

Date of Hearing: May 3, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2408 (Cunningham and Wicks) – As Amended March 24, 2022

As Proposed to be Amended

SUBJECT: SOCIAL MEDIA: CHILD USERS: ADDICTION

KEY ISSUE: SHOULD SOCIAL MEDIA PLATFORMS BE LIABLE FOR NEGLIGENTLY ADDICTING CHILD USERS?

SYNOPSIS

Social media has become common place in our society, to the point where it is almost shocking to find someone who does not have any social media presence. We use it for all sorts of endeavors, from party planning and dating, to marketing businesses. For many, social media is a vital way to connect with the world around them and engage in our increasingly global society. Particularly over the last decade, social media has seen an astounding growth in platforms and users, and therefore in revenue. As can be true for anything, the development of new products is accompanied by potential pitfalls and dangers. Intentional product decisions by social media companies have resulted in products rife with features designed to engage and, in some cases, addict users through well-known psychological mechanisms.

This bill as currently in print would arguably create a strict liability standard by which social media platforms may be held liable for addicting child users and then exposed to significant civil penalties. Under the current language, if a parent or guardian of a child user of a social media platform can demonstrate their child was addicted to the platform, under the definition of addiction provided for in the bill, they may recover a number of civil penalties, including up to \$25,000 per violation, as well as actual and punitive damages. Further, a claimant who successfully demonstrates that the platform knew or intended to addict children could subject the platform to an additional \$250,000 civil penalty. In an attempt to significantly narrow the bill, the author has proposed a number of amendments, discussed in detail in the analysis that reduce the impact of the bill.

This bill is sponsored by the Children's Advocacy Institute and supported by a large and politically diverse coalition of legal, child welfare, and consumer advocacy groups. It is opposed by TechNet, NetChoice, Chamber of Progress, and the California Chamber of Commerce.

SUMMARY: Makes social media platforms, as defined, civilly liable for negligently addicting child users. Specifically, **this bill:**

- 1) Makes findings and declarations on behalf of the Legislature regarding the prevalence of social media, its relationship to minors, and the prevalence of business models that encourage use of their platforms.
- 2) Defines the following for the purpose of this bill:

- a) “Addict” means to knowingly or negligently cause or contribute to 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 difficult to cease or reduce use of, a social media platform despite the user’s desire to cease or reduce that use; or
 - ii) Causes or contributes to physical, mental, emotional, developmental, or material harms to the user.
 - c) “Child user” means a person who uses a social media platform and is younger than 18 years of age.
 - d) “Personal data” means information that identifies a natural person or is linked or linkable to an identifiable natural person;
 - e) “Social media platform” means an internet service that meets both of the following criteria:
 - i) The internet service is a means by which content 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;
 - (1) For purposes of this definition, “content” means anything communicated by means of an internet service, whether publicly or privately, including written material or messages, oral communications, photographs, videos, or visual images;
 - (2) For purposes of this definition, “content that may be encountered by another user, or other users, of a service” includes content that is capable of being shared with a user by operation of a functionality of the service that allows the sharing of content; and
 - (3) For purposes of this definition, “encounter” means to read, view, hear, or otherwise experience content.
 - ii) The internet service is controlled by a business entity that generated at least \$100,000,000 in gross revenue during the preceding calendar year.
 - f) “Social media platform” does not include an email service, a service offering only one-to-one live aural communications, an internal business service that is an internal resource or tool for a business or nonprofit organization in which the services is not available to children in the general public, or the comment or review section of a digital news or consumer review site.
- 3) Establishes a duty for a social media platform to not negligently addict child users, including by any of the following means:

- a) The use or sale of a child user's personal data or;
 - b) The development, design, implementation, or maintenance of a design, feature, or affordance.
- 4) Authorizes a civil cause of action for a person authorized to assert the legal rights of a child user who suffers injury as a result of a violation of the bill's provisions, and allows for recovery of any of the following relief:
- a) Actual damages, including in a class action where the amount of damages awarded must be at least \$1,000 per member of the class;
 - b) A civil penalty of up to \$25,000 per violation;
 - c) Injunctive relief;
 - d) Punitive damages;
 - e) Litigation costs and no more than twice the amount of reasonable attorney's fees;
 - f) Any other relief that the court deems proper; and
 - g) An additional penalty of up to \$250,000 for a knowing or willful violation.
- 5) Prohibits a civil penalty awarded by this bill from being treated as an offset against an award of damages caused by the same knowing or willful violation of this bill's provisions.
- 6) Establishes liability for a social media platform that, before January 1, 2023, developed, designed, implemented, or maintained features that were known, or should have been known, by the platform to be addictive to child users, for all damages to child users that are, in whole or in part, caused by the platform's features, including, but not limited to, suicide, mental illness, eating disorders, emotional distress, and costs for medical care, including care provided by licensed mental health professionals. Allows a social media platform to avoid liability under this clause if, by April 1, 2023, the platform ceases development, design, implementation, or maintenance of features that were known, or should have been known, by the platform to be addictive to child users.
- 7) Offers a safe harbor provision whereby a social media platform will not be subject to a civil penalty under 4) if the operator does both of the following:
- a) Instituted and maintained 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
 - b) Corrected, within 30 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 violation of the provisions of this bill.
- 8) Prohibits liability from attaching 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.

- 9) Makes the provisions of the bill severable.
- 10) Makes waiver of these provisions unenforceable as void against public policy.

EXISTING LAW:

- 1) Requires an operator of a commercial website or online service that collects personally identifiable information about consumers to conspicuously post its privacy policy on its website and included specified disclosures. (Business & Professions Code Section 22575.)
- 2) Requires, pursuant to the California Consumer Protection Act of 2018 (CCPA), businesses, as defined, to include specified information in their privacy policies, such as a description of consumer rights, the categories of personal information the business collects about consumers, and a list of the categories it has sold about consumers in the preceding 12 months. (Civil Code Section 1798.130.)
- 3) Requires, pursuant to the CCPA, businesses, as defined, to provide a clear and conspicuous link on the business's internet homepage, titled "Do Not Sell My Personal Information" that enables a consumer to opt-out of the sale of the consumer's personal information. (Civil Code Section 1798.135.)
- 4) Imposes liability against everyone, 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. (Civil Code Section 1714 (a).)
- 5) Provides that no provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider or user. (47 U.S.C. Section 230 (c)(1).)
- 6) Provides protection from liability under the Communications Decency Act to a provider or user of an interactive computer service whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker of information provided by another information content provider. (*Barnes v. Yahoo!, Inc.* (2009) 570 F.3d 1096.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Social media has become so common place in our society, that it is rare to find someone who does not have any social media presence. We use it for all sorts of endeavors, from party planning and dating, to marketing businesses. For many, social media is a vital way to connect with the world around them and engage in our increasingly global society. Particularly over the last decade, social media has seen astounding growth. As can be true for anything, the development of new products is accompanied by potential pitfalls and dangers, a risk which in the case of social media is particularly acute for minors and young adults. According to the author:

American children and teens are in an unprecedented crisis. Over the past decade, rates of suicide, hospitalizations from self-harm, and depression have soared, with suicides and self-harm hospitalizations doubling in that short span. That sharp rise in the worst mental health problems afflicting teens and children coincides almost exactly with the rise in social media, especially Meta (formerly Facebook)-owned Instagram.

In an attempt to address concerns concerning mental health data, this bill would create civil liability for social media platforms who negligently addict child users.

The Effects of Social Media Usage on Mental Health. Billions of people worldwide use social media, with seven in 10 U.S. adults using Facebook alone. (Gramlich, *10 Facts about Americans and Facebook* (Juen 2021) Pew Research Center, available at <https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/>.) Nearly half of adults use Facebook multiple times per day. (*Ibid.*) As usage of social media apps and websites has grown, so has research on its consequences. Research published by Facebook’s data scientists demonstrates the effects of its product decisions on the mental health of users. In one study, Facebook intentionally displayed either positive or negative emotion-inducing content to over 600,000 users in order to test if their product could alter a user’s mood. (Kramer *et al.*, *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks* (June 2014) Proceedings of the National Academy of Sciences.) The company reported that when displays of content with positive expressions were reduced, users produced fewer positive posts and more negative posts. When the company chose to reduce the display of negative content, the opposite pattern occurred. Though the effects were relatively small, the researchers convincingly argued that the effects can have far-reaching consequences: “Given the massive scale of social networks such as Facebook, even small effects can have large aggregated consequences. For example, the well-documented connection between emotions and physical well-being suggests the importance of these findings for public health. Online messages influence our experience of emotions, which may affect a variety of offline behaviors.” (*Ibid.*) In sum, though the study evaluated the effects of user content on mental health, it demonstrated that the intentional design of social media apps can impact public health, user emotions, and behaviors that impact users beyond the platform.

