

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NETCHOICE, LLC, *Plaintiff-Appellee*,

v.

ROB BONTA, in his official capacity as
Attorney General for the State of
California, Defendant-Appellee.

Case No. 23-2969

*On Appeal from the U.S. Dist. Ct. for the Northern District of California
No. 22-cv-08861, The Hon. Beth Labson Freeman*

**AMICUS BRIEF OF THE PRINCETON UNIVERSITY CENTER
FOR INFORMATION TECHNOLOGY POLICY
TECH POLICY CLINIC**

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INTEREST OF THE AMICUS CURIAE¹

CITP Tech Policy Clinic is part of Princeton University’s Center for Information Technology Policy (“CITP”), which works to better understand and improve the relationship between technology and society. The Clinic provides nonpartisan research, analysis, and commentary in the public interest. This brief is the product of a clinic project and reflects the individual views of researchers and practitioners in computer science, law and policy who study the behavior of online platforms and the effect that they have on users and society at large.²

¹ All parties consent to the filing of this brief. Further, no party’s counsel authored this brief in whole or in part. No party or its counsel contributed money to the preparation of this brief. And no other person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

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SUMMARY OF THE ARGUMENT

This brief addresses the narrow question about whether the provision of California’s Age-Appropriate Design Code Act (the “Act”) that regulates the use of dark patterns by online services (Cal. Civ. Code § 1798.99.31(7)) runs afoul of the First Amendment.

“Dark patterns” or “manipulative designs” are user interface features that benefit an online service by leading consumers into making decisions they might not otherwise make.³ We first explain what dark patterns are and how they manipulate vulnerable users. Next, we explain why the Act’s dark pattern provision passes muster under the First Amendment because it is directed at non-expressive conduct. Finally, we explain why, even if viewed as a commercial speech regulation, the Act’s provision is a reasonable, content-neutral

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(*denotes signatories who provided substantial drafting assistance.)

³ The California Consumer Privacy Rights Act (CPR) provides the following definition for dark patterns: “Dark pattern’ means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision making, or choice, as further defined by regulation.” Cal. Civ. Code § 1798.140.

regulation aimed at preventing unfair or deceptive practices from harming vulnerable users.

ARGUMENT

I. PROHIBITING DARK PATTERNS ALLOWS USERS TO MAKE FREE AND INFORMED CHOICES.

The Act’s dark pattern provision prohibits online services from using manipulative interfaces that “lead or encourage children” to (a) “provide personal information beyond what is reasonably expected[, or] forego privacy protections” (the *privacy clause*); or (b) “take any action that the business knows, or has reason to know, is materially detrimental to the child’s physical health, mental health, or well-being” (the *harm clause*). Cal. Civ. Code § 1798.99.31(7). As detailed below, there is extensive academic research supporting the need for both clauses. Online services have used manipulative design features to impede the ability of users to make free and informed choices about what data to provide and have used design features that exploit vulnerable users to cause them harm.⁴

⁴ See Wall Street Journal Staff, *The Facebook Files*, Wall Street Journal (October 1, 2021), <https://www.wsj.com/articles/the-facebook-files-11631713039>.

In the context of online interfaces, the term “dark patterns” was coined in 2010 by Harry Brignull (a user experience designer who created the website darkpatterns.org) to spotlight interface designs that he described as “tricks used in websites and apps that make you do things that you didn’t mean to, like buying or signing up for something.” Subsequent academic work in the field of human-computer interaction (“HCI”) has developed extensive taxonomies that document how different services take advantage of their users.⁵

Online services create dark patterns by designing interfaces that result in unfair or misleading practices. As documented in several research studies,⁶ consumers may encounter dark patterns in many online contexts, such as when they make choices to consent to the

⁵ Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 Proc. ACM Hum.-Comput. Interact. 1 (2019); Johanna Gunawan, et al. *A comparative study of dark patterns across web and mobile modalities*. 5 Proc. ACM on Hum.-Comput. Interaction. 377 (2021).; Colin M. Gray et al. *The Dark (Patterns) Side of UX Design*, Proc. 2018 CHI Conf. on Hum. Factors Comput. Sys. (CHI '18). Assoc. for Comput. Mach., 21 April 2018 at 1; Alessandro Acquisti et al., *Nudges for Privacy and Security: Understanding and Assisting Users’ Choices Online*, 50 ACM Comput. Surv., 1 (2018).

