SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2408 (Cunningham)
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SUBJECT

Child users: addiction

DIGEST

This bill establishes a negligence cause of action for a platform's use of any design, feature, or affordance that causes a child user to become addicted to the platform. It also provides for heightened civil penalties in actions brought by public prosecutors.

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 used social media and estimates from 2018 put the number of teens on the sites at over 70 percent.

Given the reach of social media platforms and the increasing role they play in many children's lives, concerns have arisen over the connection between social media usage and mental health. This bill establishes a duty on social media platforms to not addict children to their sites through their design, features, or affordances.

This bill is sponsored by the Children's Advocacy Institute and Common Sense. It is supported by a wide variety of organization and individuals, including NextGen California and Fairplay. The bill is opposed by various industry groups, including the California Chamber of Commerce and TechNet.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Establishes the federal Children's Online Privacy Protection Act (COPPA) to provide protections and regulations regarding the collection of personal information from children under the age of 13. (15 U.S.C. § 6501 et seq.)

2) 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)(2).)

3) 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).)

2) Establishes the Privacy Rights for California Minors in the Digital World (PRCMDW), which prohibits an operator of an internet website, online service, online application, or mobile application ("operator") from the following:
    a) marketing or advertising specified products or services, such as firearms, cigarettes, and alcoholic beverages, on its internet website, online service, online application, or mobile application that is directed to minors;
    b) marketing or advertising such products or services to minors who the operator has actual knowledge are using its site, service, or application online and is a minor, if the marketing or advertising is specifically directed to that minor based upon the personal information of the minor; and
    c) knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of a minor with actual

knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising such products or services to that minor, where the website, service, or application is directed to minors or there is actual knowledge that a minor is using the website, service, or application. (Bus. & Prof. Code § 22580.)

3) Requires, pursuant to the PRCMDW, certain operators to permit a minor user to remove the minor's content or information and to further inform the minor of this right and the process for exercising it. (Bus. & Prof. Code § 22581.)

4) Requires, pursuant to the Parent's Accountability and Child Protection Act, a person or business that conducts business in California, and that seeks to sell any product or service in or into California that is illegal under state law to sell to a minor to, notwithstanding any general term or condition, take reasonable steps, as specified, to ensure that the purchaser is of legal age at the time of purchase or delivery, including, but not limited to, verifying the age of the purchaser. (Civ. Code § 1798.99.1(a)(1).)

5) Establishes the CCPA, which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)

6) Establishes the California Privacy Rights Act of 2020 (CPRA), which amends the CCPA and creates the California Privacy Protection Agency (PPA), which is charged with implementing these privacy laws, promulgating regulations, and carrying out enforcement actions. (Civ. Code § 798.100 et seq.; Proposition 24 (2020).)

7) Prohibits a business from selling or sharing the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of consumers at least 13 years of age and less than 16 years of age, or the consumer's parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized the sale or sharing of the consumer's personal information. A business that willfully disregards the consumer's age shall be deemed to have had actual knowledge of the consumer's age. (Civ. Code § 1798.120.)

This bill:

1) Provides that "want of ordinary care or skill" in Section 1714 includes a social media platform's use of a design, feature, or affordance that causes a child user to become addicted to the platform. A child user, or their parent or guardian on

their behalf, may file suit for a violation of this duty. In order to prevail, such plaintiff must prove by a preponderance of the evidence:
   a) the design, feature, or affordance was a substantial factor in causing the child user's addiction and harm;
   b) it was reasonably foreseeable that the use of that design, feature, or affordance would addict and harm child users; and
   c) the child user in such a suit became addicted and was therefore harmed.

2) Authorizes a public prosecutor to also bring an action for a violation and seek:
   a) a civil penalty of up to $25,000 per violation;
   b) litigation costs and reasonable attorneys' fees; and
   c) an additional civil penalty of up to $250,000 for a knowing and willful violation.
3) Provides a minimum award of damages of $1,000 for class members in a class action brought by an individual or public prosecutor.

4) Provides that a social media platform can be subject to liability for conduct occurring before January 1, 2023. It can avoid such liability by ceasing development, design, implementation, or maintenance of features that were known, or should have been known, by the platform to be addictive to child users.

5) Establishes a safe harbor from liability for civil penalties if the platform institutes and maintains a program of at least quarterly audits of its practices, designs, features, and affordances to detect practices or features that have the potential to cause or contribute to the addiction of child users. And, the platform corrects within an unspecified number of days of the completion of an audit any practice, design, feature, or affordance discovered by the audit to present more than a de minimis risk of violating this subdivision.