A wealth of external research demonstrates the link between social media usage and mental health. In a systematic review of this research, researchers found numerous studies linking social media use with depression and anxiety. (Hussain, *et al.*, *Problematic Social Networking Site Use and Comorbid Psychiatric Disorders: A Systematic Review of Recent Large-Scale Studies* (Dec. 2018) *Frontiers in Psychiatry*.) Longitudinal studies document the causal effects of social media usage over time. In one study, researchers tracked the social media usage and mental health of thousands of teenagers between 2012 and 2018. (Boers, *et al.*, *Association of Screen Time and Depression in Adolescence* (July 2019) *JAMA Pediatrics*.) They found increased social media usage resulted in lower self-esteem and higher rates of depression over the course of four years. In a study of over 5,000 respondents over a span of three years, researchers found that Facebook use resulted in compromised well-being over time, even after controlling for other variables. (Shakya, *et al.*, *Association of Facebook use with compromised well-being: A longitudinal study* (2017) *American Journal of Epidemiology*.)

Conversely, *reducing* social media usage can result in positive health outcomes. Participants who were randomly assigned to take a one-week break from Facebook reported significantly higher levels of well-being and positive emotion than those who were not tasked with taking a break. This effect was especially pronounced among participants who tended to be heavy Facebook users. (Tromholt, *The Facebook Experiment: Quitting Facebook Leads to Higher Levels of Well-Being* (Nov. 2016) *Cyberpsychology, Behavior and Social Network*.) In a similar experimental study, college students who were randomly tasked with limiting their social media use displayed reductions in loneliness and depression after only three weeks. (Hunt, *et al.*, *No More FOMO: Limiting Social Media Decreases Loneliness and Depression* (Dec. 2018) *Journal of Social and Clinical Psychology*.)

Social Media Addiction. For over a decade, researchers have documented a behavioral disorder known as problematic use of social networking sites (SNS). (Hussain, *et al.*, *Problematic Social Networking Site Use and Comorbid Psychiatric Disorders*, *supra.*) Problematic SNS use, also known as SNS addiction, is defined as a disorder in which an individual is overly concerned about SNS, is driven by a strong motivation to log onto or use SNS, and devotes so much time and effort to SNSs that it impairs other social, education and/or occupation activities, interpersonal relationships, and/or psychological health and well-being. (*Ibid.*) Information leaked from a Facebook whistleblower demonstrates that the company tracks the prevalence of “problematic use,” finding that one in eight users report problematic use behaviors. (Lyons, *Facebook reportedly is aware of the level of ‘problematic use’ among its users* (Nov. 2021) *The Verge*, available at <https://www.theverge.com/2021/11/6/22766935/facebook-meta-aware-problematic-use-addiction-wellbeing>.)

Intentional product decisions by social media companies have resulted in products rife with features designed to engage and, in some cases, addict users through well-known psychological mechanisms. (Bhargava, *Ethics of the Attention Economy: The Problem of Social Media Addiction* (2020) *Business Ethics Quarterly*.) First, social media sites often contain variable reward features, colloquially known as “slot machine” features. These features are predicated on the well-established psychological finding that the most effective way of maintaining a behavior is not with a consistent, predictable reward, but with unpredictable rewards that vary in their frequency or magnitude. Variable reward features on social media apps include “pull-to-refresh” affordances and unexpected notifications and animations encouraging a user to engage with new content.

Social media sites often build engagement and, in turn, addict users, through features that capitalize on human desires for social validation and social reciprocity. The encouragement to publicly “like” or favorite another user’s content or message provides a sense of validation while also nudging the receiver of a “like” to “like” content as well, generating a mutually-reinforcing network of engagement. Snapchat’s “snap streaks” feature capitalizes on the desire for social reciprocity by encouraging users to exchange content daily. The feature employs a system of emoji badges that indicate how many days the streak has lasted and when the streak is about to expire. Finally, social media products tend to addict users by omitting natural stopping cues from products. Nearly all social media products contain a near-infinite feed of content with no logical end. Moreover, the content in this feed is often only partly displayed on the screen, which is designed to encourage users to continue to scroll to see the content.

