TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

James E. Dunstan[i]

In the Matter of

National Telecommunications and Information Administration

Initiative to Protect Youth Mental Health, Safety & Privacy Online

Dockets: NTIA-2023-0008
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INTRODUCTION

TechFreedom hereby responds to the Request for Comment (RFC) issued by the Department of Commerce's National Telecommunications and Information Administration (NTIA), in the above-referenced proceeding entitled "Initiative To Protect Youth Mental Health, Safety & Privacy Online."[1] The Notice asks 22 questions (54 counting the sub-questions) related to protecting youth mental health, safety, and privacy online.[2] This, after the Notice declares that "preventing and mitigating *any* adverse health effects from use of online platforms on minors, while preserving benefits such platforms have on minors' health and well-being, are critical priorities of the Biden-Harris Administration."[3] It likewise declares an "unprecedented youth mental health crisis"[4] and then asks for solutions to this self-proclaimed crisis.

What the Notice doesn't do, however, is ask the fundamental framing questions that surround this debate. In particular, the Notice fails to ask for comment on the First Amendment issues that regulating speech on social media triggers.[5] Equally as fundamental, the Notice nowhere discusses the role of the NTIA or any other administrative agency in setting rules for Internet speech after *West Virginia v. EPA*.[6] We ask these tough questions here.[7]

TechFreedom has been an active participant in the public debate over speech and the Internet. We've been at the forefront of the debate over protecting young minors (those

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[1] The Notice and Request for Comment (RFC) was published in the Federal Register on October 2, 2023. 88 Fed. Reg. 67733 (October 2, 2023) [hereinafter Notice]. The Notice set the comment date as November 16, 2023. These comments are timely filed.

[2] *Id.* at 67737-39.

[3] *Id.* at 67733 (emphasis added).

[4] *Id.*, citing White House, *Fact Sheet: Biden-Harris Administration Announces Actions to Protect Youth Mental Health, Safety & Privacy Online*, THE WHITE HOUSE (May 23, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/23/fact-sheet-biden-harris-administration-announces-actions-to-protect-youth-mental-health-safety-privacy-online.

[5] As discussed below, the term "social media" is so broadly defined in the Notice that a huge percentage of the Internet would be subject to whatever comes of this exercise, well beyond the traditional definitions of "social media" that the majority of the public is familiar with (e.g., Facebook, Twitter/X, YouTube, etc.).

[6] *See* West Virginia v. Envtl. Prot. Agency, No. 20-1530 (U.S. June 30, 2022).

[7] The Notice requests that commenters limit themselves to 15 pages. *See* Notice at 67737 ("Please note that for this comment, because of the volumes of material already available in this area, NTIA is requesting concise comments that are at most fifteen (15) single-spaced pages."). Because of what the Notice leaves out, it simply is not possible to respond in just fifteen pages.

under 13) with COPPA.[8] We've long cautioned about the dangerous First Amendment implications of expanding COPPA beyond its original congressional intent to empower parents and protect those under 13 from sexual predators.[9]

We've testified before Congress related to speech and the Internet.[10] We've warned the FTC on several occasions of the danger of trying to regulate advertising on the Internet under the guise of protecting minors.[11] We've provided amicus briefs in numerous cases related to speech on the Internet.[12] And we've pointed out time and again that bills under consideration by Congress run roughshod over the First Amendment rights of children and adults alike.[13]

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[8] *See, e.g.*, *TechFreedom Event: 20 Years of Coping with COPPA*, TECHFREEDOM (July 26, 2018), https://techfreedom.org/techfreedom-event-20-years-coping-coppa/; *The Future of the COPPA Rule: An FTC Workshop*, FED. TRADE COMM'N (Oct. 7, 2019), https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop (TechFreedom General Counsel James E. Dunstan participated as a speaker at the workshop hosted by the FTC on October 7, 2019); James Dunstan & Berin Szóka, Comments of TechFreedom, *COPPA Rule Review, 16 CFR Part 312,* FTC-2019-0054 (Dec. 11, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf. TechFreedom also filed comments in the FTC's "Loot Box" proceeding, which has implications for children's privacy as well. *See* Berin Szóka & Jim Dunstan, Comments of TechFreedom*, Video Game Loot Boxes*, FTC Matter No. P194502 (Oct. 11, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-FTC-Loot-Box-Comments-10-11-19.pdf.

[9] *See* Berin Szóka & Adam Thierer, *COPPA 2.0: The New Battle Over Privacy, Age Verification, Online Safety & Free Speech* (Oct. 26, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408204.

[10] *Protecting Internet Freedom: Testimony before the Subcomm. on Oversight, Agency Action, Federal Rights & Federal Courts of the S. Comm. on the Judiciary*, 114th Cong. (2016) (statement of Berin Szóka, President, TechFreedom), http://docs.techfreedom.org/berin_szoka_testimony_icann_hearing_9.14.2016.pdf; AI and the Future of our Elections, Testimony before the S. Comm. on Rules & Administration, 118th Cong. (2023) (statement of Ari Cohn, Free Speech Counsel, TechFreedom), https://techfreedom.org/wp-content/uploads/2023/09/Testimony-on-AI-and-the-Future-of-our-Elections.pdf.

[11] Comments of TechFreedom in the Matter of Protecting Kids from Stealth Advertising in Digital Media, Docket No. FTC-2022-0054 (Nov. 18, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-on-Stealth-Advertising-11-18-22.pdf.

[12] Brief for TechFreedom & Prof. Eric Goldman as Amici Curiae Supporting Appellees, Volokh v. James, No. 23-356; Brief for TechFreedom as Amicus Curiae Supporting Defendant-Appellee, Johnson v. Griffin, No. 23-5257; Brief for TechFreedom as Amicus Curiae Supporting Respondent, Gonzalez v. Google, LLC, No. 21-1333.

[13] Letter from Ari Cohn & Berin Szóka, TechFreedom, to Senate Commerce Committee (July 26, 2023), https://techfreedom.org/wp-content/uploads/2023/07/KOSA-July-26-2023-TechFreedom-Letter.pdf; Coalition Letter to Congress Re: S. 3663 (Dec. 6, 2022), https://techfreedom.org/wp-content/uploads/2022/12/Kosa-Letter-December-6-2022.pdf.

I. Kids! What's the Matter with Kids Today?

The Notice portrays a bleak landscape for children today.[14] *Of course* children are struggling right now: We are finally emerging from two years of pandemic lockdowns, where youth mental health has clearly suffered.[15] They've been indoors, not outside exercising, or in many instances not able to participate in athletics, a detriment to their physical wellbeing.[16] Group activities such as music and drama have been curtailed, eliminating much-needed social interaction and outlets of expression.[17] Their academic performance has also lagged during the past few years,[18] which also is impacting their mental wellbeing.[19] The pandemic has been especially hard on America's children, and adults bear a responsibility for what we've

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[14] *See* Notice at 67734 ("Concurrently, the Surgeon General of the United States issued an Advisory that labeled the potential harm to American youth stemming from use of online platforms an 'urgent public health issue,' citing 'increasing concerns among researchers, parents and caregivers, young people, healthcare experts, and others about the impact of social media on youth mental health,' and called for action by, among others, technology and online service providers." (footnotes omitted)). *See also id.*, ("Minors' use of social media and other online platforms have produced an evolving and broad set of concerns, touching on, among other things, health, safety, and privacy. These concerns include impacts upon mental health, brain development, attention span, sleep, addiction, anxiety, and depression. These concerns stem from both the design of the social media environment and the specific types of content to which minors are exposed, often repeatedly over long periods of time. Exposure to self-harming and suicide-related content, for example, have been linked in some cases to deaths of minors." (footnotes omitted)).

[15] *See* Monique Theberath et al., *Effects of COVID-19 pandemic on mental health of children and adolescents*, SAGE OPEN MED. (Mar. 20, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8972920/ ("Mental health problems among children and adolescents are increasingly observed during the outbreak of COVID-19, leading to significant healthcare concerns.").

[16] *See* Sara Raimondi et al., *The Impact of Sport Activity Shut down during the COVID-19 Pandemic on Children, Adolescents, and Young Adults: Was It Worthwhile?*, INT. J. ENV'T. RES. PUBLIC HEALTH (June 28, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9265880/ ("[S]port closure and limitations had an important negative impact on the overall health of young athletes, being also not effective in reducing the spread of COVID-19.").

[17] *See* Sitki Akarsu, *Investigating Secondary School Music Teachers' Views about Online Music Lessons During the COVID-19 Pandemic*, EDUC. POLICY ANALYSIS AND STRATEGIC RSCH. (2021), https://files.eric.ed.gov/fulltext/EJ1301886.pdf ("The study found that the majority of secondary school music teachers thought that distance education was not suitable for music lessons. It was also determined that most of the participants had no prior experience with distance education, had difficulty using instruments in online lessons, and had synchronization problems in all music activities. Furthermore, internet connection problems, low motivation on the student side, the inefficiency of online lessons, digital fatigue, and the risk of children being exposed to harmful content on the internet emerged as other problems encountered by the participants.").

[18] The Associated Press, *Test scores dropped to lowest levels in decades during pandemic, according to nationwide exam*, NBC NEWS (Oct. 24, 2022, 6:41 AM), https://www.nbcnews.com/news/us-news/test-scores-dropped-lowest-levels-decades-pandemic-according-nationwid-rcna53659.

[19] Megan Kuhfeld et al., *The pandemic has had devastating impacts on learning. What will it take to help students catch up?*, BROOKINGS (Mar. 3, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/03/03/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/ ("students and educators continue to struggle with mental health challenges, higher rates of violence and misbehavior, and concerns about lost instructional time.").

done to them. The Notice, however, wants to lay all the blame on social media, computer games, and the Internet—to the exclusion of the mistakes made during the COVID pandemic or any other factors.

