CONSTITUTIONAL LAW:

THE SAFE FOR KIDS ACT & THE FREEDOM OF EXPRESSION

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INTRODUCTION

In June of 2024, the New York Legislature passed the Stop Addictive Feeds Exploitation ("SAFE") for Kids Act, officially cited as S7694A,[1] aimed to protect children online and curb the harmful impacts of addictive social media use. The SAFE for Kids Act prohibits covered social media platforms from providing "addictive feeds" to users who are under the age of 18 without verifiable parental consent.[2]

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1. *See* N.Y. Gen. Bus. Law § Ch. 20, art. 45 (McKinney 2024).

2. *See* Nancy Libin et al., *Empire State of Minding the Minors: New York Laws Aim to Ensure Children's Privacy and Online Safety*, DAVIS WRIGHT TREMAINE

Whatever one's views are with respect to the policy decision that the SAFE for Kids Act underscores and the means of achieving that policy, the law is likely to face legal challenges from industries that are opposed.

In this Article, we examine the SAFE for Kids Act and potential challenges to its enforceability. We begin by exploring the rationale behind the New York legislature's decision to pass this bill and providing an overview of its key provisions, including an examination of how the legislation aims to address concerns identified by the New York legislature and addressing its potential impact on social media use moving forward. Next, we examine likely challenges to the law's enforcement. In that context, we provide a high-level summary of relevant First Amendment jurisprudence as a backdrop for assessing likely constitutional challenges to the new law. We end with a discussion on how courts are likely to interpret constitutional challenges to the SAFE for Kids Act.

I. THE SAFE FOR KIDS ACT

A. Background & Intended Benefits

The New York legislature passed the SAFE for Kids Act due to rising concerns surrounding children's mental health, and specifically the role social media use plays in contributing to mental health issues in minors.[3] The primary concern of the New York legislature centered around the personalized algorithms social media companies use and the addictive nature of these algorithms' design.[4] Many, if not all, social media companies use algorithms designed to keep users engaged on their applications for extended periods of time. These algorithms are specifically intended to keep children (and adults) scrolling through their personalized feeds for "dangerously long periods of time" by tracking and utilizing thousands of data points with the singular goal of creating a personally curated feed that elicits addictive dopamine responses in the brain.[5]

LLP: INSIGHTS (June 26, 2024), https://www.dwt.com/blogs/privacy—security-law-blog/2024/06/child-online-safety-and-data-privacy-in-new-york (on file with Syracuse Law Review).

3. *See* OFF. OF THE N.Y. ATT'Y GEN., SAFE FOR KIDS ACT: ADVANCED NOTICE OF PROPOSED RULEMAKING PURSUANT TO N.Y. GEN. BUS. LAW § 1500 ET SEQ., at 2 (2024) (notice prepared by the Office of the Attorney General outlining the rationale behind the SAFE for Kids Act and posing questions to the public for general comment).

4. *See id.*

5. *Id.*

In justifying their rationale for passing the SAFE for Kids Act, New York lawmakers and supporters of the bill pointed to a recent Harvard study that found the six largest social media companies generated $11 billion from advertising to minors in 2022.[6] Indeed, internet advertising content attracted more advertising income in 2025 than content from traditional media companies, and online content creators are expected to generate $376.6 billion dollars by 2030.[7] New York lawmakers determined that the SAFE for Kids Act is a necessary piece of legislation to ensure that minors engaging with social media are protected from the harmful effects of overuse, given factors such as the incentives for social media companies to engage individuals for extended periods of time, children's lack of self-control with social media as compared to adults, and the correlation between high amounts of time spent on social media platforms with increased rates of depression and anxiety.[8]

There is data to back up the concerns expressed by New York lawmakers. Recent independent studies have shined a light on just how ubiquitous social media use is. A 2018 Pew Research Poll found that 97% of adolescents report using at least one of the seven most popular social media platforms (YouTube, Instagram, Snapchat, Facebook, Twitter/X, Tumblr, and Reddit).[9] A study published by JAMA Psychiatry found that adolescents who spend more than three hours a day on social media put themselves at a heightened risk for mental health problems, most commonly in the form of internalizing problems, depression, and anxiety.[10] With these factors and more in mind,

6. *See* Jonathan Allen & Steve Gorman, *New York lawmakers pass measure to protect youths on social media*, REUTERS (June 7, 2024, 8:52 PM), https://www.reuters.com/world/us/new-york-lawmakers-pass-measure-protect-youths-social-media-2024-06-08/ (on file with Syracuse Law Review).

