Defending Children's Data Privacy: Strategies for the 21st Century

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Children's use of social media has been linked to an overwhelming number of adverse effects on their mental health, privacy, and well-being. There is a general consensus among parents, researchers, and lawmakers that children's online protections must be expanded. However, recent legislative efforts to effect change have been met with consistent failure. Recently, California, Arkansas, and Texas passed new legislation intended to bolster existing protections and expand child privacy online. The Arkansas law and portions of the California and Texas laws do not pass constitutional muster under current case law, and all three federal district courts articulated their inability to permit these proposed protections within First Amendment precedential confines.

The present framework is outdated, unsuitable, and overly narrow for application to today's online context. Assumptions about the internet at the time this case law was developed are counterfactual in 2025. A reconsideration of existing Supreme Court First Amendment precedent to sanction greater regulation of child safety online is critical to setting up an expansive framework in which child protections can be prioritized. Pending the Supreme Court's revision of First Amendment precedent, lawmakers are not without options. Legislators can initiate solutions that are permissible under the existing framework, including cell phone bans in schools, restrictions on access to obscene materials, increased regulations on data collection and sales or the use of dark patterns, and funding programs that educate parents and children about safe online practices. Though assembling a patchwork of narrow regulations this way may be effective, the Supreme Court needs to update its First Amendment framework to make space for policymakers to broadly expand privacy laws and create a robust defense against technology-related harms to minors.

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INTRODUCTION

Faced with pleas to address mounting concerns over youth technology use, policymakers have compared social media use among children to pre-1964 cigarette use.[1] Specifically, they contend children's[2] unsafeguarded access to social media is similar to cigarettes' popularity before the Surgeon General reported their harmful effects in 1964.[3] In contrast with the 47 percent of American adults who smoked cigarettes prior to 1964,[4] however, scholars estimate that among teenagers, 97 percent use the internet daily and 90 percent use social media.[5] In 2022, a study revealed that 38 percent of children between 8 and 12 years old use social media.[6] This is despite social media platform restrictions against users under thirteen years old creating accounts on these platforms.[7] And with social media use by minors being linked to rises in self-harm, suicide, and mental health issues,[8] some argue that "if social media is the new cigarette, legislators have the opportunity to be the new Surgeon General."[9] However, legislators are attempting but failing to effectuate change. Arkansas, Texas, and California recently enacted state laws aimed at enhancing online youth privacy and minimizing harm; but portions of the Texas and California laws and the entire Arkansas law were blocked from enforcement because they were enjoined as unconstitutional violations of the First Amendment.[10] An analysis of these three state statutes and the grounds on which the federal district

1. Catherine Ransom, *"The Pre-1964 Cigarette" of Today: Social Media, Predatory Online Practices, and New Advances in Children's Privacy Regulation*, 24 N.C. J.L. & TECH. 103, 104–05 (2023).

2. Unless otherwise specified, this Note will interchangeably use "minor," "youth," and "child" to refer to individuals under the age of eighteen.

3. Ransom, *supra* note 1.

4. K. Michael Cummings & Robert N. Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 CANCER EPIDEMIOLOLOGY, BIOMARKERS & PREVENTION 32, 32 (2014).

5. EMILY A. VOGELS, RISA GELLES-WATNICK, & NAVID MASSARAT, PEW RSCH. CTR., TEENS, SOCIAL MEDIA AND TECHNOLOGY 2022, at 5 (2022); *Social Media and Teens*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx#:~:text=Social%20media%20plays%20a%20big,not%20including%20time%20for%20homework. *See generally* Press Release, Am. Psych. Ass'n, APA Chief Scientist Outlines Potential Harms, Benefits of Social Media for Kids (Feb. 14, 2023) [hereinafter *APA Press Release*], https://www.apa.org/news/press/releases/2023/02/harms-benefits-social-media-kids (describing the harmful impact social media can have on children).

6. VICTORIA RIDEOUT, ALANNA PEEBLES, SUPREET MANN & MICHAEL B. ROBB, THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS, 2021, at 5 (2022).

7. Anna Myers, *Kids & Social Media*, PEDIATRIC HEALTH CARE ALL., P.A., https://pedialliance.com/socialmediaguide (last visited Dec. 4, 2024).

8. Ransom, *supra* note 1, at 105.

9. *Id.*; *see also* Cal Newport, *Is Social Media More Like Cigarettes or Junk Food?*, NEW YORKER (Jan. 22, 2025), https://www.newyorker.com/culture/infinite-scroll/is-social-media-more-like-cigarettes-or-junk-food; Jennifer Bryant, *The 'Big Shift' Around Children's Privacy*, IAPP (Apr. 25, 2023), https://iapp.org/news/a/the-big-shift-around-childrens-privacy.

10. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 937 (N.D. Cal. 2023); NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024); NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 WL 5660155, at *2 (W.D. Ark. Aug. 31, 2023); Free Speech Coal., Inc. v. Paxton, 689 F. Supp. 3d 373, 382 (W.D. Tex. 2023); Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024) (mem.).

courts struck them down using 1990s precedent, show that existing Supreme Court First Amendment case law stands as the barrier between children and increased protections. The current case law prioritizes adult convenience over the expansion of children's rights and refuses to allow any barriers to online information that could effectively deter child consumption of harmful content. However, under the existing framework, lawmakers are not devoid of solutions. There are several presently permissible strategies that legislators can utilize in patching together a resistance to harms against minors in today's digital world. Legislators can propose narrow laws that ban cell phone use in schools or target specific content such as pornography; increase data collection and sales regulations; restrict the use of dark patterns;[11] or fund organizations or schools to educate parents and children about online safety. But these strategies will only go so far.

Courts are invalidating attempts to update and strengthen child privacy laws in the wake of unprecedented technological advancements. This Note argues that the Supreme Court needs to weigh in on recent cases to effectuate comprehensive and updated child privacy laws. In doing so, the Court must provide a new landscape upon which children's protections can be expanded through enhanced state regulatory efforts. Part I provides an overview of youth technology use, presents the existing First Amendment precedent, and examines the new proposed state laws intended to bolster child privacy online. Part II discusses the federal district courts' reliance on the current, restrictive case law and argues that the Supreme Court needs to update this framework. Part III offers several permissible solutions for legislators to implement while they await a decision from the Supreme Court. The final Part of this Note concludes that as technology continues to evolve, so will issues of child privacy online, creating an urgent need for updated laws.

A. BACKGROUND OF TECHNOLOGY USE BY MINORS

Research reveals that technology offers learning and social development benefits to children by facilitating communication and collaboration, providing opportunities for self-expression and exploration, and increasing access to information, including for self-help and mental health care.[12] Psychological

11. "The concept of a 'dark pattern' is not yet defined in law, although several pieces of legislation touch on the concept. A dark pattern is a deceptive design tactic, used in an online environment that is engineered to subtly manipulate the end user's decision." Leo Moore & Roisin Culligan, *Dark Patterns: Not a New Concept but Will Now Be Heavily Regulated*, WILLIAM FRY (Feb. 9, 2024), https://www.williamfry.com/knowledge/dark-patterns-not-a-new-concept-but-will-now-be-heavily-regulated.

12. A majority of teens have also self-reported that social media helps them feel more accepted, as if they have support during tough times, like they have a place to demonstrate their creativity, and more connected with their friends' lives. U.S. SURGEON GEN. ADVISORY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH 6 (2023); *see also* Thomas D. Grace, Christie Abel & Katie Salen, *Child-Centered Design in the Digital World: Investigating the Implications of the Age-Appropriate Design Code for Interactive Digital Media*, 2023 INTERACTION DESIGN & CHILD. 289, 290; *APA Press Release*, *supra* note 5; MONICA ANDERSON & JINGJING JIANG, PEW RSCH. CTR., TEENS' SOCIAL MEDIA HABITS AND EXPERIENCES 6 (2018).

research also indicates that forming and maintaining online relationships foster a more diverse peer group and give young people a support system during times of stress, especially for youth with marginalized identities.[13]

Despite those benefits, however, the newly identified risks of youth social media use are troubling. Scholars and the American Academy of Child and Adolescent Psychiatry state that risks include exposure to harmful or inappropriate content, dangerous people, and cyberbullying; oversharing of personal information; excessive exposure to advertisements; identity theft; and interference with sleep.[14] One study even estimated that online advertisement companies collect over 72 million pieces of information about one child by age thirteen.[15] Studies also demonstrate that cellphone use during the school day hinders a child's learning.[16] Research into the negative impact of youth online consumption is robust and supports growing parental concern over children's exposure to social media.

To further illustrate these concerns, the U.S. Surgeon General's 2023 Advisory Report on Social Media and Youth Mental Health compiled thirty six studies.[17] The Advisory Report found a consistent relationship between cyberbullying and depression, and that 75 percent of adolescents believe social media sites do a "fair to poor" job addressing harassment.[18] Another study shows technology use is associated with changes in neural brain development, negatively affecting physical characteristics of the brain such as its size.[19] Regardless of the agreed-upon degree of harm this technology is causing to minors, there is a growing consensus that youth protections online need to be expanded.

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13. *APA Press Release*, *supra* note 5.

14. Parents reporting concerns about their children's online activity cite "addiction, sleep loss, anxiety, learning and attention problems, and exposure to violent images." Grace et al., *supra* note 12; *see also Social Media and Teens*, *supra* note 5.

15. Valerie Steeves, *Regulating Children's Privacy: The UK Age Appropriate Design Code and the Pitfalls of the Past*, THE LONDON SCH. OF ECON. & POL. SCI.: PARENTING FOR A DIGIT. FUTURE (June 22, 2022), https://blogs.lse.ac.uk/parenting4digitalfuture/2022/06/22/regulating-privacy.

16. *See infra* Subpart.III.A; *see also* Sara Abrahamsson, *Smartphone Bans, Student Outcomes and Mental Health* 2–3 (NHH Dept. of Econ. Discussion Paper No. 01, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4735240.

17. According to the U.S. Surgeon General's 2023 Advisory, up to 95% of youth ages 13 to 17 report using social media and despite age restrictions, almost 40% of US youth ages 8 to 12 report using it. U.S. SURGEON GEN. ADVISORY, *supra* note 12, at 9.

18. *Id.*

19. According to APA Chief Science Officer Mitch Prinstein, PhD, youths are "biological vulnerability to technology and social media, and their resulting frequent use of these platforms, . . . has the potential to alter youths' neural development." *APA Press Release*, *supra* note 5; *see also* Gary W. Small, Jooyeon Lee, Aaron Kaufman, Jason Jalil, Prabha Siddarth, Himaja Gaddipati, Teena D. Moody & Susan Y. Bookheimer, *Brain Health Consequences of Digital Technology Use*, 22 DIALOGUES IN CLINICAL NEUROSCIENCE 179, 180 (2020) (finding a link between technology use and attention deficit disorders by explaining that because "people are constantly using their technology, they have fewer opportunities to interact offline and allow their brain to rest in its default mode").

The sentiment that children need greater protection from the ills of the internet is nothing new. Similar concerns over internet-harms to children led policymakers to develop the Children's Online Privacy Protection Act (COPPA) in 1998. COPPA applies to children under thirteen years old and imposes requirements on online apps and services, but only on those "directed to children."[20] Even though COPPA creates liability for predatory practices, the primary requirement in COPPA is parental consent, placing the responsibility on parents to regulate their children's online use.[21] COPPA has also been critiqued for being "easy to circumnavigate" by companies that claim children under thirteen years old are not the target of their digital technology.[22] Specifically, critics cite the fact that COPPA predates social media, video-sharing websites, and smartphones.[23] They argue that as technology advances, federal laws cannot keep up.[24]

In light of COPPA's many criticisms, there have been various attempted resolutions.[25] The ineffectiveness of these existing federal protections coupled with unsettling research[26] has sparked action. Advocates in various positions of power have begun pushing aggressively for change. In 2023, President Biden highlighted the need to update child online privacy laws in his State of the Union address.[27] Additionally, a Facebook employee leak alleging the company knew

20. 15 U.S.C. §§ 6501–6506.

21. COPPA is aimed at protecting child privacy and data online through child-centered internet design, and was most recently upheld in 2013. Ransom, *supra* note 1, at 107.

22. Grace et al., *supra* note 12, at 290. For example, Instagram explicitly prohibits children under thirteen from creating accounts, meaning COPPA would not apply; but in reality, there are many users under age thirteen on the social media app and one lawsuit alleges that Instagram is aware of that fact and still collects user data without complying with COPPA. Eva Rothenberg, *Meta Collected Children's Data, Refused to Close Under 13 Instagram Accounts, Court Document Alleges*, CNN (Nov. 26, 2023, 3:12 PM EST), https://www.cnn.com/2023/11/26/business/meta-collecting-data-children-facebook/index.html.

23. *The State of Play–Issue Brief: COPPA 101*, FUTURE OF PRIV. F. (Feb. 2, 2022), https://fpf.org/blog/the-state-of-play-issue-brief-coppa-101.