As we've heard so many times, correlation is not causation. An increase in youth mental health issues may correlate to an increased use of the Internet by youth, and especially time spent on social media. But that does not necessarily lead to the conclusion that social media has caused the problem, especially when youth have suffered from the largest medical "black swan" event to have occurred in a century.[20]

Within the scientific community, there is significant study and discussion of children's mental health issues, but virtually no social scientist is willing to say that Internet overuse is *the* cause of the current situation. For example, one recent study suggests that social media use may be changing the brain patterns of children.[21] However, the authors hypothesize that such changes may be *beneficial*:

> While for some individuals with habitual checking behaviors, an initial hyposensitivity to potential social rewards and punishments followed by hypersensitivity may contribute to checking behaviors on social media becoming compulsive and problematic, for others, this change in sensitivity may reflect an adaptive behavior that allows them to better navigate their increasingly digital environment.[22]

At most, the authors suggest more research be done; they do not conclude that public policy should address social media in any way in response to their findings.[23] One author went on to say that the study may be showing positive adaptive responses to our digital world:

> We don't know if this is good or bad—if the brain is adapting in a way that allows teens to navigate and respond to the world they live in, it could be a very good thing. If it is becoming compulsive and addictive and taking away

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[20] For a fuller discussion of this issue, *see* Comments of TechFreedom in the Matter of Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement, FTC-2022-0073 (Jan. 18, 2023), https://techfreedom.org/wp-content/uploads/2023/01/TechFreedom-Comment-on-CDD-Engagement-Petition.pdf.

[21] *See* Maria T. Maza et al., *Association of Habitual Checking Behaviors on Social Media With Longitudinal Functional Brain Development*, JAMA PEDIATRICS (Jan. 3, 2023), https://jamanetwork.com/journals/jamapediatrics/article-abstract/2799812.

[22] *Id.* at 7.

[23] "Further research examining long-term prospective associations between social media use, adolescent neural development, and psychological adjustment is needed to understand the effects of a ubiquitous influence on development for today's adolescents." *Id.* at 1.

> from their ability to engage in their social world, it could potentially be maladaptive.[24]

Another study from 2019, appearing in *JAMA Pediatrics*, found little association between games and adverse effects on mental health.[25] And as one report on this study put it:

> While the way this study categorized different forms of screen use is undeniably a strength, it still suffers from the correlation/causation problem that hounds the majority of screen time research. Is the association seen in the data simply due to a depressed individual being more likely to use social media or watch television?
>
> Gemma Lewis, a psychiatric researcher from University College London who did not work on this new study, agrees this new study does not allow for any causal conclusion to be made. In fact, Lewis questions how the subjects in the study were selected, suggesting these results may not be generally representative of all adolescents.[26]

Finally, a study published in *Nature Human Behaviour* in 2019, using data from over 350,000 subjects, found that digital technology use accounts for less than half a percent of a young person's negative mental health.[27] As one report states, "The research suggests everything from wearing glasses to not getting enough sleep have bigger negative effects on adolescent well-being than digital screen use."[28]

In short, strong new evidence would be required to inform any formal government action on these issues. A national discussion about children and time spent online may well be

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[24] Cara Murez, *Frequent Social Media Checks May Affect Young Brains*, MEDICAL EXPRESS (Jan. 3, 2023), https://medicalxpress.com/news/2023-01-frequent-social-media-affect-young.html (quoting Eva H. Telzer).

[25] *See generally* Elroy Boers et al., *Association of Screen Time and Depression in Adolescence*, JAMA PEDIATRICS (July 15, 2019), https://jamanetwork.com/journals/jamapediatrics/article-abstract/2737909?resultClick=1.

[26] Rich Haridy, *Teen Depression Linked to Social Media Screen Time, But Video Games Are Fine*, NEW ATLAS (July 16, 2019), https://newatlas.com/social-media-screen-time-teenage-depression/60604/?itm_source=newatlas&itm_medium=article-body.

[27] *See* Amy Orben & Andrew K. Przybylski, *The Association Between Adolescent Well-Being and Digital Technology Use*, 3 NATURE HUMAN BEHAV. 173 (Jan. 14, 2019), https://www.nature.com/articles/s41562-018-0506-1.

[28] Rich Haridy, *Oxford Study Finds Digital Screen time Has Little Effect on Teen Mental Health*, NEW ATLAS (Jan. 14, 2019), https://newatlas.com/screen-time-digital-technology-adolescent-mental-health/58019/?itm_source=newatlas&itm_medium=article-body.

overdue.[29] But it hardly follows that the Administration, rather than the democratically elected representatives of the American people, should decide so major a question. Increasingly, the courts require otherwise.[30]

A. Finding a Media Scapegoat Is Nothing New

Ascribing the ills of our children to media exposure and use is an age-old practice. Elvis Presley's music was banned from some radio stations after his appearance on NBC's *Milton Berle Show* in 1956 created a fervor over his hip-grinding rendition of "Hound Dog," leading to him being filmed only from the waist up on a subsequent *Ed Sullivan Show* appearance.[31] The impact of rock and roll on children was parodied in the 1960 Broadway musical *Bye Bye Birdie*, which included the iconic song, "Kids! What's the Matter with Kids Today."[32]

On May 9, 1961, then–FCC Chair Newton Minow excoriated the National Association of Broadcasters on the state of television programming:

> But when television is bad, nothing is worse. I invite each of you to sit down in front of your television set when your station goes on the air and stay there, for a day, without a book, without a magazine, without a newspaper, without a profit and loss sheet or a rating book to distract you. Keep your eyes glued to that set until the station signs off. I can assure you that what you will observe is a vast wasteland.

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[29] *See also* Elizabeth Nolan Brown, *5 New Studies That Challenge Conventional Wisdom About Kids and Tech*, REASON (Dec. 27, 2022, 7:00 AM), https://reason.com/2022/12/27/5-new-studies-that-challenge-conventional-wisdom-about-kids-and-tech/; *Is Screen Time Bad for Kids?*, TECH POLICY PODCAST (Jan. 11, 2023), https://podcast.techfreedom.org/episodes/335-is-screen-time-bad-for-kids.

[30] *See infra* Section IV.

[31] Katie Cameron, *A (Brief) History of Music Censorship in America*, PASTE MAG. (Dec. 17, 2018, 10:30 AM), https://www.pastemagazine.com/music/censorship/a-brief-history-of-censorship-of-music-in-america/; Trina Young, *Why Elvis Presley Was Censored on the Ed Sullivan Show*, ELVIS BIOGRAPHY (Sep. 9, 2020), https://elvisbiography.net/2020/09/09/why-elvis-presley-was-censored-on-the-ed-sullivan-show/.

[32] The lyrics of that song include:

> Kids! I don't know what's wrong with these kids today!
> Kids! Who can understand anything they say?
> Kids! They are disobedient, disrespectful oafs!
> Noisy, crazy, sloppy, lazy, loafers!
> While we're on the subject:
> Kids! You can talk and talk till your face is blue!
> Kids! But they still just do what they want to do!
> Why can't they be like we were
> Perfect in every way?
> What's the matter with kids today?

ORIGINAL BROADWAY CAST, *Kids, on* BYE BYE BIRDIE (Columbia Masterworks 1960).

> You will see a procession of game shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence, and cartoons. And endlessly, commercials—many screaming, cajoling, and offending. And most of all, boredom. True, you'll see a few things you will enjoy. But they will be very, very few. And if you think I exaggerate, I only ask you to try it.[33]

Was Minow's lament really all that different from the Notice's claims about the nature of the Internet and its impact on children?

B. The Moral Panic of the Notice Looks All Too Familiar

We've seen this show before. In the 1980s, heavy metal music was rotting the brains of children, and Al and Tipper Gore attempted to protect them. The result was a Senate hearing in which Twisted Sister lead singer Dee Snider embarrassed both the Gores and other Senators who wanted to blame music for the ills that plagued children at the time.[34]

Also in the 1980s, parents turned their sights on the roleplaying game Dungeons & Dragons ("D&D"), in which players (often children or young adults) take on the roles of fantasy characters, roll dice (with highly random results), encounter monsters, find treasures, and perhaps meet a fictional death.[35] When a few isolated teens—who happened to play D&D—committed suicide, parent groups quickly inferred causation, and CBS's *Sixty Minutes* even did an exposé of the issue.[36] As it turned out, each of the deceased players had had significant underlying mental health issues unrelated to the game.[37] As a 2014 BBC report put it, "Looking back now, it's possible to see the tendrils of a classic moral panic, and some elements of the slightly esoteric world of roleplaying did stir the imaginations of panicked outsiders."[38]

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[33] Lily Rothman, *The Scathing Speech That Made Television History*, TIME (May 9, 2016), https://time.com/4315217/newton-minow-vast-wasteland-1961-speech/.

[34] *See Dee Snider vs Tipper Gore 1984*, YOUTUBE (June 14, 2009), https://www.youtube.com/watch?v=veoYcsH7Wrs (Senate hearing excerpts).

[35] Peter Ray Allison, *The Great 1980s Dungeons & Dragons Panic*, BBC NEWS (Apr. 11, 2014), https://www.bbc.com/news/magazine-26328105.

[36] *See 60 Minutes on Dungeons & Dragons* (CBS television broadcast Sep. 15, 1985), https://archive.org/details/60_minutes_on_dungeons_and_dragons.

[37] *See* Allison, *supra* note 35 ("In truth, Egbert suffered from, among other things, depression and drug addiction," and "Again, it was clear that more complex psychological factors were at play. Victoria Rockecharlie, a classmate of Irving Pulling, commented that 'he had a lot of problems anyway that weren't associated with the game.'").

[38] *Id.*

The Administration would do well to recall these technopanics. Again, we do not dispute that children today are struggling, but media consumption—here, social media and computer games—is an easy bogeyman, a kind we've seen before. The Administration's discussion of youth mental health issues cannot merely start and stop with the Internet.

