

PROTECTING KIDS ONLINE: CHALLENGES & OPPORTUNITIES IN A DIGITAL WORLD

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BACKGROUND PAPER

I. Background

On February 8, 2022, United States Surgeon General Vivek Murthy testified before the United States Senate Committee on Finance regarding the crisis of deteriorating mental health among the nation’s youth, which he dubbed a “crisis of loneliness and hopelessness.”¹ Murthy’s testimony identified several factors contributing to the uniquely difficult circumstances affecting the emotional, psychological, and social wellbeing of young people today, beginning with their unprecedented relationship with technology. According to Murthy:

The recent ubiquity of technology platforms, especially social media platforms, has had harmful effects on many children. Though undoubtedly a benefit to our lives in important ways, these platforms have also exacerbated feelings of isolation and futility for some youth. They’ve reduced time for positive in-person activities, pitted kids against each other, reinforced negative behaviors like bullying and exclusion, impeded healthy habits, and undermined the safe and supportive environments kids need to thrive.

This increase in social media use has also contributed to a bombardment of messages that undermine this generation’s sense of self-worth – messages that tell our kids with greater frequency and volume than ever before that they’re not good looking enough, not popular enough, not smart enough, not rich enough.²

In the U.S. Surgeon General’s Advisory on the topic entitled “Protecting Youth Mental Health,” however, Murthy offered some qualification of this indictment alongside further evidence of its severity. The Advisory noted:

Importantly, the impact of technology almost certainly varies from person to person, and it also matters what technology is being used and how. [Citation] So, even if technology doesn’t harm young people on average, certain kinds of online activities likely do harm some young people. For example, some research has linked “passive” social media use (such as scrolling through posts and auto-play video) to declines in wellbeing (versus more “active” use such as commenting on posts or recording videos). [Citation]

¹ Vivek H. Murthy, Testimony before United States Senate Committee on Finance, Feb. 8, 2022.

² *Id.*

There can also be benefits to certain online activities such as connecting meaningfully with friends and family, learning a new skill, or accessing health care, and these also vary from person to person. [Citation] For example, LGBTQ+ young people may be more vulnerable than other young people to cyberbullying but also more likely to consider social media important for feeling less alone, expressing themselves, finding inspiration, and getting support. [Citations]³

Together, these statements highlight the complexity of resolving issues related to the online harms facing today's youth. The breadth of content online is vast and diverse, and the circumstances and conditions of internet use can vary substantially between children, leading to both positive and negative outcomes. The internet has undeniable utility for young people to explore new ideas and interests, develop practical skills, and stay connected with family and friends. At the same time, online media have the potential to amplify harms associated with traditional media, and to present novel threats to the wellbeing of children. The majority of adolescents consider social media to contribute positively to their lives,⁴ but a growing body of academic literature documents profound socio-emotional and health-related harms associated with increased internet use.

While these issues predate the COVID-19 pandemic, public health measures taken to combat the virus have exacerbated many of these harms. In addition to the toll imposed on youth mental health as a result of prolonged stress and social isolation, the COVID-19 pandemic dramatically increased screen time for children. Most, if not all, academic and social activities moved online, and screen time unrelated to school more than doubled for American teenagers, from 3.8 to 7.7 hours per day.⁵ 72% of parents of children in grades K-12 said their kids are spending more time on screens compared to pre-pandemic, and nearly 40% of those parents said their rules moderating their children's screen time have become less strict.⁶ In a 2020 survey, 81% of 14-22 year olds indicated "daily" or "almost constant" use of social media.⁷

Internet use has become a ubiquitous and essential endeavor for children and adults alike – 90% of U.S. adults say the internet has been *essential* or *important* for them personally during the pandemic⁸ – but the implications of the internet's growing role in society are most pronounced for children. As a 2021 UNICEF/Gallup report surveying young people from around the globe to explore "what it means to be a child in the 21st century" points out:

³ Vivek H. Murthy, "Protecting Youth Mental Health: The U.S. Surgeon General's Advisory," U.S. Dept. of Health & Human Services, 2021, p. 25.