⁶ Jamie Luguri & Lior Strahilevitz, *Shining a light on dark patterns*, 13 J. of Legal Analysis 43 (2021).; Agnieszka Kitkowska, *The hows and whys of dark patterns: Categorizations and privacy*, in Hum. Factors Priv. Rsch. 173 (2023).

disclosure of personal information, or when they interact with games or content feeds that seek to capture and extend user attention and time spent on the service.

Some dark patterns deceive users, while others exploit cognitive biases or shortcuts to manipulate or coerce them into choices that they would not have freely selected. While behavioral researchers have studied the psychology of deceptive persuasion in the marketplace for decades, the advent of the internet has spurred a growing number of academic studies on how online services can use digital interfaces to manipulate users in a variety of different settings.⁷

Researchers at CITP synthesized the various taxonomies analyzed in the academic literature into six attributes in a peer-reviewed paper that was published in 2021.⁸ Those attributes are as follows:

1. *Deceptive*. Deceptive dark patterns induce false beliefs in users through affirmative misstatements, misleading statements, or omission. An example is a phony countdown timer that pushes users to incorrectly rush and select a suboptimal choice.

⁷ Arunesh Mathur, et al., *What makes a dark pattern... dark?*, Proc. 2021 CHI Conf. on Hum. Factors in Comput. Sys. (2021).

⁸ *Id.*

2. *Asymmetric*. Asymmetric dark patterns impose unequal burdens on the choices available to the user. The choices that benefit the service feature prominently while the options that benefit the user are tucked away behind several clicks or are obscured from view by varying the style and position of that choice. An example of this pattern is how it often takes one click to sign up for a service, but it then requires navigating a maze of options to unsubscribe.
3. *Covert*. Covert dark patterns push a user to select a choice while hiding the influence mechanism from the user. An example of this pattern is the casino-style variable rewards feature in many “loot boxes” in online games for children. These features encourage spending more time playing the game and making additional purchases.
4. *Information hiding*. Information hiding dark patterns obscure or delay the presentation of necessary information to users. An example of this pattern is the addition of fees to the purchase of a tickets at the last minute to obscure the true price of the ticket.

5. *Restrictive*. Restrictive dark patterns reduce or eliminate choices presented to users. An example of this type of pattern is when a website forces users to agree to its terms of use and marketing emails before creating an account.
6. *Disparate treatment*. Patterns that disadvantage some users at the expense of others are often found in online games. They work by having features that induce the disadvantaged user to spend more money or time on the service to level the playing field.

The common themes across the different types of dark patterns observed by researchers can be grouped into two categories. The first category includes interfaces that modify the set of choices available to users. The second category includes interfaces that manipulate the information that is available to users. Below is a table adapted from the paper synthesizing the academic literature:⁹

⁹ *Id.*

<i>Design Feature</i>	<i>Attribute</i>	<i>Description</i>
<i>Modifying the decision space</i>	Asymmetric	Placing unequal burdens on choices available to the user
	Restrictive	Eliminating certain choices that should be available to users
	Disparate Treatment	Disadvantaging and treating one group of users differently from another
	Covert	Hiding the influence mechanism from users
<i>Manipulating the information flow</i>	Deceptive	Induce false beliefs in users either through affirmative misstatements, misleading statements, or omissions
	Information Hiding	Obscuring or delaying the presentation of necessary information to users

Irrespective of how they manifest in an interface, all dark patterns affect users by taking advantage of users’ cognitive shortcuts (heuristics and biases) in their decision-making processes. By doing so, dark patterns unfairly influence people’s choices—the core concern of consumer protection laws. When confronted with dark patterns, users are manipulated, deceived, or coerced into accepting something that they would not have chosen if that were a free and informed choice. This is especially harmful in the case of children compared to adults as

they may be less aware of the risks of an action, or their rights with respect to the processing of data.¹⁰ As detailed in a peer-reviewed study of popular children apps co-authored by one of the state's experts, dark patterns were present in 80% of those apps.¹¹ The common features include interfaces that prolong engagement, encourage purchases, and force children to view ads in order to continue playing.