II. The Foundations of the Notice Go Far Beyond Current Law

The Notice makes some fundamental assumptions and assertions that potentially doom this exercise at the outset. Gone are the foundations that Congress erected under COPPA. Instead, the Notice makes four key assumptions: 1) that the same rules should apply to all persons under 18 years of age; 2) that all harms that might befall a minor on the Internet are of equal concern and require similar solutions; 3) that advertising to minors is inherently evil; and 4) that parents are incapable of participating in the Internet activities of their children, and therefore should be eliminated from the protection equation. The existing statutory framework to protect children supports none of these assumptions.

A. Regulating the Speech Seen by Seventeen-Year-Olds Obliterates the Underpinnings of COPPA

The Notice makes clear that the goal of the current administration is to protect all minors from the dangers of the Internet, not just those under 13; COPPA already protects the latter. "The terms 'minors' and 'youths' are used in this document to describe people under 18 years of age."[39] Making no distinction between older and younger teens flies in the face of the congressional findings that underpin both COPPA and the Children's Television Act, the two major statutes that currently protect the privacy of young people and the way that they interact with advertisers. COPPA has survived without a constitutional challenge precisely because Congress made a clear distinction between the needs of young children (those under 13), and the rights of older minors and adults.[40] This was because Congress studied the relevant expert literature available in 1990 (for the Children's Television Act) and in 1998 (for COPPA), which found that there is a profound difference between the cognitive abilities of those under 13 and those approaching maturity, who are much better able to differentiate between program content and advertising,[41] or understand the dangers of potential threats

[39] Notice at 67733, n. 10. In these comments, we use "minors" to refer to all children under 18 and "young children" to refer to children under 13.

[40] *See infra* Section III.B.

[41] *See, e.g.*, *Children's Television Report and Order*, 6 FCC Rcd 2111, 2112 (1991) ("Moreover, there is some empirical evidence with respect to children's comprehension of commercial matter that supports an upper age limit as high as 12 years.") (citing Children's Television Act of 1989, House Committee on Energy and Commerce, H.R. Rep. No. 385, 101st Cong., 1st Sess. 16 (House Report); Senate Report at 22 (referring to definition of 12 years of age and under used in former version of FCC broadcast license renewal form))).

and predators on the Internet.[42] By suggesting that the same rules should apply to seventeen-year-olds that apply to those under thirteen, the Administration is jettisoning this foundation, and the decades of sound studies that distinguish between younger and older minors. In doing so, as discussed more fully below, the Administration cannot ignore the First Amendment rights of older minors, which look very different from the rights of young children.[43]

B. Contrary to the Notice, Not All Harms Are Equal

As noted above, the Administration's goal in this proceeding is "preventing and mitigating *any* adverse health effects from use of online platforms on minors."[44] In saying this, however, the Notice places all harms that might befall minors on the Internet on equal footing.

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[42] In his testimony before the Senate Committee considering the COPPA bill, then-FTC Chairman Robert Pitofsky emphasized the need for additional tools for the FTC to protect young children from sexual predators:

> Further, the FBI and Justice Department's "Innocent Images" investigation into the use of the Internet by pedophiles and other sexual predators reveals that online services and bulletin boards are rapidly becoming the most prevalent sources used by such predators to identify and contact children. Although there is little evidence directly linking commercial data collection to these problems, the practice of collecting personal identifying information directly from children without parental consent is clearly troubling, since its [sic] *teaches children to reveal their personal information to strangers and circumvents parental controls over their family's information*.

Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation, 105th Cong. 19-54 at 11 (Comm. Print, Sept. 23, 1998), https://bit.ly/2LDuS88 (emphasis added). Chairman Pitofsky went on later in that hearing to say: "we had testimony at our hearings from the FBI and the DOJ that when young people list their name, zip code, actual address on the Internet, that is a real security concern, and we are troubled by that as well." *Id.* at 17. In other words, the legislative history of COPPA makes clear that Congress's primary concern was with the safety of children under 13, and particularly with data collection that jeopardized their safety.

[43] Remarkably, while the Notice lumps all minors into the same category, many jurisdictions are moving to allowing 16-year-olds to vote, arguing that 16-year-olds are mature enough to exercise the franchise. *See, e.g.*, *4 Reasons to Lower the U.S. Voting Age to 16*, VOTE16USA (last accessed Nov. 15, 2023), https://vote16usa.org/reasons-for-lowing-voting-age-16/ ("sixteen- and 17-year olds are ready to vote. Research shows that 16- and 17-year-olds have the necessary civic knowledge, skills, and cognitive ability to vote responsibly. . . Lowering the voting age would force local politicians to listen to sixteen- and 17-year-olds and address their concerns."); *Why Should We Lower the Voting Age to 16?*, FAIRVOTE (last accessed Nov. 15, 2023), https://fairvote.org/archives/why_should_we_lower_the_voting_age_to_16/ ("At first glance, many assume that 16-year-olds are unable to make mature and informed decisions about voting, that they will not turn out to vote, or that they will just vote the way their parents tell them to. However, research indicates that all three of those assumptions are untrue and are not a reason to keep local governments from extending voting rights to 16-year-olds."). These two claims cannot both be true. Those below 18 can't have all the capabilities to cast a vote, yet still must be shunted into walled gardens on the Internet because they lack the mental capabilities to defend themselves against manipulative design practices.

[44] Notice at 67734 (emphasis added).

> Safety is also an area of concern related to use of online platforms, particularly the risk of predators targeting minors online for physical, psychological, and other forms of abuse, including sexual exploitation, extortion (or sextortion) and cyberbullying.[45]

Protecting young children from sexual predators was a key component of COPPA,[46] and the Administration has ample authority to protect minors from Child Sexual Abuse Material (CSAM),[47] which are not protected under the First Amendment.[48] The Administration should concentrate its efforts on this class of potential harm to minors.[49]

Creating rules and government-imposed industry "best practices" [50] to eliminate cyberbullying, however, is a fool's errand. It will never be possible for government or industry to keep Jimmy from saying something mean online about Tom, multiplied millions of times per day. Bullies have existed since the dawn of time, and in the same way that we've never been able to rid our schoolyards of Mean Girls, we'll never be able to rid the Internet of people saying bad things about others.[51] More important, every dollar and every minute

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[45] *Id.*

[46] MARTHA K. LANDESBERG ET AL., FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS 5 (1998), https://www.ftc.gov/reports/privacy-online-report-congress. *See also* Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation, 105th Cong. 19-54 at 11 (Comm. Print, Sept. 23, 1998), https://bit.ly/2LDuS88. Chairman Pitofsky went on later in that hearing to say: "we had testimony at our hearings from the FBI and the DOJ that when young people list their name, zip code, actual address on the Internet, that is a real security concern, and we are troubled by that as well." *Id.* at 17.

[47] *See* 18 U.S.C. § 2258 *et seq.*

[48] Osborne v. Ohio, 495 U.S. 103, 109 (1990) ("the State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.").

[49] Indeed, where the Notice gets it most right is when it talks about the continuing efforts that are being made to prosecute predators. Notice at 67736-37 ("The Department of Justice and the Department of Homeland Security are working to enhance their efforts to, among other things, (i) identify and prosecute those who sexually exploit children online, (ii) identify, rescue, and provide support to children who have been sexually victimized, (iii) provide some transparency and accountability concerning the online harms children face every day, and (iv) undertake education and prevention efforts to help children avoid becoming victims of sexual exploitation."). TechFreedom supports these efforts and urges the Administration to focus on these issues rather than many of the boogeymen listed in the Notice that have far less harmful impacts on minors than sexual predators.

[50] Notice at 67735 ("The Task Force is charged with exploring ways to assess and address risks and harms to minors online. Among other things, the Task Force will evaluate how best to harness technology for these purposes and will consider best practices for social media and online platforms and their use.").

[51] *See, e.g.*, *How parents, teachers, and kids can take action to prevent bullying*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2011), https://www.apa.org/topics/bullying/prevent ("Bullying has been part of school, and even workplaces, for years."); Richard Armitage, *Bullying in children*, BMJ PAEDIATRICS OPEN 2 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7957129/pdf/bmjpo-2020-000939.pdf ("[T]raditional

spent on trying to eradicate cyberbullying[52] will divert attention and resources from the true dangers of sexual predation on the Internet.

C. Advertising to Minors Is Not Illegal or Immoral—It Is at the Heart of the Free Internet

There is a strong undercurrent in the Notice that advertising to minors is bad.[53] The Notice takes square aim at the fundamental structure of content delivery on the Internet: sites provide content to users for free in exchange for the opportunity to provide advertising. "Concerns regarding minors' privacy are exacerbated by the rise of data analytics and tracking tools that collect and make use of large quantities of personal data, often along with offering free or reduced-cost access to online services."[54]

We've seen this demonization of advertising dozens of times before. As we discussed in our comments to the FTC in 2022, many of the most vocal proponents of limiting minors' access to the Internet believe that minors should not be exposed to *any* advertising.[55] Yet since Mr. Potato Head was featured in a television commercial in 1952,[56] advertising aimed at children has been part of our lives for well over half a century. Similarly, advertising is what allows users to access the vast enclaves of knowledge stored on the Internet.[57]

1. Attempts to Limit Advertising to Minors Pre-date the Internet

Critics of advertising to children first took their message to the Federal Communications Commission more than fifty years ago. In response to a petition for rulemaking filed by

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bullying has been recognized and studied for many decades and is often accepted as an inevitable aspect of a normal childhood.").

[52] This is not to say that the government is helpless in attempting to punish cyberbullying which results in injury or death. *See* Nate Raymond, *Massachusetts Manslaughter Conviction Upheld in Teen Texting Suicide Case*, REUTERS, (Feb. 6, 2019, 9:57 AM), https://www.reuters.com/article/us-massachusetts-crime-teen-texting/massachusetts-manslaughter-conviction-upheld-in-teen-texting-suicide-case-idUSKCN1PV1SV (reporting on Massachusetts Supreme Court decision upholding the manslaughter conviction of Michelle Carter for urging her 18-year-old boyfriend to commit suicide.).