6) Provides that it shall not be construed to impose liability for a social media platform for any of the following:
   a) content that is generated by a user of the service, or uploaded to or shared on the service by a user of the service, that may be encountered by another user, or other users, of the service;
   b) passively displaying content that is created entirely by third parties;
   c) information or content for which the social media platform was not, in whole or in part, responsible for creating or developing; or
   d) any conduct by a social media platform involving child users that would otherwise be protected by 47 U.S.C. 230, or by application of case law interpreting the First Amendment of the United States Constitution or Section 2 of Article 1 of the California Constitution.

7) Defines the following terms:

a) "addict" means to knowingly or negligently cause addiction through any act or omission or any combination of acts or omissions;
b) "addiction" means use of one or more social media platforms that does both of the following:
    i. indicates preoccupation or obsession with, or withdrawal or difficulty to cease or reduce use of, a social media platform despite the user's desire to cease or reduce that use; and
    ii. causes physical, mental, emotional, developmental, or material harms to the user.

8) Clarifies that it shall not be construed to negate or limit a cause of action that may have existed or exists against an operator and that it is cumulative to any other duties or obligations imposed under other laws. It provides that any waiver is unenforceable and void.

9) Includes a severability clause.

COMMENTS

1. The effects of social media usage on mental health

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 25, 2022.

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 between such problematic use and 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, the [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-topexecutives-nixed-solutions-11590507499.

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.
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> 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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[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.

[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.

> "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, reviewed by The Wall Street Journal. "Comparisons on Instagram can change how young women view and describe themselves."
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> 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.
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> "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

[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.

> users photos and videos curated by an algorithm, can send users deep into content that can be harmful.
>
> "Aspects of Instagram exacerbate each other to create a perfect storm," the research states.[8]

It is these types of features that are most concerning and that are at the heart of the bill. In addition to the "Explore page" there are various other features that are believed to contribute to excessive social media use and preoccupation and attendant mental health issues in children. 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]

2. Establishing a duty not to addict children

As a general rule, California law provides that persons are responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their 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).) Liability has the primary effect of ensuring that some measure of recourse exists for those persons injured by the negligent or willful acts of others; the risk of that liability has the primary effect of ensuring parties act reasonably to avoid harm to those to whom they owe a duty.

This bill seeks to hold social media platforms accountable when they addict children to their platforms. It amends Section 1714 to make clear that the "want of ordinary care" described can include a social media platform's use of any design, feature, or affordance that causes a child user to become addicted the platform. To ensure an adequate connection between the conduct and the harm, the bill provides that no claim lies unless the use of the design, feature, or affordance was a *substantial factor* in causing the child user's addiction, and therefore harm, and that it was *reasonably foreseeable* that such use would addict and therefore harm child users. If the child proves addiction and harm, then the remedies generally available for a negligence action are warranted. The bill sets a minimum amount of statutory damages for successful members in a class action at $1,000.

"Addict," for these purposes, means to knowingly or negligently cause addiction through any act or omission or any combination of acts or omissions. Recent amendments suggested by this Committee removed a lower threshold allowing for

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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.

conduct that merely *contributes* to addiction to suffice. For purposes of this cause of action, "addiction" means use of one or more social media platforms that does both of the following:

- indicates preoccupation or obsession with, or withdrawal or difficulty to cease or reduce use of, a social media platform despite the user's desire to cease or reduce that use; and
- causes physical, mental, emotional, developmental, or material harms to the user.

Again, recent amendments tightened this standard to ensure more substantial connection between the conduct and the child's addiction. Ultimately, plaintiffs are required to prove that the social media platform used mechanisms that they reasonably should have foreseen would addict children to their platform and that were actually a substantial factor in causing addiction and thereby causing physical, mental, emotional, developmental, or material harms to child users.

To ensure more robust enforcement of this duty to not addict children, the bill authorizes public prosecutors to bring actions for violations seeking civil penalties of up to $25,000 per violation and an additional penalty of up to $250,000 for knowing and willful violations. Recent amendments remove the ability of individuals to seek these heightened penalties. The bill also includes a provision that provides for retroactive liability for social media platforms for the described conduct before the effective date of this bill.