⁴ Anderson M & Jingjing Jiang, "Teens and their experiences on social media," *Pew Research Center*, Nov. 28, 2018, <https://www.pewresearch.org/internet/2018/11/28/teens-and-their-experiences-on-social-media/>.

⁵ Nagata JM, et al., "Screen Time Use Among US Adolescents During the COVID-19 Pandemic: Findings From the Adolescent Brain Cognitive Development (ABCD) Study," *JAMA Pediatr.* 2022;176(1):94-96, doi:10.1001/jamapediatrics.2021.4334, Nov. 1, 2021.

⁶ McClain C, et al., "The Internet and the Pandemic," *Pew Research Center*, Sep. 1, 2021, <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/>.

⁷ Rideout V, et al., "Coping with COVID-19: How young people use digital media to manage their mental health," *Common Sense and Hopelab*, [https:// www.common sense media.org/sites/default/files/uploads/ research/2021-coping-with-covid19-full-report.pdf](https://www.common sense media.org/sites/default/files/uploads/research/2021-coping-with-covid19-full-report.pdf).

⁸ *Supra*, fn. 5.

More than any other issue the survey covers, the deepest divide between young and old relates to digital technology. A generational gap exists not only in the use of digital technologies, but also in perspectives about its benefits for, and risks to, children.

In terms of usage, the generational gap is yawning, and young people are far more likely than those over 40 years old to be online every day. Across 21 countries surveyed, a median of 77 per cent of young people say they use the internet daily versus just 52 per cent of older people. [...] In every country, young people are at least 10 percentage points more likely than older people to use online sources for information, and in most countries, the difference is 30 percentage points or more.⁹

Extensive surveys of youth across the globe also highlight significant differences in perception of internet media between younger and older users, including disparate relative evaluation of the respective risks and benefits. A 2017 collaboration between Western Sydney University, UNICEF, and RErights systematically solicited the perspectives of young people worldwide on the role of online media in their lives. According to that study, global youth are “overwhelmingly positive about the possibilities [digital technology] affords them.”¹⁰ The youth surveyed also reported a range of concerns regarding their engagement with digital technologies. These included fear of interacting with strangers, accessing inappropriate content, or being exposed to malware or viruses, reliability of access to technology, parental intrusion into their “private” lives online, and insufficiency of their digital literacy skills. The study indicated that “overall, participants report being most concerned – and careful – about their online privacy,” but believe that their parents are primarily worried about “the bad influence the internet might have on [them]; including the possibility that they would develop inappropriate contacts and friendship networks, potentially corrupting them.”¹¹

It is important to note that young people are not a monolith, and even among youth, engagement with, attitudes toward, and impacts of online media can and do vary. Though it seems self-evident that the ways very young children engage with online media, and the consequences of that engagement, differ from online activity by adolescents, most efforts to combat potential harms do not distinguish among these groups. Often, the voices of young people are left out of the discourse surrounding these issues entirely, despite the fact that the dialogue centers on how best to cater to their development and wellbeing. A 2021 Family Online Safety Institute research report focusing on the relationship of Generation Z with online media highlighted the self-aware and nuanced perspectives youth, especially teens and young adults, have concerning their place in the digital world:

[T]here isn’t a simple answer about how Generation Z relates to the digital world. They are simultaneously enthusiastic yet trepidatious, seeing both value and risk in spending time online. They understand that this technology plays a crucial role in their lives, and therefore they may need to live with some risk to their online safety to reap the rewards.

⁹ “The Changing Childhood Project: A multigenerational, international survey on 21st century childhood,” *UNICEF, Gallup*, 2021, p. 8.

¹⁰ Third A, et al., “Young and Online: Children’s perspectives on life in the digital age,” *Western Sydney University, UNICEF, RErights*, Dec. 2017, p. 39.