24. *Id.*

25. Both the FTC and replacement law proposals attempt to address COPPA criticisms. The FTC has updated the COPPA Rule to try to account for "[t]he development of ever more sophisticated targeting practices," and the FTC has stated that "concerns that businesses might engage in harmful conduct" has "led to calls for strengthening children's privacy protections." *Policy Statement of the Federal Trade Commission on Education Technology and the Children's Online Privacy Protection Act*, FTC 1 (May 19, 2022), https://ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Education%20Technology.pdf. The FTC also implemented a rule review in 2019. *What's Going on with the Children's Online Privacy Act (COPPA)?*, OSANO (Apr. 9, 2024), https://www.osano.com/articles/whats-new-coppa. While awaiting updates on COPPA, significant revisions to the law have been proposed. *Id.* COPPA 2.0 would prohibit the collection of personal data from 13 to 16 year old's, ban targeting children in marketing, and permit children to erase their data. *Id.* The Kids Online Safety Act or "KOSA" would default to high privacy for minors and require platforms to prevent and mitigate harm to minors. *Id.*

26. Another study asserted that in 2020, thirty-two percent of teenage girls said that Instagram worsened their body image feelings, while another study reports that social media has caused unrealistic expectations of body image and sources of popularity. Ransom, *supra* note 1, at 125.

27. *Id.* at 108.

their application harmed minors[28] triggered the introduction of several congressional bills addressing children's use of the internet.[29] These proposed bills outline expanded privacy regulations, create provider liability for third-party content, and restrict content that can be accessed by minors.[30] Congress continues to attempt to enact updated legislation that would replace COPPA.[31]

Congress has also acted by identifying companies of particular concern.[32] In April 2024, the House of Representatives passed a bill that would ban TikTok, a popular social media platform, if the company's China-based owner does not sell its stake in the company within the year.[33] Concerns about data and the privacy of TikTok users are cited as motivations for the bill.[34]

Law firms filing class action lawsuits have started to ring alarm bells, too. These suits "focus on both the illegal use of children's data and the repercussions that social media algorithms can have on children's mental health."[35] Over 200 school districts across the country have sued social media platforms, alleging that these companies harm children and cause valuable school resources to be dedicated to social media addiction counseling, social media use and misuse counseling, and cyberbullying mitigation.[36] In 2023, forty-one states sued Meta under COPPA for engaging in a scheme to "maximiz[e] young users' time and attention spent on its Social Media Platforms" by deploying "manipulative [] features to induce young users' compulsive and extended Platform use, while falsely assuring the public that its features were safe and suitable for young users."[37]

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28. At the end of 2021, a former Facebook employee leaked an article outlining the impact of social media on teenage girls, revealing that teenagers attributed new feeling of loneliness (21%), depression (10%), self-harm (9%), or suicidal thoughts (6%) to having started after joining Instagram. *Teen Mental Health Deep Dive*, WALL ST. J. *18 (Sept. 29, 2021), https://s.wsj.net/public/resources/documents/teen-mental-health-deep-dive.pdf.

29. ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 1 (2022).

30. *Id.*

31. "At least three bills could be contenders for replacing COPPA altogether: COPPA 2.0, the Kids Online Safety Act ("KOSA"), and the American Data Privacy and Protection Act ("ADPPA")." Ransom, *supra* note 1, at 110–11.

32. Mary Clare Jalonick & Haleluya Hadero, Associated Press, *Possible U.S. TikTok Ban Clears House Vote, but Don't Expect the App to Go Away Anytime Soon*, PBS (Apr. 20, 2024, 6:11 PM EST), https://www.pbs.org/newshour/politics/possible-u-s-tiktok-ban-clears-house-vote-but-dont-expect-the-app-to-go-away-anytime-soon.

33. *Id.*

34. *Id.*

35. Ransom, *supra* note 1, at 111; *see, e.g.*, Jones v. Google LLC, 56 F.4th 735, 738 (9th Cir. 2022) ("[A]lleging that Google used persistent identifiers to collect data and track their online behavior surreptitiously and without their consent.").

36. Sara Randazzo & Ryan Tracy, *Schools Sue Social-Media Platforms over Alleged Harms to Students*, WALL ST. J. (July 23, 2023, 9:00 AM ET), https://www.wsj.com/articles/schools-sue-social-media-platforms-over-alleged-harms-to-students-ebca91a5.

37. Complaint for Injunctive and Other Relief at 1, *In re* Social Media Adolescent Addiction/ Personal Injury Products Liability Litigation, Nos. 4:23-cv-05448, 4:23-cv-05885, 2024 WL 453297 (N.D. Cal. Oct. 15, 2024).

In attempts to bring this situation back under control, states have taken matters into their own hands by enacting state laws similarly aimed at mitigating harm to minors who use social media.[38] Even though the proposed and enacted laws take slightly different approaches, they share common constitutional concerns under the First Amendment.[39]

In August and September of 2023, three recently enacted state laws in California, Arkansas, and Texas were all temporarily enjoined from enforcement by federal district courts as likely violative of the First Amendment.[40] The California law remains partially enjoined.[41] While blocking part of the California law for its facial violation of the First Amendment, the Ninth Circuit has remanded the case to determine whether the law can be severed to save any remaining sections that do not violate the First Amendment.[42] The Arkansas law remains fully enjoined.[43] The Texas law remains partially enjoined.[44] The Fifth Circuit, reviewing the Texas law, only affirmed the injunction in part and found the law to be more narrowly drawn than laws considered in previous cases.[45] Oral arguments in this case were heard by the Supreme Court in January of 2025, and a decision is expected this summer.[46] While these cases are still under review by various courts, the conclusion is clear: privacy laws aimed at protecting children online have difficulty passing constitutional muster.

In considering the constitutionality of the narrow Texas law, the Supreme Court should take the opportunity to update the existing framework. Within the current First Amendment legal framework, more expansive privacy laws do not and will not pass constitutional muster. Developing judicial orders and opinions demonstrate that lower courts understand the impact that social media and

38. California, Connecticut, Illinois, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Texas, Utah, Virginia, and West Virginia all have proposed variations of the Age Appropriate Design Codes or the "AADC." Jenna Zhang, Lindsey Tonsager, Diana Lee, Madeline Salinas & Priya Leeds, *State, Federal, and Global Developments in Children's Privacy, Q1 2023*, COVINGTON: INSIDE PRIV. (Apr. 2, 2023), https://www.insideprivacy.com/childrens-privacy/state-federal-and-global-developments-in-childrens-privacy-q1-2023; Kate Lucente, *California's Age-Appropriate Design Code Act—and the Looming State Patchwork of Online Child Protection Laws*, DLA PIPER (May 8, 2023), https://www.dlapiper.com/en/insights/publications/2023/05/californias-age-appropriate-design-code-act.

39. Complaint for Declaratory and Injunctive Relief, Free Speech Coal., Inc. v. Colmenero, 689 F. Supp 3d 373 (W.D. Tex. 2023) (No. 23-cv-917) [hereinafter Colmenero Complaint]; Complaint for Declaratory and Injunctive Relief, NetChoice, LLC v. Griffin, No. 23-cv-05105, 2023 WL 5660155 (W.D. Ark. June 29, 2023); Complaint for Declaratory and Injunctive Relief, NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924 (N.D. Cal. 2022) (No. 22-cv-08861) [hereinafter Bonta Complaint].

40. *Bonta*, 692 F. Supp. 3d at 937; *Griffin*, 2023 WL 5660155, at *2; Free Speech Coal., Inc. v. Paxton, 689 F. Supp. 3d 373, 382 (W.D. Tex. 2023).

41. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024).

42. *Id.*

43. *Griffin*, 2023 WL 5660155, at *2.

44. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024) (mem.).

45. *Id.* at 287.

46. Press Release, ACLU, Supreme Court May Decide if Government Can Age-Gate Sexual Expression Online (Jan. 15, 2025, 12:30 PM), https://www.aclu.org/press-releases/supreme-court-may-decide-if-government-can-age-gate-sexual-expression-online.

internet use have on minors, but that they are restricted from enforcing proposed state protections by Supreme Court precedent.[47] To understand the common constitutional issues presented, it is necessary to first review the existing 1990s First Amendment framework. Next, this Note will analyze the three state laws and the legal arguments that either struck down or upheld them. This Note will do so in Subparts I.B and I.C, respectively,[48] to reveal that the laws are not the problem; the precedential landscape is.

B. FIRST AMENDMENT FRAMEWORK DEVELOPED IN THE 1990S

Using existing First Amendment precedent, district courts preliminarily struck down the California, Arkansas, and Texas laws. After being heard on appeal, only part of the California and Texas laws remain enjoined.[49] All three federal district courts reviewing the state laws relied on a variation of the following cases in reasoning that they could not be upheld, either entirely or in part. This controlling framework was developed in the 1990s when the internet was much less expansive and invasive into the everyday lives of families than it is today.

First, in 1989, in *Sable Communications of California v. FCC*, the Supreme Court permitted the prohibition of obscene but not indecent commercial telephone communications, holding that legislation regulating telephone communications violated the First Amendment.[50] The Court distinguished telephone communications from radio broadcasting, which it considered to have a unique nature that justified its increased regulation in *FCC v. Pacifica Foundation*.[51]

Next, in 1997, in *Reno v. ACLU*, the Supreme Court held that a federal statute,[52] enacted to restrict minor consumption of "indecent" and "patently offensive" materials on the internet, violated the First Amendment.[53] The Court reasoned that the internet, in contrast with the radio discussed in *Pacifica*, has not been traditionally regulated and the "'invasive' nature" of radio broadcasting is "not present in the cyberspace," sanctioning restrictions on radio communications but not the internet.[54] Therefore, they determined that, in contrast with a radio station's "special factors" of invasion into the home and a history of regulation, the risk that some minors could be exposed to

47. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 937 (N.D. Cal. 2022); *Griffin*, 2023 WL 5660155, at *2; Free Speech Coal., Inc. v. Paxton, 689 F. Supp. 3d 373, 382 (W.D. Tex. 2023).

48. *Infra* Subparts.I.B–I.C.

49. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024); *Paxton*, 95 F.4th at 267.

50. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989).

51. *Id.* at 127–28; *see* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

52. The Communications Decency Act, 47 U.S.C. § 230.

53. Reno v. ACLU, 521 U.S. 844, 849 (1997).

54. *Id.* at 868.

inappropriate speech online did not outweigh the large amount of speech that would be covered.[55]

In 1999, citing *Sable* and *Reno* to distinguish the radio (discussed in *Pacifica*) from cable television, the Court in *United States v. Playboy Entertainment Group* reasoned that affirmative steps were required to access pornography on cable television—whereas no such steps were required for inappropriate content on the radio.[56] The Court declared that content-based restrictions on displaying pornography during the daytime are unconstitutional and that the government had not shown a "pervasive, nationwide problem justifying its nationwide daytime speech ban."[57] Then in 2004, in *Ashcroft v. ACLU (II)*, the Court held that a statute aimed at protecting minors from sexually explicit material on the internet, Child Online Protection Act (COPA), enacted in response to the issues identified in *Reno*, was again unconstitutional under the First Amendment.[58]

It was upon this late 1990s and early 2000s precedent, which was grounded in the fact that the internet was *not* invasive into American homes, that the Supreme Court and lower courts continued to bolster the barrier to children's online protections in order to preserve convenience for adult users. In *ACLU v. Mukasey*, the Third Circuit expanded upon *Sable*, *Reno*, and *Ashcroft*, invalidating Congress's updated version of COPA again on First Amendment grounds.[59] Relying heavily on binding reasoning in *Ashcroft*, the court said that criminalizing speech harmful to minors is a content-based prohibition on protected speech.[60] Then in *Brown v. Entertainment Merchants Association* in 2011, the Supreme Court began applying this precedent to a more modern context to invalidate violent video game restrictions under the First Amendment.[61] The *Brown* court cited *Playboy*, and the concurrence cited *Sable* and *Reno*, further articulating the dominating role that this 1990s precedent took in shaping the landscape of children's protections when interacting with evolving technology.[62] In *Sorrell v. IMS Health*, the Court applied this precedent to again uphold "that the creation and dissemination of information are speech within the meaning of the First Amendment[,]" explaining that their decision was supported by the strong foundation that these precedents created to require courts to subject these laws to strict scrutiny.[63] At this point, the Court had not yet reconsidered the role of the internet in society and the ways in which its presence and influence in American lives had dramatically increased since that

55. *Id.* at 845, 877–78.
56. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 814–15 (2000).
57. *Id.* at 822–23.
58. Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).
59. ACLU v. Mukasey, 534 F.3d 181, 207 (3d Cir. 2008).
60. *Id.* at 187.
61. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011).
62. *Id.* at 807 (Alito, J., concurring).
63. Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).

foundational 1990s precedent was developed. The prospective review of the California, Arkansas, or Texas law could present the Supreme Court with an opportunity to recognize the impact of today's version of the internet on children's privacy.