The bill provides platforms a prospective safe harbor from liability where they have: (1) conducted at least quarterly audits of its practices, designs, features, and affordances to detect practices or features that have the potential to cause or contribute to the addiction of child users and (2) corrected, within a to-be-determined number of days of the completion of the audit, any practice, design, feature, or affordance discovered by the audit to present more than a de minimis risk of violating the bill. However, this safe harbor only applies to the civil penalties that can be sought by public prosecutors.

According to the author:

> AB 2408 poses three questions for the Committee:
>
> 1. Might the "responsibility" imposed on "everyone" "for an injury occasioned to another" by "want of ordinary care or skill in the management of his or her property" (Civil Code section 1714(a)) include a responsibility of giant social media platforms not to deploy features that foreseeably make addicts of their child customers?
>
> The authors and supporters respectfully answer: "Yes, obviously so."

Indeed, this "responsibility" is greater when the platforms are dealing with their child customers:

> "Those who place an attractive but dangerous, contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owe the duty of exercising ordinary care to prevent such injury to them, because such persons are charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee, comprehend, and avoid the danger into which they are thus knowingly allured.

(*Faylor v. Great Eastern Q. Min. Co.* (1953) 45 Cal.App. 194, 199-200. *See also, and e.g., Shannon v. Central–Gaither Union School Dist.* (1933) 133 Cal.App. 124, 129-130.)

Moreover, the 9th Circuit recently applied these principles to a social media platform in *Lemmon v. Snap* (9th Cir. 2021) 995 F.3d 1085, 1094 ("In short, Snap is being sued for the predictable consequences of designing Snapchat in such a way that it allegedly encourages dangerous behavior. [Section 230] does not shield Snap from liability for such claims.").

2. Should we wait for a court in a published decision to state the obvious: that as a purely legal matter this responsibility of ordinary care includes a duty not to make addicts of child customers?

The authors and supporters respectfully answer: "No. We are in the middle of a never-before-seen youth mental health catastrophe caused to some significant degree by social media addiction, according to no less than Instagram's own research. It could be a decade or more before a published decision is rendered. Normal cases can easily take four years to be resolved by appeal. And, a social media company that can pay a $5 billion fine to the FTC and see its stock rise the next day could offer staggering sums in settlement to a plaintiff to prevent such a case from ever being published. It is immoral to place millions of children at-risk of, for example, suicide to avoid stating the obvious in law."

3. Should unprecedented safe harbors from negligence be offered to encourage social media platforms to stop using the inventions that make addicts of their child customers?

The authors and supporters respectfully answer "Yes. This bill is about protecting children. We must urgently use every tool available to encourage social media platform giants to stop making addicts of their

> child customers. Insulating them from liability for their past misbehavior for doing the right thing in the future is one such tool."

A coalition in opposition to the bill, including the California Chamber of Commerce and TechNet, argues the bill imposes "immense liability" on platforms:

> Due to its unprecedented civil liability and enforcement provisions, AB 2408 would make social media unavailable to adolescents in California. AB 2408 creates a private right of action for any parent who believes their child has been injured by social media. If successful, they could receive actual damages ($1,000 minimum for each member of a class action suit), punitive damages, a civil penalty of up to $25,000, litigation costs and attorney's fees, and a knowing violation would subject the violator to an additional $250,000 civil penalty per violation. Due to the uncertainty of what constitutes a violation and the ease with which a plaintiff could show a knowing violation under the provisions of the bill, a single class action could easily approach half a billion dollars.

In response, the author has agreed to amendments that dramatically rework the bill. The provisions are removed from Section 1714 and a new section is created providing for liability only in actions brought by public prosecutors. The retroactive liability provision is completely removed from the bill. However, to ensure that this change is not interpreted to affect any other claims, the bill will make clear that the legislative history is not admissible as evidence of legislative intent for such claims, in addition to the existing provision that the bill should not be construed to negate or limit a cause of action that may already exist.

> <u>Amendment</u>
>
> Add Section 17052 to the Business & Professions Code to read:
>
> (a) A social media platform shall not use 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.
> (b) Actions for relief pursuant to this section may be prosecuted exclusively by the Attorney General or by a district attorney, county counsel, or city attorney as described in section 17204.
> (c) In addition to any other relief available pursuant to chapter 5, including, relief or penalties available under sections 17204 and 17206, any person who has violated subdivision (a) may be liable for an additional civil penalty not to exceed two hundred fifty thousand dollars ($250,000) per violation for a knowing and willful violation, and an award of litigation costs and attorneys' fees.

With these changes, the prospective safe harbor becomes much more protective without continuing vulnerability to liability in private actions. The safe harbor, properly labeled as an affirmative defense to any actions, will provide platforms 30 days for corrective action after quarterly audits.