¹¹ *Id.* at pp. 64-65, 67-68.

Growing up with technology (and its role as a necessity) makes them willing (or maybe just resigned) to accept the good with the bad. Gen Z’ers admit to being almost too hooked on technology, and yet their usage still seems to be trending upward.

For Gen Z as a whole, the key purposes of technology and social media center on entertainment, connection, and communication. Within that, there is a lot of variation in behavior and attitudes, which differs dramatically by age, between what teens (ages 13-17) and young adults (ages 18-24) are feeling and doing. Both age groups find social media informative and influential, but teens seem to enjoy it far more, and report feeling happier and more confident while using it. Young adults lean more toward cynicism and criticism, expressing greater social and emotional reservations or negative feelings.¹²

These differences in perspective apply across the spectrum of youth from infancy to young adulthood (with adult perspectives diverging further still), across demographic and socioeconomic categories, and across the spectrum of neurodivergency. Accordingly, when contemplating potential approaches to resolving documented harms facing children online, these varying relationships with technology must be considered.

This hearing seeks to showcase diverse perspectives and approaches regarding the relationship between children and the online world, including those of practitioners and experts who work closely with the youth most affected by the ever-changing digital landscape, and those of advocates and academics dedicated to understanding and improving the complex machinations of the online ecosystem.

II. Challenges of an Increasingly Digital Childhood

The internet in general, and social media in particular, have provided notable benefits for the edification of children. If properly used, digital media can provide venues for identity exploration, peer engagement, and immersive learning experiences, and can improve self-esteem and increase understanding and empathy with respect to otherwise unfamiliar or marginalized cultures and lifestyles. Unfortunately, these benefits emerge alongside well-documented harms to the psychosocial wellbeing of children resulting from certain online products and practices.

The nature and severity of, and indifference to, these harms has been elevated in the public discourse surrounding social media and other online products in part as a result of documents and testimony provided by Frances Haugen, a former lead product manager for Facebook’s division on civic integrity who disclosed a trove of internal documents from the company to the U.S. Securities and Exchange Commission.¹³ Haugen’s documents and testimony portray the extent of Facebook’s knowledge as to its effects on the mental health of children, as well as the company’s efforts to recruit children to their platforms nonetheless. According to the documents disclosed by Haugen, internal studies at Facebook have allegedly confirmed anecdotal accounts that its amplification algorithms, e.g. engagement-based rankings on

¹² “Managing the Narrative: Young People’s Use of Online Safety Tools,” *Family Online Safety Institute*, 2021 Research Report.

¹³ See, e.g., Morris M, Dvoskin E, & Shaban H, “Whistleblower testimony and Facebook Papers trigger lawmaker calls for regulation,” *Washington Post*, Oct. 25, 2021, <https://www.washingtonpost.com/technology/2021/10/25/facebook-papers-live-updates/>.

Instagram, “can lead children from very innocuous topics like health recipes [...] to anorexia promoting content over a very short period of time. [...] So Facebook know that they are leading young users to anorexia content.”¹⁴

Reports compiled within the company also detail the severe harm to body image visited upon teens and young adults, especially women, as a result of social comparison on these platforms.¹⁵ Young, impressionable users are particularly susceptible to the long-term mental and physical health impacts of this type of troublesome content. Additionally, the documents included a study exploring problematic use of Facebook’s platforms, and found that rates of problematic use by age peak with 14 year olds, likely due to underdeveloped self-regulatory capacity. Haugen testified:

Facebook has studied a pattern that they call problematic use, what we might more commonly call addiction. It has a very high bar for what it believes it is. It says you self-identify that you don’t have control over your usage and that it is materially harming your health, your schoolwork, or your physical health. Five to 6% of 14 year olds have the self-awareness to admit both those questions. It is likely that far more than 5-6% of 14 year olds are addicted to Instagram.¹⁶

The submitted documents also included internal reports from Facebook indicating that Instagram makes “body image issues worse for one in three teen girls,” and that “13% of British users and 6% of American users trace their desire to kill themselves to Instagram.” According to Haugen, these negative effects are exacerbated by the inability of most parents to understand and address these unfamiliar problems, and the ensuing isolation that children experience as a result.¹⁷

These revelations underscored the culpability of some social media companies in propagating features detrimental to the wellbeing of youth, and several independent studies corroborate that certain patterns of internet use can be harmful to the mental and physical wellbeing of children. Such problematic patterns of use are often encouraged by intentional design choices that maximize engagement with profit-motivated online services.

