SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 3172 (Lowenthal)
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SUBJECT

Social media platforms: injuries to children: damages

DIGEST

This bill increases the penalties that can be sought against a social media platform, as defined, if the platform fails to exercise ordinary care or skill toward a child.

EXECUTIVE SUMMARY

In 2005, five percent of adults in the United States used social media. In just six years, that number jumped to half of all Americans. Today, over 70 percent of adults use at least one social media platform. Facebook alone is used by 69 percent of adults, and 70 percent of those adults say they use the platform on a daily basis.

However, this explosion is not limited to adults. Survey data found that overall screen use among teens and tweens increased by 17 percent from 2019 to 2021, with the number of hours spent online spiking sharply during the pandemic. A recent survey found almost 40 percent of tweens stated that they use social media and estimates from 2018 put the number of teens on the sites at over 70 percent.

Given the reach of social media and the increasing role they play in many children's lives, concerns have arisen over the connection between social media usage and mental health, drug use, and other self-harming conduct. This bill seeks to address these issues by simply enhancing the remedies that can be sought against a social media platform that breaches its existing duty of ordinary care and skill to a child. Based on existing negligence law, this bill provides for statutory damages of $5,000 to $1 million per violation or three times the amount of the child's actual damages, whichever is larger.

This bill is supported by various groups, including Common Sense Media and the California Teachers Association. It is opposed by a number of industry associations, including Technet and the Computer and Communications Industry Association.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Provides, in federal law, that a provider or user of an interactive computer service shall not be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. § 230(c)(1).)

2) Provides that a provider or user of an interactive computer service shall not be held liable on account of:
    a) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
    b) any action taken to enable or make available to information content providers or others the technical means to restrict access to such material. (47 U.S.C. § 230(c)(2).)

Existing state law:

1) Provides that every person is responsible, not only for the result of their willful acts, but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a) ("Section 1714(a)").)

2) Defines "social media platform" as a public or semipublic internet-based service or application that has users in California and that meets both of the following criteria:
    a) A substantial function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application. A service or application that provides email or direct messaging services shall not be considered to meet this criterion on the basis of that function alone.
    b) The service or application allows users to do all of the following:
        i. Construct a public or semipublic profile for purposes of signing into and using the service or application.
        ii. Populate a list of other users with whom an individual shares a social connection within the system.
        iii. Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users. (Bus. & Prof. Code § 22675(e).)

This bill:

1) Provides that a social media platform that violates Section 1714(a) and breaches its responsibility of ordinary care and skill to a child shall, in addition to any other remedy, be liable for statutory damages for the larger of the following:
    a) $5,000 per violation up to a maximum, per child, of $1,000,000.
    b) Three times the amount of the child's actual damages.

2) Provides that the duties, remedies, and obligations it imposes are cumulative to the duties, remedies, or obligations imposed under other law and shall not be construed to relieve a social media platform from any duties, remedies, or obligations imposed under any other law.

3) Includes a severability clause and applies prospectively. Any attempted waiver is void and unenforceable.

4) States findings and declarations.

COMMENTS

1. Social media and children

The effects of social media on our mental health and what should and can be done about it are pressing policy and societal questions that have become increasingly urgent. Evidence shows that engagement on social media has a clear effect on our emotions.

Researchers conducted a massive experiment on Facebook involving almost 700,000 users to test the emotional effects of social networks:

> The results show emotional contagion. [For] people who had positive content reduced in their News Feed, a larger percentage of words in people's status updates were negative and a smaller percentage were positive. When negativity was reduced, the opposite pattern occurred. These results suggest that the emotions expressed by friends, via online social networks, influence our own moods, constituting, to our knowledge, the first experimental evidence for massive-scale emotional contagion via social networks [. . .] and providing support for previously contested claims that emotions spread via contagion through a network.[1]

[1] Adam D. I. Kramer et al., *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks* (June 17, 2014) Proceedings of the National Academy of Sciences, vol. 111, No. 24, https://www.pnas.org/doi/full/10.1073/pnas.1320040111. All internet citations are current as of June 18, 2024.