[53] Notice at 67735, n. 23 ("Children are subject to the platforms' excessive data collection, which they use to deliver sensational and harmful content and troves of paid advertising."); Notice at 67737 ("even search engines could be viewed as advertising platforms.").

[54] *Id.* at 67734-35.

[55] *See* Comments of TechFreedom in the Matter of Protecting Kids from Stealth Advertising in Digital Media, Docket No. FTC-2022-0054 (Nov. 18, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-on-Stealth-Advertising-11-18-22.pdf.

[56] *What Was the First Toy Ever Advertised on Television*, SMALL BUSINESS MENTOR (Dec. 16, 2021), https://www.smallbmentor.com/blog/what-was-the-first-toy-ever-advertised-on-television.

[57] *See* Ophir Tanz, *How Ad Tech Fuels Innovation*, ENTREPRENEUR (June 7, 2016), https://www.entrepreneur.com/science-technology/how-ad-tech-fuels-innovation/275646 (detailing how advertising technology "keeps the internet alive.").

Action for Children's Television (ACT), the FCC opened Docket 19142 on January 26, 1971, as a "wide-ranging inquiry into children's programming and advertising practices."[58] The ACT Petition asked the FCC to adopt the following rules:

a) There shall be no sponsorship and no commercials on children's television;
b) No performer shall be permitted to use or mention products, services or stores by brand names during children's programs, nor shall such names be included in any way during children's programs; and
c) Each station shall be required to air at least 14 hours of children's programming per week.[59]

The ACT Petition set off a four-year journey for the FCC. It included receiving more than 100,000 public comments, an amazing amount given that there was no way to file electronically in that era; panel discussions in 1972; and three days of oral argument before the full FCC in January 1973, something unheard of at today's FCC. The result was the 1974 Policy Statement, issued on November 6, 1974, which provided a clear roadmap for children and television advertising.[60]

The FCC recognized both that broadcasters have a special responsibility to children, and that younger children may have difficulty separating program content from commercial material:

> Broadcasters have a special responsibility to children. Many of the parties testified and we agree, that particular care should be taken to insure that they are not exposed to an excessive amount of advertising. It is a matter of common understanding that, because of their youth and inexperience, children are far more trusting of and vulnerable to commercial "pitches" than adults. There is, in addition, evidence that very young children cannot distinguish conceptually between programming and advertising; they do not understand that the purpose of a commercial is to sell a product. See Report to the Surgeon General, Television and Growing Up: The Impact of Televised Violence, Vol. IV at 469, 474 (1970). Since children watch television long before they can read, television provides advertisers access to a younger and

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[58] In the Matter of Petition of Action for Child.'s Television (Act) for Rulemaking Looking Toward the Elimination of Sponsorship & Com. Content in Children's Programming & the Establishment of a Wkly. 14-Hour Quota of Child.'s Television Programs, 50 F.C.C.2d 1, 1 (1974) ("1974 Policy Statement").

[59] *Id.*

[60] Although the 1990 Children's Television Act (CTA), Pub. L. No. 101-437, 105 Stat. 996 (1990), established new rules for the relationship between broadcasters and children, the underlying policies (such as the need for separation between programming and commercial matter, prohibitions on "host-selling," and the concept of "program-length commercials") all stem from the 1974 Policy Statement.

> more impressionable age group than can be reached through any other medium. [citation omitted]. For these reasons, special safeguards may be required to insure that the advertising privilege is not abused.[61]

But rather than concluding that the proposals set forth in the ACT Petition should be adopted, prohibiting commercials, sponsorship, or any sort of product placement in children's programming, the FCC found the exact opposite:

> Despite these concerns, we have chosen not to adopt ACT's proposal to eliminate all sponsorship on programs designed for children. The Commission believes that the question of abolishing advertising must be resolved by balancing the competing interests in light of the public Interest. *Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming.* Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area. Moreover, it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task.
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> Some suggestions were made during the proceeding that institutional advertising or underwriting would replace product advertising if the latter were prohibited. Although we would encourage broadcasters to explore alternative methods of financing, at this time there is little evidence that the millions of dollars necessary to produce children's programming would, in fact, be forthcoming from these sources. Since eliminating product advertising could have a serious impact on program service to children, we do not believe that the public interest would be served by adopting ACT's proposal.[62]

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[61] 1974 Policy Statement, ¶ 34. The 1974 Policy Statement thus draws a clear line between young children (12 years and younger) and older children (13 and above), and their ability to distinguish between commercial and programming matter. *See* In the Matter of Policies and Rules Concerning Child.'s Television Programming, 6 FCC Rcd 2111, ¶ 3 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991) ("The legislative history of the Act, however, reveals that Congress intended that we use a definition of 12 and under for children's programming. Moreover, there is some empirical evidence with respect to children's comprehension of commercial mater that supports an upper age limit as high as 12 years.").

[62] 1974 Policy Statement, ¶¶ 35–36 (emphasis added, footnotes omitted).

2. The FTC's "KidVid" Proceeding in the 1970s Demonstrates the Dangers of Attempting to Overregulate Advertising

Having failed at the FCC, critics of advertising next took their arguments to the Federal Trade Commission in what became known as the "KidVid" proceeding. The arguments were similar, except this time they were couched not in the FCC's "public interest" jargon, but in FTC language, the critics arguing that commercials aimed at children are an "unfair business practice." But the regulatory demand remained the same: "Ban all television advertising for any product, which is directed to, or seen by, audiences with a significant proportion of children too young to understand the selling purpose of advertising."[63] The FTC staff in 2004 characterized the proceeding, begun in 1978, as "by far the most exhaustive examination ever undertaken of the practical realities that would have to be addressed in any effort to restrict advertising to children."[64]

Whereas it took the FCC almost four years to reach its conclusions, this time the reaction from all quarters was swift. The 2004 FTC Staff Report describes what ensued:

> The children's advertising proceeding was toxic to the Commission as an institution. Congress allowed the agency's funding to lapse, and the agency was literally shut down for a brief time. The FTC's other important law enforcement functions were left in tatters. Newspapers ran stories showing FTC attorneys packing their active investigational files in boxes for storage, and entire industries sought restriction of, or even outright exemptions from, the agency's authority. Congress passed a law prohibiting the FTC from adopting any rule in the children's advertising rulemaking proceeding, or in any substantially similar proceeding, based on an unfairness theory. It was more than a decade after the FTC terminated the rulemaking before Congress was willing to reauthorize the agency. A congressional response of this magnitude was not simply the result of skilled lobbying by politically well connected industries, although they certainly did make their views known. Rather, it was the reaction to what was widely perceived as a grossly overreaching proposal. Even The Washington Post, normally a reliable friend of an activist FTC, editorialized that the proposal was "a preposterous intervention that would turn the FTC into a great national nanny." The Washington Post continued: [T]he proposal, in reality, is designed to protect

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[63] Fed. Trade Comm'n, Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

[64] FTC STAFF REPORT, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf ("2004 FTC Staff Report").

> children from the weaknesses of their parents—and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess—if you can afford one. It is not a proper role of government.[65]

The conclusion of the 2004 FTC Staff Report puts those years in proper context:

> Although the idea of banning certain kinds of advertisements may offer a superficial appeal in this context, it is neither a workable nor an efficacious solution to the health problem of childhood obesity. The Federal Trade Commission has traveled down this road before. It is not a journey that anyone at the Commission cares to repeat.[66]

Congress responded swiftly and passed the FTC Improvements Act of 1980.[67] Section 11(a)(1) states:

> The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.[68]

The legislative history of the Act, and specifically the floor debate prior to defeating, by a vote of 30-67, an amendment that would have stripped this provision, shows two things: (1) Congress believed that advertising to children is not inherently unfair; and (2) curtailment of advertising would adversely affect the quantity and quality of content for children.

Congress was quite clear in defining the FTC's authority in this area. The Senators' comments regarding the path the FTC was pursuing in 1979 ring eerily similar to present efforts to control content on the Internet. As Senator Howard Cannon put it,

> No one would dispute that the FTC has the authority to regulate false or deceptive advertising but regulating truthful, nondeceptive advertising is a new exercise in overregulation—overregulation made more objectionable by the presence of the first amendment. And what is unfair? This term is

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[65] *Id.* at 7–8 (footnotes omitted).

[66] *Id.* at 23.

[67] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96- 252, §§ 11(a)(1), (3), 94 Stat. 374, 378–79 (1980) (codified in part at 15 U.S.C. § 57a(i)).

[68] *Id.*

> ambiguous, broad, capable of being molded to fit the ideas of the one who is defining it. One need look no further than the current kidvid rulemaking. I quote from the FTC staff, report on children's advertising, "unfairness arises out of the striking imbalance of sophistication and power between well-financed adult advertisers, on one hand, and children on the other, many of whom are too young to even appreciate what advertising is." The problem with this concept of unfairness is that, taken to its logical conclusion, the money and sophistication of every advertiser could be considered unfair, especially compared with the sophistication and economic power of a hungry 10 year old.[69]

Senator Wendell Ford used his floor time to "blow away the smoke of emotion," and rationally discuss the actual metes and bounds of government authority, as constrained by court precedent.[70] And Sen. John Danforth said,

> In its children's advertising rulemaking, the FTC is considering an industry-wide rule which would ban advertising to young children and extensively regulate the content of advertising to older children even though such advertising may not be false or deceptive but because, in the Commission's view, its content is "unfair." This exemplifies a newly formulated theory of power to regulate "unfair" advertising that is a step beyond the Commission's long-recognized authority to prevent false or misleading advertising and one with such potentially far-reaching consequences and constitutional implications that the Committee believed it desirable to place a modest check on the Commission's activities in this area by expressly limiting its authority in industrywide rulemaking to advertising which is false or misleading. It should be remembered that the Commission's basic charter, section 5 of the Federal Trade Commission Act, makes no mention at all of advertising.
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> The agency's authority over advertising was very early established by court decision declaring that the publication of false or deceptive advertising was an unfair method of competition within the meaning of section 5. Sections 12 through 15 of the act, added in 1938, expressly prohibit false advertising of food, drugs, devices or cosmetics and define false advertising as that which is "misleading in a material respect." Nothing contained in the act is a warrant for the Commission to regulate the nondeceptive advertising of a lawful

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[69] 126 CONG. REC. 2353 (1980) (statement of Sen. Cannon).