7. *See* Michael Savage, *Social media creators to overtake traditional media in ad revenue this year*, THE GUARDIAN (June 9, 2025, 7:01 PM), https://www.theguardian.com/media/2025/jun/10/social-media-creators-to-overtake-traditional-media-in-ad-revenue-this-year (on file with Syracuse Law Review).

8. *See* OFF. OF THE N.Y. ATT'Y GEN., *supra* note 3.

9. *See* Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RSCH. CTR. (May 31, 2018), https://www.pewinternet.org/wp-content/uploads/sites/9/2018/05/PI_2018.05.31_TeensTech_FINAL.pdf (on file with Syracuse Law Review).

10. *See* Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76 JAMA PSYCH. 1266, 1266–73 (2019) (independent research study outlining the impact of increased social media use on the mental health of adolescents).

the New York Legislature passed the SAFE for Kids Act into law to protect kids from the harms of addictive social media use.[11]

B. Structure & Implementation

The mechanism by which the SAFE for Kids Act attempts to protect New York minors from addictive social media feeds is by prohibiting social media platforms from providing minors with an addictive feed that uses data collected from a particular minor's device to personalize the feed that the minor ultimately sees—unless the social media platform first obtains the consent of the minor's parent.[12]

The ultimate goal of the legislation is to prevent minors from being exposed to addictive algorithms that use data points to personally curate social media feeds while their brains are in developmental stages and are particularly susceptible to the addictive nature of these feeds.[13] The SAFE for Kids Act refers to these algorithm-driven feeds as "addictive feeds," which is defined under the act as follows:

> 1. "Addictive feed" shall mean a website, online service, online application, or mobile application, or a portion thereof, in which multiple pieces of media generated or shared by users of a website, online service, online application, or mobile application, either concurrently or sequentially, are recommended, selected, or prioritized for display to a user based, in whole or in part, on information associated with the user or the user's device, unless any of the following conditions are met, alone or in combination with one another:
>
> (a) the recommendation, prioritization, or selection is based on information that is not persistently associated with the user or user's device, and does not concern the user's previous interactions with media generated or shared by other users;
>
> (b) the recommendation, prioritization, or selection is based on user-selected privacy or accessibility settings, or technical information concerning the user's device;
>
> (c) the user expressly and unambiguously requested the specific media, media by the author, creator, or poster of media the user has subscribed to, or media shared by users to a page or group the user has subscribed to,

11. *See* OFF. OF THE N.Y. ATT'Y GEN., *supra* note 3.

12. *See* OFF. OF THE N.Y. ATT'Y GEN., *supra* note 3; *see also* N.Y. Gen. Bus. Law § 1501(1) (McKinney 2024).

13. *See* OFF. OF THE N.Y. ATT'Y GEN., *supra* note 3.

> provided that the media is not recommended, selected, or prioritized for display based, in whole or in part, on other information associated with the user or the user's device that is not otherwise permissible under this subdivision;
>
> (d) the user expressly and unambiguously requested that specific media, media by a specified author, creator, or poster of media the user has subscribed to, or media shared by users to a page or group the user has subscribed to pursuant to paragraph (c) of this subdivision, be blocked, prioritized or deprioritized for display, provided that the media is not recommended, selected, or prioritized for display based, in whole or in part, on other information associated with the user or the user's device that is not otherwise permissible under this subdivision;
>
> (e) the media are direct and private communications;
>
> (f) the media are recommended, selected, or prioritized only in response to a specific search inquiry by the user;
>
> (g) the media recommended, selected, or prioritized for display is exclusively next in a pre-existing sequence from the same author, creator, poster, or source; or
>
> (h) the recommendation, prioritization, or selection is necessary to comply with the provisions of this article and any regulations promulgated pursuant to this article.[14]

In place of what the SAFE for Kids Act defines as "addictive feeds," users of social media under the age of 18 will receive a chronological feed of content which contains posts only from accounts which the user follows.[15] This model of content display in social media apps mirrors how feeds used to appear to users prior to personalized feeds using algorithms to drive content became so prominent (the good old days). As an added layer of harm prevention, the SAFE for Kids Act also prohibits social media platforms from sending notifications