C. COURTS ARE USING 1990S PRECEDENT TO BLOCK NEWLY PROPOSED STATE LAWS.

As stated above, three recent state laws were enacted and then preliminarily enjoined under 1990s case law. First, the California state legislature unanimously passed the California Age Appropriate Design Code Act ("CAADCA")[64] to monitor and regulate business practices in an attempt to curtail harm to consumers under the age of eighteen.[65] Next, Arkansas passed the Social Media Safety Act ("S.B. 396") to *block* users under eighteen years from creating social media accounts without parental consent.[66] The California and Arkansas federal district courts had no choice but to preliminarily block the two broadly sweeping privacy laws from going into effect under current Supreme Court First Amendment law. The Arkansas law remains fully enjoined.[67] However, the California law is only partially enjoined while the district court reconsiders the constitutionality and severability of the other parts of the law.[68] Texas adopted a more targeted approach to prevent minors from accessing pornographic websites by introducing a law that mandates these websites to post health warnings, verify users' ages with photo identification, and block access to anyone under eighteen ("H.B. 1181").[69] After the Texas federal district court struck down the law, the Fifth Circuit affirmed that the health warnings are impermissible compelled speech but stated that the age verification requirement is allowed because it narrowly targets obscene material.[70] This differential treatment reveals the narrow confines in which policymakers must attempt to increase children's protections online. By evaluating these three laws and the grounds on which they were upheld or overturned, it becomes clear that no state will be able to make dramatic headway on this issue before the Court steps in. Until the Supreme Court changes this framework to permit expanded regulations online, even where there are incidental burdens on adult users, states will have to follow Texas in taking smaller steps to target harms to minors as well as consider other alternatives to combat the detrimental impact of technology on children.

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64. Natasha Singer, *California Governor Signs Sweeping Children's Online Safety Bill*, N.Y. TIMES (Sept. 15, 2022), https://www.nytimes.com/2022/09/15/business/newsom-california-children-online-safety.html.

65. CAL. CIV. CODE §§ 1798.99.28–1798.99.40 (West 2025).

66. ARK. CODE ANN. § 4-88-1102 (West 2025).

67. NetChoice, LLC v. Griffin, No. 23-cv-05105, 2023 WL 5660155, at *1 (W.D. Ark. June 29, 2023).

68. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024).

69. TEX. CIV. PRAC. & REM. CODE § 129B.002 (West 2025).

70. Free Speech coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024) (mem.).

1. California's Age Appropriate Design Code Invalidated

Frustrated with slow progress at the federal level, California became the first state to take matters into its own hands by proposing an Age Appropriate Design Code to expand and strengthen children's privacy laws.[71] Modeled after its UK counterpart, the CAADCA was the "first-of-its-kind" in the United States,[72] but other states have started to propose similar laws.[73] These Design Codes are policy and regulatory frameworks created to develop standards for interactive technology designers that address parental concerns and existing privacy law loopholes to add protections for children under eighteen.[74] The goals of CAADCA were to ensure that technology companies design their platforms to prioritize privacy and the well-being of children over commercial interests and to give the government power to enforce compliance through the judiciary.[75]

Enacted on August 13, 2022, the CAADCA requires businesses that provide online services likely to be *accessed* by children under eighteen[76] to take affirmative actions as well as refrain from taking certain actions.[77] U.S. businesses not in compliance are fined $2,500 per affected child.[78] Under the CAADCA, qualifying businesses must complete a data protection impact assessment for any content that is likely to be accessed by children and create a risk mitigation plan before offering services to the public.[79] Businesses must also estimate child users' ages "with a reasonable level of certainty" or apply children's data protections to all of their users.[80] Additionally, businesses need

71. In August 2020, the UK's Age Appropriate Design was passed and went into effect the following year. INFORMATION COMMISSIONER'S OFFICE, AGE APPROPRIATE DESIGN: A CODE OF PRACTICE FOR ONLINE SERVICES 5 (2020). The UK law has less regulatory power than its California counterpart. Grace et al., *supra* note 12, at 289.

72. Ransom, *supra* note 1, at 118.

73. *Id.*

74. Grace et al., *supra* note 12, at 289–90; CAL. CIV. CODE § 1798.99.31 (West 2025).

75. It also attempts to relieve the responsibility placed on parents under current legislation by placing the initial burden companies to create safe spaces for children by reasoning that corporations are in the better position to do this than parents, who have a limited understanding of privacy rights and which methods are being used by corporations. Ransom, *supra* note 1, at 128.

76. A.B. 2273, 2021–2022 Leg., Reg. Sess. (Cal. 2022); *see* CAL. CIV. CODE § 1798.99.31 (West 2025). The distinction between the CAADCA and COPPA is that COPPA regulates content "directed to" children while the CAADCA regulates content likely to be accessed by children, making the CAADCA more expansive. *Id.*; 15 U.S.C. §§ 6501–6506. The FTC has also attempted to expand the scope of COPPA to cover content likely to be accessed by children. In 2019, the FTC filed an enforcement action against YouTube for collecting data from children-directed channels, which resulted in a record-high $170 million settlement. Press Release, FTC, Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law (Sept. 4, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law; *see also* CAL. CIV. CODE § 1798.99.30(b)(1) (West 2025).

77. A.B. 2273, 2021–2022 Leg., Reg. Sess. (Cal. 2022); *see* CAL. CIV. CODE § 1798.99.31(a)–(b) (West 2025).

78. Businesses will be fined up to $7,500 for each affected child of an international violation. CAL. CIV. CODE § 1798.99.35(a) (West 2025).

79. CAL. CIV. CODE § 1798.99.31(a)(1)–(4) (West 2025).

80. *Id.* § 1798.99.31(a)(5).

to default to high privacy settings[81] and provide terms of services in clear language understandable to children as well as enforce those terms and policies.[82] Finally, the CAADCA requires businesses to obviously signal to a child user that their location is being tracked and provide tools permitting parents to report concerns.[83] These businesses are also prohibited from using children's personal information in a way that is materially detrimental to their health or well-being and from collecting, selling, sharing, improperly using, or retaining their personal data longer than necessary.[84] The CAADCA prevents businesses from profiling children by default, selling the geolocation of children by default or without obvious signaling, and using dark patterns to gain personal information.[85]

Critics of this law believe it is counterproductive because age verification requirements could actually decrease data privacy for everyone as companies will have access to *more* information.[86] Others argue the CAADCA's barriers will deter users and constrain access to resources for youth relying on the internet for lifesaving information and support resources, exacerbating mental health concerns instead of reducing them.[87] Some opponents question the law's practical effects, arguing that the law is unworkable for companies and could result in "brain drain" from enacting states and hinder innovation.[88] Those with a more extreme point of view believe this legislation has the potential to cause the internet to be unusable for everyone because it could create such inconvenience to visitors that it deters them altogether.[89] Others point out that the law's vagueness will make it especially difficult for companies to comply

81. *Id.* § 1798.99.31(a)(6).

82. *Id.* § 1798.99.31(a)(7), (9).

83. *Id.* § 1798.99.31(a)(8), (10).

84. *Id.* § 1798.99.31(b)(1), (3)–(4), (8).

85. *Id.* § 1798.99.31(b)(2), (5)–(7).

86. Ransom, *supra* note 1, at 121; *see, e.g.*, Press Release, NetChoice, NetChoice Sues California to Protect Families & Free Speech Online (Dec. 14, 2022), https://netchoice.org/netchoice-sues-california-to-protect-families-free-speech-online; Eric Goldman, *Op-Ed: The Plan to Blow Up the Internet, Ostensibly to Protect Kids Online (Regarding AB 2273)*, TECH. & MKTG. L. BLOG (Aug. 22, 2022), https://blog.ericgoldman.org/archives/2022/08/op-ed-the-plan-to-blow-up-the-internet-ostensibly-to-protect-kids-online-regarding-ab-2273.htm.

87. Ransom, *supra* note 1, at 121; *see, e.g.*, Jennifer Huddleston, *Would New Legislation Actually Make Kids Safer Online?*, CATO INST. 3 (Apr. 6, 2023), https://www.cato.org/sites/cato.org/files/2023-04/BP150.pdf; Natasha Singer, *Tech Trade Group Sues California to Halt Children's Online Safety Law*, N.Y. TIMES (Dec. 14, 2022), https://www.nytimes.com/2022/12/14/technology/netchoice-lawsuit-children-online-safety.html.

88. Ransom, *supra* note 1, at 120; *see, e.g.*, Vallari Sanzgiri, *Businesses to Brace Themselves for California's Age Appropriate Design Code*, MEDIANAMA (Oct. 11, 2022), https://www.medianama.com/2022/10/223-summary-california-age-appropriate-design-code. "Brain drain" is a term used to describe the "loss of human capital from one area to another or from one industry to another" and can result from political or economic changes. Julie Young, *Brain Drain: Definition, Causes, Effects, and Examples*, INVESTOPEDIA (June 20, 2024), https://www.investopedia.com/terms/b/brain_drain.asp.

89. Ransom, *supra* note 1, at 121; *see, e.g.*, Goldman, *supra* note 86.

with and the government to enforce,[90] causing the CAACDA to be susceptible to abuse for censorship purposes.[91]

In addition to these efficacy concerns, there are strong legal arguments against this Act's constitutionality. Historically, policymaker attempts to broadly restrict access to internet content have not withstood constitutional scrutiny when challenged in federal courts applying precedent developed in the late 1990s.[92] Though courts do recognize carve-out exceptions where laws may restrict children's access to particular types of information, those categories are narrow and depend on a number of factors, including whether there is a demonstrable harm that restricting content will address and whether the law restricts more protected speech than necessary.[93]

CAADCA's number one opposer is NetChoice, a national trade association of online businesses including Google, Amazon, Meta, and TikTok that advocates for free speech on the internet. NetChoice filed a lawsuit against California's Attorney General in December 2022[94] and quickly moved for a preliminary injunction by asserting, among other arguments, that the CAADCA violates the First Amendment.[95] On September 18, 2023, the U.S. District Court for the Northern District of California granted NetChoice's motion for a preliminary injunction, holding that although the purpose of protecting children online is important, NetChoice demonstrated that it was likely to succeed in showing that the provisions of the CAADCA do not pass constitutional muster under existing First Amendment precedent.[96]

Finding that the law is likely an unconstitutional content-based regulation in violation of the First Amendment, the federal district court did not address NetChoice's other arguments to strike down the law.[97] Next, although unable to

90. Ransom, *supra* note 1, at 121–22; *see, e.g.*, Mengting Xu, *Lawsuit Challenges Constitutionality of California Age Appropriate Design Code*, CAL. LAWS. ASS'N, https://calawyers.org/privacy-law/lawsuit-challenges-constitutionality-of-california-age-appropriate-design-code (last visited Dec. 20, 2024).

91. Huddleston, *supra* note 87, at 3.

92. HOLMES, *supra* note 29, at 14 ("Though the internet still has not been subject to a history of regulation, some legal scholars argue that the trajectory of the internet has positioned it closer to broadcast than it may have been in the 1990s."); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1660–61 (2018); Angela J. Campbell, *The Legacy of Red Lion*, 60 ADMIN. L. REV. 783, 788 (2008).

93. HOLMES, *supra* note 29 ("Whether a legislative restriction of particular internet content could withstand judicial scrutiny would likely depend on a number of factors, including the existence of a demonstrable harm that a restriction on content may address and the government's ability to ensure that any restriction does not encumber more constitutionally protected speech than is necessary.").

94. *See* Bonta Complaint, *supra* note 39.

95. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 936 (N.D. Cal. 2023).

96. *Id.* at 937.

97. *Id.* at 963–64. NetChoice's other arguments are that the law violates the Dormant Commerce Clause, is unconstitutionally vague, and is preempted by federal laws COPPA and Section 230 of the Communications Decency Act. *See* Bonta Complaint, *supra* note 39, at 2.

discern what level of scrutiny to apply,[98] the court applied a version of intermediate scrutiny to invalidate the CAADCA's challenged mandates and prohibitions.[99] The court reasoned that NetChoice's argument that the CAADCA failed the standard had more support because under *Playboy*, it was "better grounded in the relevant binding and persuasive precedent."[100]

To withstand a constitutional challenge under the commercial speech test, California would need to show that (1) a substantial government interest is achieved by these restrictions on commercial speech; (2) the restrictions directly advance California's interest; and (3) the CAADCA is not "more extensive than is necessary to serve that interest."[101] Bound by the decision in *Brown*,[102] the federal district court explained that "the compelling and laudable goal of protecting children does not permit the government to shield children from harmful content by enacting greatly overinclusive or underinclusive legislation."[103] Because of this, the court had no choice but to enjoin enforcement of the CAADCA. Under existing First Amendment precedent, including *Sable*,[104] lower courts cannot enhance minor protections in such an expansive way if those enhancements could burden adults. The court considers CAADCA's restrictions and mandates on covered business to be conduct and speech regulations that fail even commercial scrutiny because the state did not show a concrete harm nor satisfy its burden of showing its restrictions advance the State's admittedly substantial interest.[105] Although the push toward increased protections for minors is desired, courts are struggling to find such broad laws to be a permissible expansion on children's rights under the current First Amendment framework. Notably, this framework was developed in the late

98. The three levels of judicial scrutiny are as follows: The rational basis test is used when a court reviews cases in which no fundamental rights are at issue, and it requires showing a legitimate state interest and a rational connection between the statute's means and goals; the intermediate scrutiny test is stricter and is used when a statute discriminates or impacts a protected class; it requires that the challenged law: (1) further an important government interest, and (2) and does so by means substantially related to that interest; and strict scrutiny is the highest level of scrutiny and is used when a state law infringes a fundamental right; it requires showing that: (1) there is an important government interest served by the law, and (2) the law is narrowly tailored to achieve that interest. *Rational Basis Test*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test (last visited Jan. 3, 2025).

99. *Bonta*, 692 F. Supp. 3d at 959.

100. *Id.* at 945 (citing United States v. Playboy Ent. Grp. Inc., 529 U.S. 803, 806 (2000)).

101. *Id.* at 941.