3. Legal concerns

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 and 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).[10] 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.[11] 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.[12]

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."[13] 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,

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[10] *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.)

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

[12] *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*, *supra*, 521 U.S. at p. 874.)

[13] *Id.*, § 230(c)(1).

lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[14]

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."[15] Courts have applied Section 230 in a vast range of cases to immunize internet platforms from "virtually all suits arising from third-party content."[16]

The bill provides for the potential liability of platforms if they negligently or intentionally use a design, feature, or affordance that foreseeably causes a child user to suffer physical, mental, emotional, developmental, or material harm as a result of an addiction to a platform. Therefore, the relevant provision here is subdivision (c)(1) of Section 230, dealing with the treatment of providers as the publisher or speaker of third party content. Ninth Circuit caselaw may shed light on how it might assess this legislation.

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 claims pursuant to this provision in Section 230: "[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 recently 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 such a reward system existed and that the Speed Filter was therefore incentivizing young drivers to drive at dangerous speeds."

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[14] *Id.*, § 230(c)(1) & (2).
[15] *Id.*, § 230(e)(1) & (3).
[16] 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.

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.[17]

The claims established by this bill arguably do not impose liability on social media platforms for any specific content or treat the platform as the publisher or speaker of

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

any content; rather, it bases liability on the use of certain designs and features that create harm in and of themselves.

Groups in opposition believe the bill does violate Section 230. The Electronic Frontier Foundation argues:

> AB 2408 does create liability for the platforms based on other users' content and activities on the site. For example, when the platform notifies a user of a comment ("You've got a new comment from Alice!"), or recommends someone under sixteen join a group, or potentially just displays content to someone under sixteen. These are all features that allow others to learn about, see, and interact with that user-generated content. The bill would create liability based on providing these services, because they are "engagement," when, in reality, they are generated by other users' content.

Expecting such challenges, the bill includes provisions specifically stating that it not be construed to impose liability for:

- content that is generated by a user of the service, or uploaded to or shared on the service by a user of the service, that may be encountered by another user, or other users, of the service;
- passively displaying content that is created entirely by third parties;
- information or content for which the social media platform was not, in whole or in part, responsible for creating or developing; or
- any conduct by a social media platform involving child users that would otherwise be protected by Section 230.

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."[18] "[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."[19] 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,"[20] "fighting words,"[21] incitement to imminent lawless action,[22]

[18] U.S. Const., 1st & 14th amends.
[19] *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.
[20] *Snyder v. Phelps* (2011) 562 U.S. 443, 452.
[21] *Cohen v. California* (1971) 403 U.S. 15, 20.
[22] *Virginia v. Black* (2003) 538 U.S. 343, 359.

defamation,[23] and obscenity.[24] Expression on the internet is given the same measure of protection granted to in-person speech or statements published in a physical medium.[25]

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."[26] On the other hand, a law is content based when the proscribed speech is "defined solely on the basis of the content of the suppressed speech."[27]

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.'"[28] 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.'"[29]

If a restriction on speech is determined to be content based, it will be subject to strict scrutiny.[30] 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."[31] Content-based restrictions subject to strict scrutiny are "presumptively unconstitutional."[32] A restriction can survive strict scrutiny only if it uses the least-restrictive means available to achieve a compelling government purpose.[33]

Arguably, this bill does not look at what content is being posted on social media or the editorial decisions of platforms. The reasoning in *Lemmon v. Snap* is instructive, as liability here is not tied to content or speech, but the use of design and features that cause harm, regardless of the content underlying it. In addition, the bill furthers a compelling government interest, protecting children from addiction and emotional harm.

Opposition argues this bill is an impermissible restriction on social media platforms' speech and children's speech. A coalition of groups, including Chamber of Progress, argues:

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[23] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 383.
[24] *Ibid.*
[25] *Reno v. ACLU* (1997) 521 U.S. 844, 870.
[26] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.
[27] *FCC v. League of Women Voters* (1984) 468 U.S. 364, 383.
[28] *Packingham*, *supra*, 137 S.Ct. at p. 1736.
[29] *McCullen v. Coakley* (2014) 573 U.S. 464, 486 (*McCullen*).
[30] *Id.* at p. 478.
[31] *Id.* at p. 479.
[32] *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2226 (*Reed*).
[33] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

Children have First Amendment rights both to receive information and to express themselves. While protecting children from self-harm is an important interest, AB 2408 makes no attempt to even reasonably scope the restrictions on social media platforms to that goal, let alone to "narrowly tailor" the law as the Constitution requires. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 646-47 (7th Cir. 2006).