14. N.Y. GEN. BUS. LAW § 1500 (McKinney 2024).

15. *See* Andrew Gounardes, *Governor Hochul Signs Gounardes and Rozic's Landmark Child Internet Safety Legislation into Law* (June 20, 2024), https://www.nysenate.gov/newsroom/press-releases/2024/andrew-gounardes/governor-hochul-signs-gounardes-and-rozics-landmark (on file with Syracuse Law Review).

related to addictive feeds to a known minor between the hours of 12 AM and 6 AM without first obtaining parental consent.[16]

In August of 2024, the legislature charged the Office of the New York State Attorney General ("OAG") with promulgating regulations before the statute takes effect, citing that the OAG has significant experience with the dangers of social media which puts them in a unique position to both (1) understand the harms the legislation is aimed at preventing and (2) create regulations that are likely to address such harms.[17] On September 15, 2025, the OAG issued a Notice of Proposed Rulemaking for the SAFE for Kids Act ("Notice of Proposed Rulemaking"), which is part of the formal rulemaking process required by New York state law and which allows for the public to provide feedback to the OAG on the rules proposed by the OAG to enact and enforce the SAFE for Kids Act ("Proposed Rules").[18] In the Notice of Proposed Rulemaking, the OAG reiterates that the SAFE for Kids Act is intended to only cover those online platforms in which an addictive feed is a central part of the platform's service and is therefore tailored to only impact those platforms which offer such addictive feeds for minors to use.[19]

The Notice of Proposed Rulemaking makes it clear that the SAFE for Kids Act is intended to ensure that minors can still utilize social media platforms and that they will not be subjected to an inferior product because social media platforms are prohibited from offering "inferior services to minors whose parents do not consent to their receiving an addictive feed."[20] In other words, the quality of the social media platform experience will not be worse due to parents opting out of their children receiving content in the form of a personalized feed driven with user-specific data.

The Proposed Rules give the New York Attorney General the power to bring an action or special proceeding "whenever it appears that any person has engaged in or is about to engage in any of the acts or practices in the State of New York stated to be unlawful" under the

16. N.Y. GEN. BUS. LAW § 1502 (McKinney 2024).

17. *See* OFF. OF THE N.Y. ATT'Y GEN., *supra* note 3.

18. *See* ECON. JUST. DIV., OFF. OF THE N.Y. ATT'Y GEN., STOP ADDICTIVE FEEDS EXPLOITATION (SAFE) FOR KIDS ACT: NOTICE OF PROPOSED RULEMAKING, 1–2 (2025) (notice of Proposed Rulemaking which, among other items, outlines the legislative intent behind the SAFE for Kids Act, provides a summary of the legislative framework for the SAFE for Kids Act, and discusses the intended benefits associated with successful implementation of the SAFE for Kids Act).

19. *See id.* at 1.

20. *See id.* at 29.

Proposed Rules.[21] The public comment period for the Proposed Rules closed on December 1, 2025, and the SAFE for Kids Act will take effect 180 days after publication of the final regulations.[22]

Supporters of the SAFE for Kids Act believe this legislation will serve as a direct response to rising rates of depression, anxiety, and overuse of social media.[23] New York Governor Kathy Hochul described the measure as a "historic step forward in our efforts to address the youth mental health crisis and create a safer digital environment for young people."[24] The SAFE for Kids Act also has the potential to serve as a model for other states to implement similar protections and shift social media platforms toward providing safer, less addictive services to minors. If the SAFE for Kids Act, which passed through the New York State legislature with bipartisan support, is a success, it could open the door for a broader national discussion on how social media platforms target their services to minors and could be a catalyst for potential federal legislation on the topic as well.[25]

II. AGE VERIFICATION UNDER THE SAFE FOR KIDS ACT

A central requirement of the SAFE for Kids Act's effectiveness is the need for media platforms that produce addictive feeds ("covered operators" under the Proposed Rules) to implement age verification requirements to comply with the prohibition on exposing minors ("covered minors" under the Proposed Rules) to addictive feeds.[26] This feature of the law is both essential to its effectiveness, and a primary target for critics who may be looking to challenge the legality of what they allege to be a violation of constitutional free speech rights.

This Section includes an analysis of the age verification requirements under the SAFE for Kids Act as outlined in the Proposed Rules and introduces some critiques and arguments against the legality of the SAFE for Kids Act's age verification restrictions.