102. 564 U.S. 786 (2011). This Supreme Court decision was developed as another link in a strong chain of precedent that started in the late 1990s, when the internet space was believed to be far less invasive into the lives of Americans than other forms of communication such as the radio. It was upon this foundation that the internet was not considered a space where protections on children were necessary nor warranted.

103. *Bonta*, 692 F. Supp. 3d at 957.

104. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989).

105. *Bonta*, 692 F. Supp. 3d at 950, 954–55 ("[T]he Court is not persuaded by the State's argument that the provision is necessary because there is currently 'no law holding online businesses accountable for enforcing their own policies' . . . . The provision at issue would likely 'burden substantially more speech than is necessary to further the government's legitimate interests,' and therefore NetChoice is likely to succeed in demonstrating that it fails commercial speech scrutiny.").

1990s when the risk of children's exposure to harmful content on the internet was not believed to be a substantial concern.

On December 13, 2023, Attorney General Rob Bonta appealed the decision to the Ninth Circuit.[106] Bonta's appeal argued that the law should not be subjected to a high level of scrutiny under *Sorrell* and that the law survives under commercial speech scrutiny.[107] Alternatively, Bonta asserted that the Act is severable, so even if the court struck down parts of the multi-part law, it need not eliminate it entirely.[108] NetChoice responded by again voicing First Amendment concerns and insisting that the law cannot stand under existing Supreme Court jurisprudence because it is subject to and fails strict scrutiny.[109] NetChoice further argued that the CAADCA must be struck down in its entirety.[110] The Ninth Circuit agreed with both arguments.[111] Applying the heightened standard of strict scrutiny to the law's provisions, the court decided that several aspects of the law, including the data protection impact assessment and related risk mitigation requirements, were facially unconstitutional and violate the First Amendment, permitting those sections of the law to remain enjoined.[112] With respect to the remaining provisions of the law, the court vacated the lower court injunction and remanded the case for the district court to assess whether they survive strict scrutiny, and if so, could effectively be severed.[113] In light of this outcome, the argument in this Note becomes more relevant because this decision signals to lawmakers that comprehensive privacy laws can now be pulled apart so that only their least restrictive mandates stand under the First Amendment.

2. Arkansas' Social Media Safety Act Enjoined

Next, motivated by similar concerns over social media use, lawmakers in Arkansas developed S.B. 396.[114] It was described as a priority of Arkansas Governor Sarah Sanders.[115] After Utah Governor Spencer Cox enacted the Utah Social Media Regulation Act by signing two laws to restrict user age and

106. Appellant's Opening Brief, NetChoice, LLC v. Bonta, 113 F.4th 1101 (9th Cir. 2024) (No. 23-2969).
107. *Id.* at 40–41.
108. *Id.* at 49.
109. Appellee's Response Brief at 17, *Bonta*, 113 F.4th 1101 (No. 23-2969).
110. *Id.* at 74.
111. *Bonta*, 113 F.4th at 1108.
112. *Id.*
113. *Id.* at 1122.
114. Cynthis Cole, Helena Engfeldt, Johnathan Tam, Fernanda Rodriguez & Avi Toltzis, *Arkansas to Regulate Children's Social Media Use with Age Verification and a Private Right of Action*, CONNECT ON TECH (Apr. 20, 2023), https://www.connectontech.com/arkansas-to-regulate-childrens-social-media-use-with-age-verification-and-a-private-right-of-action.
115. Hunter Field, *Arkansas Social Media Age Verification Law Struck Down by Federal Court*, ARK. ADVOC. (Aug. 31, 2023, 7:34 PM), https://arkansasadvocate.com/2023/08/31/arkansas-social-media-age-verification-law-struck-down-by-federal-court. Sanders opined that "Big Tech companies put our kids' lives at risk [and] push an addictive product that is shown to increase depression, loneliness, and anxiety and puts our kids in human traffickers' crosshairs." *Id.*

implement a curfew,[116] Arkansas created S.B. 396 to also verify the ages of social media users and create liability for not doing so or illegally retaining data.[117] On April 12, 2023, S.B. 396 was signed into law.[118] The Act mandates that covered companies[119] acquire documentation to verify the age of their users and only permit users under eighteen to create social media accounts if they have "express consent of a parent or legal guardian."[120] The Act excludes companies generating less than $100 million in revenue or deriving less than 25 percent of their revenue from operating social media platforms,[121] excluding Google and YouTube.[122]

The law passed with a twenty-one to three state congress vote.[123] Proponents, including Sanders, describe it as another step in protecting children from big tech hazards.[124] Arkansas argues that the law is essential to protect children against sexual predators and to decrease self-harm and cyberbullying content, comparing it to prohibitions on minors being in bars.[125]

Those opposed to S.B. 396 call the bar age limit analogy "weak" because minors do not have a constitutional right to drink alcohol and the purpose of a bar is to sell alcohol, while the purpose of social media is to "engage in speech" and these applications contain "constitutionally protected speech for both adults and minors."[126] Other critics point out the irony in the fact that under the law, seventeen-year-olds need parent consent to access Instagram, but not to get

116. UTAH CODE ANN. § 13-63-101 (West 2025) (repealed 2024); *Arkansas Enacts Legislation Restricting Social Media Accounts for Minors*, HUNTON ANDREWS KURTH: PRIV. & INFO. SEC. L. BLOG (Apr. 13, 2023), https://www.huntonprivacyblog.com/2023/04/13/arkansas-enacts-legislation-restricting-social-media-accounts-for-minors.

117. ARK. CODE ANN. § 4-88-1102 (West 2025).

118. *Id.*

119. Covered businesses include social media companies that permit account holders to create a profile "for the primary purpose of interacting socially with other profiles and accounts," to upload and view content, or with the "substantial function . . . to allow users to interact socially." ARK. CODE ANN. § 4-88-1401(7)(A)–(B) (West 2025).

120. ARK. CODE ANN. § 4-88-1402(a) (West 2025).

121. ARK. CODE ANN. § 1401(7)(B)(iii)(a)–(b) (West 2025).

122. NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 WL 5660155, at *2 (W.D. Ark. Aug. 31, 2023).

123. *Senate Vote—Thursday, April 6, 2023 11:25:59 AM*, ARK. STATE LEG. (Apr. 16, 2023), https://www.arkleg.state.ar.us/Bills/Votes?id=SB396&rcs=991&chamber=Senate&ddBienniumSession=2023%2F2023R.

124. Neal Earley, *POLL: Arkansas' Governor Signs Social Media Bill Requiring Age Verification for New Users*, ARK. DEM. GAZ. (Apr. 13, 2023, 5:46 AM), https://www.arkansasonline.com/news/2023/apr/13/arkansas-governor-signs-social-media-bill/#//.

125. Field, *supra* note 115; *see also* Daniel Breen, *Social Media Age Verification Bill Gets Final Approval in Arkansas Legislature*, NPR: A SERVICE OF UA LITTLE ROCK (Apr. 6, 2023, 2:32 PM CDT), https://www.ualrpublicradio.org/local-regional-news/2023-04-06/social-media-age-verification-bill-gets-final-approval-in-arkansas-legislature ("Bill sponsor Sen. Tyler Dees, R-Siloam Springs, said it's needed to help protect minors from potential exploitation.").

126. Field, *supra* note 115. Senator Ricky Hill also stated that the Bill "amounts to censorship and a restriction of commerce." Breen, *supra* note 125. He also believes that "[no] matter what we do, we're not going to prevent [harm to minors] from happening" and this law "[is] not going to change anything" other than the fact that we are now susceptible "to hav[ing] our identity stolen" because of the new age verification requirements. *Id*.

married.[127] The Chamber of Progress focused its critique on the fact that the bill would expose *all* users' privacy and effectively ban a website used by teens to learn about the world, strengthen social connections, and foster deeper community ties.[128] The ACLU argues that the law's age verification will burden First Amendment rights online, "rob people of anonymity, deter privacy- and security-minded users, and block some individuals [altogether]."[129]

In response to these criticisms, bill sponsor Senator Dees explained that S.B. 396 is not a ban on social media, nor a First Amendment issue censoring free speech, but rather a law that protects children in the online context.[130] NetChoice adamantly disagreed and filed a lawsuit on July 29, 2023 against Arkansas Attorney General Tim Griffin to enjoin enforcement of Arkansas' S.B. 396.[131] NetChoice argued that even though "social media usage poses risks to minors' physical and mental well-being," the bill did not provide a constitutional means of addressing the dangers that minors face online.[132] Specifically, they argued that S.B. 396 is unconstitutionally vague, violates the First Amendment because the age verification requirements are not narrowly tailored to address harms to minors, and places an undue burden on both adults and minors trying to access constitutionally protected speech.[133]

The U.S. District Court for the Western District of Arkansas granted NetChoice's motion for preliminary injunction and held that S.B. 396 is unconstitutionally vague because it "fails to adequately define which entities are subject to its requirements"[134] and its ambiguous terms "unnecessarily burden minors' access to constitutionally protected speech."[135] The court in Arkansas agreed with NetChoice that strict scrutiny likely applies.[136] The court applied intermediate scrutiny, however, like the federal district court in California considering the CAADCA, because it did not want to reach the strict scrutiny conclusion at this early stage.[137] Applying existing First Amendment precedent, the federal district court in Arkansas held that although S.B. 396 "clearly serves

127. Stacey Steinberg, *The Myth of Children's Online Privacy Protection*, 77 SMU L. REV. 441, 460 (2024).

128. Wendy Davis, *Arkansas Passes Bill Banning Minors from Social Media Without Parents' Consent*, DIGIT. NEWS DAILY (Apr. 6, 2023), https://www.mediapost.com/publications/article/384152/arkansas-passes-bill-banning-minors-from-social-me.html; *see also* Dr. Edward Longe, *Keeping Teens Safe On Social Media: A Guide for Free-Market Lawmakers*, THE JAMES MADISON INSTIT. 5 (2023), https://jamesmadison.org/wp-content/uploads/IssueCommentary_TeenOnlineSafety_Jul2023-v05.pdf (stating that this severe restriction is "potentially denying [teens] an understanding of how to use social media in an age-appropriate way").

129. Amicus Brief for ACLU at 11, NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023) (pointing out that social media allows both children and adults to be "up to date on the news, engage with elected officials, connect with friends, create art, and build movements").

130. Breen, *supra* note 125.

131. *Griffin*, 2023 WL 5660155, at *1.

132. *Id.*

133. *Id.*

134. *Id.* at *13.

135. *Id.* at *15.

136. *Id.* at *16.

137. *Id.*

an important governmental interest,"[138] it is not narrowly tailored enough to target content to minors and to avoid unduly burdening adult and minor rights to free speech.[139] This reasoning again exposed that the existing First Amendment framework does not permit such high burdens on adult content consumption. Specifically, the court explained that it was bound by *Reno* when it reasoned that "'the governmental interest in protecting children does not justify an unnecessarily broad suppression of speech addressed to adults,'"[140] and *Brown* when it stated that "'even where the protection of children is the object, the constitutional limits on governmental action apply.'"[141] The court also cited to *Playboy*,[142] *Ashcroft*,[143] and *Mukasey*,[144] to show the long line of First Amendment precedent that bound their decision to enjoin the law.[145]

The Arkansas federal district court repeatedly acknowledged that there are "very real problems associated with minors' time spent online and access to harmful content on social media."[146] Even so, the court declared that this law is likely unconstitutional and unduly burdensome on minors and adults.[147] Again, following clear precedent, the court did not see a way for child protections to be so greatly expanded on the internet.

On November 28, 2023, NetChoice filed a motion for summary judgment and two days later, Arkansas responded by filing a motion to deny or defer the motion for summary judgment until discovery was complete.[148] On March 24, 2024, the court issued an order denying in part and granting in part both of the motions filed by Arkansas and NetChoice.[149] The court explained that they would proceed with limited discovery as to Arkansas's factual challenges to specific paragraphs in NetChoice's motion for summary judgment.[150] NetChoice filed an amended motion of summary judgment on June 21, 2024.[151] On July 24, 2024, the court held that the amended motion for summary judgment was moot, and the law remains enjoined.[152]

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138. *Id.*

139. *Id.* at *20–21.

140. *Id.* at *17 (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)). The district court in Arkansas also stated that laws cannot "impose[] significant burdens on adult access to constitutionally protected speech" because it "'discourage[s] users from accessing [the regulated] sites.'" *Id.* (quoting *Reno*, 521 U.S. at 856).

141. *Id.* (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 804–05 (2011)).

142. 529 U.S. 803 (2000).

143. 542 U.S. 656 (2004).

144. 534 F.3d 181 (3d Cir. 2008).

145. *Griffin*, 2023 WL 5660155, at *17, 21.

146. *Griffin*, 2023 WL 5660155, at *21.

147. *Id.*

148. *See* Brief in Support of Motion for Summary Judgment, *Griffin*, 2023 WL 5660155 (No. 5:23-cv-05105); Attorney General's Supplemental Briefing, *Griffin*, 2023 WL 5660155 (No. 5:23-cv-05105).

149. NetChoice, LLC v. Griffin, No. 5:23-cv-5105, 2024 WL 1262476, at *1 (W.D. Ark. Mar. 24, 2024).

150. *Id.* at *3.

