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NetChoice

April 9, 2024

The Honorable Rebecca Bauer-Kahan
Chair, Assembly Privacy and Consumer Protection Committee
1020 N Street, Room 162
Sacramento, CA 95814

RE: AB 3172 (Lowenthal) – Social Media – OPPOSE

Dear Assemblymember Lowenthal,

TechNet and the following organizations must respectfully oppose AB 3172, which imposes such an extreme and subjective standard of liability on social media platforms that companies would have no choice but to dramatically restrict content or cease operations for kids under 18.

Our member companies prioritize the safety and digital well-being of children who access their sites and platforms. Our members strongly believe children deserve a heightened level of protection and have been at the forefront of raising the standard for digital well-being across the industry by creating new features such as settings, parental tools, and protections that are age-appropriate, empowering families to create the online experience that fits their needs, and tailoring features to the differing developmental needs of young people.

AB 3172's Vagueness Will Result in a Flood of Litigation

It is entirely unclear what will constitute a violation of a platform's "responsibility of ordinary care and skill" in this context. Feasibly, any sort of negative impact on a child could be sufficient for a plaintiff to allege a breach of the platform's responsibility of ordinary care and skill. Every platform feature, every interaction between users, and every post that a teen sees could be the basis for a lawsuit. Reasonable people, even parents in the same household, might disagree about what is harmful to a particular teen. AB 3172 asks social media platforms to decide what is harmful to every user and exercise ordinary care to prevent that harm. This ambiguity will be impossible for platforms to operationalize.

This vagueness, combined with high per-violation statutory penalties (up to \$1 million per violation per child per social media platform) that are decoupled from a plaintiff's actual harm and potential lawsuits from outside of California, will invite a flood of frivolous litigation. AB 3172 does not limit suits to only California users or residents; rather, any platform with users in California could face liability. Feasibly, a user in Texas could try to bring suit in California against not only those platforms that are domiciled in California but against those that are *not* domiciled in California but that have California users, under the current wording of the bill. Consequently, litigants from across the country could file suits in California state courts, potentially resulting in judgments in the hundreds of millions per case and encouraging opportunistic plaintiffs' attorneys.

Even after lawsuits are filed, decisions are rendered, or cases are settled, it'll be impossible for platforms to learn or anticipate what sort of features violate this duty as each case will be heavily fact intensive. What might be found to violate a platform's duty in one case, might not in another. Platforms can't draw sound conclusions and make decisions about their features or policies from a conflicting patchwork of precedents. As a result, AB 3172 will not lead to improvements in platform safety and will likely restrict teens' access to social media platforms.

Restrictions on Teen Access to the Internet

To the extent this bill provides an incentive for platforms to change their policies and features, the extreme risk of liability will likely result in companies severely limiting or completely eliminating online spaces for teens.

Litigation leads to uneven and inconsistent outcomes, with different companies choosing to limit the immense exposure this bill will create in different ways. There are two main ways platforms could respond to the vague requirements and extreme liability in this bill, neither of which are good outcomes for teens.

First, companies could adjust their policies and terms of service to exclude all users under the age of 18. This would be a tremendous and detrimental blow to teens' ability to access information and the open internet. As discussed below, this violates First Amendment principles and protections for teens. However, even if a platform stated in its terms of service that teens under 18 were not allowed on the platform and took steps to prevent their access, that may not be enough to avoid liability for a teen who accesses the site anyway and has a negative outcome.

Second, companies could also adjust their terms of service so that users under the age of 18 have a heavily sanitized version of the platform. This could include limiting which users teens can interact with (e.g. only users approved by parents), which features they have access to (no messaging or public posting), and even what content they can interact with or view (no political, news, or other "potentially harmful" content). This might reduce but would not prevent every instance of harm to teens given the nebulousness and subjectivity that is inherent in defining "harm".

This bill's implicit concern is harmful content. It is impossible for companies to identify and remove every potentially harmful piece of content because there's no clear consensus on what exactly constitutes harmful content, apart from clearly illicit content. Determining what is harmful is highly subjective and varies from person to person, making it impossible to make such judgments on behalf of millions of users. Faced with this impossible task and the liability imposed by this bill, some platforms may decide to aggressively over restrict content that *could* be considered harmful for teens. For instance, content promoting healthy eating could be restricted due to concerns it *could* lead to body image issues. Similarly, content about the climate crisis or foreign conflicts would need to be restricted as it *could* lead to depression, anxiety, and self-harm. Additionally, beneficial information like anti-drug or smoking cessation programs, mental health support, and gender identity resources could get overregulated because of the impossibility of deciding what is harmful to every user.

Furthermore, platforms would need to evaluate whether to eliminate fundamental features and functions of their platform, features that are the reason teens and users go to their platforms, due to the legal risk involved. For instance, since direct messaging features *could* potentially be misused for contacting and bullying other teens, such features would likely be removed.

Teens' use of these platforms would be overly policed and sanitized to such a degree that they would surely leave our sites in favor of others that don't meet AB 3172's \$100 million revenue threshold. Collectively, our organizations represent platforms that take their responsibility to their users incredibly seriously and have devoted millions of dollars to increasing the safety and enjoyment of their platforms. Teens will seek out the ability to interact online, whether it is on our platforms or on others, including ones that don't prioritize their safety and well-being.