Several enforcement actions illustrate the harms of dark patterns to users. *Federal Trade Commission v. AMG Services, Inc.* involves the payday lender AMG Services, which deceived borrowers by using dark patterns to impose undisclosed charges and inflated fees.¹² The defendants told customers that they would pay a one-time finance fee, but then made multiple withdrawals from customer bank accounts,

¹⁰ The United Kingdom's Information Commissioner's Office has extensive guidance to digital services on avoiding dark patterns in interfaces that children use. Information Comm'r's Office, *Age Appropriate Design: A Code of Practice for Online Services*, 71-77 (2022) <https://ico.org.uk/media/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf>

¹¹ Jenny Radesky, et al., "Prevalence and characteristics of manipulative design in mobile applications used by children." *JAMA Network Open* 5.6 (2022): e2217641-e2217641

¹² Federal Trade Comm'n. *Online Payday Lending Companies to Pay \$21 Million to Settle Federal Trade Commission Charges that They Deceived Consumers* (Jan, 16, 2015).

assessing a new finance fee each time. As a result, borrowers paid far more for the loans than they originally agreed to pay.

The FTC's recent *ABCmouse* enforcement action highlights how an online service tricked parents of young children through negative option marketing (silence as consent) into signing up for unwanted services.¹³ The FTC also alleged that ABCMouse made it difficult for customers to cancel the unwanted services. The cancellation interface required consumers to navigate between six and nine screens to cancel their memberships, and consumers could not skip ahead or cancel without visiting each screen. Further, each screen included multiple links and buttons that, if pressed, would take consumers out of the cancellation path altogether.

In the Fareportal enforcement action, the New York Attorney General's Office reached a settlement with an online travel website, which used several dark patterns to trick consumers into booking hotel rooms and airline tickets by conveying a false sense of urgency.¹⁴ In

¹³ Federal Trade Comm'n. *Children's Online Learning Program ABCmouse to Pay \$10 Million to Settle FTC Charges of Illegal Marketing and Billing Practices* (Sept. 2, 2020).

¹⁴ *Attorney General James Secures \$2.6 Million From Online Travel Agency for Deceptive Marketing*. NY State Att'y Gen. (March 16, 2022).

Federal Trade Commission v. LeadClick Media, an affiliate marketing company, drove traffic to the LeanSpa website by employing affiliate marketers, disguised ads, phony user testimonials, and fake news sites.¹⁵ In *Federal Trade Commission v. Intuit Inc.*, the FTC charged Intuit, the creators of the tax software product, TurboTax, with misleading consumers by promoting free tax-filing products, even though it designed the interface to make it difficult to find these free products.¹⁶ Finally, the multi-state enforcement action against Google’s location tracking settings illustrates how dark patterns can be used to obscure information collection and the ability of consumers to control who has access to sensitive information.¹⁷

An FTC Staff Report titled “Bringing Dark Patterns to Light” released in 2022, summarizes the FTC’s public workshop about the proliferation of dark patterns and their effect on obscuring, subverting, or impairing consumer autonomy and decision-making. The Staff

¹⁵ Federal Trade Comm’n. *U.S. Circuit Court Finds Operator of Affiliate Marketing Network Responsible for Deceptive Third-Party Claims Made for LeanSpa Weight-loss Supplement* (Oct. 4, 2016).

