation-estimation-and-verification.

then in-turn be held liable for mischaracterizations, this would unreasonably treat the business as the bad actor. Further, it is unclear what impact the use of VPNs and similar mechanisms to evade state-specific age verification requirements by users could have on organizations' liability under this bill.

To achieve compliance and avoid the proposed penalties for violations, it is likely that age estimation would effectively amount to age verification. Current commercially available facial recognition and other mechanisms that provide age estimation cannot sufficiently accomplish what lawmakers are expecting.[7] The AADC purports not to require age verification, but the definitions and policy itself are so vague that sites will have no choice but to implement some kind of age verification technology to achieve compliance. Such verification requirements then raise questions about potential conflicts with data minimization principles and other consumer data privacy protection measures.

CCIA is concerned that businesses may be forced to collect age verification data, which would paradoxically force companies to collect a higher volume of data on children.[8] Businesses may be forced to collect personal information they don't want to collect and consumers don't want to give, and that data collection creates extra privacy and security risks for everyone. Further, the Commission Nationale de l'Informatique et des Libertés (CNIL) analyzed several existing online age verification solutions but found that none of these options could satisfactorily meet three key standards: 1) providing sufficiently reliable verification; 2) allowing for complete coverage of the population, and; 3) respecting the protection of individuals' data, privacy, and security.[9] Though the intention to keep kids safe online is commendable, this bill is counterproductive to that initiative by requiring more data collection about young people.

3. This legislation may halt services for individuals under 18, hindering teenagers' internet access and, consequently, restricting their First Amendment right to information. This includes access to supportive online communities that might not be available in their physical location.

The First Amendment, including the right to access information, is applicable to teens. Vague restrictions on protected speech cannot be justified in the name of "protecting" minor users online nor is a state legislative body the arbiter of what information is suitable for younger users to access. Moreover, when businesses are required to deny access to social networking sites or other online resources, this may also unintentionally restrict children's ability to access and connect with like-minded individuals and communities. For example, children of racial or other minority groups may not live in an area where they can easily connect with others that represent and relate to their own unique experiences. An online central meeting place where kids can share their experiences and find support can have positive impacts.

The hyperconnected nature of social media has led many to allege that online services may be negatively impacting teenagers' mental health. However, some researchers argue that this theory is not well supported by existing evidence and repeats a "moral panic" argument frequently associated with new technologies and new modes of communication. Instead, social media effects are nuanced,[10] small at best, reciprocal over

[7] Berin Szóka, *Comments of TechFreedom In the Matter of Children's Online Privacy Protection Rule Proposed Parental Consent Method; Application of the ESRB Group for Approval of Parental Consent Method*, TechFreedom (Aug. 21, 2023), https://techfreedom.org/wp-content/uploads/2023/08/Childrens-Online-Privacy-Protection-Rule-Proposed-Parental-Consent-Method.pdf.
[8] Caitlin Dewey, *California's New Child Privacy Law Could Become National Standard*, The Pew Charitable Trusts (Nov. 7, 2022), https://pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/11/07/californias-new-child-privacy-law-could-become-national-standard.
[9] *Online age verification: balancing privacy and the protection of minors,* CNIL (Sept. 22, 2022), https://www.cnil.fr/en/online-age-verification-balancing-privacy-and-protection-minors.
[10] Amy Orben *et al.*, *Social Media's enduring effect on adolescent life satisfaction*, PNAS (May 6, 2019), https://www.pnas.org/doi/10.1073/pnas.1902058116.

time, and gender-specific. Additionally, a study conducted by researchers from Columbia University, the University of Rochester, the University of Oxford, and the University of Cambridge found that there is no evidence that associations between adolescents' digital technology engagement and mental health problems have increased.[11] Particularly, the study shows that depression's relation to both TV and social media was practically zero. The researchers also acknowledged that it is possible, for example, that as a given technology becomes adopted by most individuals in a group, even individuals who do not use that technology could become indirectly affected by it, either through its impacts on peers or by them being deprived of a novel communication platform in which social life now takes place.

4. Age estimation and verification requirements for online businesses are currently being litigated in several different jurisdictions.

When the federal Communications Decency Act was passed, there was an effort to sort the online population into children and adults for different regulatory treatment. That requirement was struck down by the U.S. Supreme Court as unconstitutional because of the infeasibility.[12] After 25 years, age authentication still remains a vexing technical and social challenge.[13] California and Arkansas recently enacted legislation that would implement age verification and estimation requirements — each law is currently facing a legal challenge due to constitutional concerns, and judges recently put both laws on hold until these challenges can be fully reviewed.[14] The fate of similar laws in Utah and Ohio is also in jeopardy as it is also facing legal challenges.[15] CCIA recommends that lawmakers permit this issue to be more fully examined by the judiciary in these ongoing challenges before burdening businesses with legislation that risks being invalidated or passing on expensive litigation costs to taxpayers.