Studies identifying associations between the use of online media and symptoms of anxiety and depression postulate various possible mechanisms through which these untoward effects may occur. Negative social comparison can result in negative self-evaluation or anxiety about evaluation by others, especially when comparing one’s own lived experience to the cultivated image presented by others.¹⁸ These comparisons are arguably exacerbated by the pervasiveness of advertising that presents certain physical ideals. Adolescents may also use online media as a distraction from emerging anxiety or other distress, resulting in

¹⁴ Frances Haugen, Testimony before United States Senate Committee on Commerce, Science and Transportation: Subcommittee on Consumer Protection, Product Safety, and Data Security, Oct. 4, 2021.

¹⁵ Wells G, Horwitz J, & Seetharaman D, “The Facebook Files: Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show,” *Wall Street Journal*, Sept. 14, 2021, <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739>.

¹⁶ *Supra*, fn. 14.

¹⁷ *Id.*

¹⁸ Hoge E, Bickham D, & Cantor J, “Digital Media, Anxiety, and Depression in Children,” *Pediatrics*, Vol. 140, No. s2, Nov. 2017, doi: <https://doi.org/10.1542/peds.2016-1758G>, p. S77.

reinforcement of internet-assisted avoidance of emotional experiences.¹⁹ Emotional regulation, i.e. the ability to withstand and cope with strong emotions by experiencing them and regulating them internally, is a skill typically developed during childhood and adolescence. The use of internet escapism as a coping mechanism can be a short-term substitute for the development of healthy emotional regulation skills, stifling the maturation of those skills and leading to more severe symptoms of anxiety and depression in the future. As a 2017 publication in the academic journal *Pediatrics* describes:

Research has shown that individuals with Internet overuse or addiction report using it to avoid negative emotions, such as anxiety and depression. [Citations] Although no studies showing causal relationships yet exist, problematic Internet use is associated with having greater difficulties in emotion regulation, [citation] and depression symptoms predict an increase in the use of the Internet for mood regulation, which “seems to act as a dysfunctional regulator of emotional distress.” [Citation]²⁰

Internet escapism as an avoidance behavior can also worsen symptoms of social anxiety disorder, a condition that substantially increases the risk for substance abuse and suicide. For those vulnerable to social anxiety disorder, the opportunity to “substitute digital media for interpersonal communication to avoid feared situations may become cyclically reinforced over time, making the person even more avoidant and worsening the symptoms and severity of social anxiety disorder.”²¹

While past research has demonstrated similar effects on wellbeing related to exposure to traditional media, the salience and pervasiveness of online media, coupled with the positive feedback loops created by algorithmic prioritization based on personal information, amplify these effects. A 2020 policy statement published by the American Academy of Pediatrics explains:

[M]ost research on children’s understanding of advertising involves television and print ads only, but newer forms of advertising found in mobile and interactive media and smart technologies, often powered by personal data, are more difficult to identify. They do not necessarily occur in a predictable manner and are often integrated into the content. [Citation] Advertising may also be linked to rewards or be embedded in trusted social networks or personalized digital platforms, which may undermine children’s abilities to identify or critically think about advertising messages. Regulations on television advertising [citation] have not yet been updated for the modern digital environment. [...]