In the fall of 2021, much of the country was enthralled by Frances Haugen’s testimony regarding Meta’s (formerly Facebook) internal research regarding the impact of social media on users, particularly young users. Her testimony claimed that social media companies are part of the reason for the child and teen mental health crisis – and at least Meta was aware of the correlation. Ms. Haugen, a former Facebook employee turned whistleblower, testified, “Facebook’s internal research is aware that there are a variety of problems facing children on Instagram, they know that severe harm is happening to children.”

Numerous studies have indicated a negative correlation between social media and young users’ mental health, particularly among young female users. While it is arguable that, particularly in the years of the pandemic, social media is not the *sole* factor contributing to the marked increase in minors who struggle with mental health, there is undeniably a relationship between the two. According to Meta’s own leaked research more than 13% of teen girls in the U.K. reported their

suicidal thoughts became more frequent after being on Instagram, while another report found 17% of teen girls reported their eating disorders worsened after being on Instagram. (Allyn, *Here are 4 key points from the Facebook whistleblower's testimony on Capitol Hill*, NPR (October 5, 2021) <https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress?msclkid=7af14aaac34511ec8214d27ce1000c62>.)

This bill as currently in print would arguably create a strict liability standard by which social media platforms may be held liable for addicting child users and subsequently exposed to enormous civil penalties. The bill creates a civil cause of action for any parent or guardian of a child user of a social media platform who can demonstrate their child was addicted to the platform. The claimant would be able to recover a number of civil remedies, including up to \$25,000 per violation in civil penalties, as well as actual and punitive damages. Further, a claimant who successfully demonstrates that the platform knew or intended to addict children could subject the platform to an additional \$250,000 civil penalty.

While the bill has undoubtedly identified an issue of significant concern, the Committee has a number of concerns regarding the bill currently in print. First, it is not clear in the current language what action or behavior would trigger a “violation.” It is arguable that any number of facts could constitute a violation, including the point at which a child becomes addicted, every subsequent use after the point of addiction, each individual use of a platform or a specific feature of the platform, or each day a child user engages with a platform. Further, there appears to be language alluding to both a strict liability and negligence standard. Under the doctrine of strict liability, a party is held liable for any harm resulting from their action or product, regardless of their level of fault. In this case, it appears that a social media platform may be held liable for any instance of addicting a child user, regardless of how the addiction arose. However, the bill also references a negligence standard, including the creation of a “duty” for social media platforms to not addict child users. Finally, while well-intentioned, the current structure of both the retroactivity clause and safe harbor provisions are unclear and impracticable.

Amendments to clarify the applicable standard for liability under this bill. In order to address these concerns, the author has proposed a number of substantive and clarifying amendments. First, the author has proposed amendments to use a negligence standard by referencing existing statutory language in Civil Code Section 1714, which imposes liability “not only for the results of [ones] willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.” (Code of Civil Procedure Section 1714 (a).) Applied to the circumstances contemplated by this bill, therefore, a social media platform may be held liable for addicting child users, if the addiction arose as a result of negligent behavior by the social media platform. A parent or guardian would not be able to recover under this bill simply by demonstrating that their child was addicted to a social media platform. Instead, under the amendment, the claimant would also need to demonstrate that the platform’s negligent acts resulted in the addiction, including, for example, a failure to research or investigate potential harmful results of a new feature. The author further proposes to strike the notification provision entirely. This would leave only two potential claims of negligence – either that the platform was negligent in its use or sale of a child user’s data, or negligent in the development or implementation of a design or feature.

These amendments appear to address one of the most significant concerns from the bill’s opponents – that the bill would impose a strict liability standard resulting in unmanageable financial risk for social media companies. The bill as proposed to be amended would now

impose a negligence standard, rather than strict liability, allowing platforms greater ability to defend themselves against potential liability. Further, this amendment is consistent with existing law, and arguably imposes no more heightened risk of liability than these companies already face under existing Section 1714. The proposed amendments to subdivision (b) would read:

~~(b) An operator of a social media platform has a duty not to addict child users. A social media platform's duty not to addict child users includes a duty not to addict child users by any of the following means: *In accordance with Section 1714, a social media platform operator has a duty not to addict child users. A social media platform operator shall be found to have violated their duty if the platform is found to have addicted a child user by either of the following means:*~~

(1) The use or sale of a child user's personal data.