[70] *Id.* at 2354 (statement of Sen. Ford).

> product or activity because the content of its advertising message is deemed to be "unfair" in the eyes of the Commission. Nor has any court ever ruled in an advertising case that the Commission has such broad power as it is now claiming over the content of truthful commercial speech.[71]

In addition to *The Washington Post* chastising the FTC for its regulatory overreach, the ACLU also weighed in.

> We do not question the Commission's power to regulate deceptive advertising. We recognize fraud, deception and misrepresentation as permissible grounds for the regulation of commercial speech. But what the FTC now proposes is in effect to label all advertising aimed at young children as inherently deceptive. This in our view is too sweeping a remedy that catches protected speech in its net. [72]

Senator Danforth responded:

> Mr. President, I think that that is exactly the point. The combination of the sweeping term "unfair" and the rulemaking authority under Magnuson–Moss have created a situation where the Federal Trade Commission can create a per-se rule that all advertising, regardless of what it is, directed toward children under the age of 8 years is, per se, unfair and, therefore, all advertising falling within this category can be banned.[73]

Finally, Senator Carl Levin put into sharp focus the problem of declaring advertising to children as unfair per se:

> Mr. President, we cannot allow catchall and vague words like "unfair" to remain undefined in the statute that the FTC is applying to advertising practices. Such an untrammeled and undefined hunting license in the area of opinion and speech, is dangerous because it is so subjective. The FTC has and should continue to have the power to take action against deceptive advertising and will continue to do so under the committee bill. The FTC will also continue to have the authority over "unfair" business acts or practices. The word "unfair" can more justifiably be enforced and interpreted in such latter instances because they do not involve speech or opinion and because the word "unfair" has been used by statutes and been interpreted by court opinions relative to

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[71] *Id*.

[72] *Id.* at 2357 (statement of Sen. Danforth) (quoting the ACLU).

[73] *Id*.

> such acts and practices with some frequency over the years. *To give the FTC the authority to move against advertising which, although not deceptive, is thought by some to be unfair is simply to give too much legislative power in a critical area of speech and opinion to an unaccountable, unelected agency.*[74]

3. Overregulating Advertising Would Adversely Impact the Creation of Media Content for Children, and Will Particularly Harm Minors in Lower Income Households

In the same way that the FCC was concerned about the impact of the loss of advertising on the creation of television content for children in 1974, Senators were equally concerned with the state of the marketplace for children's content in 1980. For example, one Senator said:

> One of the proposals in the kidvid proceeding is a total ban on children's advertising. I cannot help but wonder (aside from my concerns about the regulation of free speech) what will happen to children's programming if a ban is imposed. Is children's television to be virtually eliminated as the FTC uses the unfairness doctrine as a broad charter to sweep away children's advertising solely because it is contrary to the Commission's concept of fairness?[75]

In the end, Section 11(a)(1) of the FTC Improvement Act of 1980 barred the FTC from "promulgat[ing] any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce."[76]

The saddest part of the latest chapter of our drama—let's call it "I Hate Commercials for Kids"—is that if those public interest groups are finally successful, the children who would be most affected by broad bans on Internet advertising to children would be the poor and minority children with fewer resources. Take away the economic engine of advertising from content producers, and content will have to retreat behind paywalls, into curated gardens, where one must pay to enter, either through monthly subscriptions or pay-to-play

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[74] *Id.* at 2366 (statement of Sen. Levin) (emphasis added).

[75] *Id.* at 2353 (statement of Sen. Cannon).

[76] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11(a)(1), 94. Stat. 374, 378 (1980) (codified in part at 15 U.S.C. § 57a(h)).

mechanisms.[77] Limit the ability of advertisers to target ads, and we risk turning "walled gardens" into "content fortresses" where only the biggest platforms can hope to survive.[78]

Harmed too will be smaller, newer, and less well-funded content producers, as those gardens are expensive to build and operate. Ban or highly restrict advertising to children, and we will be handing our children over to large media conglomerates, who can build those gardens, or whose name recognition is so high that they can afford to produce free content without advertising on the Internet because of their reach in other advertising markets.[79] Last year two veterans of the FTC's Consumer Protection Bureau summarized the asymmetrical effects on small publishers as follows:

> Data-driven advertising is particularly important to small publishers—the "long tail" of niche websites that make browsing the internet such an interesting activity. Large publishers have a great deal of information about users based on what they do on the publisher's own site and may have their own sales force. Small publishers cannot afford a sales force, have less data of their own, and are far more dependent on information from third parties. Indeed, the data advantages of large platforms and publishers are an important barrier to entry into advertising markets. Context is also likely to be a poor substitute for user data for niche sites, both because their audiences change over time and because the visitor to a site specializing in, say, quilting,

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[77] *See,* Adam Thierer, *Kids, Privacy, Free Speech & The Internet: Finding the Right Balance*, MERCATUS CTR. GEORGE MASON UNIV. 13, (Aug. 2012), https://www.mercatus.org/system/files/Kids_Privacy_Free_Speech_and_the_Internet_Thierer_WP32.pdf ("New Privacy rules could result in online pay walls, subscriptions, micropayment schemes, or tiered services. Web developers might have no choice but to raise prices to cover costs or cut back service. Regulation could also destroy opportunities for new or smaller website operators to break into the market and offer competing services and innovations, thus contributing to consolidation of online content and services by erecting barriers to entry."); *See also* Comments of Lartease M. Tiffith, Executive Vice President, Public Policy, Interactive Advertising Bureau, Panel 3: Looking Forward and Considering Solutions, Protecting Kids from Stealth Advertising in Digital Media, FTC (Oct. 19, 2022) (transcript, p. 63), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf.

[78] Eric Seufert, *The Profound, Unintended Consequence of ATT: Content Fortresses*, MOBILE DEV MEMO (Feb. 15, 2021), https://mobiledevmemo.com/the-profound-unintended-consequence-of-att-content-fortresses/.

[79] *Id. See also* Avi Goldfarb and Catherine E. Tucker, *Privacy Regulation and Online Advertising*, 57 MGMT. SCI. 1, 6 (Aug. 5, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600259 (following the 2002 EU Privacy Directive, which restricted the ability to deliver targeted advertising, advertising effectiveness decreased on average by around 65 percent in Europe relative to the rest of the world).

> has other interests that may be far more varied—and valuable—to advertisers other than sellers of quilting supplies.[80]

As a result of the YouTube settlement agreement, and the restrictions on advertising implemented thereafter, we've seen a marked decrease in new children's content on YouTube, and an exodus of many smaller creators from that market.[81] The FTC in the past has connected these dots and concluded that a reduction in advertising "would include the loss of advertising-funded online content."[82]

What was true in 1974 and 1980 is still true today. Take away the money that pays for content creation through advertising and sponsorship, and the content will go away, at least for those that can't afford to subscribe to premium services. The analysis of the FCC's 1974 Policy Statement still applies to today's Internet:

> Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming. Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area.[83]

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[80] J. Howard Beales & Andrew Stiver, *An Information Economy Without Data*, 1, 3 (Nov. 2022), https://www.privacyforamerica.com/wp-content/uploads/2022/11/Study-221115-Beales-and-Stivers-Information-Economy-Without-Data-Nov22-final.pdf.

[81] Comments of James C. Cooper, Professor of Law and Director of the Program on Economics & Privacy at George Mason University, Panel 3: Looking Forward and Considering Solutions, Protecting Kids from Stealth Advertising in Digital Media, FED. TRADE COMM'N (Oct. 19, 2022) (transcript, p. 46), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf ("Things go behind paywalls. I actually have some work in progress with some other co-authors on the impact of the FTC's suit against YouTube, the COPPA suit, which turned off behavioral advertising for all kids channels. And you see a large exit empirically, this is not anecdotal; a lot of exits, reduction of videos, reduction of channels, channels moving to a more mixed or moving to a grownup, a plus 13 audience . . . And there's other evidence that when you turn off the spigot of advertising that you reduce content."). *See also* Garrett Johnson et al, *COPPAcalypse? The YouTube Settlement's Impact on Kids Content* at 2 (May 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430334 ("[W]e find that the YouTube settlement reduced the supply of made-for-kids channel content by 13% as well as reduced content views by 22%.").

[82] FTC Staff Comment to the NTIA: Developing the Administration's Approach to Consumer Privacy, Docket No. 18021780-8780-01 (Nov. 9, 2018), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developingadministrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.

[83] 1974 Policy Statement, ¶ 35.

D. The Notice Views Parents as Incapable of Participating in Their Minors' Use of the Internet, a Profound Departure from the Role of Parents under COPPA

One of the key underpinnings of COPPA was the idea that parents are in the best position to protect their children if given sufficient information about the potential dangers they face.[84] Shortly after introducing S. 2326, which ultimately became COPPA, Senator Bryan addressed the Senate to "explain the purpose and some of the important features" of COPPA:

> The goals of this legislation are: (1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent.[85]

FTC Chairman Robert Pitofsky's testimony before the Senate Subcommittee hearing echoed the key role of parents in the process. "The parents should be in control of dealings, for example, with an 11-year-old on a commercial Web site."[86]

The current Notice effectively gives up on parents' roles in their children's Internet activities. "Parents and guardians, who are called upon to regulate their children's use of online platforms, are often provided little to no information about these potential harms."[87] Instead, the Notice calls on industry, not parents, to do more.