The nature of media used by children and teenagers has changed dramatically in the past decade, and children now spend more time on the Internet, social media, user-created content, video games, mobile applications (apps), virtual or augmented reality, virtual assistants, and Internet-connected toys. The Internet allows advertisers to contact, track, and influence users, as guided by behavioral data collection; a user’s digital trail of location, activities, in-app behavior, likes, and dislikes contributes to a digital profile

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Id.* at p. S78.

shared among many companies that can be used to make advertising messages more effective.²²

Studies discussed in the aforementioned policy statement indicate that children are particularly susceptible to this type of advertising. Children under the age of 12 on average exhibit a diminished capacity to understand and identify the persuasive intent of advertisements,²³ and identifying persuasive intent is further complicated by the blurring of lines between personal and commercial content by modern social media. With the emergence of so-called “influencers,” user-generated content often involves commercial and marketing messages. Unboxing and toy-play videos and influencer reviews of products common on video-streaming services are often commercially sponsored, but are far more difficult than traditional advertising to identify as commercial content. Much of this child-directed influencer marketing, which is not generally disclosed as advertising, would not be allowed on children’s television under existing law precisely because it is harder for children to identify and resist – “host selling,” or the use of stars of television programs in commercials airing during that program, is prohibited under federal law.²⁴

Data collection for targeting advertisements is ubiquitous, and school-aged children up to teenagers do not fully comprehend the complex ways in which digital data are collected, analyzed, and used for commercial purposes. The policy statement elaborates on this complexity, and the particular susceptibility of youth to exploitation of their personal information for commercial use:

Data collection for commercial purposes includes use of cookies in a user’s browser, which record and follow Web page history; the collection of posts, likes, purchases, and viewing history by apps such as Facebook and Instagram or search engines such as Google [citation]; and collection of data via apps granted permission to track device data, such as location or contacts. Software mines such data from user accounts, devices, and virtual assistants and often shares data with third-party companies to develop a profile of the user, which informs the delivery of targeted ads. [Citation] [...] User data can be aggregated and stored, sold to third parties, and used to infer personal characteristics, such as sexual orientation or health problems.[Citation] [...]

[S]tudies suggest that teenagers have a more interpersonal, and less technical, conceptualization of privacy, so they may not be as aware of the ramifications of sharing data with governments or corporations compared with sharing private information with friends or parents. Young children are more trusting of privacy-invasive technologies, such as location trackers, [citation] likely because of their convenience.²⁵

Targeted content can also prey on the particular interests, insecurities, and vulnerabilities of young users to either increase the effectiveness of advertisements, or to increase engagement with the medium in order to maximize exposure to advertisements. Engagement-centered profit incentives resulting from ad-based business models tend to encourage amplification of

²² Redesky J, et al., “Digital Advertising to Children,” AAP Council on Communication and Media, *Pediatrics*, Vol. 146, No. 1, July 2020, doi: <https://doi.org/10.1542/peds.2020-1681>, p. 2.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Id.* at p. 3.

extreme and emotionally charged content, including the toxic content most harmful to the psychosocial wellbeing of users. With respect to Facebook, Haugen’s testimony and accompanying documents revealed that beginning in 2017, Facebook’s algorithm gave emoji reactions such as “angry” five times the weight of “likes” in prioritizing content in users’ feeds, and Facebook’s data scientists confirmed that “angry,” “wow,” and “haha” emoji reactions occurred more frequently on toxic content and misinformation.²⁶ As the aforementioned policy statement explains, “previous online behaviors shape what is delivered to users via news, notifications, and social media feeds, creating a filter bubble in which all input, unbeknownst to users, is tailored to their interests and creates false norms that can undermine healthy behavior.”²⁷

Though the harms of digital technology are substantial, they are not insurmountable, and are particular to certain types of content, patterns of internet use, and design features. Adequately addressing online media that are problematic to the wellbeing of young people could accordingly allow children to utilize the considerable advantages online media provide over traditional media without endangering their mental and physical health.