~~(2) *The child user's engagement in the platform's products or services, including through the use of notifications soliciting child users to access those products or services, or permissions or advertising related to those products or services.*~~

~~(3) The development, design, implementation, or maintenance of a design, feature, or affordance.~~

Amendments to clarify the penalties available under this bill. Next, the author proposes various clarifying amendments to the available remedies. Subsection (c)(4) of the bill originally appeared to make the provisions of this bill retroactive, thereby making remedies likewise retroactive. In its original form, this clause is incredibly broad and would arguably immediately impose significant costs on every social media company that operates within the state. In an effort to narrow this provision, the author has proposed adding a safe harbor provision to this clause, whereby every social media company who would be liable for the damages found under this subdivision could avoid any liability for the costs if, by April 1, 2023, they halt development or implementation of the features that they know or should know are addictive to child users. The proposed amendments are as follows:

(4) A social media platform that, before January 1, 2023, developed, designed, implemented, or maintained features that were known, or should have been known, by the platform to be addictive to child users shall be liable for all damages to child users that are, in whole or in part, caused by the platform's features, including, but not limited to, suicide, mental illness, eating disorders, emotional distress, and costs for medical care, including care provided by licensed mental health professionals.

(A) A social media platform shall not be held liable for a violation under this paragraph if, by April 1, 2023, the platform ceases development, design, implementation, or maintenance of features that were known, or should have been known, by the platform to be addictive to child users.

Even with this amendment, this provision is still quite broad. *Therefore, the author may wish to consider further amendments to ensure that the intent of the bill – to encourage social media companies to identify and cease harmful practices – is achievable, rather than overly punitive.*

Amendments to the safe harbor provision. The bill currently in print also provides a safe harbor provision that would allow social media platforms to avoid liability for future violations if

“before engaging in a practice that led to a violation,” the platform both implements a practice of quarterly audits to evaluate their “practices, designs, features, and affordances,” to determine whether they would “have the potential to cause or contribute to the addiction of child users,” *and* upon identifying a feature or practice that does cause or contribute to addiction, corrects the feature or practice within 30 days of identifying it. It appears that the intent of the clause is to avoid penalizing development that could unintentionally or unknowingly addicts child users, which could risk discouraging innovation. However, by conditioning both requirements on satisfying “before engaging in a practice that led to the violation,” the safe harbor provision is rendered virtually useless. A platform that, at any point, implemented a design or feature that risked harm could not benefit from the safe harbor. Therefore, the author proposes amending the language to allow a platform to claim safe harbor if they implement a practice of regular audits to identify harmful practices or features and, within 30 days of identification, remove any potentially harmful practices or features. Under this language, a platform that develops and implements a feature in November may conduct a quarterly audit on December 1st at which the November feature is found to have potentially harmful effects. If the platform subsequently removes the feature by December 31st (30 days after identification), they may successfully avoid liability under this bill. This amendment would arguably be a significant tool to encourage the development of a culture within the industry that prioritizes the health of their users. The proposed amendments read:

(d) An operator of a social media platform shall not be subject to a civil penalty pursuant to subdivision (c) if, ~~*before engaging in a practice that led to that violation,*~~ the operator did both of the following:

(1) Instituted and maintained 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.

(2) Corrected, within 30 days of the completion of an audit described in paragraph (1), any practice, design, feature, or affordance discovered by the audit to present more than a de minimis risk of violating this section.

Technical and clarifying amendments. In addition to the substantive amendments detailed above, the author proposes various technical and clarifying amendments throughout the bill. First, the author proposes to strike “per calendar year” from both subparagraph (c)(1)(B) and paragraph (c)(3). Because there is not a schedule of penalties designed to increase with each violation within a given year, this language is unnecessary. The relevant paragraphs would now read:

(B) A civil penalty of up to twenty-five thousand dollars (\$25,000) per violation ~~*per calendar year.*~~

(3) (A) A knowing or willful violation of this section shall subject the violator to an additional civil penalty not to exceed two hundred fifty thousand dollars (\$250,000) per violation ~~*per calendar year.*~~

Further, the language under existing paragraph (c)(2) appears to have been intended as a rebuttable presumption. However, because the author is proposing to impose a negligence standard that language would arguably allow a respondent to disprove an established element of

the claim in a manner that is inconsistent with existing doctrines of tort law, the author proposes to strike that paragraph in its entirety.

