Legislative Affairs
One Whitehall Street
New York, NY 10004
212-607-3300
www.nyclu.org

2023 – 2024 Legislative Memorandum

Subject: **S.7694-A (Gounardes) / A.8148-A (Rozic)**

Position: **OPPOSE**

Summary

The ACLU of New York **OPPOSES S.7694-A / A.8148-A**, titled the "Stop Addictive Feeds Exploitation for Kids Act" (SAFE Act). A product of the Legislature's concerns about the potentially harmful effects of too much social media on minors—particularly teenagers—the bill aims to curtail social media platforms' use of so-called "addictive feeds": website design features that increase user engagement by offering content customized to each user's past browsing habits and preferences. While well-intended, it unfortunately faces the same nearly insurmountable First Amendment obstacles as recent efforts in California, Arkansas, Ohio, Florida and other states. Because it is almost certain to be struck down, we respectfully urge members to vote against it.

Details

The SAFE Act would prohibit social media platforms from offering "addictive feeds" to anyone under 18 without parental consent, instead limiting users to chronological content from other users they already follow, or feeds of generally popular material. An addictive feed is defined as user-generated/shared content prioritized based upon information "associated with the user or the user's device," subject to various exceptions (discussed below).

A platform may not offer an addictive feed to *any user* unless the platform has first (1) determined, using a "commercially reasonable and technically feasible" method, that a user is not a minor; or (2) obtained verifiable parental consent.

The bill would also prohibit social media platforms from sending notifications during the hours of 12AM and 6AM without verifiable parental consent.

The bill would authorize the Attorney General's office to bring an action to enjoin violations, and seek restitution, disgorgement of related profits, or civil penalties of up to $5,000 per violation. There is no private right of action.

The SAFE Act violates the First Amendment

The SAFE Act imposes content-based restrictions on private individuals' First Amendment right to receive information anonymously and without government-imposed controls, as well as social media companies' right to provide that information in the manner they choose. While well-intended, it faces considerable constitutional challenges:

(a) "Audience impact" laws are generally considered content-based

First, the state cannot restrict otherwise protected expression solely out of concern for an audience's emotional well-being. Laws that limit expression solely to prevent psychological harm—absent more—are generally regarded as content-based[1] and subjected to strict scrutiny.[2] The SAFE Act, which the state considers essential to address the "significantly higher rates of youth depression, anxiety, suicidal ideation, and self-harm" arguably tied to excessive social media use, is no exception.

Supporters will argue that SAFE does not expressly dictate by subject matter *what* content social media platforms may no longer prioritize—indeed, the SAFE Act is carefully worded to appear content-neutral. But the underlying purpose is clear enough: to address "depression, anxiety, suicidal ideation, and self-harm" among minors, the state has chosen to limit the manner in which social media platforms may customize the delivery of content—all content, not just content shown to cause depression, anxiety, suicidal ideation, and self-harm—to minors. And regardless of subject, any law that restricts the "availability and use" of information by some speakers but not others, and for some purposes but not others, for the purpose of preventing psychological harm, is still a content-based regulation of protected expression, likely subject to strict scrutiny—the most rigorous legal standard of review, under which laws that suppress speech are presumptively unconstitutional—and almost certain to be struck down.[3]

---

[1] "'[R]egulations that focus on the direct impact of speech on its audience' are not properly analyzed [as time, place, and manner regulations]." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (observing, in the context of a law restricting truthful speech: "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects."); *ACLU v. Reno*, 521 U.S. at 868 (*same*); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ('Listeners' reaction to speech is not a content-neutral basis for regulation.')."

[2] In enjoining an Arkansas law that would have required social media platforms to verify users' age, the district court noted, "If the State's purpose is to restrict access to constitutionally protected speech based on the State's belief that such speech is harmful to minors, then arguably [the law] would be subject to strict scrutiny." *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155, at *15 (W.D. Ark. Aug. 31, 2023)

[3] *Sorrell* at 570–71. To survive strict scrutiny, a content-based restriction on First Amendment-protected expression must be the least restrictive means necessary to achieve a compelling government interest.

(b) Age-verification is constitutionally problematic

Any measure that restricts social media content by age likely violates the First Amendment. Indeed, courts across the country have struck down age verification laws almost everywhere they've been enacted, and for a variety of reasons: age verification burdens those who wish to use social media anonymously;[4] age verification deters *lawful* users who can't or won't verify their age;[5] and, age verification raises significant privacy concerns.[6]

Here, banning *all* "addictive feeds" for *everyone* unable or unwilling to verify their age violates the First Amendment rights of not only adult users, who have a right to receive information generally free of government interference,[7] but also minors, whom the bill treats as a homogenous group but whose informational needs actually differ across individuals, age groups and communities.

(c) The law would deprive minors of protected speech

While states have considerable discretion in deciding how to protect children, minors—especially teenagers close to the age of majority—nonetheless have First Amendment rights. The Supreme Court has noted that First Amendment protections "are no less applicable when government seeks to control the flow of information to minors[,]"[8] that the State does not possess "a free-floating power to restrict the ideas to

---

[4] *See ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (holding that mandatory age verification "violates the First and Fourteenth Amendments of the United States Constitution because it prevents people from communicating and accessing information anonymously"), *aff'd*, 194 F.3d 1142 (10th Cir. 1999).

[5] *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 236-37 (4th Cir. 2004) (age-verification using credit card numbers "creates First Amendment problems of its own" because "many adults may be unwilling to provide their credit card number online" and "[s]uch a restriction would also serve as a complete block to adults who wish to access adult material but do not own a credit card"); *Se. Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773, 782 (D.S.C. 2005) (holding that age verification creates a "First Amendment problem" because "age verification deters lawful users from accessing speech they are entitled to receive").