III. Laws Pertaining to Children Online

Over the past several decades, the United States has taken several steps to mitigate the potential harms of traditional media, especially as they affect children. For instance, the broadcast of children's television programming stations in the United States is regulated by the Federal Communications Commission (FCC), under regulations colloquially referred to as the Children's Television Act. Since 1997, television stations have been required to broadcast at least three hours per week of programs that are specifically designed to meet the educational and informative needs of children aged 16 and younger. There are also regulations on advertising in broadcast and cable television programming targeting children 12 and younger, including limits on ad time, and prohibitions on advertising of products related to the program currently airing.

As the internet has become more accessible and attractive to children, the government has similarly created laws and regulations to protect children online. Nonetheless, the legal framework protecting kids online is still in its infancy and has struggled to keep pace with advances in technology and marketing. Enacted in 1998, the federal Child’s Online Privacy Protection Act of 1998 (COPPA), requires the Federal Trade Commission (FTC) to issue and enforce a rule (the Rule) concerning children’s online privacy. The FTC notes that:

The primary goal of COPPA and the Rule is to place parents in control over what information is collected from their young children online. The Rule was designed to protect children under age 13 while accounting for the dynamic nature of the internet. The Rule applies to operators of commercial websites and online services directed to children under 13 that collect, use, or disclose personal information from children, and operators of

²⁶ Merrill JB & Oremus W, “Five points for anger, one for a ‘like’: How Facebook’s formula fostered rage and misinformation,” *Washington Post*, Oct. 26, 2021, <https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/>.

²⁷ *Supra*, fn. 25.

general audience websites or online services with actual knowledge that they are collecting, using, or disclosing personal information from children under 13.²⁸

Provisions of the Rule include requirements that the operator of a website or online service directed to children do all of the following: provide notice of what information it collects from children, how it uses such information, and its disclosure practices; obtain verifiable parental consent prior to any collection, use, or disclosure of personal information from children; provide a reasonable means for a parent to review the personal information collected from a child and refuse to permit its further use or maintenance; not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children. (15 U.S.C. Sec. 6502.)

In an effort to further protect minors online, California subsequently passed SB 568 (Steinberg, Ch. 336, Stats. 2013), known as Privacy Rights for California Minors in the Digital World, which prohibits the operator of an internet website or other online service from marketing or advertising a product or service to a minor, or compiling personal information to market those products or services, if the minor cannot legally purchase the product or participate in the service in California. This prohibition only applies to an operator that has actual knowledge that a minor is using its online service or whose site service is directed to minors. That bill also permits a minor to remove content or information posted to a website or service, as specified. (Bus. & Prof. Code Secs. 22580 and 22581.)

In subsequent years, California passed several additional laws intended to protect children from invasions of privacy and predatory advertising. The Student Online Personal Information Protection Act (SOPIPA; Steinberg, Ch. 839, Stats. 2014) prohibits an operator of a website, online service, online application, or mobile application that is used primarily for K-12 school purposes *and* was designed and marketed for K-12 school purposes from knowingly engaging in various activities concerning the targeting of advertising to K-12 students. These include: engaging in targeting advertising on the operator's site or service, or targeting advertising on another site or service when the targeting is based on information that the operator has acquired because of the use of the operator's site or service; using information created or gathered by the operator's site or service to amass a profile about a K-12 student except in furtherance of K-12 school purposes; selling a student's information; or disclosing certain information about a student except under specified circumstances. SOPIPA also requires such an operator to implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the information from unauthorized access, destruction, use, modification, or disclosure, and to delete a student's information if the school or district requests deletion of data under the control of the school or district. (Bus. & Prof. Code Sec. 22584.) Two years later, AB 2799 (Chau, Ch. 620, Stats. 2016), the Early Learning Personal Information Protection Act (ELPIPA), expanded these protections to include children enrolled in preschool or prekindergarten courses of instruction. (Bus. & Prof. Code Sec. 22586.)

²⁸ FTC: Frequently Asked Questions about the Children's Online Privacy Protection Rule, <http://www.ftc.gov/privacy/coppafaqs.shtml>, [as of Apr. 2, 2021].)