Finally, the current definition of “child user” found in paragraph (a)(3) could arguably include children who are 17 years old plus one day. In order to avoid unnecessary confusion, the author proposes to amend that section to define child users as any person who is younger than 18. The author proposes the following amendment:

(3) “Child user” means a person who uses a social media platform and is *younger than 18*.
~~not older than 17 years of age.~~

Section 230 of the Communications Decency Act. The opposition has posited that the bill as currently in print is invalid on both constitutional and federal preemption grounds. Specifically, they state:

It is in many ways similar to regulations state and local governments have attempted to enact to protect minors from effects of playing violent video games. Such laws have repeatedly been found unconstitutional. [...] The bill directly interferes with expressive rights of both the minors who will be banned from social media services and the service providers themselves. [...] Children have First Amendment rights to both 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.

To bolster its argument, the opposition cites numerous court decisions in other jurisdictions. While tangentially related, these jurisdictions have not issued controlling case law on the validity of California law.

What the Committee finds more convincing is the decision issued by the Ninth Circuit Court of Appeals in *Lemmon v. Snap, Inc.* In this matter, Snap attempted to argue that the Communications Decency Act immunized them from liability in a negligent design lawsuit, brought by parents whose children were killed in a car accident that the parents claim was a result of Snap’s negligent design of a new feature. (*Lemmon v. Snap, Inc.* (2021) 995 F.3d 1085.) In support of their position, Snap argued that Section 230 of the Communications Decency Act shielded them from liability for the publication of third party materials. (*Id.* at pp. 1090 – 1091.) The Ninth Circuit applied the three-pronged test set forth by *Barnes v. Yahoo! Inc.* (2009) 570 F.3d 1096, which held that a company is immunized if it is 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. (*Id.* at p. 1091) The court ultimately decided against Snap “because the Parents’ claim turns on Snap’s design of Snapchat.” (*Id.* at p. 1092).

The bill currently in print would arguably fall under the same analysis as the parents’ litigation in *Lemmon*, as it focuses on social media platforms’ internal manipulation of data and design, rather than third-party content. Further, the proposed amendments significantly narrow the scope of the bill, not only making it more closely aligned with the Ninth Circuit’s decision in *Lemmon*, but also further protecting it from a claim of unconstitutionality. Finally, nothing in the bill suggests a limit on child users’ ability to receive content. Any content that is otherwise available for consumption for child users would continue to be available to them. What this bill addresses is

the strategies or tools used by social media platforms to encourage use of their products that may ultimately cause significant harm to minors.

ARGUMENTS IN SUPPORT: AB 2408 is sponsored by CommonSense Media and the Children’s Advocacy Institute at the University of San Diego. It is supported by a coalition of legal, child, and consumer advocate organizations. The supporters make comparisons between social media and tobacco companies, and claim a need for corresponding regulation of marketing practices. Additionally, supporters reference the marked increase of mental health struggles among young users of social media and a corresponding need for accountability measures as the basis for this bill. The Children’s Advocacy Institute writes:

Nobody seriously contests that we are in an unprecedented teen and youth mental crisis. Suicides, self-harm, major depression are spiking in ways never before seen, especially among teen girls. An entire generation of future American citizens is at-risk.

We all claim that children are our top priority. If so, all doubts must be resolved in favor of urgently putting out the mental health fire that is currently engulfing our children.

[...]

[A]side from bill’s definitions that seek to exempt the overwhelming majority of companies from its reach and a safe harbor permitting companies to escape civil penalties if they discover addictions and stop them, the rest of AB 2408 is simply about how to motivate these companies of unimaginable wealth to cease doing something that is undeniably profitable: obtain customers through addiction rather than freely choosing a quality product.

Our children are hurting; millions of them, daily. They and their parents are no match for the wealth of some of the world’s biggest corporations armed with teams of neuroscientists. Parental controls? That isn’t a practical or moral answer. Nobody would say that cigarette companies should be free to sell and market cigarettes to children if they gave parents free nicotine patches. Stopping the addiction in the first place is the moral and practical thing to do.

Further, theJustice2Jobs Coalition states in support:

These “severe harms” being knowingly inflicted on millions of children by one of the nation’s wealthiest companies hits children of color particularly hard. The unhealthy content children are kept exposed to on social media through persuasive designs that addict them includes a heavy dose of food marketing for an unhealthy diet. A 2020 study by researchers at the Rudd Center for Food Policy and Obesity found that 70% of adolescents reported engaging with food or beverage brands on social media, with at least half engaging with fast food brands and sugary drink products.