¹⁶ Federal Trade Comm’n. *Administrative Law Judge Issues Initial Decision in FTC’s Case Against Intuit Inc.* (Sept. 8, 2023)

¹⁷ Oregon DOJ. *Google: AG Rosenblum Announces Largest AG Consumer Privacy Settlement in U.S. History.* (Nov. 14, 2022)

Report discusses the Agency’s intent to seek regulatory action against companies that use dark patterns.¹⁸

Apart from enforcement actions, several states have also passed legislation prohibiting dark patterns that improperly obtain consent from users. These states include Colorado, Connecticut, Delaware, and Texas. Colo. Rev. Stat. § 6-1-1303; Conn. Gen. Stat. § 42-515; Del. Code tit. 6 § 12D-102; Tex. Bus. & Com. Code § 541.001.

In sum, dark patterns are a widely recognized form of unfair or deceptive practices that subvert users’ abilities to make autonomous decisions.

II. THE DARK PATTERNS PROVISION REGULATES DESIGN FEATURES THAT ONLY HAVE AN INCIDENTAL EFFECT ON SPEECH.

The Supreme Court recognizes that states are allowed to place restrictions on commercial conduct even if that results in incidental regulation of expressive speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on

¹⁸ Federal Trade Comm’n Bureau of Consumer Protection. *Bringing Dark Patterns to Light* (2022)

speech.”). Here, the regulation of dark patterns concerns the conduct of online services in designing interface features that manipulate users and only has an incidental impact on expression.

In *Sorrell*, the First Amendment concern stems from restrictions Vermont placed on the use of information for marketing purposes (the content-based provision) and by its restrictions on pharmaceutical manufacturers (the speaker-based provision). 564 U.S. 552, 564. Here, the district court relies on *Sorrell* to conclude that because the Act “restricts the ‘availability and use’ of information by some speakers but not others, and for some purposes but not others, [it] is a regulation of protected expression.” *Netchoice, LLC v. Bonta*, 2023 WL 6135551, *21-22 (N.D. Cal. September 18, 2023). But the regulation in this case has no equivalent content-based restriction. The only requirement is that it regulates the conduct of a commercial service. Similarly, there is no speaker-based provision—the regulation prohibits all commercial speakers who use dark patterns to subvert consent or harm children.

In sum, the dark patterns regulation bears no similarity to the Vermont law in *Sorrell*. The type of conduct proscribed by the dark pattern law is illustrated by a recent FTC enforcement action

concerning an online gaming service. In that action, the FTC charged the popular videogame, Fortnite, with using counterintuitive, inconsistent, and confusing button configurations to lead players to incur unwanted charges based on the press of a single button.¹⁹ That service also made it easy for children to make purchases while playing the game without requiring any parental consent. The service settled those allegations for \$245 million. A prohibition that prevents exploiting users in this manner does not implicate expressive conduct.

III. REGULATING DARK PATTERNS PROTECTS CHILDREN’S PRIVACY AND WELL-BEING BY REQUIRING SERVICES TO INTERACT HONESTLY AND TRANSPARENTLY WITH CHILDREN.

Even if the Act’s dark patterns provision is assumed to regulate commercial speech, it is permissible under the First Amendment.

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), provides the governing framework to evaluate commercial speech regulation. The threshold issue in *Central Hudson* is that the speech “must concern lawful activity and not be misleading.”

¹⁹ Federal Trade Comm’n. *FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay \$245 Million for Tricking Users into Making Unwanted Charges* (Mar. 14, 2023)

Id. at 566. The inquiry can stop here because, as detailed in section I *supra*, the regulation of dark patterns mainly concerns regulating potentially misleading interfaces that induce users to take actions they would not have otherwise chosen.