In 2018, the California Legislature passed AB 375 (Chau, Ch. 55, Stats. 2018), the California Consumer Privacy Act of 2018, which provides various rights to consumers related to the sale of their personal information along with certain more robust protections for protecting the personal information of children. (Civ. Code Sec. 1798.100, et seq.) The CCPA prohibits any business, as defined, from selling the personal information of minors 16 years of age and under without prior affirmative consent to the sale of the information. For minors between the ages of 13 and 16, the minor can independently opt-in to the sale of their personal information under CCPA, whereas minors under 13 years of age require the consent of a parent or guardian to opt-in to the sale of the minor's information. (Civ. Code Sec. 1798.120.)

Notably, SB 568 (Steinberg, 2013) faced some opposition due to the bill's limitation that a website must be directed to minors for the provisions of the bill to apply. SB 568 provided that a site or service is "directed to minors" if it is "created for the purpose of reaching an audience that is *predominantly* composed of minors, *and* is not intended for a more general audience comprised of adults." (Emphasis added.) The definition adds that a site or service would not be deemed to be "directed at minors" merely because it contained links to sites or services that were directed to minors. Similarly, SOPIPA and ELPIPA apply only if the operator of the website or service has *actual knowledge* that the site or service is used *primarily* for K-12 or preschool/pre-K purposes, respectively, *and* if the site or service was designed and marketed for K-12 or preschool/pre-K purposes.

Because of the way social media platforms in particular collect, use, and sell data, the passage of COPPA, SB 568, CCPA, and similar laws have resulted in many social media platforms prohibiting children under 13 years of age from creating profiles or otherwise joining those platforms. Facebook and Instagram, for example, both require that a user be at least 13 years of age before registering for an account. While Facebook contends that users frequently lie about their ages and are removed if discovered, however, internal research from Facebook seems to indicate passive knowledge that a substantial contingent of users are under the required age. According to Francis Haugen's congressional testimony

There are reports within Facebook that show cohort analyses where they examine at what ages do people join Facebook and Instagram. [...] When Facebook does cohort analyses and looks back retrospectively, it discovers things like up to 10-15% of even 10 year olds in a given cohort may be on Facebook or Instagram. [...] I want to emphasize how vital it is that Facebook should have to publish the mechanisms by which it tries to detect these children because they are on the platform in far greater numbers than anyone is aware. [...] I am aware that Facebook is doing research on children under the age of 13 [...].²⁹

In addition, despite nominal prohibitions on their use of these platforms, Facebook allegedly actively markets to children under the age of 13, either to engage with these platforms or other platforms designed to acclimate young children to social media. Haugen testified:

Facebook's internal documents talk about the importance of getting younger users, for example, tweens, onto Instagram, like Instagram Kids, because they know that children bring their parents online and things like that. And so they understand the value of younger users for the long term success of Facebook. [...] Facebook actively markets to children or

²⁹ *Supra*, fn. 14.

markets to children under the age of 18 to get on Instagram and definitely targets children as young as eight to be on Messenger Kids.³⁰

Still, legally speaking, it is difficult to hold such actors to account under existing law. COPPA does not apply if the website or service is considered to be targeted to a general audience, and SOPIPA and ELPIPA's actual knowledge requirements leave significant space for plausible deniability, so long as the age of users has not been specifically verified.

IV. Addressing the Harms of Online Media Faced by Children

In his testimony before the United States Senate Committee on Finance, Surgeon General Murthy argued that the first steps to mitigating the harms facing children online must be both proactive and post-hoc, including contemplating effects on children in the design of online media and rigorously investigating the real effects on public health after the fact. As Dr. Murthy described:

[W]e need to better understand the impact that technology and social media has on mental health. At a minimum, if technology companies are going to continue to conduct a massive, national experiment on our kids, then public health experts and the public at large must be the ones to analyze the data, to draw the conclusions, and draft the recommendations – not the companies alone. That's how we give parents and caregivers the ability to make informed choices about their kids' use of technology. We should also act to ensure that these platforms are built to help and not harm the mental health of our youth, and are designed in an age appropriate way, with the health and wellbeing of all users, especially younger users, coming before profit and scale.³¹