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21. *Id.* at 18–19 (referring to Proposed Rule § 700.8).

22. *See Protecting Children Online*, OFF. OF THE N.Y. ATT'Y GEN., https://ag.ny.gov/resources/individuals/consumer-issues/technology/protecting-children-online (on file with Syracuse Law Review) (last visited Jan. 31, 2026).

23. *See* Jonathan Allen & Steve Gorman, *New York lawmakers pass measure to protect youths on social media*, REUTERS (June 7, 2024, 8:52 PM), https://www.reuters.com/world/us/new-york-lawmakers-pass-measure-protect-youths-social-media-2024-06-08/ (on file with Syracuse Law Review).

24. *Id.*

25. *See NY lawmakers pass child internet safety laws,* WESTSIDE NEWS (June 16, 2024), https://westsidenewsny.com/news/2024-06-16/ny-lawmakers-pass-child-internet-safety-laws/ (on file with Syracuse Law Review).

26. *See* ECON. JUST. DIV., OFF. OF THE N.Y. ATT'Y GEN., *supra* note 18, at 3.

A. Proposed Rules for Age Verification

The Proposed Rules provide that, to ensure that no covered minors are provided with addictive feeds, covered operators must provide their users with age assurance methods designed to meet an "accuracy minimum" set out in the Proposed Rules, at least one of which must be "certified" in accordance with the Proposed Rules.[27] Covered operators are further required to obtain annual certification for each age assurance method they offer, and must utilize testing protocols to prove the accuracy of their methods and obtain such certification.[28] A simple process whereby a user checks a box certifying that they are an adult will not meet the requirements of the Proposed Rules.[29]

With the proper, certified methods of age verification in place, covered operators must determine that their users are not covered minors before providing their users with an addictive feed.[30] A covered operator can either (i) make an affirmative determination that a user is an adult based on the use of properly certified age verification methods, or (ii) presume a user is an adult if all of the covered operator's age verification methods are inconclusive and the covered operator otherwise has no actual knowledge that the user is a covered minor.[31] With respect to actual knowledge, the Notice of Proposed Rulemaking explains that "[i]f a covered user self-declares as a minor, either in response to a request by the covered operator *or in any other form that allows the covered operator to reasonably associate the declaration with the covered user*, that self-declaration constitutes actual knowledge of minor age status by the covered operator."[32]

The requirement that there be no actual knowledge is significant, since presumably a covered operator looking to provide an addictive feed is looking to use the user's data in order to curate that feed. Covered operators who collect a lot of user data to build addictive feeds might acquire data sufficient to identify the user's status as a minor in their collection, even if the user in question was able to bypass the certified age verification processes, thereby obtaining actual knowledge of the user's age.

While age verification regulations like the SAFE for Kids Act raise interesting questions of legality, discussed in more detail below,

27. *Id.* at 13 (referring to Proposed Rule § 700.4 (b)).
28. *See id.* at 15 (referring to Proposed Rule § 700.5).
29. *See id.* at 71–72.
30. *See* ECON. JUST. DIV., OFF. OF THE N.Y. ATT'Y GEN., *supra* note 18 at 30.
31. *See id.* at 13 (referring to Proposed Rule § 700.4(b)).
32. *Id.* at 82.

there is evidence that covered operators are able to comply with verification methods from a practical standpoint: X recently announced the use age inference using social connections as an age verification method in the United Kingdom; Bluesky is using facial age estimation, ID verification, and payment card verification to age-gate mature content and direct messaging in the United Kingdom; Instagram has implemented facial age estimation and ID verification in connection with the rollout of teen accounts; and Google offers ID and credit card age verification in the United States and additionally offers email age inference in the United Kingdom.[33]

B. Opposition to the SAFE for Kids Act

While the SAFE for Kids Act certainly has its supporters, it is likely that any attempts to enforce the law once it goes into effect will be challenged in court. The SAFE for Kids Act implicates interesting constitutional questions surrounding free speech which are likely to be central tenets of legal challenges to the law.