Research has shown that amongst American teenagers, YouTube, Instagram, and Snapchat are the most popular social media sites, and 45 percent of teenagers stated that they are "online almost constantly."[2] A meta-analysis of research on social networking site (SNS) use concluded the studies supported an association between problematic SNS use and psychiatric disorder symptoms, particularly in adolescents.[3] The study found most associations were with depression and anxiety.

As pointed out by recent Wall Street Journal reporting, the companies' employees are aware of the dangers:

> A Facebook Inc. team had a blunt message for senior executives. The company's algorithms weren't bringing people together. They were driving people apart.
> "Our algorithms exploit the human brain's attraction to divisiveness," read a slide from a 2018 presentation. "If left unchecked," it warned, Facebook would feed users "more and more divisive content in an effort to gain user attention & increase time on the platform."
>
> That presentation went to the heart of a question dogging Facebook almost since its founding: Does its platform aggravate polarization and tribal behavior?
> The answer it found, in some cases, was yes.[4]

A recent New York Times article on leadership at Facebook elaborates:

> To achieve its record-setting growth, [Facebook] had continued building on its core technology, making business decisions based on how many hours of the day people spent on Facebook and how many times a day they returned. Facebook's algorithms didn't measure if the magnetic force pulling them back to Facebook was the habit of wishing a friend happy birthday, or a rabbit hole of conspiracies and misinformation.
>
> Facebook's problems were features, not bugs.[5]

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[2] Zaheer Hussain and Mark D Griffiths, *Problematic Social Networking Site Use and Comorbid Psychiatric Disorders: A Systematic Review of Recent Large-Scale Studies*."
(December 14, 2018) Frontiers in psychiatry vol. 9 686, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6302102/pdf/fpsyt-09-00686.pdf.
[3] *Ibid.*
[4] Jeff Horowitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive* (May 26, 2020) Wall Street Journal, https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499.
[5] Sheera Frenkel & Cecilia Kang, *Mark Zuckerberg and Sheryl Sandberg's Partnership Did Not Survive Trump* (July 8, 2021) The New York Times, https://www.nytimes.com/2021/07/08/business/mark-zuckerberg-sheryl-sandberg-facebook.html.

Another paper recently released provides "Recommendations to the Biden Administration," and is relevant to the considerations here:

> The Administration should work with Congress to develop a system of financial incentives to encourage greater industry attention to the social costs, or "externalities," imposed by social media platforms. A system of meaningful fines for violating industry standards of conduct regarding harmful content on the internet is one example. In addition, the Administration should promote greater transparency of the placement of digital advertising, the dominant source of social media revenue. This would create an incentive for social media companies to modify their algorithms and practices related to harmful content, which their advertisers generally seek to avoid.[6]

A series of startling revelations unfolded after a Facebook whistle-blower, Frances Haugen, began sharing internal documents. The Wall Street Journal published many of the findings:

> About a year ago, teenager Anastasia Vlasova started seeing a therapist. She had developed an eating disorder, and had a clear idea of what led to it: her time on Instagram.
>
> She joined the platform at 13, and eventually was spending three hours a day entranced by the seemingly perfect lives and bodies of the fitness influencers who posted on the app.
>
> "When I went on Instagram, all I saw were images of chiseled bodies, perfect abs and women doing 100 burpees in 10 minutes," said Ms. Vlasova, now 18, who lives in Reston, Va.
>
> Around that time, researchers inside Instagram, which is owned by Facebook Inc., were studying this kind of experience and asking whether it was part of a broader phenomenon. Their findings confirmed some serious problems.
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> "Thirty-two percent of teen girls said that when they felt bad about their bodies, Instagram made them feel worse," the researchers said in a March 2020 slide presentation posted to Facebook's internal message board,

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[6] Caroline Atkinson, et al., *Recommendations to the Biden Administration On Regulating Disinformation and Other Harmful Content on Social Media* (March 2021) Harvard Kennedy School & New York University Stern School of Business, https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/6058a456ca24454a73370dc8/1616421974691/TechnologyRecommendations_2021final.pdf.