> YouTube offers a separate application for children under 13, which allows parents to limit minors' screen time and disable some search capabilities. Industry can, however, do more to protect American children and teens online.

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[84] *See* Comments of TechFreedom before the FTC In the Matter of 2011 COPPA Rule Review (Dec. 19, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-on-2011-COPPA-Rule-Review.pdf.

[85] 144 CONG. REC. S11657 (Oct. 7, 1998) (Statement of Sen. Bryan), https://bit.ly/35bi14P.

[86] Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation, 105th Cong. 19-54 at 11 (Comm. Print, Sept. 23, 1998), https://bit.ly/2LDuS88.

[87] *See* Notice at 67734.

> Reports and recommendations focused on youth social media and online platforms often include recommendations for the tech sector.[88]

The Notice does ask a number of questions related to how parents can become better informed of both the dangers to minors and what tools could be developed to help them prevent harms to minors.[89] But very clearly, the Notice contemplates placing a far greater responsibility and onus on industry than it does on parents. "The Task Force is further charged with developing voluntary guidance, policy recommendations, and a toolkit on safety-, health- and privacy-by-design for industry in developing digital products and services."[90] "Finally, we seek input on current and future industry efforts to mitigate harms and promote the health, safety and well-being of minors who access these online platforms."[91]

TechFreedom supports a return to what Congress intended with COPPA: to empower parents with the tools necessary to help protect their children from harms on the Internet.

III. The Notice Ignores the Serious First Amendment Issues Inherent in Regulating Speech on the Internet

The Notice fails to address the very real First Amendment issues inherent in regulating speech on the Internet. Rather than cordoning off content that is afforded no First Amendment protections (*e.g.*, CSAM), the Notice sweeps together non-protected speech and the most highly protected speech—personal opinions—and suggests that the Administration can act equally to regulate all types of speech on the Internet. Indeed, in listing the benefits of social media, the Notice talks about the power to "buffer[] against negative conduct and speech" [92] and the harms caused when minors are subject to "sensational" content.[93]

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[88] *Id.* at 67736 (footnote omitted).

[89] *See id.* at 67737, question 1(c) ("c. What information concerning platform safety is provided to parents, care givers, and children by providers? Where is that information found? Where could it be located that would provide the best avenue to reach parents, care givers, and children?"); *id.* at 67748, question 15 ("Are there technical options that could assist parents, guardians, caregivers, and minors by reducing potential for harm and/or increasing potential for beneficial aspects of social media and other online platforms?"); *id.*, question 16(a) ("What guidance, if any, might assist parents, guardians, caregivers and others in protecting the health, safety, and privacy of minors who use online platforms, including possible tools, their usage and potential drawbacks?").

[90] *Id.* at 67734.

[91] *Id.* at 67733.

[92] *Id.* at 67735.

[93] *Id.* n. 23.

The Notice's reference to the UK's age-appropriate design code[94] likewise ignores the fact that this country, unlike Great Britian, has the First Amendment woven into its DNA. Unlike most other places in the world, government regulations or policies that impact speech must be able to withstand First Amendment scrutiny, something the Notice simply ignores. What use is the current debate if the output is a regulatory regime that facially violates the First Amendment?

We've seen this before, with disastrous results, because efforts to limit certain types of expressive speech that a seventeen-year-old might wish to access necessarily impact the rights of adults. Other attempts to regulate speech online that impinge on the ability of adults to browse the Internet freely and anonymously have been struck down by the courts. These court decisions involved the Communications Decency Act of 1996 (CDA) and the Child Online Protection Act of 1998 (COPA). Both statutes imposed criminal liability for anyone who allowed minors to access potentially harmful content—unless courts determined that they had done enough to block minors.[95] The courts found CDA's protection for providers that did so was far too vague to satisfy the First Amendment.[96] In COPA, Congress attempted to mitigate the problem by removing the CDA's "effective" requirement and allowing for additional methods of age-segregating content. This did not save the statute: courts concluded that the affirmative defense was "effectively unavailable because [the age verification methods] do not actually verify age."[97]

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[94] *Id.* at 67737 ("All around the world, nation-states, civil society organizations, and researchers are working to determine how best to keep children and teens safe while maximizing the benefits of social media and other online platforms. For example, the United Kingdom's age-appropriate design codes incorporate such elements as prohibiting the use of techniques to manipulate minors into agreeing to give up some privacy.").

[95] *See, e.g.*, Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736, § 231 (codified at 47 U.S.C. § 223(e)(5) (1998)), invalidated by American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008), cert. denied, 555 U.S. 1137 (2009) (no liability if an operator "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology.").

[96] *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 881–82 (1997) ("It is the requirement that the good-faith action be 'effective' that makes this defense illusory. . . . The Government recognizes that its proposed screening software does not currently exist. . . . Without the impossible knowledge that every guardian in America is screening for the 'tag,' the transmitter could not reasonably rely on its action to be 'effective.' . . . [T]he Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults . . . [and] thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech. . . .").

[97] *ACLU v. Mukasey*, 534 F.3d at 196. *See also* American Civil Liberties Union v. Ashcroft, 322 F.3d 240, 260 (3d Cir. 2003) ("[T]he affirmative defenses do not provide the Web publishers with assurances of freedom from prosecution. . . . The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.") (internal quotation marks and citation omitted).

A. Minors, Especially Those Approaching the Age of Maturity, Have First Amendment Rights

The metes and bounds of the First Amendment rights of minors are still developing. What is clear, however, is that the language articulated in Justice Stewart's concurrence in *Tinker v. Des Moines School District* is self-limiting to a schoolhouse setting, where the government stands in the shoes of parents to educate children. "The First Amendment rights of minors are not 'co-extensive with those of adults.'"[98] Justice Stewart the year before had stated: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[99]

Outside of the classroom or broadcast setting, however, it is far from clear that minors (especially those approaching the age of maturity) have any less First Amendment rights than adults.[100] This was best articulated by the Supreme Court in *Erznoznik v. Jacksonville* (1975), which overturned a local Florida ordinance barring drive-in theaters from showing films that contained any nudity:

> Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. 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. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.[101]

Since *Erznoznik*, regulators have often tried to defend limitations on the speech rights of minors by arguing that such actions fell into the "other legitimate proscription" bucket suggested by the Supreme Court. In 2001, the Seventh Circuit explained the tension between

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[98] Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring).

[99] Ginsberg v. New York, 390 U.S. 629, 649-650 (1968) (Stewart, J., concurring). The "passive audience" rationale, along with the unique regulatory treatment of broadcasters, was cited by the Supreme Court to allow the FCC to channel indecent, but not obscene, content to late night hours. Fed. Commc'n Comm. v. Pacifica Foundation, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978).

[100] Outside of the classroom, minors "are entitled to a significant measure of First Amendment protection." Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021) (quoting Brown v. Entertainment Merchants Assn., 564 U.S. 786, 794 (2011)).

[101] Erznoznik v. Jacksonville, 422 U.S. 205, 213-14 (1975) (citations omitted).

Tinker and *Erznoznik* in striking down an Indianapolis ordinance that sought to limit the access of minors to video games that depict violence.

> The grounds must be compelling and not merely plausible. Children have First Amendment rights. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511-14 (1969). This is not merely a matter of pressing the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.[102]

What are the "other legitimate proscriptions" not elucidated in *Erznoznik*? Clearly, allowing minors to view violent material is not one of them.[103] In *Brown v. Entertainment Merchants Association* (2011), the Supreme Court struct down a California law limiting access to videogames the state deemed too violent for minors.[104] In doing so, the court made very clear that the government is not free to create new categories of protected speech that the government may nonetheless limit minors access to. "Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."[105] Nor may the government restrict protected speech because the government concludes that the speech might impact children differently from adults.

> We have found no case, nor have plaintiffs cited any, distinguishing between the psychological impact on adults and that on children in determining

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[102] Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576-77 (7th Cir. 2001).

[103] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011).

[104] *Id*.

[105] *Id.* (citing United States v. Stevens, 559 U.S. 460 (2010)).

> whether a restriction is content-neutral. Thus, because under *Boos* the children's distress here at seeing defendants' posters would be a primary effect of defendants' speech, we conclude that any restriction solely to prevent this distress is content-based.[106]

Nor can mixed studies of harm provide the basis for restricting the speech received by minors. In *Otto v. City of Boca Raton*, the Eleventh Circuit held that ordinances banning conversion therapy for minors violated the First Amendment.[107] The court found that the state interest in protecting minors did not permit restricting speech that could be received by them.[108] Studies, the court said, were inconclusive regarding the effects of conversion therapy.[109] The First Amendment requires a "strong presumption against content-based limitations on speech," and "ambiguous proof" will not suffice.[110] Because of that strong presumption, evidence supporting the serious harms of content-based restrictions must be rigorous and convincing: "Permitting uncertain evidence to satisfy strict scrutiny would blur the lines that separate it from lesser tiers of scrutiny."[111] Even rigorous evidence might fail to satisfy strict scrutiny for viewpoint-based restrictions on speech.[112] Generally:

> People who actually hurt children can be held accountable, but "[b]road prophylactic rules in the area of free expression are suspect." In other words, "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply."[113]

Not only does the Notice fail to discuss the First Amendment, in doing so it fails to acknowledge that much of the speech the government hopes to curtail fits squarely into the line of cases discussed above and is thus off-limits to government restriction in the name of protecting minors.

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[106] Saint John's Church in the Wilderness v. Scott, 296 P.3d 273, 282-83 (Colo. App. 2012) (citing Cf. Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't, 533 F.3d 780, 790 (9th Cir. 2008) ("There is . . . no precedent for a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its content.")).

[107] Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

[108] *Id.*

[109] *Id.* at 869-870.

[110] *Id.* at 870 n.9.

[111] *Id.*

[112] *Id.* n.12.

[113] *Id.* at 870.