4. Definition of social media platform

With a multitude of bills currently moving through the legislative process that seek to regulate social media platforms, efforts have been made to harmonize the various definitions that exist. The author has agreed to amend in the following definition, which will be going into the various other bills. However, the Committee and authors will continue to engage with stakeholders to further refine the definition as necessary.

Amendment

(4) (A)"Content" means statements or comments made by users and media that are created, posted, shared, or otherwise interacted with by users on an internet-based service or application.
(B) "Content" does not include media put online exclusively for the purpose of cloud storage, transmitting documents, or file collaboration.
(5) "Social media platform" means a public or semipublic internet-based service or application that has users in California and that meets all 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.
(B) 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.
(C) 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.
(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.
(6) "Public or semipublic internet-based service or application" excludes a service or application used to facilitate communication within a business or enterprise among employees or affiliates of the business or enterprise, provided

> that access to the service or application is restricted to employees or affiliates of the business or enterprise using the service or application.

The author wishes to continue to limit the application of the bill to only social media platforms controlled by a business entity that generated at least $100,000,000 in gross revenue during the preceding calendar year, so that exemption continues to apply. Although it is unclear whether any social media platform, as newly defined, even meets this criteria, the author wishes to continue to exempt from the bill any social media platform whose "primary function is to allow users to play video games."

5. Stakeholder positions

Common Sense, a co-sponsor of the bill, makes the case:

> Targeting young people with products that are known to be addictive and harmful is both unethical and a violation of the trust afforded to corporations. Much like Big Tobacco, Big Tech has realized that addicting kids — whose brains and identities still are developing — produces astronomical profits and lifelong customers, even when those customers are unwilling.
>
> The science of addicting children is driving how many technology companies design their platforms, and without regulation requiring them to operate differently, they will continue to do so. Design features such as emoji reactions and comments, autoplay and infinite scroll, push notifications, ephemeral content, and "beautifying" filters keep kids clicking, but they also provoke social comparison, addiction, social pressure, fear of missing out, body image issues, and more.
>
> As stated by Common Sense's Founder and CEO James P. Steyer, "We know there are many ways that social media platforms can harm kids. And tech companies know it, too. Addictive design features, algorithmic amplification of harmful content, and overly commercial content are just some of the harms social media platforms inflict on kids and teens. Big tech companies won't change their practices on their own, but California can take an important step to force them to do the right thing for our kids, teens, and families."

Writing in support, NextGen California asserts:

> Evidence has surfaced that social media platforms know they are addictive and are contributing to the mental health crisis among our youth. Without the legal requirements and associated penalties established in AB 2408, social media platforms could continue to employ

> design features that maximize their profits to the detriment of the mental health of California's children and teens. It is incumbent upon the state to take actions that will protect the well-being of vulnerable young people in California and AB 2408 puts in place the necessary statutory provisions to regulate and curtail the addictive aspects of social media platforms.

The Internet Accountability Project, a self-proclaimed conservative non-profit organization, writes in support:

> In truly free markets, consumers are free to choose between products based upon the quality and price of a company's offerings. The foundation of markets is freedom of choice.
>
> Unfortunately, many Big Tech companies have embraced a business model of addiction. The 'innovation' these companies talk so much about is not designed to create better products and services, but to win and retain customers by using psychological tricks to addict customers.

The coalition in opposition, including the Civil Justice Association of California and the Entertainment Software Association argues the bill rests on a faulty premise:

> AB 2408 relies on the premise that social media only negatively impacts children and completely ignores the growing research that social media use and technology has numerous positive effects on adolescents. For example, a 2018 study found that digital communication serves as an important means of social connection by creating a forum that allows for the development of rapid and nuanced communication skills, identity exploration, artistic creativity, and even increased opportunities to safely express emotional vulnerability. (Anderson & Jiang, 2018). Additionally, the beneficial role of digital media may be especially evident among adolescents who come from underrepresented or at-risk backgrounds. One study found that "adolescents who feel ostracized or stigmatized within their offline social contexts, such as members of ethnic, racial, gender, and sexual minority groups, often report access to online companionship, resource sharing, and emotional validation that is much harder to access otherwise" (e.g., Ybarra et al., 2005).
>
> More research is warranted into both the positive and negative effects of social media use on adolescents. But without a clearer understanding of how one impacts the other, AB 2408 is unjustifiable.