> reviewed by The Wall Street Journal. "Comparisons on Instagram can change how young women view and describe themselves."
>
> For the past three years, Facebook has been conducting studies into how its photo-sharing app affects its millions of young users. Repeatedly, the company's researchers found that Instagram is harmful for a sizable percentage of them, most notably teenage girls.
>
> "We make body image issues worse for one in three teen girls," said one slide from 2019, summarizing research about teen girls who experience the issues.
>
> "Teens blame Instagram for increases in the rate of anxiety and depression," said another slide. "This reaction was unprompted and consistent across all groups."
>
> Among teens who reported suicidal thoughts, 13% of British users and 6% of American users traced the desire to kill themselves to Instagram, one presentation showed.
>
> Expanding its base of young users is vital to the company's more than $100 billion in annual revenue, and it doesn't want to jeopardize their engagement with the platform.
>
> More than 40% of Instagram's users are 22 years old and younger, and about 22 million teens log onto Instagram in the U.S. each day . . . .[7]

The released documents from Instagram make clear that "Facebook is acutely aware that the products and systems central to its business success routinely fail":

> The features that Instagram identifies as most harmful to teens appear to be at the platform's core.
>
> The tendency to share only the best moments, a pressure to look perfect and an addictive product can send teens spiraling toward eating disorders, an unhealthy sense of their own bodies and depression, March 2020 internal research states. It warns that the Explore page, which serves users photos and videos curated by an algorithm, can send users deep into content that can be harmful.

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[7] Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show* (September 14, 2021) The Wall Street Journal, https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline.

> "Aspects of Instagram exacerbate each other to create a perfect storm," the research states.[8]

The referenced documents revealed that Facebook's own internal research found "1 in 8 of its users reported compulsive social media use that interfered with their sleep, work, and relationships— what the social media platform calls 'problematic use' but is more commonly known as 'internet addiction.'"[9]

There are various features of social media that are believed to contribute to excessive social media use and preoccupation and attendant mental health issues in children and that are repeatedly highlighted as the most problematic for users, especially children. They are pinpointed by academic research,[10] and lawsuits brought by most states' Attorneys General,[11] as the core of the problem. These include the display of "likes" and other feedback on posted media that drive minors' unhealthy comparisons to others and their obsessive usage.

In addition, the constant notifications that are sent to users to nudge them back onto a platform throughout the day and night to seek the next hit of dopamine. The biggest and most central of them all is the algorithmic feeds that are fueled by a user's own information and inferences drawn from their past behavior and data collected from other sources. While these features can effectively serve up content curated for a user's personal tastes and create social connections among users, it is these types of features that are most concerning to advocates for reform.

2. Ensuring social media platforms are held accountable for the harms they cause

Existing negligence law imposes a responsibility on everyone, including social media platforms, for injuries occasioned to others by their want of ordinary care or skill in the management of their property or person. This bill does not alter any existing duty. Rather, it seeks to acknowledge the unique impacts that social media platforms are shown to have on a particularly vulnerable population, California's children.

The bill does that by increasing the remedies that children may seek when social media platforms break this existing duty to refrain from causing them injury. The bill provides

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[8] *Ibid.*
[9] Kim Lyons, *Facebook reportedly is aware of the level of 'problematic use' among its users* (November 6, 2021) The Verge, www.theverge.com/2021/11/6/22766935/facebook-meta-aware-problematic-use-addiction-wellbeing.
[10] Kirsten Weir, *Social media brings benefits and risks to teens. Here's how psychology can help identify a path forward* (September 1, 2023) American Psychological Association, https://www.apa.org/monitor/2023/09/protecting-teens-on-social-media.
[11] Matt Richtel, *Is Social Media Addictive? Here's What the Science Says* (October 25, 2023) The New York Times, https://www.nytimes.com/2023/10/25/health/social-media-addiction.html.

for statutory damages from $5,000 to $1 million per violation, per child or three times the child's actual damages, whichever is more.

According to the author:

> This bill holds social media platforms accountable for the harm they cause to children and teenagers. This legislation would impose financial liabilities on large social media companies if proven in court that they knowingly offered products or design features that resulted in harm or injury to minors and are found to violate long standing state negligence law.