B. Cordoning Off Content to Minors Will Require Age Verification, Which Is Virtually Impossible

The reason COPPA works is that the types of content which attract a twelve-year-old are far different from what a seventeen-year-old might want to interact with.[114] The industry thus can create these walled gardens and limit the interactivity of such walled gardens to minimize collection of personal data. Creating systems that equally protect all minors all the way up to age 18 would require age verification that literally must be accurate to within a single day.[115] To do this, platforms effectively would be required to age-verify all users.

The Notice references age-verification as one tool that might assist in protecting minors online.[116] In practice, however, no age verification mechanism ever developed would be reliable enough to differentiate between a seventeen- and eighteen-year-old.[117] Only by sidestepping the problem entirely has the Children's Online Privacy Protection Act (COPPA) of 1998 avoided First Amendment challenges.[118] Defending the constitutionality of the Child

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[114] *See supra* note 9 at 12 ("What these advocates fail to acknowledge is that, to the extent COPPA has enhanced child safety—indeed, to the extent that COPPA can be effectively administered at all—it is because of the unique circumstances of the under-13 age bracket and the PI-collecting sites that have evolved to serve that community. In particular: 1. The functionality of child-oriented sites is usually tightly limited: They are closed, walled gardens; 2. Many smaller websites catering to children charge a fee for admission—even as feebased models have withered away on the rest of the Internet; and 3. There are relatively few sites that cater exclusively to the under-13 crowd, which may be an unintended consequence of COPPA itself.").

[115] Such a system, to be successful, would have to reject a user who is seventeen years, 364 days old but allow a user to participate who is eighteen years, zero days old.

[116] *See* Notice at 37735 ("the National Institute of Standards and Technology has worked with industry to improve ID verification and authentication that might be relevant to age verification."); and at 37736 ("Other companies offer age-verification tools.").

[117] *See* Gordon v. Holder, 721 F.3d 638, 642, 657 (D.C. Cir. 2013) (recognizing that "[r]emote purchasing also makes it easier for parties to evade age restrictions . . . age verification requirements are only partially effective"); American Booksellers Found. For Free Expression v. Sullivan, 799 F. Supp. 2d 1078, 1082 (D. Alaska 2011) ("There are no reasonable technological means that enable a speaker on the Internet to ascertain the actual age of persons who access their communications.").

[118] COPPA requires "verifiable parental consent" for the "collection, use, or disclosure of personal information from children" by services and sites "directed to" children under 13 or when sites have "actual knowledge" that users are under 13. 15 U.S.C. § 6502. Thus, children can access mixed-audience services and sites by lying about their age (often with their parents' consent and/or participation). The Federal Trade Commission has accepted the provision of a credit card by *someone* as a "reasonable" way to "obtain verifiable parental consent," 16 C.F.R. § 312.5(b)(2)(ii), even though this mechanism in no way verifies the parent-child relationship and merely makes it *more* likely (yet far from certain) that *someone* over the age of 18 is involved. U.S. credit card issuers generally do not issue credit cards to anyone under 18, but most will allow primary account holders to add minors *of any age* to their cards as authorized users. Alexandria White, *What's the minimum age to be an authorized user on a credit card?*, CNBC (Apr. 15, 2022), https://www.cnbc.com/select/whats-the-minimum-age-to-be-an-authorized-user-on-a-credit-card/. The distinction between primary and secondary card users is not apparent to operators when they verify the credit card information provided will work. In effect, COPPA requires adults to identify themselves only before accessing content aimed at the youngest children—sites with limited interactivity that few, if any,

Online Protection Act (COPA) of 1998, the government argued that websites could avoid liability for providing information deemed "harmful to minors" by requiring users to input credit card information and thereby verify that they were not minors. The Third Circuit rejected this proposition, holding that credit card information does not actually verify a user's identity, thus rendering COPA's affirmative defense "effectively unavailable."[119] More modern identity verification solutions involve providing government-issued documents and/or "selfies" or live video. But there is good reason to doubt that these methods are much more reliable: the Internet is replete with instructions on how to fool such verification measures with free, easy-to-use software.[120] And again, to be able to treat seventeen- and eighteen-year-olds differently, such verification methods must be accurate to within a single day.

Further, age verification itself poses serious privacy and security risks, ultimately undermining the Notice's desire to protect minor privacy.[121] The Notice fails entirely to address the risks created by requiring the collection of the sensitive identity information and biometric data that would be needed to age-verify users—especially by companies that are rich targets for malicious actors.[122] Platforms should collect less data about us, not more. There is as yet no comprehensive federal privacy law to govern such information.

Ultimately, mandating age verification is unconstitutional; most clearly, it would still violate the First Amendment rights of adults to anonymously access lawful, constitutionally protected content online. The Third Circuit's analysis of COPA is particularly instructive:

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adults would ever use except alongside a very young child. Because COPPA has avoided burdening the rest of the Internet, the law has avoided First Amendment challenge.

[119] American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 196 (3d Cir. 2008) ("We conclude that the District Court correctly found that the affirmative defenses are 'effectively unavailable' because they do not actually verify age.").

[120] The links found on the first page of Google search results for "trick selfie verification" make clear how easy it is to find information on bypassing these verification schemes. *See, e.g.*, *Deepfakes Expose Cracks in Virtual ID Verification*, GEMINI ADVISORY (Jan. 27, 2021), https://geminiadvisory.io/deepfakes-id-verification/; Avi Gopani, *How To Fool Facial Recognition Systems*, ANALYTICS INDIA MAGAZINE (Aug. 4, 2021), https://analyticsindiamag.com/how-to-fool-facial-recognition-systems/; John Kowalski, *Ever wondered how people are passing selfie & ID verification?*, BLACK HAT WORLD (May 3, 2021), https://www.blackhatworld.com/seo/ever-wondered-how-people-are-passing-selfie-id-verification.1324282/.

[121] *See* Notice at 67734 ("Social media and other online platforms also pose risks to minors of infringements on privacy, with concerns focused on the particularly sensitive nature of images and other personally identifiable information such as educational records, including misuse, minors' vulnerability to harms from those with access to such information, and, more generally, minors' exposure to comprehensive surveillance.").

[122] Jason Kelley et al., *Victory! ID.me to Drop Facial Recognition Requirement for Government Services*, ELEC. FRONTIER FOUND. (Feb. 9, 2022), https://www.eff.org/deeplinks/2022/02/victory-irs-wont-require-facial-recognition-idme.

"The Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech, because such restrictions can have an impermissible chilling effect on those would-be recipients."[123] Accordingly, the Third Circuit held COPA unconstitutional in part because age verification requirements "will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial."[124] In 2008, striking down COPA again for the final time, the Third Circuit reiterated that age verification "would deter users from visiting implicated Web sites" and therefore "would chill protected speech."[125]

The approach taken in the Notice, of protecting minors from "negative" and "sensational" speech[126] would be even worse than COPA. Given that the Notice defines "social media" so broadly,[127] whatever comes of this process would apply to virtually *all* Internet services,[128] while COPA generally excluded online services that provided a forum for user-generated content.[129] COPA effectively mandated age verification only for *accessing* content deemed "*harmful to minors*." The Notice asks for solutions that would be even broader than COPA in two respects.

First, the Notice's proposed approach would force age verification for accessing a much broader range of content, including information about abortion (which could lead to their prosecution in many states after the *Dobbs* decision), fringe ideologies, drug abuse, gambling, and other topics that adults may have entirely lawful reasons to inform themselves about. As

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[123] American Civil Liberties Union v. Ashcroft, 322 F.3d 240, 259 (3d Cir. 2003).

[124] *Id.*

[125] American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 197 (3d Cir. 2008).

[126] Notice at 67735, n. 23.

[127] *Id.* at 67737 ("The term 'social media and other online platforms' could encompass many services and technologies. These include, among others, platforms set up as social media, gaming platforms and interactive games (even if decentralized), online platforms or websites that host postings of video and other content, and even search engines could be viewed as advertising platforms."). *See also, id.,* 67733, n. 3 ("For the purposes of this Request for Comment, the term 'social media' and 'online platforms' encompass a wide array of modern technology from video sharing networks, such as TikTok, Twitch and YouTube, to social networks such as Facebook, Instagram. It includes the many gaming networks in addition to Twitch, such as Discord, Roblox and Xbox, which allow individuals to interact with each other through, and adjacent to, games."). The Notice also states that "Social media and other online platforms are nearly ubiquitous, and minors spend substantial amounts of time using them." *Id.* at 67734.

[128] *See id.* ("Adult and children frequently use the same online platforms, particularly social media platforms, and that enables adults to readily engage children who are ill-equipped to understand the adults' intentions.").

[129] 47 U.S.C. § 231(b)(4). COPA applied to such platforms so long as they did not "select" or "alter" content in any way inconsistent with Section 230.

the Fourth Circuit noted when striking down a Virginia analogue to COPA, "the stigma associated with [controversial content] may deter adults from [accessing it] if they cannot do so without the assurance of anonymity. . . . Such requirements would unduly burden protected speech in violation of the First Amendment."[130]

Second, while COPA focused only on *access* to content, the Notice, in seeking tools to tamp down cyberbullying, would impose an age verification barrier for *communication*, chilling freedom of expression. Today, users can create pseudonymous Twitter(X) accounts by providing nothing more than an email—and use that account to comment publicly and message privately. To stop cyberbullying, Twitter(X) would have to require more—likely a government-issued ID, since courts have already found credit cards ineffective as a means of age verification.[131] Users could no longer trust their pseudonyms to protect themselves, especially from government actors and powerful figures who would seek to stifle criticism.