151. Plaintiff's Amended Motion for Summary Judgment, *Griffin*, 2024 WL 1262476 (No. 5:23-cv-5105).

152. *Tracker Detail NetChoice, LLC v. Griffin*, TECH POLICY PRESS (Aug. 31, 2023), https://www.techpolicy.press/tracker/netchoice-llc-v-griffin.

C. *Texas' H.B. 1181 Initially Struck Down But Subsequently Upheld as Sufficiently Narrow*

While the Arkansas and California laws look to age verification in generally regulating access to social media, other states have made efforts to target access to specific content, including that which is sexually explicit. One of these laws is Texas' H.B. 1181, which was signed into law by Governor Greg Abbot on June 12, 2023.[153] The U.S. District Court for the Western District of Texas initially enjoined enforcement of the law,[154] but the Fifth Circuit reversed this decision in part, permitting the age-based restriction and prohibiting the health warning mandates.[155] The Supreme Court heard oral arguments in this case in January of 2025,[156] providing the Court with an opportunity to update their precedent. Their decision is expected by early summer 2025.[157]

Although the law was partially upheld by the appellate court, the federal district court decision is useful in expanding this Note's explanation of the precedential landscape and explaining the Supreme Court's considerations and limitations in increasing protections for minors. As discussed in Part III, the Fifth Circuit decision upholding this law in part also highlights a potential avenue for lawmakers to consider when drafting permissible, narrow laws.

Texas' H.B. 1181 has two requirements.[158] First, any "commercial entity that knowingly distributes materials" that are "more than one-third . . . sexual material harmful to minors" needs to use age verification to ensure users are over eighteen.[159] It is important to note that H.B. 1181 targets *sexual* content harmful to minors, but will likely cover more content than just obscene material.[160] To ascertain the age of their consumers, commercial entities must obtain proof of age through government-issued identification or rely on public or private transactional data.[161] Second, commercial entities that publish this material must also post various health warnings.[162] Failure to comply with these requirements will result in a fine of $10,000 per day that the entity operates in violation of H.B. 1181 or up to $250,000 if a minor is discovered to have accessed the material.[163] Texas is the largest state to enact this type of legislation, but it is not

153. H.B. 1181, 88th Leg., Reg. Sess. (Tex. 2023).

154. Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 417 (W.D. Tex. 2023).

155. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024).

156. ACLU, *supra* note 46.

157. *Id.*

158. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002 (West 2025).

159. *Id.* § 129B.002(a).

160. "Material that is sexual will likely satisfy H.B. 1181's test, because it is inappropriate for minors, even though it is not obscene for adults. Any prurient material risks being regulated, because it will likely be offensive to minors and lack artistic or scientific value to them." *Colmenero*, 689 F. Supp. 3d at 397.

161. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.003 (West 2025).

162. *Id.* § 129B.004.

163. *Id.* § 129B.006.

the first to do so.[164] In 2022, Louisiana was the first state to require age verification on websites that contain more than 33 percent adult content, sparking "a flurry of copycat legislation to be introduced in state houses around the country."[165]

The Texas law curtails minor access to pornography, and while it is uncontested that this content is inappropriate for children,[166] the law has received pushback from various groups and individuals. First, critics argue age verification raises significant privacy and security concerns that are naturally associated with providing government identification.[167] Next, some believe these restrictions prevent adults from accessing controversial speech when they know that the state government can log and track that access.[168] Because "the law risks forcing individuals to divulge specific details of their sexuality to the state government," some contend it has "a substantial chilling effect."[169] Specifically considering "Texas's ongoing criminalization of homosexual intercourse[] . . . people who wish to view homosexual material will be profoundly chilled from doing so if they must first affirmatively identify themselves to the state."[170] Based on these arguments, some believe these laws deter adult access to these materials "far beyond the interest of protecting minors."[171] Outside of these privacy concerns, opponents of the law argue age verification will be so expensive that it will bankrupt applicable websites.[172] Critics also point to the law's potential loopholes, such as how it does not apply

164. Makena Kelly, *Child Safety Bills Are Reshaping the Internet for Everyone / Lawmakers Across the Country Are Trying to Protect Kids by Age-gating Parts of the Internet*, THE VERGE (Aug. 29, 2023, 7:00 AM PDT), https://www.theverge.com/2023/8/29/23849375/kosa-child-safety-free-speech-louisiana-utah-parental-consent.

165. *Age Verification Bill Tracker*, FREE SPEECH COAL.: ACTION CTR., https://action.freespeechcoalition.com/age-verification-bills (last visited Dec. 21, 2024); *see also* Kelly, *supra* note 164; Ken Miller, *Texas Law Requiring Age Verification to View Pornographic Websites Will Not Go into Effect, Federal Judge Says*, PBS NEWS (Sept. 1, 2023, 12:00 PM EST), https://www.pbs.org/newshour/nation/texas-law-requiring-age-verification-to-view-pornographic-websites-will-not-go-into-effect-federal-judge-says.

166. Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 382–83 (W.D. Tex. 2023).

167. Julia Shapero, *Texas Law Requiring Age-Verification Measures for Pornography Sites Unconstitutional, Judge Rules*, THE HILL (Sept. 1, 2023, 10:40 AM ET), https://thehill.com/policy/technology/4182867-texas-law-requiring-age-verification-measures-for-pornography-sites-unconstitutional-judge-rules; Emma Bowman, *A Texas Law Requiring Age Verification on Porn Sites Is Unconstitutional, Judge Rules*, TEX. PUB. RADIO (Sept. 1, 2023, 10:15 PM CDT), https://www.tpr.org/government-politics/2023-09-01/a-texas-law-requiring-age-verification-on-porn-sites-is-unconstitutional-judge-rules (nothing the "deterring effects caused by the threats of exposing sensitive information through potential leaks or hacks").

168. Bowman, *supra* note 167.

169. Shapero, *supra* note 167; *see also* Bowman, *supra* note 167 ("Having to identify oneself in order to access a gay porn site, for example, could be particularly troubling in a state that still hasn't repealed a law banning sodomy, as the ruling noted.").

170. *Colmenero*, 689 F. Supp. 3d at 399–400.

171. Bowman, *supra* note 167.

172. Kelly, *supra* note 164 (stating that one company has already implemented age verification and seen "the numbers drop drastically").

to social media websites not meeting the one-third standard.[173] This exception means that minors can still view pornographic content on "Reddit communities, Tumblr blogs and Instagram pages[] . . . . [Or by] . . . [r]unning image searches."[174]

A few of these critics came together to challenge the law. On August 4, 2023, Texas' interim Attorney General Angela Colmenero was sued by the Free Speech Coalition (a for-profit trade association representing creative artists) as well as other corporations and actors involved in the adult entertainment industry.[175] The plaintiffs alleged H.B. 1181 violates the First Amendment, and the U.S. District Court for the Western District of Texas granted a preliminary injunction on these grounds on August 31, 2023.[176]

Specifically, the federal district court in Texas subjected the law's age verification requirement to strict scrutiny.[177] The court reasoned that although "obscene material" had previously fallen outside of First Amendment protected speech, there is more skepticism toward permitting regulations that restrict content beyond "obscene" materials.[178] Under this reasoning, the court determined that H.B. 1181 regulates beyond obscene materials because it "includes all content offensive to minors, while failing to exempt material that has cultural, scientific, or educational value to adults only."[179] Therefore, the court declared that the law was subject to and failed strict scrutiny because the *ACLU Decisions* are controlling.[180] The court reasoned that H.B. 1181 was also underinclusive and contained substantial exemptions, "including material most likely to serve as a gateway to pornography use."[181]

The court also stated that the law did not advance a government interest because it did not prevent minors from accessing pornographic content hosted by foreign websites not subject to the law.[182] The court expressed that the statute's language would chill protected speech under *Reno* and *Sable*.[183] The Texas federal district court stated that even though the law was narrowly constructed, under *Playboy*, H.B. 1181 was unconstitutionally overbroad and overly restrictive as there were less restrictive alternatives available.[184] Finally, the court stated that H.B. 1181 unconstitutionally compelled speech under *Sable*

173. Bowman, *supra* note 167.

174. *Id.*

175. *See* Colmenero Complaint, *supra* note 39.

176. *Colmenero*, 689 F. Supp. 3d at 416–17.

177. *Id.* at 391.

178. *Id.* at 390, 397 (citing Reno v. ACLU, 521 U.S. 844, 850 (1997)).

179. *Id.* at 397 (citing *Reno*, 521 U.S. at 875).

180. *Id.* at 397–98 (citing *Reno*, 521 U.S. at 875); *see id.* at 390–91 (noting that the *ACLU Decisions* include *Reno*, *Ashcroft*, and *Mukasey*).

181. *Id.* at 394 (citing Williams-Yulee v. Fla. Bar, 575 U.S. 433, 448–49 (2015); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 802 (2011)).

182. *Id.* at 393.

183. *Id.* at 397.

184. *Id.* at 395, 398, 400, 403.

by mandating health warnings.[185] Positing that the law likely violated the First Amendment under binding case law, the court preliminarily enjoined enforcement of H.B. 1181.[186]

The court stated that H.B. 1181 would be constitutional "if the Supreme Court changes its precedent on obscenity," but explained that the defendants "cannot argue that it is likely to succeed on the merits as they currently stand based upon the mere possibility of a change in precedent."[187] Once again, a federal district court recognized that protecting children from adult material online is a legitimate goal,[188] but felt restricted from protecting children under First Amendment precedent. The glaring problem is that this precedent defines how to treat child privacy in the context of the *1990s version* of the internet, when the need for regulation did not outweigh the burden on adults. On appeal, the Fifth Circuit agreed with the lower court that the health warning requirement constituted unconstitutionally compelled speech,[189] but stated that the age-based restriction on access to pornographic content is constitutional under rational basis review.[190] Even though the Fifth Circuit upheld a portion of this law, the federal district court's reasoning is still useful in outlining the tough position courts are in when considering laws that address child privacy concerns. The Supreme Court decision in this case is expected by summer 2025.[191]

II. THE SUPREME COURT NEEDS TO REEXAMINE ITS FIRST AMENDMENT PRECEDENT TO PERMIT EXPANDED CHILD PRIVACY PROTECTIONS ONLINE

The California, Arkansas, and Texas laws were preliminarily enjoined under existing First Amendment precedent established in the 1990s. The guiding framework was developed when society understood the cyberspace not to be as "invasive" into American life as radio broadcasting, making its regulation unjustified.[192] Considering the invalidity of that statement today, Part II argues that the Supreme Court needs to update its framework to treat internet regulations as constituting special circumstances where restrictions can be permitted, just like it did with radio broadcasting in the 90s in *Pacifica*.[193] Subpart II.A examines the ways that the three federal district courts relied on the 1990s First Amendment case law, and Subpart II.B provides insight into the more recent reactions to the inapplicability of this precedent in today's online world. Subpart II.C presents the argument that in light of developments in the

185. *Id.* at 405.
186. *Id.* at 417.
187. *Id.* at 416–17.
188. *Id.* at 417.
189. *Id.* at 267.
190. *Id.*
191. ACLU, *supra* note 46.
192. *See* Reno v. ACLU, 521 U.S. 844, 868–69 (1997).
193. FCC v. Pacifica Found., 438 U.S. 726 (1978).

online world, the Supreme Court must update this case law to permit regulatory protections of youth online.

A. THREE DISTRICT COURTS RELIED ON THIS EARLY CASE LAW TO INVALIDATE INCREASED PROTECTIONS

The Supreme Court precedent discussed in Subpart I.B. was developed upon the idea of the internet as it existed in 1997, and this framework continues to guide decisions regarding today's exponentially vaster online world. Recently, in *303 Creative v. Elenis*, the Court held that a website owner could not be compelled to display messages not aligning with their religious beliefs under Colorado's Anti-Discrimination Act by citing *Reno* and *Brown* to declare the Act unconstitutional, again refusing to permit government restrictions on online speech under this outdated precedent.[194]

The federal district courts in California, Arkansas, and Texas, bound by this same Supreme Court precedent, declared these recent, expansive state laws intended to increase child safety to be likely unconstitutional under the First Amendment. After being appealed, only part of the California law remains enjoined while the district court considers the constitutionality and severability of the other sections of the law on remand.[195] Similarly, Texas' narrowly pointed state law was declared by the Fifth Circuit to likely be constitutional, but only in part.[196] Though overturned, the Texas and California federal district courts' reasoning, which initially enjoined the laws from enforcement, is still an effective analytic tool to reveal the way this 1990s case law is shaping childhood online privacy or lack thereof. Additionally, the Texas law is being reviewed by the Supreme Court this term,[197] and the arguments in both the federal district court and appellate court opinions will be considered.

Using support from *Reno*, these federal district courts subjected these laws to the First Amendment after determining they regulate protected speech. Under *303 Creative*, California's CAADCA[198] and Texas' H.B. 1181[199] were believed to also unconstitutionally compel speech. While the courts did find a compelling government interest under *Sable* and *Mukasey*, they all agreed that the burden imposed by the laws outweighed those interests under *Reno*.[200] Finally, these three federal district courts stated that the laws were not narrowly tailored because they were overly and underly inclusive and did not demonstrate they

194. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023).

195. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024).

196. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024) (mem.).

197. ACLU, *supra* note 46.

198. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 940 (N.D. Cal. 2023).