Writing in support, Dr. Michael J. Carter from California State University, Los Angeles breaks down the problem addressed:

None of the benefits of social media platform use by children and teens is dependent upon the techniques that most closely correlate to causing addiction among children and teens. Social media as a concept is not the problem. Sophisticated and studied neuroscientific techniques deployed by vast companies to keep children and teens on the platform against their will, no matter the cost to their mental health and that correlate with addiction, are the problem.

SUPPORT

Children's Advocacy Institute (co-sponsor)
Common Sense (co-sponsor)
Alcohol Justice
American Association of University Women California
Becca Schmill Foundation
Black Minds Matter Coalition
Dr. Michael Carter
Center for Digital Democracy
Center for Humane Technology
Consumer Federation of California
Consumer Watchdog
Defending the Early Years
Digital Well-being Lab
Digital Wellness Institute
DoCurious, Inc.
Eating Disorders Coalition for Research, Policy, and Action
Exposure Labs
Fairplay
Geo Listening
Half the Story
Internet Accountability Project
Jewish Family and Children's Services
Justice2jobs Coalition
Dr. Anna Lembke
LookUp
Lynwood Unified School District
Media Education Foundation
National Association of Social Workers, California Chapter
Nextgen California
Parent Coalition for Student Privacy
Parents Television and Media Council
ParentsTogether Action
Project HEAL
Public Health Advocates

Dr. Rafael Coira
REDC Consortium
Dr. Richard Freed
#SafeSocial
Dr. Stephen Phillips
Stop Predatory Gambling & the Campaign for Gambling-Free Kids
Teen Therapy Center
Teens 4 Teens Help
Thomas Papageorge
TRUCE - Teachers Resisting Unhealthy Children's Entertainment
20 individuals

OPPOSITION

California Chamber of Commerce
Chamber of Progress
Civil Justice Association of California
Electronic Frontier Foundation
Entertainment Software Association
Oakland Privacy
Netchoice
TechNet

RELATED LEGISLATION

Pending Legislation:

SB 1056 (Umberg, 2022) requires 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. This bill is currently in the Assembly Judiciary Committee.

AB 587 (Gabriel, 2022) requires social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis. AB 587 is currently pending before this Committee and is being heard the same day as this bill.

AB 1628 (Ramos, 2022) requires online platforms to create and post a policy that includes policies regarding distribution of controlled substances and its prevention, reporting mechanisms, and resources. AB 1628 is currently pending before this Committee and is being heard the same day as this bill.

AB 2273 (Wicks, 2022) establishes 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. The bill tasks the California Privacy Protection Agency with establishing a taskforce to evaluate best practice and to adopt regulations. AB 2273 is currently pending before this Committee and is being heard the same day as this bill.

AB 2571 (Bauer-Kahan, 2022) prohibits firearm industry members from advertising or marketing, as defined, firearm-related products to minors. The bill restricts the use of minors' personal information in connection with marketing or advertising firearm-related products to those minors. This bill is currently on the Senate Floor.

AB 2879 (Low, 2022) requires social media platforms to implement a mechanism by which school administrators can report instances of cyberbullying, and to disclose specified data related to reported instances of cyberbullying and the platform's response. AB 2879 is currently pending before this Committee and is being heard the same day as this bill.

Prior Legislation:

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.

SB 890 (Pan, 2020) would have required social media companies to remove images and videos depicting crimes, as specified, and imposed civil penalties for failing to do so. SB 890 died in the Senate Judiciary Committee.

AB 2391 (Gallagher, 2020) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 2931 died in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Media.

SB 1424 (Pan, 2018) would have established a privately funded advisory group to study the problem of the spread of false information through Internet-based social media platforms, and draft a model strategic plan for Internet-based social media platforms to use to mitigate this problem. SB 1424 was vetoed by Governor Brown, whose veto message stated that, as evidenced by the numerous studies by academic and policy

groups on the spread of false information, the creation of a statutory advisory group to examine this issue is not necessary.

SB 1361 (Corbett, 2010) would have prohibited social networking websites from displaying, to the public or other registered users, the home address or telephone number of a registered user of that site who is under 18 years of age, and imposed a civil penalty of up to $10,000 for each willful and knowing violation of this prohibition. SB 1361 died in the Assembly Committee on Entertainment, Sports, Tourism, and Internet Media.

PRIOR VOTES:

Assembly Floor (Ayes 51, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)

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