AB 3172 Creates an Incentive for Platforms to Surveil and Moderate Direct Messages

Direct messaging is a common feature of social media platforms and is a safe feature for the overwhelming majority of users. But in rare circumstances, messaging can be abused by bad actors to victimize other users. To the extent that this bill creates a strong incentive to drastically reform any features that present even a slight risk of harm, it would incentivize platforms to remove end-

to-end encryption for user messaging. End-to-end encryption protects user privacy by ensuring that the message cannot be read by the platform or other users if it is intercepted. Any incentive to encrypt private messages would allow platforms to surveil and moderate content in users' private messages, which is a tremendous invasion of privacy. This is an outcome our members are firmly against. Not only does it completely undermine users' trust in our platforms not to monitor their private communications but would seem to conflict with the principles of the California Privacy Rights Act.

AB 3172 is Likely Unconstitutional and Violative of Teens' Rights to Access Information

AB 3172 seeks to regulate speech by requiring platforms exercise "ordinary care and skill" for teen users. This will inevitably lead to lawsuits based on harmful content as well as content-serving features, both of which violate first amendment principles.

These applications of the bill are likely subject to "heightened scrutiny" because they are neither content- nor speaker-neutral (i.e., they impose liability for disseminating some types of content but not others and distinguish between large social media platforms and other services).¹ Where heightened scrutiny applies, the government must show that the statute (1) "directly advances a substantial governmental interest" and (2) "is drawn to achieve that interest."²

AB 3172 is unconstitutional because it imposes liability on social media platforms for whether certain types of third-party content are shown to child users, as well as the expressive choices social media platforms make in designing the user experience. This violates the First Amendment rights of both minors and social media platforms. Courts have repeatedly upheld and protected platforms' First Amendment rights to decide how to moderate and present content on their platforms. Likewise, because the bill would result in limited or restricted access to teens, it infringes upon their First Amendment rights to receive information and express themselves.

Additionally, the bill's "overbreadth" appears both "real" and "substantial,"³ and is thus arguably unconstitutional, because it sweeps in social media activity that might negatively affect a relatively small amount of children but prove to be of utility to many more (i.e., organizing children's social media feeds to highlight content they are more interested in).

AB 3172 also directly interferes with the expressive rights of both the minors who will be banned from social media services and the service providers themselves. The imposition of liability for harm to a minor (the bill does not require the provider to know that a user is under 18 to trigger liability) amounts to a requirement to age verify all users of social media services, interfering with constitutionally-protected rights of adults and minors alike. As the Supreme Court emphasized in *Packingham v. North Carolina*, 582 U.S. ____, 137 S.Ct. 1730 (2017): "For many," social media platforms "are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge," such that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 1737. To the extent AB 3172 has the practical effect of foreclosing minors' access to social media "altogether" (e.g., because the bill makes it practically impossible for social media platforms to offer their services to children in California), the law would raise grave concerns under the First Amendment.

Children also have First Amendment rights to both receive information and to express themselves. Protecting children from self-harm is an important objective, but AB 3172 makes no attempt to even reasonably scope the restrictions on social media platforms to that goal, let alone

¹ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

² *Sorrell*, 564 U.S. at 562.

³ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)

to "narrowly tailor" the law as the Constitution requires.⁴ Accordingly, broad regulations restricting youth expression have been struck down on First Amendment grounds, including a California law that prohibited the sale of violent video games to minors where the Supreme Court declared that, "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."⁵

Additionally, online service providers have a First Amendment right to make decisions about how to present content on their sites, including through ranking and recommendation algorithms. Courts have repeatedly upheld platforms' rights to rank and even favor certain expression over others. To do otherwise would "plainly violate the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."⁶

For these reasons, we believe that a court would find AB 3172 to be unconstitutional.

Federal Preemption

Section 230 of the Communications Decency Act (47 U.S.C. §230) generally protects platforms from liability for content that users generate with limited exceptions. This protection enables platforms to host third party content and moderate third party content on their platforms without fear of liability.

Without the protections of Section 230, the internet ecosystem would be dramatically different with a limited ability for users to post, share, read, view, and discover the content of others.

Fortunately, Section 230 explicitly preempts state laws such as AB 3172 that would conflict with this protection. This bill creates liability for platforms based on third party content by applying to any feature that allows users to encounter content. It effectively assumes that all features are harmful and imposes liability on a site for offering any of those features to children. Platforms' algorithms and features that allow users to encounter or share content from other users are inextricably linked to the underlying content. Therefore, by imposing liability on platforms for these features, AB 3172 conflicts with Section 230 and is likely preempted.

Thank you for your consideration. We would be happy to discuss alternative policies that provide a better incentive for companies to incorporate best practices into the design and function of platforms, without an excessive imposition of liability.

For these reasons, we must respectfully oppose AB 3172. If you have any questions regarding our position, please contact Dylan Hoffman at dhoffman@technet.org or 505-402-5738.

Sincerely,



⁴ *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 646-47 (7th Cir. 2006).

⁵ *Brown v Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011)

⁶ See, e.g., *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 440 (S.D.N.Y. 2014) (dismissing a lawsuit seeking to hold a search engine liable for the "decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects." See also *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (holding that injunctive relief sought against search engines to place a plaintiff's ads in prominent places and to re-rank search results would contravene the search engines' First Amendment rights); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568, at *3-4 (W.D. Okla. May 27, 2003) (concluding that a search engine's search ranking decisions were protected opinions under the First Amendment).

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