These sentiments were further elaborated by President Biden in his March 1, 2022 State of the Union address, in which he argued:

[W]e must hold social media platforms accountable for the national experiment they're conducting on our children for profit. It's time to strengthen privacy protections, ban targeted advertising to children, demand tech companies stop collecting personal data on our children.³²

In pursuit of these objectives, several bills have been proposed in Congress seeking to strengthen protections for the privacy and safety of children online. Approaches proposed at the federal level include: banning and regulating “damaging design features, harmful content, and manipulative marketing” including certain targeted advertising activities; prohibiting targeted marketing directed at children under the age of 13; expanding the age range for which collecting personal information requires parental consent under COPPA; requiring operators to allow parents and minors to erase personal information; requiring operators to assess the impacts of design choices on children prior to deploying features; expanding or funding the development of educational curricula pertaining to skills and competencies essential to

³⁰ *Ibid.*

³¹ *Supra*, fn. 1.

³² Joseph Biden, 2022 State of the Union Address, Mar. 1, 2022, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.

healthy engagement with online media; and prohibiting the use of a student’s personal information for the development of commercial products without parental consent.

At the state level, the political appetite for addressing the foremost concerns facing children online is similarly strong, yet California has seen only incremental success at implementing guardrails to protect from online harms. In part, this inaction is a product of the complexity of the issue and the elusiveness of simple solutions, but many conceivable solutions at the state level are also constrained by federal laws that generally limit state authority.

Section 230 of the federal Communications Decency Act of 1996 (CDA), for instance, 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,” and affords broad protection from civil liability for the good faith content moderation decisions of interactive computer services. (47 U.S.C. Sec. 230(c)(1) and (2).) Though Section 230 was originally passed in response to judicial inconsistency with respect to the liability of internet service providers (ISPs) under statutes pertaining to “publishers” of content created by others, it has since been interpreted to confer operators of social media platforms and other online services with broad immunity from liability for content posted on their platforms by others.

Section 230 also indicates that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section,” but further provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (47 U.S.C. Sec. 230(e)(3).) The latter provision has generally been interpreted to expressly preempt any state law that has the effect of treating a social media or other online platform as the publisher of information posted by other users, including prescriptive requirements relating to content moderation. This is consistent with the law’s original intent, which was to ensure that internet platforms facilitating the sharing of content can do so without considerable risk of liability in the event that content is not meticulously policed. As the Electronic Frontier Foundation points out in an issue brief relating to Section 230 protections:

Given the sheer size of user-generated websites (for example, Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute), it would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. Rather than face potential liability for their users’ actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do online.³³

A side effect of this broad indemnification, however, is that state-level efforts to address harms related to the content on online platforms have often been frustrated by issues of federal preemption. Absent federal action to modify or qualify Section 230 protections, the slate of available regulatory solutions for threats to the safety and wellbeing of children online is limited to those which do not rely on operators of online services policing user-generated content, a significant component of some of the most commonly-used online services. It

³³ “CDA 230: The most important law protecting internet speech,” *Electronic Frontier Foundation*, <https://www.eff.org/issues/cda230>, [as of Apr. 4, 2021].

should be noted that Section 230 does not protect online services from liability for content they themselves produce, which can include product design.

Despite these constraints, the Committees on Privacy & Consumer Protection and Arts, Entertainment, Sports, Tourism, & Internet Media expect to consider an array of bills proposing unique approaches to resolving many of the concerns discussed herein during this legislative session and in the years to come. In conducting this hearing, the Committees aim to educate members of the Legislature and the general public on the intricacies of this critical issue to ensure informed deliberation as California, and the nation at large, continue this robust dialogue as to the role of online media in the lives of children.