3. Legal considerations

Concerns have been raised about whether the bill runs afoul of federal statutory and constitutional law. Namely, whether the bill is preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 or violates the First Amendment to the United States Constitution.

a. Section 230

Section 230 does not apply to the *users* of social media (or the internet generally), but rather applies to the *platforms themselves*. In the early 1990s, prior to the enactment of Section 230, two trial court orders—one in the United States District Court for the Southern District of New York, and New York state court—suggested that internet platforms could be held liable for allegedly defamatory statements made by the platforms' users if the platforms engaged in any sort of content moderation (e.g., filtering out offensive material).[12] In response, two federal legislators and members of the burgeoning internet industry crafted a law that would give internet platforms immunity from liability for users' statements, even if they might have reason to know that statements might be false, defamatory, or otherwise actionable.[13] The result—Section 230—was relatively uncontroversial at the time, in part because of the relative novelty of the internet and in part because Section 230 was incorporated into a much more controversial internet regulation scheme that was the subject of greater debate.[14]

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[12] *See Cubby, Inc. v. Compuserve, Inc.* (S.D.N.Y. 1991) 776 F.Supp. 135, 141; *Stratton Oakmont v. Prodigy Servs. Co.* (N.Y. Sup. Ct., May 26, 1995) 1995 N.Y. Misc. LEXIS 229, *10-14. These opinions relied on case law developed in the context of other media, such as whether bookstores and libraries could be held liable for distributing defamatory material when they had no reason to know the material was defamatory. (*See Cubby, Inc.*, 776 F. Supp. at p. 139; *Smith v. California* (1959) 361 U.S. 147, 152-153.)

[13] Kosseff, The Twenty-Six Words That Created The Internet (2019) pp. 57-65.

[14] *Id.* at pp. 68-73. Section 230 was added to the Communications Decency Act of 1996 (title 5 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56), which would have imposed criminal liability on internet platforms if they did not take steps to prevent minors from obtaining "obscene or indecent" material online. The Supreme Court invalidated the CDA, except for Section 230, on the basis that it violated the First Amendment. (*See Reno v. ACLU* (1997) 521 U.S. 844, 874.)

The crux of Section 230 is laid out in two parts. The first provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[15] The second provides a safe harbor for content moderation, by stating that no provider or user shall be held liable because of good-faith efforts to restrict access to material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[16]

Together, these two provisions give platforms immunity from any civil or criminal liability that could be incurred by user statements, while explicitly authorizing platforms to engage in their own content moderation without risking that immunity. Section 230 specifies that "[n]o cause of action may be brought and no liability may be imposed under any State law that is inconsistent with this section."[17] Courts have applied Section 230 in a vast range of cases to immunize internet platforms from "virtually all suits arising from third-party content."[18]

This bill does not specifically address content at all. In fact, it does not alter any existing obligation, but merely alters the remedies.

The Ninth Circuit Court of Appeals in *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1100-01 established a three-part test for assessing the immunities of Section 230 on claims against platforms: "[I]t appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."

This test was applied by the Ninth Circuit in *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085. In that case, the parents of minor decedents sued Snap, the owner and operator of Snapchat, a social media application. At issue was the use of a filter provided by Snapchat that allowed users to record their real-life speed and overlay it over photos or video. The plaintiffs' children opened Snapchat and used the filter shortly before their fatal high-speed car crash. The opinion states that "[t]o keep its users engaged, Snapchat rewards them with 'trophies, streaks, and social recognitions' based on the snaps they send. Snapchat, however, does not tell its users how to earn these various achievements" but that many users believed hitting 100 miles per hour using the filter would result in such rewards. According to the opinion: "Snapchat allegedly knew or should have known, before May 28, 2017, that its users believed that

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[15] *Id.*, § 230(c)(1).
[16] *Id.*, § 230(c)(1) & (2).
[17] *Id.*, § 230(e)(1) & (3).
[18] Kosseff, *supra*, fn. 13, at pp. 94-95; *see, e.g., Doe v. MySpace Inc.* (5th Cir. 2008) 528 F.3d 413, 421-422; *Carfano v. Metrospalsh.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125; *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 333-334.

such a reward system existed and that the Speed Filter was therefore incentivizing young drivers to drive at dangerous speeds."