[6] *See NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551, at *12 (N.D. Cal. Sept. 18, 2023) (noting the California Age Appropriate Design Code's age verification provision was "actually likely to exacerbate the problem by inducing covered businesses to require consumers, including children, to divulge additional personal information.")

[7] Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing **imposes significant burdens on adult access to constitutionally protected speech and 'discourage[s] users from accessing [the regulated] sites**.' *Reno v. American Civil Liberties Union*, 521 U.S. 844, 856 (1997). Age-verification schemes like those contemplated by Act 689 'are not only an additional hassle,' but '**they also require that website visitors forgo the anonymity otherwise available on the internet**.' *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003); *see also ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to 'relinquish their anonymity to access protected speech').

[8] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975)

which children may be exposed,"[9] and that "speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[10]

Limiting access to "speech that is neither obscene as to youths nor subject to some other legitimate proscription" is basically what the SAFE Act does. It treats all algorithmically prioritized content, regardless of subject, as an easy proxy for the arguably harmful content it can neither isolate nor ban. But the Supreme Court has been adamant that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [children]."[11] A ban on *all* algorithmically prioritized content in order to get at a few offensive or troubling subjects the government deems harmful when consumed excessively is neither narrow nor well-defined.

(d) Parental consent exceptions are disfavored in the speech context

Brown v. Entertainment Merchants Ass'n presents a particularly salient challenge to content-based parental consent requirements like the SAFE Act's. In invalidating California's prohibition on the sale of violent video games to minors, the Supreme Court reasoned that even if "the state has the power to enforce parental prohibitions" . . . "it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent."[12] Parental consent requirements, as the Court explained, "[do] not enforce parental authority over children's speech […]; they impose governmental authority, subject only to a parental veto."[13]

(e) *Dictating how social media companies prioritize content is unconstitutional*

Current law gives social media platforms robust First Amendment protections. "When platforms choose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity."[14] Indeed, at least one federal appeals court has questioned whether *any* government interest allows officials to dictate how social media companies prioritize content.[15]

---

9 *Id.* at 790

10 *Erznoznik*, *supra*, at 213–214

11 564 U.S. 786, 794-95 (2011)

12 *Id*. at 795, n.3

13 *Id.*

14 *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023).

15 *Id*. at 1229 (recognizing "**no governmental interest** sufficient to justify **forcing platforms to show content to users in a sequential or chronological order**") (internal quotes omitted), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023).

(f) The SAFE Act is not narrowly tailored

Whether content-based or content-neutral, the SAFE Act cannot survive First Amendment scrutiny unless it is—at a minimum—narrowly tailored to serve the state's interest in protecting children.[16] If it captures too much constitutionally protected speech in advancing the government's interest, it is overinclusive. On the other hand, if it doesn't capture enough harmful behavior to actually advance the government's interest, it is underinclusive. In either condition, the law is too *imprecisely* tailored to be constitutional.

The SAFE Act suffers both flaws. It is overinclusive because, as we've discussed above, it treats *all* algorithmically prioritized content—most of which is not only constitutionally protected but completely innocuous—as dangerous for *everyone* who can't or won't verify their age, in order to restrict minors' access to *too much* of a handful of categories of material it deems harmful.

At the same time, the SAFE Act is underinclusive because it defines "addictive feed" so narrowly and with so many exceptions that it is unlikely to seriously limit minors' access to the sort of content the state finds concerning. As defined, an "addictive feed" is nothing more than content prioritized based on "information associated with the user or the user's device." That's it. A feed prioritized based on information "not persistently associated" with a user or device and not based upon that user's previous interactions with other user-generated content—in other words, information that is generally trending, no matter how unrealistic or outrageous—doesn't count as addictive. Content that is requested or subscribed to doesn't count either. Direct and private communications also don't count. Neither do search results. Neither do playlists or compilations arranged in a preexisting sequence by the same user.

In short, **the SAFE Act doesn't prevent minors from searching for harmful content on their own, downloading and consuming as much of it as they can find, sharing it with their friends, and communicating it directly to each other—it just prevents social media platforms from giving them more**.

In the context of underinclusivity, the Supreme Court's opinion in *Brown* bears mentioning. There, the Court recognized that the state's interest in curtailing minors' exposure to violent images was "legitimate," but held that legislation restricting the sale of violent video games to minors without parental consent [was] "seriously underinclusive, not only because it exclude[d] portrayals other than video games, but also because it permit[ted] a parental ... veto."[17] It did not make sense, the Court explained, to leave material so "dangerous [and] mind-altering". . . "in the hands of

---

16 *See Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)

17 *Brown, supra* at 805

children so long as one parent ... says it's OK."[18] Equally, "as a means of assisting concerned parents," the Court held that the law was "seriously overinclusive because it abridge[d] the First Amendment rights of young people whose parents ... think violent video games are a harmless pastime."[19]

***

Social media has arguably wrought as much social harm as it has social good, and its effects on young people are—while still the subject of ongoing research—concerning. And the state is clearly working its way in good faith through a thicket of First Amendment problems. But in simplest terms, the SAFE Act appears merely to target "addictive" design features as a proxy for the objectionable content the state can't restrict without running afoul of the First Amendment. Limiting content delivery—even without targeting a particular subject—in this manner, to only government-approved quantities and sequences, is still unconstitutional, and the ACLU of New York urges legislators to vote against it.

[18] *Id.* at 802
[19] *Id.* at 805