5. Businesses operating online depend on clear regulatory certainty across jurisdictions nationwide.

Existing U.S. law provides websites and online businesses with legal and regulatory certainty that they will not be held liable for third-party content and conduct. By limiting the liability of digital services for misconduct by third-party users, U.S. law has created a robust internet ecosystem where commerce, innovation, and free expression thrive — all while enabling providers to take creative and aggressive steps to fight online abuse. Ambiguous and inconsistent regulation at the state level would undermine this business certainty and deter new entrants, harming competition and consumers. This particularly applies to new small businesses that tend to operate with more limited resources and could be constrained by costs associated with compliance. While larger companies may be able to more easily absorb such costs, it could disproportionately prevent new smaller start-ups from entering the market.

Further, careful consideration of what constitutes best practice should consider inputs from practitioners and relevant stakeholders. Online businesses are already taking steps to ensure a safer and more trustworthy internet — recently, leading online businesses announced[16] that they have been voluntarily participating in the

[11] Amy Orben, Andrew K. Przybylski, Matti Vuorre, *There Is No Evidence That Associations Between Adolescents' Digital Technology Engagement and Mental Health Problems Have Increased*, Sage Journals (May 3, 2021), https://journals.sagepub.com/doi/10.1177/2167702621994549.
[12] *Reno v. ACLU*, 521 U.S. 844 (1997).
[13] Jackie Snow, *Why age verification is so difficult for websites*, The Wall Street Journal (Feb. 27, 2022), https://www.wsj.com/articles/why-age-verification-is-difficult-for-websites-11645829728.
[14] *NetChoice, LLC v. Bonta* (N.D. Cal. 5:22-cv-08861); *NetChoice, LLC v. Griffin* (W.D. Ark. 5:23-cv-05105).
[15] *NetChoice, LLC v. Yost* (S.D. Ohio 2:24-cv-00047); *NetChoice, LLC v. Reyes* (D. Utah 2:23-cv-00911); *Zoulek et al. v. Hass & Reyes* (D. Utah 2:24-cv-00031).
[16] Margaret Harding McGill, *Tech giants list principles for handling harmful content*, Axios (Feb. 18, 2021), https://www.axios.com/techgiants-list-principles-for-handling-harmful-content-5c9cfba9-05bc-49ad-846a-baf01abf5976.html.

Digital Trust & Safety Partnership (DTSP) to develop and implement best practices and recently reported on the efforts to implement these commitments.[17] We urge lawmakers to study both the benefits and drawbacks of teen safety and privacy requirements and to engage with practitioners and stakeholders to support the ongoing development of practicable solutions.

6. In the United Kingdom, the Age Appropriate Design Code is not an enforceable law but is regulatory guidance for ensuring compliance with the UK Data Protection Act.

The Age Appropriate Design Code of the United Kingdom is not a law, but regulatory guidance, rooted in a UN Convention to which the United States does not belong. It is possible for a business to comply with UK law while not following the UK AADC. In fact, the UK Data Protection Act ("DPA") explicitly states that a "*failure by a person to act in accordance with a provision of a code issued under section 125(4) does not of itself make that person liable to legal proceedings in a court or tribunal.*"[18] The code was designed by the UK Information Commissioner's Office to meet its obligations under the UK DPA to prepare a code or suggestions for safe practice.

Many proponents of the Age Appropriate Design Code in the United States claim that the UK's internet is "still working." However, this mischaracterizes the approach taken in the United Kingdom. UK businesses processing personal data about UK children are not required to implement "*age estimations*" or other requirements in this proposed Act in order to operate. UK legislators avoided imposing "age verification" or similar higher thresholds upon organizations, recognizing the tension between higher accuracy and further data collection.

The UK also does not have the same fundamental and structural laws and rights that Americans do such as the Constitution and its First Amendment, nor does it share Americans' noted affinity for expensive civil litigation. Under U.S. law, where the proposed Act's language would be legally enforceable, covered entities would be forced to implement *age verification* measures to avoid potential liability — even if they did not want to direct their services to children.

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While we share the concerns of the sponsor and the Joint Committees regarding the safety of young people online, we encourage Committee members to resist advancing legislation that is not adequately tailored to this objective. We appreciate the Joint Committee's consideration of these comments and stand ready to provide additional information as the Legislature considers proposals related to technology policy.

Sincerely,

Jordan Rodell
State Policy Manager
Computer & Communications Industry Association

[17] *See, e.g.*, DTSP, *The Safe Assessments: An Inaugural Evaluation of Trust & Safety Best Practices* (July 2022), https://dtspartnership.org/wp-content/uploads/2022/07/DTSP_Report_Safe_Assessments.pdf (Appendix III: Links to Publicly Available Company Resources), at 37.
[18] *Age appropriate design: A code of practice for online services*, ICO (retrieved Mar. 2, 2023), https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/.