Disturbingly, the Rudd researchers reported, “Greater social media engagement with unhealthy food brands by non-Hispanic Black and less-acculturated Hispanic adolescents also raises concerns due to diet-related health disparities affecting communities of color. All of this is quite disturbing considering that the latest data from the National Health and Nutrition Examination Survey (NHANES) demonstrates skyrocketing obesity, especially in kids of color, as while 16% of non-Hispanic white teens are obese, 28% of non-Hispanic black teens and 30.5% of Mexican-American teens are obese.

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. (Footnote omitted.)

ARGUMENTS IN OPPOSITION: TechNet, NetChoice, the California Chamber of Commerce, and the Chamber of Progress oppose AB 2408, arguing that it would impose unmanageable civil liability on social media platforms in California, and additionally claim that the bill is unconstitutional. In particular, TechNet claims “[t]he bill directly interferes with expressive rights of both the minors who will be banned from social media services and the service providers themselves,” and that “[d]ue to its unprecedented civil liability and enforcement provisions, AB 2408 would make social media unavailable to adolescents in California.” They further claim:

There is no social media company let alone any business that could tolerate that legal risk, especially considering how much this bill puts the thumb on the scales of justice for plaintiffs. **In response, social media companies and online web services would have no choice but to cease operations for kids under 18 and would institute stringent age-verification in order to ensure that adolescents did not use their sites.** Kids under 18 would be shut out of one of their few solaces during the COVID-19 pandemic. When schools were shut down and they could no longer interact with their friends and peers in person, they used social media to maintain connections and a sense of normalcy and belonging. AB 2408 would ensure that kids under 18 would no longer have an online community to turn to.”

Further, Chamber of Progress states in opposition:

One of our organization’s top priorities is to promote safe and healthy online communities – and we know this committee shares that goal. Social media, like many technologies, can be used for good or for ill, and **many leading services have taken steps to promote kids’ positive use of their services.** For example:

- YouTube Kids provides a curated experience for younger kids, using a combination of algorithms and manual curation to make sure it only shows child-appropriate videos.
- Last year Instagram announced that it would roll out new settings that give teens and parents more control over upsetting content. Instagram today steers teens who are searching for disordered eating topics towards helpful support resources.
- Google’s Safe Search gives parents the ability to control some of the content that kids and teens see – including filtering out explicit results like pornography, violence, and gore.
- Twitter announced Safety Mode, which temporarily blocks accounts for seven days for using potentially harmful language — such as insults or hateful remarks — or sending repetitive and uninvited replies or mentions.

These services recognize their responsibility in promoting healthy content, and positive experiences for younger users – and they have taken these steps and more to support that commitment.

While this legislation is well intentioned, it could actually worsen the experience of kids online, by *threatening access to important support networks; limiting access to content that is important for kids' health and well-being; and driving kids to services that may lack the safeguards in place on covered services.*

Pending similar or related legislation. AB 2273 (Wicks, 2022) would establish the California Age-Appropriate Design Code Act which generally would require businesses that create goods, services, or product features likely to be accessed by children to comply with specified standards. That bill is currently in Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Children's Advocacy Institute (sponsor)
 #safesocial
 Becca Schmill Foundation
 Center for Digital Democracy
 Center for Humane Technology
 Common Sense
 Common Sense Media
 Consumer Attorneys of California
 Consumer Federation of California
 Consumer Watchdog
 David John Shawver, Mayor of Stanton
 Defending the Early Years
 Digital Well-being Lab
 Digital Wellness Institute
 Do Curious Inc.
 Eating Disorders Coalition
 Exposure Labs, Creators of The Social Dilemma
 Fairplay
 Fred Whitaker, Chair of Orange County Republican Party
 Geo Listening
 Half the Story
 Internet Accountability Project
 Justice2Jobs Coalition
 Lookup.live
 Lookup.live & Half the Story Petition
 Lynwood Unified School District
 Media Education Foundation
 National Association of Social Workers, California Chapter
 Organization for Social Media Safety
 Parent Coalition for Student Privacy
 Parents Television and Media Council
 Parents Together Action
 Project Heal
 Public Health Advocates
 REDC Consortium

Stop Predatory Gambling & the Campaign for Gambling-free Kids
Teen Therapy Center
Teens 4 Teens Help
Truce - Teachers Resisting Unhealthy Children's Entertainment
University of San Diego, School of Law
250 Individuals

Opposition

California Chamber of Commerce
Chamber of Progress
NetChoice
TechNet

Analysis Prepared by: Manuela Boucher-de la Cadena / JUD. / (916) 319-2334