The parents filed a negligent design lawsuit against Snap, and the district court agreed with Snap's argument that Section 230 immunity foreclosed such suit, granting Snap's motion to dismiss. On appeal, the Ninth Circuit turned to the *Barnes v. Yahoo* test. After acknowledging the first element was met, it turned to the second:

> The second Barnes question asks whether a cause of action seeks to treat a defendant as a "publisher or speaker" of third-party content. We conclude that here the answer is no, because the Parents' claim turns on Snap's design of Snapchat.
> In this particular context, "publication" generally "involve[s] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." A defamation claim is perhaps the most obvious example of a claim that seeks to treat a website or smartphone application provider as a publisher or speaker, but it is by no means the only type of claim that does so. Thus, regardless of the type of claim brought, we focus on whether "the duty the plaintiff alleges" stems "from the defendant's status or conduct as a publisher or speaker."
>
> Here, the Parents seek to hold Snap liable for its allegedly "unreasonable and negligent" design decisions regarding Snapchat. They allege that Snap created: (1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards. The Speed Filter and the incentive system then supposedly worked in tandem to entice young Snapchat users to drive at speeds exceeding 100 MPH.
>
> The Parents thus allege a cause of action for negligent design—a common products liability tort. This type of claim rests on the premise that manufacturers have a "duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." Thus, a negligent design action asks whether a reasonable person would conclude that "the reasonably foreseeable harm" of a product, manufactured in accordance with its design, "outweigh[s] the utility of the product."
>
> The duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA.[19]

[19] *Lemmon v. Snap, Inc.*, 995 F.3d at 1091-92, internal citations omitted.

Writing in opposition, a coalition of industry groups, including TechNet argue the bill is likely preempted by Section 230:

> Section 230 explicitly preempts state laws such as AB 3172 that would conflict with this protection. This bill creates liability for platforms based on third party content by applying to any feature that allows users to encounter content. It effectively assumes that all features are harmful and imposes liability on a site for offering any of those features to children. Platforms' algorithms and features that allow users to encounter or share content from other users are inextricably linked to the underlying content. Therefore, by imposing liability on platforms for these features, AB 3172 conflicts with Section 230 and is likely preempted.

It should be noted that the operative part of the bill does not reference features or content. Existing negligence law has always applied to social media platforms, and as seen in cases such as *Lemmon*, platforms can be held liable for the injuries they negligently cause without triggering Section 230 preemption.

b. First Amendment

The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits Congress or the states from passing any law "abridging the freedom of speech."[20] "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[21] However, while the amendment is written in absolute terms, the courts have created a handful of narrow exceptions to the First Amendment's protections, including "true threats,"[22] "fighting words,"[23] incitement to imminent lawless action,[24] defamation,[25] and obscenity.[26] Expression on the internet is given the same measure of protection granted to in-person speech or statements published in a physical medium.[27]

A constitutional challenge to a restriction on speech is generally analyzed under one of two frameworks, depending on whether the courts deem it to be "content neutral" or "content based," i.e., targeting a particular type of speech. A law is content neutral when it "serves purposes unrelated to the content of the expression."[28] On the other

[20] U.S. Const., 1st & 14th amends.
[21] *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.
[22] *Snyder v. Phelps* (2011) 562 U.S. 443, 452.
[23] *Cohen v. California* (1971) 403 U.S. 15, 20.
[24] *Virginia v. Black* (2003) 538 U.S. 343, 359.
[25] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 383.
[26] *Ibid.*
[27] *Reno v. ACLU* (1997) 521 U.S. 844, 870.
[28] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

hand, a law is content based when the proscribed speech is "defined solely on the basis of the content of the suppressed speech."[29]

If a law is determined to be content neutral it will be subject to intermediate scrutiny, which requires that the law "be 'narrowly tailored to serve a significant government interest.'"[30] In other words, the law "'need not be the least restrictive or least intrusive means of' serving the government's interests," but "'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"[31]

If a restriction on speech is determined to be content based, it will be subject to strict scrutiny.[32] A restriction is content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."[33] Content-based restrictions subject to strict scrutiny are "presumptively unconstitutional."[34] A restriction can survive strict scrutiny only if it uses the least-restrictive means available to achieve a compelling government purpose.[35]

The coalition in opposition argues that the bill seeks to regulate speech because it requires "platforms exercise 'ordinary care and skill' for teen users." Essentially, the argument is that any application of negligence law to platforms is a regulation of speech. The coalition states:

> AB 3172 is unconstitutional because it imposes liability on social media platforms for whether certain types of third-party content are shown to child users, as well as the expressive choices social media platforms make in designing the user experience. This violates the First Amendment rights of both minors and social media platforms. Courts have repeatedly upheld and protected platforms' First Amendment rights to decide how to moderate and present content on their platforms. Likewise, because the bill would result in limited or restricted access to teens, it infringes upon their First Amendment rights to receive information and express themselves.
>
> Additionally, the bill's "overbreadth" appears both "real" and "substantial," and is thus arguably unconstitutional, because it sweeps in social media activity that might negatively affect a relatively small amount of children but prove to be of utility to many more (i.e., organizing

[29] *FCC v. League of Women Voters* (1984) 468 U.S. 364, 383.
[30] *Packingham v. North Carolina* (2017) 582 U.S. 98, 105.
[31] *McCullen v. Coakley* (2014) 573 U.S. 464, 486 (*McCullen*).
[32] *Id.* at p. 478.
[33] *Id.* at p. 479.
[34] *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2226 (*Reed*).
[35] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

> children's social media feeds to highlight content they are more interested in).
>
> AB 3172 also directly interferes with the expressive rights of both the minors who will be banned from social media services and the service providers themselves.

Again, the operative part of the bill does not reference content or the moderation choices of platforms. It does not change any basis for liability.

4. Arguments in support

NextGen California writes in support:

> AB 3172 (Lowenthal) utilizes the threat of financial liability to compel social media platforms to proactively safeguard youth users from potential harm. AB 3172 makes one change to California's existing negligence law, Civil Code, Section 1714, by increasing statutory damages to encourage proactive measures by social media companies. The bill provides penalties of $5,000 per violation, up to $1 million per child, or three times the damages otherwise awarded in court.
>
> California must intervene for our youth and hold social media companies accountable and financially responsible for negligent actions and practices.

A coalition in support, including Common Sense Media and Jewish Family and Children's Services explains the need:

> This bill establishes statutory damages in California's existing negligence law for harms to minors related to social media that can be proven in court. That is the only change to California law that this bill makes. These financial penalties are needed and intended to motivate large social media companies to do what they currently refuse to do - ensure that the way they design and operate their platforms does not injure young users. There is mounting evidence, including from internal company communications, that social media platforms contribute to our youth mental crisis and to other direct harms to kids and teens, including accessing fentanyl and other illegal drugs.
>
> As the use of social media continues to climb among children and adolescents, so too does the urgency for legislative action. AB 3172 offers a path to mitigate the risks faced by our youth in an increasingly connected

> world, ensuring that social media companies operate with the due care our children deserve.
>
> Again, AB 3172 makes no other change to California law other than to introduce specific financial liabilities for platforms whose products or designs are proven in court to result in harm to minors, incentivizing those companies to prioritize the safety of their younger users. In light of the compelling association between social media use and injuries to young users, including effects on their mental well-being, we strongly urge your support for AB 3172.

Chamber of Progress writes in opposition:

> The "responsibility of ordinary care and skill to a child" is excessively vague, given the diverse range of opinions regarding appropriate content for children of varying ages. Faced with the risk of a deluge of litigation seeking high payments based on unclear standards, websites will be forced to strip any content or features that could be possibly considered inappropriate (or risk severe penalties), which is precisely the sort of "chilling" that the Supreme Court's vagueness doctrine is intended to prevent.

In response to opposition concerns, the author has agreed to amendments that limit these additional penalties to being recoverable only in actions brought by public prosecutors. The amendments will ensure that a majority of any civil penalties recovered are provided to the child to whom the duty of ordinary care and skill was owed. To be clear, the bill provides enhanced remedies in these actions and the duties, remedies, and obligations imposed continue to be cumulative to the duties, remedies, and obligations imposed under other laws. Therefore, nothing herein affects the ability of an individual to bring their own suit, as exists under current law. The amendments will also push out the operative date such that the changes apply only to causes of actions arising from conduct occurring on or after January 1, 2026.