199. Free Spech Coal., Inc. v. Paxton, 689 F. Supp. 3d 373, 408 (W.D. Tex. 2023).

200. *Bonta*, 692 F. Supp. 3d at 949; *Paxton*, 689 F. Supp. 3d at 395; NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 WL 5660155, at *17 (W.D. Ark. Aug. 31, 2023).

would produce the intended results under *Playboy*, *Mukasey*, *Brown*, and *Ashcroft*.[201]

By applying Supreme Court precedent developed in the late 1990s, these three federal district courts made decisions in line with the long history of invalidating increased protection for children online. Federal courts have repeatedly held that "laws prohibiting the communication of certain materials online without verifying the ages of recipients" are unconstitutional.[202] Within the current framework, these sweeping laws are perceived as limiting constitutionally protected speech. Attempts to strike down these three state laws mark just the most recent efforts in a long chain of precedent to prohibit the expansion of children's privacy in order to prevent inconvenience for adult internet users.[203]

The California and Arkansas federal district courts relied on the same First Amendment precedent to reach the same conclusion. The CAADCA was barred because its restrictions and mandates were considered content-based regulations that are much more extensive than necessary to serve a legitimate California government concern.[204] On appeal, several portions of the law were upheld as unconstitutional and the constitutionality and severability of the other sections of the law are being considered by the district court on remand.[205] Arkansas' S.B. 396 was invalidated because it was found to be unconstitutionally vague, not narrowly tailored to target harm to minors, and unduly burdensome on adult and minor rights to free speech.[206] Texas' more narrow law was upheld in large part because the Fifth Circuit found that it targeted obscene material specifically.[207] This decision overruled the lower court's injunction, which was granted based on the district court's reasoning that under First Amendment precedent, H.B. 1181 chilled protected speech, was not narrowly tailored enough because it regulated too much protected speech, and was underinclusive and overly restrictive.[208] The detailed reasoning in these three cases demonstrates the way lower courts are bound by this 1990s precedent.

B. THE INAPPLICABILITY OF THESE EARLY CASES SUGGESTS THAT THE SUPREME COURT NEEDS TO UPDATE THIS OUTDATED FRAMEWORK

The reaction to these decisions has been varied. The paralleled reasoning in all three injunctions as well as the Fifth Circuit and Ninth Circuit decisions on the Texas and California laws could inform policymakers' next steps. At the

201. *Bonta*, 692 F. Supp. 3d at 961; *Paxton*, 689 F. Supp. 3d at 393; *Griffin*, 2023 WL 5660155, at *18.

202. Brief of Amici Curiae ACLU, ACLU of Ark. & Elec. Frontier Found. in Support of Plaintiff's Motion for Preliminary Injunction at 12, *Griffin*, 2023 WL 5660155 (No. 5:23-cv-05105).

203. Longe, *supra* note 128, at 2.

204. Bonta, 692 F. Supp. 3d at 961.

205. *See* NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024).

206. *Griffin*, 2023 WL 5660155, at *21.

207. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 269–70, 287 (5th Cir. 2024).

208. Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 393–403 (W.D. Tex. 2023).

state level, some policymakers believe that "rather than signaling a change in the tide, the lawsuits may ultimately spur a new round of bills that address flaws in those passed in the first wave."[209] However, without making specific changes addressing the issues identified by the federal district courts and under existing First Amendment jurisprudence, new state proposals that attempt to broadly address the holes in current child privacy laws will likely meet a similar fate. Conversely, the Fifth Circuit and Ninth Circuit opinions reveal that laws narrowly tailored to address specific harms might survive.

At the federal level, lawmakers also continue to be unsuccessful in passing an updated child privacy bill. For example, some lawmakers believe that the Kids Online Safety Act (KOSA), a recently considered child privacy bill, is likely to create an "unconstitutional age verification regime" and "an unworkable and unconstitutional duty of care."[210] Critics similarly criticize the Making Age-Verification Technology Uniform, Robust, and Effective Act (MATURE Act), a bill proposed to prohibit those under sixteen years old from operating social media accounts using age verification, for creating a "vast database of sensitive information for cybercriminals and denying millions of teenagers the potential benefits of intelligent social media use."[211] These opinions echo the federal district courts' concerns over expansive child privacy laws.

Courts also express concern over the validity of these types of laws. Pointing out the fact that age-gating does not seem an effective means to address state concerns over *content* on social media, the U.S. District Court for the Western District of Arkansas stated that "[t]he many exemptions in Act 689 all but nullify the State's purposes in passing the Act and ignore the State's expert's view that parental oversight is what is really needed to insulate children from potential harms that lurk on the internet."[212] One article stated that the opinion revealed that the "drafters of the law did a poor job, writing legislation that was too vague, overbroad and violated Arkansans' First Amendment rights."[213] The court recommended more research be done before the state can enact a narrowly tailored regulation that addresses "the harms that minors face due to prolonged use of certain social media."[214] The U.S. District Court for the Northern District of California similarly pointed out that, ironically, "the CAADCA's age

209. Brian Joseph, *Children's Online Safety Bills Suffer Legal Setback*, LEXISNEXIS (Oct. 6, 2023), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/children-s-online-safety-bills-suffer-legal-setbacks. One lawmaker stated that they are not following these lawsuits and conceding, "OK kids data privacy is done." *Id.* A lawmaker even revised a pending bill "but not in response to the lawsuits, which she sees more as evidence of the tech industry's 'gamesmanship' than a substantive challenge to policy." *Id.* If anything, she said these lawsuits tell her that they are "on the right track." *Id.*

210. Longe, *supra* note 128, at 3 ("[The law] threaten[s] adults' first amendment rights by limiting speech that Americans are constitutionally permitted to receive." (footnote omitted)).

211. *Id.*

212. NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 WL 5660155, at *21 (W.D. Ark. Aug. 31, 2023).

213. Field, *supra* note 115.

214. *Griffin*, 2023 WL 5660155, at *21.

estimation provision appears not only unlikely to materially alleviate the harm of insufficient data and privacy protections for children, but actually likely to exacerbate the problem."[215] The U.S. District Court for the Western District of Texas also exposed H.B. 1181's loopholes, including that "a website could quite easily evade the law by simply adding non-sexual material up to the point that it constitutes at least two-thirds of the site."[216] This loophole is an example of lawmakers' apprehension in drafting narrow laws and a reason why states such as California and Arkansas took care to propose broader laws with fewer workarounds. The problem with this approach is becoming clear: the more comprehensive the regulatory legislation is, the less likely it is to pass constitutional muster.

Regardless of the improvements that policymakers implement, First Amendment issues will continue to create a strong foundation for courts to continue striking down effective, increased protections for children under the current precedent. Possibly more significant than informing next steps for policymakers, the federal district courts' application of existing precedent demonstrates the need to update the First Amendment framework. The Texas federal district court admitted that "online interactions have changed since the Supreme Court's decisions in 1997 and 2004."[217] Texas' attorney general even argued that the *Ashcroft* analysis, specifically, should no longer apply because it was based on an evidence record made in 1999 and should not be compared to H.B. 1181's modern context and increased security measures.[218] But "despite changes to the internet in the last two decades, the [c]ourt [came] to the same conclusion regarding the efficacy and intrusiveness of age verification as the ACLU courts did in the early 2000s."[219] These opinions demonstrate that while the clarity of the precedent is not a problem, the applicability of it to today's internet is proving to be.

C. THE SUPREME COURT RE-EVALUATION OF FIRST AMENDMENT PRECEDENT IS NECESSARY TO PERMIT COMPREHENSIVE INTERNET REGULATIONS

The theme across these lawsuits paves a way for the Supreme Court to step in. The Supreme Court needs to re-evaluate the precedent that applies to First Amendment protections of children in the online space because it was developed when the vastness of today's internet was unimaginable. By applying precedent from the late 90s, these federal district courts have demonstrated that expansive

215. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 951 (N.D. Cal. 2023).

216. Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 395 n.8 (W.D. Tex. 2023).

217. *Id.* at 398; *see also* Eugene Volokh, *Texas Law Mandating Age Verification for Sexually Themed Sites Violates First Amendment, A Federal Judge Held Today*, REASON: THE VOLOKH CONSPIRACY (Aug. 31, 2023, 11:58 AM), https://reason.com/volokh/2023/08/31/texas-law-mandating-age-verification-for-sexually-themed-sites-violates-first-amendment.

218. *Colmenero*, 689 F. Supp. 3d at 398; *see also* Volokh, *supra* note 217.

219. *Colmenero*, 689 F. Supp. 3d at 398–99; *see also* Volokh, *supra* note 217.

state laws will violate the First Amendment. The precedent is strong, which is evident by the way the federal district courts relied on nearly identical reasoning. Though upholding the state law in large part, the Texas federal appellate decision still shows that even narrow laws are arguably unconstitutional under this long line of free speech cases. Similarly, since the Ninth Circuit has affirmed enjoining only part of the CAADCA,[220] its decision informs lawmakers that the case law permits only the small parts of these comprehensive laws that are least restrictive. The state attorneys general each argue that the federal district court judges should set aside this outdated precedent, but the Supreme Court is the only court with the power to overrule those decisions. And they should, because within this ancient framework, legislators cannot constitutionally bolster youth protection online in a meaningful way.

1. Online First Amendment Case Law Is Outdated

In *Reno*, one of the earliest cases upon which this 1990s First Amendment framework was developed in the online space, the Court declared that the internet was not as invasive as radio broadcasting, using support from *Sable*.[221] It also stated that accessing inappropriate content online required "affirmative steps" and "some sophistication,"[222] distinguishing the cyberspace from the physical world where minors could apparently receive more protections.[223] In light of today's widespread internet use, however, these arguments do not hold much validity. The *Reno* court cited that "40 million people use[d] the [i]nternet" at the time of the opinion,[224] but this is in stark contrast with the 5.52 billion people who use the internet daily in 2024 and 5.22 billion social media users.[225] Additionally, if the Court was willing to expand protections on "invasive" forms of communications, in light of the "special factors . . . justifying [their] regulation," it seems clear that the *Reno* and *Sable* courts would actually support expanded protections in light of the special factors of today's version of the internet.[226] At the very beginning of the growing digital world, *Reno* marked a concrete barrier to creating protections for children as technology expanded because the Court considered it to be noninvasive. Considering how far technology has come since 1997, *Reno* should not control the area of First Amendment protections for minors on the internet.

Applying *Reno*, the Supreme Court in *Playboy* stated that "[a] court should not assume a plausible, less restrictive alternative would be ineffective; and a

220. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024).

221. Reno v. ACLU, 521 U.S. 844, 869 (1997).

222. *Id.* at 854.

223. *See id.* at 868–69.

224. *Id.* at 870.

225. *Digital Around the World*, DATAREPORTAL, https://datareportal.com/global-digital-overview (last visited Dec. 22, 2024) (stating the number of internet and social media users worldwide as of October 2024).

226. *See Reno*, 521 U.S. at 845, 869.

court should not presume parents, given full information, will fail to act."[227] This argument might have been strong in 2000, but in 2025, the suggestion that parents should be responsible for creating a safe space online has several flaws. Not only have children been successful in finding a way around parent content filtering,[228] but there are a lot of online practices not subject to filtering, such as dark patterns and data collection and sales.[229]

Citing *Reno* and *Playboy*, the Court in *Ashcroft* said that it was "not [permitted] . . . to depart from well-established First Amendment principles."[230] In doing so, however, the Court admitted that it based its decision on a "[1999] factual record . . . not [reflecting] current technological reality," which it described as "a serious flaw in any case involving the [i]nternet."[231] The Court conceded that "it is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time."[232] However, it upheld the lower court decision that the law was unconstitutional.[233] Justice Scalia's dissenting opinion stated that "[n]othing in the First Amendment entitles the type of material covered by COPA to [a strict scrutiny] standard of review."[234] The federal district court considering Texas' H.B. 1181 indicated that it could not ignore binding precedent in favor of Scalia's non-binding dissenting opinion.[235] While it is true that lower courts do not have this power, the Supreme Court does. The Court should use its power to reconsider the concerns expressed in *Ashcroft*'s dissenting opinion in today's online context.

Building upon these early opinions, more recent opinions continued to cite and uphold their integrity but started to exhibit indications that the Court's beliefs about the internet could be outdated. The *Brown* dissent and concurrence again reiterated the growing concern that the 1990s precedent is not well-adapted to consider these evolving questions.[236] Justice Alito's dissent "predicted that the effect of such a 'sweeping' opinion would be to unnecessarily

227. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 805, 824 (2000).

228. Jackie Baucom, *How Kids Get Around Parental Controls (and Other Sneaky Moves)*, GABB NOW (Nov. 8, 2024), https://gabb.com/blog/how-kids-get-around-parental-controls ("These strategies range from the simplest—guessing passwords or changing device settings—to more sophisticated techniques parents might not even be aware of. Using VPNs (Virtual Private Networks) to bypass content filters is one of the most common in that latter category.").

229. Stephen Gossett, *How Much Can We Regulate Dark Patterns?*, BUILTIN (Aug. 22, 2023), https://builtin.com/design-ux/dark-patterns-regulation ("Namely, they only impact interactions that pertain to personal information. The endlessly protracted unsubscribe process? The confirmshaming language trying to foil your service opt-out? The repeated notification requests with no way to say no? Those aren't accounted for under these rules.").

230. Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

231. *Id.* at 671.

232. *Id.*

233. *Id.*

234. *Id.* at 676 (Scalia, J., dissenting).

235. Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 391 (W.D. Tex. 2023).

236. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 808–13, 835–39 (2011) (Alito, J., concurring) (Thomas, J., dissenting).

limit legislative efforts to combat concerns that new technologies are harmful to minors."[237] He stated that "[i]n considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution[,] . . . should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar, [and] . . . should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology."[238] Believing that "playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show," Justice Alito disagreed with the approach taken by the Court in *Brown*.[239]

The *Sorrell* court marked another step toward recognizing that this precedent is inapplicable to today's technological world. The opinion again conceded that the Court was aware of the "capacity of technology to find and publish personal information," believing it "present[ed] serious and unresolved issues with respect to personal privacy and the dignity it [sought] to secure."[240] Further putting the applicability of this case law into question is the fact that *Brown* and *Sorrell* were decided over a decade ago, and the internet has exponentially developed even since then. Over the past thirty years, First Amendment precedent has strongly defined the narrow boundaries in which legislatures can attempt to operate. But trying to carve out protections within this limited framework will continue to fall short because there is not enough room to account for today's expansive minor internet use and data collection.

2. Supreme Court Updates Would Make Space for an Expansive Child Privacy Law Regime

The Supreme Court needs to reconsider the precedent that continues to shape children's online privacy rights. It needs to either subject laws aimed at protecting children online to a lower level of scrutiny or declare that these protections of minors are necessary to achieve a compelling government interest, allowing them to pass even the highest burden of strict scrutiny. They could reason that the interest in child safety online is sufficiently compelling and outweighs burdens on adult internet users. The Court could recognize that the online space is an area where free speech can be subject to greater regulation by reasoning that the potential harm to minors outweighs any burdens that these laws impose onto adults. As discussed in Part III, the Court has taken this step

237. *Regulation of Violent Video Games Sales to Minors Violates First Amendment*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/journals/regulation-violent-video-games (last visited Dec. 22, 2024). Alito stated that he "would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 821 (2011) (Alito, J., concurring).

238. *Brown*, 564 U.S. at 806 (Alito, J., concurring).

239. *Id.*

240. Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011).

in the context of K-12 schools, where it permits greater regulations of speech than in other spaces with the justification that safeguarding children warrants such differential treatment.

Further, the Court could rely on *Reno* in updating its precedent. The *Reno* court, which laid the foundation for this framework, made their decision to prohibit expansive regulations on the internet based on how minimally invasive into the lives of Americans the internet was in 1997.[241] The Court needs to consider the expansive nature of today's online world, including its advantages and disadvantages for minor users, in order to create a modern First Amendment framework that both reflects the importance of online services to minors and contemplates its potential harms.

The Supreme Court needs to review *Sable*, *Reno*, *Playboy*, and *Ashcroft* and update the Court's definition of the online space to properly treat the internet like the unique and widespread mode of communication it is today, just as the Court did with the radio in 1997 under *Pacifica*. The Court once declared, "communications over the [i]nternet do not 'invade' an individual's home."[242] While that may have been true at the time, it could not be farther from the truth today. Just as the Court permitted the regulation of radio broadcasting in light of its "special factors" and invasive presence,[243] the Court now needs to allow for regulation of the internet. Recognizing the unique and pervasive nature of today's cyberspace and its impact on children's development, the Court must be willing to permit some inconveniences on adult access to online information. The Court must recognize that there are real child privacy concerns resulting from technological growth since the 1990s. By allowing the development of small obstacles to adult internet use, the Court can sanction the creation of a safe place for minors to enjoy the benefits of technology while protecting them from its significant risks. Once the Court updates this First Amendment precedent to account for the changes in technology, federal and state legislatures will have the room they need to research and address growing concerns surrounding safe minor internet use without being knocked down by this existing, outdated precedent.

The internet has come a long way in the twenty-seven years since *Reno*. At the turn of the century, *only* 49 percent of family households reported that their child used the internet.[244] Comparing that internet to the one the world knows today, "[w]hat was once slow, cumbersome and only accessible for a few, has

241. Reno v. ACLU, 521 U.S. 844, 869 (1997).

242. *Id.*

243. *Id.* at 845.

244. GRUNWALD ASSOCS., CHILDREN, FAMILIES AND THE INTERNET 1 (2000), https://grunwald.com/pdfs/CHILDREN-FAMILIES-AND-INTERNET-2000.pdf.

now been replaced by something speedy, sleek and openly accessible to everyone."[245] It has been described as "the second coming of water."[246]

As technology has become more sophisticated, children have become targets for data collection and marketing schemes. Now embedded into almost every aspect of society, internet use is unavoidable. Along with that integration comes child privacy concerns that have yet to be addressed in any meaningful way. As long as we are unwilling to burden adults in the name of expanding protections for children, updating these laws will be impossible. Late 1990s precedent will control until the Supreme Court recognizes the critical need to reassess their First Amendment framework in this evolved online context. The dissenting opinions in more recent Supreme Court cases applying this precedent, as well as the opinions of the federal court judges in these three cases, demonstrate the widespread recognition that the technological world is not what it was in the late 90s. Unfortunately, the rates of harm to minors are not either. Because the precedent is outdated and stands as a concrete barrier to online protections for children, the Supreme Court needs to weigh in to update this legal framework and permit the regulation of internet use so that protections of minors can withstand First Amendment challenges.

III. CONSTITUTIONALLY VALID SOLUTIONS TO ADDRESS HARMS CAUSED BY SOCIAL MEDIA

While legislators await reconsideration of First Amendment precedent in the context of today's version of the internet, there are alternative paths to resolution to pursue. This Part III overviews several alternatives for legislators to consider in the meantime. While these options will not individually address the full range of issues in the same way as an expansive privacy law would, a combination of them could lead to effective, increased protections for minors. One course of action is to look into laws that would prohibit phone use in schools or that target specific harms like Texas did when regulating access to pornographic content. Another option is to develop legislation that restricts data collection and sales or the use of dark patterns and other addictive tactics, in particular. More generally, state officials can allocate funding to schools or organizations to educate parents and children about safe technology use. Each of these alternatives contains loopholes and only addresses the issue in part. However, even small changes—that will be permissible under current First Amendment jurisprudence—have the power to collectively create a safer online space for children, one law at a time.

245. Dillon Wallace, *What the Internet Looked Like in 2000*, ANALOG, https://legacybox.com/blogs/analog/what-the-internet-looked-like-in-2000 (last visited Dec. 22, 2024).

246. *Id.*

A. PROHIBIT PHONES IN K-12 SCHOOLS

One approach is to increase restrictions that prohibit phones in secondary schools. Studies show that cellphone use during instruction hours presents a magnitude of problems.[247] One educator explained that students have "difficulty recalling and retaining information because of the very idea that *something* can be happening on their phone."[248] At the college level, one experiment revealed that although using devices during class didn't lower students' lecture comprehension, it did lower test scores in final exams by half a grade, indicating that "the main effect of divided attention in the classroom is on long-term retention."[249] One researcher found that banning smartphones significantly decreased healthcare needs for psychological symptoms and diseases among girls, decreased bullying among both genders, and improved GPA.[250]

Unlike the complicated barriers to protecting children online through laws like CAADCA or S.B. 986, there is currently a pathway under existing Supreme Court precedent to carve out increased protections and to minimize youth technology use concerns by creating prohibitions during school hours. This option is especially viable because the Court has historically considered schools to be a place where the state has the power to regulate speech, minimizing constitutional concerns.

In *Tinker v. Des Moines Independent Community School District*, in 1969, the Supreme Court first held that a school could not punish students for protesting the Vietnam War by wearing black armbands because the "undifferentiated fear or apprehension of disturbance [was] not enough to overcome the right to freedom of expression," explaining that regulation of student speech is permissible only when the school reasonably fears the speech will disrupt or interfere with school operations.[251] Nearly twenty years later, the Court appeared to have a different outlook. In *Bethel School District v. Fraser*, the Court upheld a suspension resulting from a high school student giving a speech containing sexual innuendos and double entendres.[252] The Court explained that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."[253] This marked a turning point for government regulations of schools because the Court explicitly recognized that the government needs the space to increase protections for

247. Abrahamsson, *supra* note 16, at 2.

248. Tim Walker, *Cellphone Bans in School Are Back. How Far Will They Go?*, NEA TODAY (Feb. 3, 2023), https://www.nea.org/nea-today/all-news-articles/cellphone-bans-school-are-back-how-far-will-they-go.

249. Neal Buccino, *Cellphone Distraction in the Classroom Can Lead to Lower Grades, Rutgers Study Finds*, RUTGERS (July 27, 2018), https://www.rutgers.edu/news/cellphone-distraction-classroom-can-lead-lower-grades-rutgers-study-finds; *see also* Arnold L. Glass & Mengxue Kang, *Dividing Attention in the Classroom Reduces Exam Performance*, 39 EDUC. PSYCH. 395, 400–401 (2018).

250. Abrahamsson, *supra* note 16, at 1–3.

251. 393 U.S. 503, 508 (1969).

252. 478 U.S. 675, 685 (1986).

253. *Id.* at 683.

minors and can do so even if regulating the same type of speech by adults would interfere with their First Amendment rights. The Court began recognizing that, in certain circumstances, there is a necessity for reasonable time, place, and manner restrictions on youth access to and distribution of free speech *at school*.[254] Then, in *Hazelwood School District v. Kuhlmeier*, the Court permitted a school principal to remove from the school newspaper stories about teen pregnancies and divorce, reasoning that the actions were "reasonably related to legitimate pedagogical concerns."[255] Again, in 2007, the Supreme Court held that no student's First Amendment rights were violated when a public high school suspended a student for bringing a banner that read "BONG HiTS 4 JESUS" to a school-sponsored event.[256] Notably, the Court found that schools may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." [257] Based on this line of precedent, it appears that cell phone bans on school campuses are a viable state path to address some of the underlying concerns motivating bills such as the CAADCA and S.B. 396. This line of reasoning was applied to technology use restrictions in 2008 when parents brought constitutional challenges against a complete ban on cell phone usage in New York public schools.[258] The New York state court upheld the ban, reasoning that "[n]othing about the cell phone policy forbids or prevents parents and their children from communicating with each other before and after school" and that the ban was "reasonably related to" legitimate pedagogical concerns.[259]

Following these cases, it seems there is a greater opportunity for government oversight in the space of campus regulations than in other aspects of children's lives. Lawmakers need to identify this angle and work on implementing these changes, and a few already have. Florida was the first state to implement a cell phone ban in K-12 schools, which "effectively bans the usage of phones and other wireless communication devices during instructional time but leaves room for [school] districts to decide how to implement the new rules."[260] Next, Indiana's governor signed a law restricting phone use in the classroom but carved out exceptions for phone use for medical reasons, teacher-

254. *Id.*

255. 484 U.S. 260, 273 (1988).

256. Morse v. Frederick, 551 U.S. 93, 397–98 (2007).

257. *Id.* at 403.

258. Price v. N.Y.C. Bds. of Educ., 51 A.D.3d 277, 286 (N.Y. App. Div. 2008).

259. *Id.* at 292; Allen Clendaniel, *You Can't Take My Phone! Legal Issues Related to Policies Restricting Students' Mobile Devices*, ASS'N OF ALASKA SCH. BDS., https://aasb.org/you-cant-take-my-phone-legal-issues-related-to-policies-restricting-students-mobile-devices (last visited Dec. 22, 2024).

260. Brandon Girod, *New Florida School Phone Rules Catches Parent Off Guard. What Else Changed over Summer*, PENSACOLA NEWS J. (Aug. 10, 2023, 11:08 AM CT), https://www.pnj.com/story/news/education/2023/08/10/new-florida-school-phone-rule-is-the-tip-of-the-iceberg-what-to-know/70566131007; *see also* Elaine S. Povich, *If Schools Won't Ban Kids' Cellphones, Some Lawmakers Say, They Will*, STATELINE (Mar. 13, 2024, 5:00 AM), https://stateline.org/2024/03/13/if-schools-wont-ban-kids-cellphones-some-lawmakers-say-they-will.

approved learning purposes, and emergencies.[261] Other states have considered similar legislation.[262]

Although several states have introduced bills regulating cell phone use in secondary schools, there is room for these restrictions to be increased. Supreme Court precedent in this area leaves space open for states to get creative in passing laws that restrict youth access to social media platforms for a substantial part of their day, the part of the day they are supposed to be learning and interacting with their peers face to face. This will not only diminish child exposure to the identified harmful risks online, but will also allow them to be more present in class.

B. PROPOSE LAWS THAT TARGET OBSCENE CONTENT

Another viable path to addressing concerns over harm to minors through technology use is to more specifically target concerns of child access to obscene materials. Research shows that pornography exposure at a young age can lead to decreased mental health, perpetuate sexism and objectification, and desensitize those viewers to abusive actions.[263] Efforts to decrease youth access to this content would address concerns over these types of harms.

As discussed in Part II, Texas has had recent success in passing such a law that targeted youth access to pornographic content. While initially enjoined from enforcement by the U.S. District Court for the Western District of Texas, the Fifth Circuit partially vacated the injunction, reasoning that "the age-verification requirement is rationally related to the government's legitimate interest in preventing minors' access to pornography."[264] This reasoning in the Fifth Circuit decision exposes another option that policymakers can pursue to combat harm to minors.