It is well-established that the First Amendment does not bar regulations requiring businesses to communicate honestly with their customers. *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 721 (9th Cir. 2017) (“The First Amendment does not generally protect corporations from being required to tell prospective customers the truth.”); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (“Misleading advertising may be prohibited entirely.”). All manner of consumer protection regulations govern how businesses should communicate with users. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976) (“The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”)

Even in the case of commercial speech that concerns lawful activity and is non-misleading, *Central Hudson* allows governments to regulate that speech when the governmental interest is (a)

“substantial,” (b) the regulation “directly advances the government interest,” and (c) the regulation is not “more extensive than necessary to serve that interest.”²⁰

For the dark patterns that are not per se misleading, California retains a substantial interest in protecting the privacy of children and from preventing their manipulation by online services. The prohibition against dark patterns, which can only be enforced by the Attorney General, and gives online services an opportunity to get notice of a potential violation and the opportunity to cure, is a reasonable means to protect that interest.

Underlying the district court’s opinion is the belief that the only cognizable harms stemming from dark patterns must be monetary in nature. *NetChoice* at *33. There is no basis for that belief. The state submitted two expert declarations documenting non-monetary harms caused by dark patterns, but the court dismissed those findings by declaring that “the State has not shown that dark patterns causing children to forego privacy protections constitutes a real harm.” *Id.* But

²⁰ *Id.*

government regulations that protect individual privacy are common and routinely pass First Amendment scrutiny. *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995) (noting the “government’s significant interest in residential privacy”); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (upholding restrictions on automated calls from a First Amendment challenge).

The district court misconstrued the Act’s harm clause to raise a First Amendment challenge by imagining that the harm is based on evaluating the content shown to children. *NetChoice* at *34 (explaining being troubled by “the lack of objective standard regarding what content is materially detrimental to a child’s well-being” and worrying that “some content that might be considered harmful to one child may be neutral at worst to another.”) But there is no such content-based evaluation required in the law. The law targets potentially manipulative *design features* that the service knows, or has reason to know, cause harm to vulnerable users.

One example of such a problematic design feature is Amazon’s in-app system that the FTC alleged allowed children playing kids’ games to spend unlimited amounts of money to pay for virtual items within

the apps. *Fed. Trade Comm’n v. Amazon.Com, Inc.*, 71 F. Supp. 3d 1158, 1166 (W.D. Wash. 2014) (denying motion to dismiss noting that Amazon did not give customers the “free and informed choice to submit themselves to the risk of in-app purchases.”) The FTC’s complaint documents how internal communications within Amazon noted that allowing such charges without a password on the service was “...clearly causing problems for a large percentage of our customers,” and that the situation was a “near house on fire.”²¹

Another potentially problematic design feature that is subject to the harm clause is the variable rewards loot boxes in children’s game. These encourage children to spend more time on the app and make more in-app purchases. A different example is from a patent that a large online gaming service filed for a system that matches a more expert player with a junior player to encourage the junior player to make game-related purchases of items owned by the expert player.²² If the service implemented this system and knowingly caused younger, inexperienced players harm, then it could be liable.

²¹ Federal Trade Comm’n. *FTC Alleges Amazon Unlawfully Billed Parents for Millions of Dollars in Children’s Unauthorized In-App Charges.* (Jul. 10, 2014)

²² US Pat. App. Pub. No. 2016/0005270 A1 to Marr et al.

A final example of a problematic, content-neutral, design feature is discussed in *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021). At issue in that case was the interaction between Snapchat’s reward system and its Speed Filter that led to allegations of bodily harm. The allegation was that Snapchat’s filter, which allowed users to capture how fast they are going and share it with friends, encouraged reckless driving. *Lemmon* explains that, because the allegations in the case did not involve “editing, monitoring, or removing of the content that its users generate through Snapchat,” they did not raise speech-related concerns.

CONCLUSION

For the foregoing reasons, the judgment of the district court preliminarily enjoining the Act’s dark patterns provision (Cal. Civ. Code § 1798.99.31(7)) should be reversed.

Dated: December 20, 2023

Respectfully submitted,

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* Counsel again wishes to recognize the substantial drafting assistance of the people identified in footnote two.

UNITED STATES COURT OF APPEALS
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