SUPPORT

California School Boards Association
California Teachers Association
Children's Advocacy Institute
Common Sense Media
Democrats for Israel - CA
Democrats for Israel Los Angeles
Etta
Fred Whitaker, Chair of Orange County Republican Party
Hadassah

Holocaust Museum LA
Jakara Movement
Jewish Center for Justice
Jewish Community Federation and Endowment Fund
Jewish Democratic Club of Marin
Jewish Democratic Club of Solano County
Jewish Democratic Coalition of the Bay Area
Jewish Family and Children's Service of Long Beach and Orange County
Jewish Family and Children's Services of San Francisco, the Peninsula, Marin and Sonoma Counties
Jewish Family Service of Los Angeles
Jewish Family Services of Silicon Valley
Jewish Federation of Greater Los Angeles
Jewish Federation of the Greater San Gabriel and Pomona Valleys
Jewish Long Beach
Jewish Public Affairs Committee
Jewish Public Affairs Committee of California
Jewish Silicon Valley
NextGen California
Parents Television and Media Council
Progressive Zionists of California

OPPOSITION

California Chamber of Commerce
Chamber of Progress
Civil Justice Association of California
Computer and Communications Industry Association
Electronic Frontier Foundation
Netchoice
Technet

RELATED LEGISLATION

Pending Legislation:

SB 976 (Skinner, 2024) prohibits operators of "internet-based services or applications" from providing "addictive feeds," as those terms are defined, to minors without parental consent and from sending notifications to minors at night and during school hours without parental consent, as provided. This bill requires operators to make available to parents a series of protective measures for controlling access to and features of the platform for their children. This bill also requires reporting on data regarding children on their platforms, as specified. SB 976 is currently in the Assembly Privacy and Consumer Protection Committee.

SB 981 (Wahab, 2024) requires social media platforms to provide a mechanism for reporting "digital identity theft," essentially the posting of nonconsensual, sexual deepfakes; and requires platforms to timely respond and investigate and to block instances of this material, as provided. SB 981 is currently in the Assembly Privacy and Consumer Protection Committee.

AB 3080 (Alanis, 2024) requires a person or business that seeks to make available a product that is illegal to make available to a minor, including pornographic websites, to take reasonable steps to ensure the user is of legal age. AB 3080 is currently in this Committee.

Prior Legislation:

SB 287 (Skinner, 2023) would have subjected social media platforms to civil liability for damages caused by their designs, algorithms, or features, as provided. It would have provided a safe harbor where certain auditing practices are carried out. SB 287 was held in the Senate Appropriations Committee.

AB 1394 (Wicks, Ch. 579, Stats. 2023) required social media platforms to provide a reporting mechanism for suspected child sexual abuse material and requires them to permanently block the material, as provided. It also prohibits platforms from knowingly facilitating, aiding, or abetting minor's commercial sexual exploitation.

SB 1056 (Umberg, Ch. 881, Stats. 2022) required a social media platform, as defined, to clearly and conspicuously state whether it has a mechanism for reporting violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed.

AB 587 (Gabriel, Ch. 269, Stats. 2022) required social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis.

AB 1628 (Ramos, Ch. 432, Stats. 2022) required a social media platform, as defined, that operates in this state to create and publicly post a policy statement including specified information pertaining to the use of the platform to illegally distribute controlled substances, until January 1, 2028.

AB 2273 (Wicks, Ch. 320, Stats. 2022) established the California Age-Appropriate Design Code Act, placing a series of obligations and restriction on businesses that provide online services, products, or features likely to be accessed by a child.

AB 2408 (Cunningham, 2022) would have prohibited a social media platform from using a design, feature, or affordance that the platform knew, or which by the exercise

of reasonable care it should have known, causes child users to become addicted to the platform. AB 2408 died in the Senate Appropriations Committee.

AB 1114 (Gallagher, 2021) would have required a social media company located in California to develop a policy or mechanism to address content or communications that constitute unprotected speech, including obscenity, incitement of imminent lawless action, and true threats, or that purport to state factual information that is demonstrably false. AB 1114 died in the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

SB 388 (Stern, 2021) would have required a social media platform company, as defined, that, in combination with each subsidiary and affiliate of the service, has 25,000,000 or more unique monthly visitors or users for a majority of the preceding 12 months, to report to the Department of Justice by April 1, 2022, and annually thereafter, certain information relating to its efforts to prevent, mitigate the effects of, and remove potentially harmful content. This bill died in the Senate Judiciary Committee.

PRIOR VOTES:

Assembly Floor (Ayes 65, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)
Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)

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