On March 7, 2024, the Fifth Circuit interpreted the set of facts differently than the lower court.[265] The court agreed with the lower court that the health warning requirement constituted unconstitutionally compelled speech.[266] However, they found that age-based restriction on access to pornographic content is constitutional by applying the lowest standard of review, rational basis review.[267] The court explained that H.B. 1181 is permissible by distinguishing it from previous laws that were not.[268] The Fifth Circuit compared the Texas

261. S.B. 185, 123rd Gen. Assemb., 2nd Reg. Sess. (Ind. 2024); *see also* Kirsten Adair, *Indiana Lawmakers Ban Cellphones in Class. Now It's Up to Schools to Figure Out How*, NPR (Apr. 3, 2024, 2:43 PM ET), https://www.npr.org/2024/04/03/1240667966/indiana-bans-cell-phones-schools-social-media-distraction.

262. Adair, *supra* note 261. Kentucky, Vermont, Tennessee, and Kansas are all considering similar legislation.

263. *Protection of Children from the Harmful Impacts of Pornography*, UNICEF, https://www.unicef.org/harmful-content-online (last visited Dec. 22, 2024).

264. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024).

265. *See id.*

266. *Id.* at 267.

267. *Id.*

268. *Id.* at 271–73.

law to the Communications Decency Act to illustrate how much more narrow it was drawn.[269] Notably, the court highlighted the fact that the *Reno* "decision was fundamentally bound up in the rudimentary 'existing' technology of twenty-seven years ago," pointing out that "technology has dramatically developed."[270]

This law is an example of a state law that targets specific harmful content. The Fifth Circuit's reasoning provides evidence that these more narrowly defined laws have a greater chance of passing constitutional muster. This is likely another avenue for legislatures to pursue in combatting technology's harms to children. However, in doing so, lawmakers must balance creating narrow laws that will survive constitutional requirements with the need to cover enough behavior to effectively target concerns.

C. REGULATE DARK PATTERNS

Another option for these lawmakers is to more directly target harmful practices, such as dark patterns. Dark patterns are digital designs that "trick or manipulate consumers into buying products or services or giving up their privacy."[271] This includes the automatic playing of media, rewards for content creation or time spent on applications, cell phone notifications, and fabricated time pressure.[272] Not only does this present the opportunity for adults using these websites to become addicted, but it is especially harmful to children, who are more susceptible to these traps. Studies show that these features are present "in 80% of apps played by *preschool*-aged children and [are] especially common in apps played by children from lower-income and lower-education households."[273]

Because these businesses are not self-identifying as directing their services to children, they escape state regulation under COPPA. CAADCA attempted to directly regulate these practices in California by prohibiting companies from designing their platforms in a way that subverts or impairs user autonomy, decision-making, or choice, or in a way "to lead or encourage" children to

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269. The Court stated:

> Most of those same differences exist between the CDA and H.B. 1181—but those are not the only differences between the two laws; they include the following: (1) The CDA included prohibitions on non-sexual material; H.B. 1181 does not. (2) Parental participation or consent could not circumvent the CDA; it can circumvent H.B. 1181. (3) The CDA did not specifically define the proscribed material; H.B. 1181 does. (4) The CDA had no limitation to commercial activity; H.B. 1181 covers only commercial entities. (5) In enjoining the CDA, the Court relied at least in part on "the absence of a viable age verification process," but that process is the central requirement of H.B. 1181. Finally, (6) the Court's decision was fundamentally bound up in the rudimentary "existing" technology of twenty-seven years ago, but technology has dramatically developed.

Id. at 272 (citations omitted).

270. *Id.* (citing Reno v. ACLU, 521 U.S. 844, 876–77 (1997)).

271. Press Release, FTC, FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers.

272. *See* Appellant's Opening Brief, *supra* note 106, at 12.

273. *Id.*

provide personal information as well as from taking "any action that the business knows, or has reason to know, is materially detrimental to the child's physical health, mental health, or well-being."[274] The problem with California's recent law, according to the U.S. District Court for the Northern District of California, is that it "may cause covered businesses to deny children access to their platforms or content."[275] Some concerns are that the language "any action," "lead or encourage," and "detrimental to [minor's] physical health, mental health, or well-being" are all overbroad and vague.[276]

If states can draft laws that are clearer and narrower, they might be able to curtail the harms created by these dark patterns. By being specific about what patterns are prohibited, a targeted law has the potential to meaningfully limit these practices. In order to do so, lawmakers must also be mindful of the risk that an overbroad definition of dark patterns may not lead to progress as effectively as a narrower definition that gets at the heart of the most damaging aspects of dark pattern designs. Creating these types of laws also gets to the motivations behind the Arkansas law without interfering with minors' First Amendment rights like a full ban on social media would. As such, inhibiting dark patterns specifically could be a potential alternative route to increase protections for minors online.

D. RESTRICT DATA COLLECTION AND SALES

Another step that legislators can take in effecting greater protections for minors (and adults) online is strengthening restrictions on data sales. The United States privacy law landscape is fragmented and inefficient. Critics urge that "the United States lacks a comprehensive data privacy law" and has "[i]nstead, a piecemeal statutory structure—consisting of an outdated communications privacy law and sector-specific data protection laws."[277] This "protects certain types of personal information from certain privacy intrusions while leaving other types of data and intrusions unregulated."[278] Recent technological advancements provide companies with ample loopholes in compliance, including opportunities for companies to side-step COPPA by claiming that they are not directing their services toward children.[279] Various proposed laws attempt to address many of COPPA's loopholes.[280] The 2024 American Data Privacy and Protection Act attempts to address many of the current loopholes in

274. CAL. CIV. CODE § 1798.99.31(b)(7) (West 2025).

275. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 959 (N.D. Cal. 2023).

276. Appellee NetChoice's Response Brief at 17, NetChoice, LLC v. Bonta, 113 F.4th 1101 (9th Cir. 2024) (No. 23-2969); *see* CAL. CIV. CODE § 1798.99.31(b)(7) (West 2025).

277. Emile Ayoub & Elizabeth Goitein, *Closing the Data Broker Loophole*, BRENNAN CTR. FOR JUST. (Feb. 13, 2024), https://www.brennancenter.org/our-work/research-reports/closing-data-broker-loophole.

278. *Id.*

279. *See* Craig Timberg, *Sex, Drugs, and Self-harm: Where 20 years of Child Online Protection Law Went Wrong*, WASH. POST (June 13, 2019, 8:00 AM EDT), https://www.washingtonpost.com/technology/2019/06/13/sex-drugs-self-harm-where-years-child-online-protection-law-went-wrong.

280. *See supra* notes 25–31 and accompanying text.

data sales more generally and places the burden on companies by defining what data can be collected and how it can be used.[281]

While there are some steps being taken at the federal level, states have also attempted to regulate data collection and sales. "[S]ome research shows that state privacy laws are largely ineffective" because they "lack 'data minimization' obligations . . . [and a] private right of action, which experts argue is the most effective way to deter companies from violating the regulations."[282] Another question considered in this debate is whether "states have the right to regulate internet content, considering the internet's national and global reach," which "brings up concerns about the feasibility and legitimacy of applying state laws to an inherently borderless platform."[283]

However, if states are able to continue passing legislation that restricts the sale of children's data, there will be progress. For example, California was looking to pass a bill that would prohibit the collection, disclosure, or use of personal information of consumers under eighteen without a consumer's affirmative consent if they are over thirteen or parent authorization if they are under thirteen.[284] This law would have eliminated the current requirement that companies have "actual knowledge" that the consumer is under sixteen years old.[285] Because these types of state laws have the ability to produce significant strides towards the expansion of child privacy online, state legislators should consider promoting their enactment, as these targeted efforts have a greater chance of survival.

E. FUND ORGANIZATIONS AND SCHOOLS IN EDUCATING STUDENTS ABOUT SAFE SOCIAL MEDIA PRACTICES

Finally, and more generally, raising awareness about safe technology use for children is another effective strategy in combatting these harms. Lawmakers can push funding for various organizations that educate parents and children about safe practices, healthy boundaries, and age-appropriate content. A recent poll conducted by the Kids Mental Health Foundation revealed that while "93 [percent] of parents agree it's important to be proactive about kids' mental health[,] [o]nly 40 [percent] say they know how."[286] This exposes a potential

281. Keely Quinlan, *The American Privacy Rights Act Could Undercut State Privacy Efforts*, STATESCOOP (Apr. 12, 2024), https://statescoop.com/american-privacy-rights-act-state-laws-data.

282. *Id.*

283. Sonja Raath, *Are Age Verification Laws in the U.S. a Threat to Digital Freedom?*, EXPRESSVPN (Mar. 25, 2024), https://www.expressvpn.com/blog/us-age-verification-laws/?srsltid=AfmBOoopvT2XzrBDoe0nSZKf9lZOGlv44r9bsWswHFIPpxYVm2Z227LM.

284. Julia Jacobson, Alan Friel, Sasha Kiosse & Stacy Swanson, *Protecting Kids Online: Changes in California, Connecticut, and Congress—Part I*, SQUIRE PATTON BOGGS: PRIV. WORLD (Feb. 27, 2024), https://www.privacyworld.blog/2024/02/protecting-kids-online-changes-in-california-connecticut-and-congress-part-i.

285. *Id.*

286. *Stats & Facts*, THE KIDS MENTAL HEALTH FOUND., https://www.kidsmentalhealthfoundation.org (last visited Dec. 22, 2024).

area of focus: education. The Kids Mental Health Foundation educates parents and children on how much social media is healthy, what age a child is ready for certain platforms, as well as the benefits and risks of using these apps.[287] The Digital Futures Initiative combats the side effects of device use in teens by curating resources and solutions to guide "digitally connected youth on making better decisions, mitigating new world risks[,] and using the power of digital[] devices and social media for their benefit."[288]

There could also be an increased focus on educating parents regarding the necessity of utilizing parent tools to monitor their children. A technology company CEO recently revealed that less than 1 percent of parents used their parent monitoring tools to regulate their children's online practices.[289] Directing government funds and grants toward initiatives such as these would likely alleviate many of the technology use issues facing families today. By increasing awareness of the harms as well as the tangible solutions that parents can turn to, this country will be one step closer to creating an internet space that is safe for children.

CONCLUSION

Children's use of social media is only growing as technology continues to invade every aspect of daily life.[290] Research indicates serious and overwhelming negative effects on children resulting from internet and social media use.[291] The advocacy of individuals and groups in various positions of power validates a consensus that it is imperative to initiate change. However, a review of prior attempts to implement change reveals a pattern of inefficacy. United States presidents, whistle-blowers, Congress, and class action lawsuits have all attempted and failed to increase protections for minors.[292] Now, California, Arkansas, and Texas state legislatures are being hindered from accomplishing their goals of crafting comprehensive legislation to protect their minors, reinforcing the contention that the Supreme Court needs to act.[293] While the three lawsuits reveal these statutes' common constitutional issues, their

287. *Resources for Technologoy and Social Media*, THE KIDS MENTAL HEALTH FOUND., https://www.kidsmentalhealthfoundation.org/mental-health-resources/technology-and-social-media (last visited Dec. 22, 2024).

288. *About Us*, DIGIT. FUTURES INITIATIVE, https://www.dfinow.org/about-us (last visited Dec. 22, 2024).

289. "Discord CEO Jason Citron noted that out of more than 150 million global users – with approximately 2.7 million monthly active users under age 18 in the U.S. alone—only 15,000 parents are connected to 15,500 children's accounts through the Discord Family Center." Kat Tenbarge, *Fewer than 1% of Parents Use Social Media Tools to Monitor Their Children's Accounts, Tech Companies Say*, NBC NEWS (Mar. 29, 2024, 10:57 AM PDT), https://www.nbcnews.com/tech/social-media/fewer-1-parents-use-social-media-tools-monitor-childrens-accounts-tech-rcna145592.

290. *See* Aditya Kumar, *How Technology Changed Our Lives: Has It Improved Life Today?*, SIMPLILEARN (Sept. 30, 2024), https://www.simplilearn.com/how-has-technology-improved-our-lives-article.

291. Ransom, *supra* note 1, at 105.

292. *See id.* at 108, 111; HOLMES, *supra* note 29; Lucente, *supra* note 38.

293. *See* NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 966 (N.D. Cal. 2023); NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 WL 5660155, at *21 (W.D. Ark. Aug. 31, 2023).

commonalities might also carve a path to resolution. The rapid growth of the internet's capabilities fosters community, productivity, access to information, and innovation, but it also creates the potential for privacy to be encroached, the internet and social media to be misused, and mental health to deteriorate. Children need to be protected from the harmful impact that technology is believed to have on their development, safety, and well-being.[294] Lawmakers are not without options in protecting minors online while they wait for the Supreme Court to weigh in on recent cases. They can turn to banning phones in schools, targeting obscene material, cracking down on data collection and sales or the use of dark patterns, and funding technology education programs, but these resolutions will only go so far. To effect meaningful change, the Supreme Court must update its 1990s precedent so that children will not be the unintended recipient of harm brought on by technological innovation and legislators *can* have a chance to be the "new Surgeon General."

294. Parents reporting concerns about their children's online activity cite "addiction, sleep loss, anxiety, learning and attention problems, and exposure to violent images." Grace et al., *supra* note 12; *see also Social Media and Teens*, *supra* note 5.