Imposing a de facto age verification mandate also violates the First Amendment rights of platforms by imposing a substantial economic burden on online expression. Age verification costs money and poses "significant costs for Internet speakers who have to segregate harmful and non-harmful material."[132] Virtually every platform on the Internet would be forced to segregate material relating to certain topics to prevent minors from accessing it. Courts have noted that this burden is particularly problematic when applied to noncommercial platforms that offer content for free.[133] The Notice proposes solutions that suffer from this same problem: not only does it effectively require covered platforms to age-verify all of their users (to deter communications between adults and minors), but it defines

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[130] Psinet, Inc. v. Chapman, 362 F.3d 227, 236–37 (4th Cir. 2004). *See also* Southeast Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 782 (D.S.C. 2005) (age verification creates a "First Amendment problem" because "age verification deters lawful users from accessing speech they are entitled to receive."); American Civil Liberties Union v. Johnson, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (mandatory age verification "violates the First and Fourteenth Amendments of the United States Constitution because it prevents people from communicating and accessing information anonymously.").

[131] *See supra* note 119 and accompanying text. *See also* Southeast Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 783 (D.S.C. 2005) ("Additionally, age verification is problematic because it requires the use of a credit card, which not all adults have . . . Moreover, to the extent that the State relies on third party verification services in lieu of credit-card based age verification, these systems have similarly been rejected by reviewing courts because of the stigma associated with their use." (citing Reno v. ACLU, 521 U.S. 844, 856 (1997)).

[132] McMaster, 371 F. Supp. 2d at 783. *See also* American Booksellers Foundation v. Dean, 202 F. Supp. 2d 300, 318 (D. Vt. 2002) ("Given the financial and practical difficulties associated with [age verification] most noncommercial—as well as some commercial—Web publishers face a heavy, if not impossible, compliance burden.").

[133] Reno v. American Civil Liberties Union, 521 U.S. 844, 881 (1997) ("it is not economically feasible for most noncommercial speakers to employ such verification."); American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 196–97 (3d Cir. 2008) (upholding the district court's ruling that age verification "place[s] substantial economic burdens on the exercise of protected speech because [it] involve[s] significant cost and the loss of Web site visitors, especially to those plaintiffs who provide their content for free.").

"social media" broadly to mean any public-facing website or service that primarily provides a forum for user-generated content. Thus, a small message board hosted as a hobby would be saddled with the same expenses and potential liabilities as the biggest social media platform. Noncommercial places of online gathering, especially small ones, can bear neither the risk of liability, nor the costs of implementing age verification. As a result, they will likely be forced to shut down. Like the Communications Decency Act of 1996, the Notice seeks to protect minors in a fashion that "threatens to torch a large segment of the Internet community."[134]

Like others before it, the Notice's reliance on age verification regimes "effectively tax[es] the distributors of protected speech [and] runs counter to a notion so engrained in First Amendment jurisprudence that the difficulties with this proposal are so obvious as to not require explanation."[135]

IV. The Notice Fails to Analyze What Powers the Administrative Branch Has over the Internet after *West Virginia v. EPA*

The final gaping hole in the Notice is its lack of self-awareness of the limitations of the executive branch to act on its own. Question 17 seems to indicate that any number of government agencies ("or other actors") can impose free speech burdens on the Internet:

> 17. What policy actions could be taken, whether by the U.S. Congress, federal agencies, enforcement authorities, or other actors, to advance minors' online health, safety, and/or privacy? What specific regulatory areas of focus would advance protections?[136]

But the executive branch is not free to move forward as it sees fit absent congressional authorization. The Supreme Court has increasingly signaled that it will no longer defer to agency interpretations of ambiguous statutory language (or here, a complete lack of congressional legislation) as the basis for broad claims of authority. First, as a matter of statutory interpretation, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[137] Second, however clearly it speaks, "Congress . . . may not transfer to another branch 'powers which are strictly and

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[134] *Reno*, 521 U.S. at 882.

[135] McMaster, 371 F. Supp. 2d at 784 (holding South Carolina's COPA analogue unconstitutional) (internal quotation marks and citations omitted).

[136] Notice at 67739.

[137] West Virginia v. Env't. Prot. Agency, No. 20-1530, slip op. at 11 (U.S. June 30, 2022) (quoting Utility Air Regul. Grp. v. Env't. Prot. Agency, 573 U.S. 302, 324 (2014)).

exclusively legislative.'" [138] Agency actions in the "regulatory areas" the Notice seeks comment about could violate both doctrines.

A. The Only References to Congress in the Notice Are to Pending or Defeated Legislation

The Notice appears to rely, as congressional authority, on bills which have been pending but never passed by Congress, and/or by reference to state statutes that are currently being litigated on First Amendment grounds:

> Congress has been exploring these issues through hearings and legislative proposals.[25] Similarly, legislators in states, such as California and Texas, have been adopting measures to try to spur changes among social media and other companies.

The accompanying footnote reads:

> n. 25/ See, e.g., Kids Online Safety Act, S. 1409, 118th Cong. (2023), as amended and posted by the Senate Committee on Commerce, Science, and Transportation on July 27, 2023; see, also, Time Change: Protecting Our Children Online, Hearing Before the Senate Committee on the Judiciary (Feb. 14, 2023) . . . ; Kids Online During COVID: Child Safety in an Increasingly Digital Age, Hearing Before the House of Representatives Subcommittee on Consumer Protection and Commerce (Committee on Energy and Commerce), (Mar. 11, 2021) . . . [139]

The Notice's reliance on pending or failed legislation to supply authority for any executive branch action is misplaced. "Whether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act." [140] Further, as discussed more fully below, the inference actually cuts the other way: the fact that Congress has not been able to pass legislation providing clear regulatory authority is an indication that Congress is not ready to have the executive branch move forward with any sort of regulations. In striking down agency actions, the Supreme Court "has found it telling when Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action." [141]

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[138] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

[139] Notice at 67735, n. 25.

[140] United States v. Price, 361 U.S. 304, 312 (1960).

[141] *West Virginia v. EPA*, slip op. at 1.

The only statute which the Notice can point to giving the executive branch any additional authority is the CAMRA Act, passed as part of the 2023 final omnibus spending package.[142] But that statute provides only study money to the National Institute of Health; it provides no regulatory authority to the executive branch.[143]

B. No Clear Statement Gives the Administration Authority over Such Major Questions

The Supreme Court recently provided its most robust articulation yet of the major questions doctrine:

> in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[144]

In other words, courts "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[145] The Supreme Court has struck down multiple agency rules for lack of clear statutory authorization under the major questions doctrine.[146]

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[142] Notice at 37736.

[143] *See* Press Release, Raskin's CAMRA Act and Thomas Paine Memorial Bills, Plus Other Legislative Initiatives, Become Law (Jan. 23, 2023), https://raskin.house.gov/2023/1/raskin-s-camra-act-and-thomas-paine-memorial-bills-plus-other-legislative-initiatives-become-law.

[144] *West Virginia v. EPA*, slip op. at 19 (quoting Utility Air Regul. Grp., 573 U.S. at 324). In general, clear statement "rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds"; these rules thus help courts "'act as faithful agents of the Constitution.'" *Id*. at 2 (Gorsuch, J., concurring) (quoting A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 169 (2010)).

[145] *Id*. at 19 (quoting United States Telecom. Ass'n. v. Fed. Commc'n Comm'n, 855 F.3d 381, 419 (2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[146] *See West Virginia v. EPA*, slip op. at 4, 28 (The EPA does not have the authority to regulate greenhouse gas emissions in virtually any industry under the "major questions" doctrine without clear Congressional authorization (citing Utility Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302 (2014) (The EPA does not have the authority to deem greenhouse gas emissions from small stationary sources as an "air pollutant"); Gonzales v. Oregon, 546 U.S. 243 (2006) (The Attorney General could not rescind the license of a physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal); Food & Drug Admin. v. Brown & Williamson Tobacco Corp. 529 U.S. 120 (2000) (The Food and Drug Administration's authority over "drugs" and "devices" does not extend to the power to regulate, and even ban, tobacco products); Alabama Assn. of Realtors v. Department of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021) *(per curiam*) (The Centers for Disease Control and Prevention do not have the authority to institute a nationwide eviction moratorium in response to the COVID-19 pandemic.); MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994) (The Federal Communications Commission cannot authorize a permissive detariffing policy for communications common carriers)).

Congress can't be presumed to have left it to the Administration to resolve the major question of which age distinctions should exist between adults and children online. The Notice proposes a regulatory approach that would be applicable to all minors. The Internet that a 17-year-old would encounter would have to be the same as that of a 12-year-old. Yet Congress has already spoken to this very issue: the only comparable federal statute, COPPA, enshrines a distinction between teenagers and children under the age of thirteen. This distinction reflected lawmakers' assessment of the developmental differences between those two age groups.[147] The Administration is not free, under *West Virginia v. EPA*, to, in effect, rewrite COPPA to limit the provision of service to all minors.

CONCLUSION

Yes, the Administration should engage in the national debate over how our children should interact with the Internet. It should be asking many of the questions that it recited in the Notice. But it also must respect the limits that the First Amendment places on restricting speech. And it must be cognizant that without clear congressional authority, its ability to do anything beyond asking questions and dialoging with industry[148] is highly constrained. Executive branch humility is in order.

Respectfully submitted,

_____/s/_____

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Date: November 16, 2023

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[147] MARTHA K. LANDESBERG ET AL., FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS 42-43 (1998), https://www.ftc.gov/reports/privacy-online-report-congress ("In a commercial context, Congress and industry self-regulatory bodies traditionally have distinguished between children aged 12 and under, who are particularly vulnerable to overreaching by marketers, and children over the age of 12, for whom strong, but more flexible protections may be appropriate.").

[148] And of course, this interfacing with industry cannot take the form of unconstitutional coercion or jawboning in order to get social media companies to do what the Administration wants in terms of controlling speech on the Internet. *See* Missouri v. Biden, No. 23-30445, slip op. at 21-23 (5th Cir. 2023), ("The dispositive question is whether the Individual Plaintiffs' censorship can also be traced to government-coerced *enforcement* of those policies. We agree with the district court that it can be." (emphasis in original)).