Many tech companies and interest groups believe that the types of feed and algorithms the SAFE for Kids Act targets are protected free speech, and a leading social media industry association, NetChoice, has called the legislation an "assault on free speech and the open internet."[34] NetChoice has successfully challenged similar measures from other states in court as unconstitutional.[35] Similar, in the Electronic Frontier Foundation ("EFF") response to the SAFE for Kids Act, EFF argued that the SAFE for Kids Act's age-verification requirements violate free speech rights of adults who are unable to verify their age and impermissibly chills individuals' right to online anonymity.[36]

On the other hand, the Notice of Proposed Rulemaking includes a defense of the SAFE for Kids Act's use of age verification assurance methods as an extension of historically established legal norms used in New York and elsewhere:

> The use of age verification has a long history grounded in established legal and cultural norms. New York State law age-restricts a variety of goods and services

33. *See id.* at 80–81.

34. Allen & Gorman, *supra* note 23.

35. *See id.*

36. *See* Hayley Tsukayama, *EFF comments to NY AG on SAFE for Kids*, ELEC. FRONTIER FOUND. (Sep. 30, 2024), https://www.eff.org/document/eff-comments-ny-ag-safe-kids-sept-2024 (on file with Syracuse Law Review).

> including the purchase of tobacco products, alcohol, firearms, lottery tickets, and a tattoo or body piercing. In addition, proof of age, typically via government-issued identification, is required for numerous activities such as renting a car or hotel room, participating in bike-sharing, opening a bank account, and signing up for a cellular phone number. In light of these requirements, showing government-issued identification to prove age to access these products is both common and expected, particularly for individuals at or just over the legal age limit.[37]

Ultimately, whether the SAFE for Kids Act can pass constitutional scrutiny will be up to courts, which will be tasked with applying decades-old precedent on free speech, and will find that new precedents are needed to address the questions raised.

III. THE SAFE FOR KIDS ACT & THE FIRST AMENDMENT

Whether or not the SAFE for Kids Act is able to stand up to legal challenges depends largely on how its restrictions on speech are viewed by courts tasked with ruling on the matter. This Section provides a brief summary of First Amendment jurisprudence and provides insight into where on the spectrum of speech restrictions the SAFE for Kids Act might fall.

A. Free Speech Protections & Lawful Restrictions on Speech

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law… abridging the freedom of speech."[38] Though Congress is specifically identified in the text of the First Amendment, the Free Speech Clause also applies to state governments through the doctrine of incorporation via the Fourteenth Amendment.[39]

While the text of the First Amendment seems fairly straightforward, jurisprudence on the matter is much more nuanced. Laws that restrict speech are subject to different levels of scrutiny depending on whether the law regulates speech based on its content or whether it provides only content-neutral restrictions. A law that restricts speech based on the content or viewpoint of the speech at issue is a content-

37. ECON. JUST. DIV., OFF. OF THE N.Y. ATT'Y GEN., *supra* note 18, at 71.
38. U.S. CONST. amend. I.
39. *See* Gitlow v. New York, 268 U.S. 652, 665 (1925).

based restriction subject to strict scrutiny.[40] By contrast, a law that merely happens to restrict speech without regard to the viewpoint or message of the speech in question is subject to an intermediate form of scrutiny.[41]

Furthermore, not all types of speech are afforded equal constitutional protection, and courts may uphold restrictions that do target the content of so-called unprotected speech without subjecting the laws to strict scrutiny.[42] Categories of "unprotected" speech recognized by courts include obscenity, defamation, fraud, fighting words, true threats, speech integral to criminal conduct, and child pornography.[43] The Court has seemed hesitant to accept new categories of unprotected speech, rejecting governmental arguments that depictions of animal cruelty and violent video games should be so classified.[44]

Brown v. Entertainment Merchants Association is of particular interest to the present discussion. There, the Supreme Court dealt with a California statute that prohibited the sale or rental of violent video games to minors.[45] Respondent representatives of video-game and software industries brought a pre-enforcement action challenging the validity of the law prior to its effectiveness. [46] The Court recognized that "video games communicate ideas—and even social messages—through many familiar literary devices," sufficient to constitute protected speech.[47] And the Court emphasized that, "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the command, do not vary when a new and different medium for communication

40. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); R.A.V. v. St. Paul, 505 U.S. 377, 417 (1992) ("Content-based regulations [of expression] are presumptively invalid").

41. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on *First Amendment* freedoms.").

42. *See R.A.V.*, 505 U.S. at 383 (free speech restrictions are acceptable "in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

43. *See* VICTORIA L. KILLION, CONG. RSCH. SERV., THE FIRST AMENDMENT: CATEGORIES OF SPEECH, IF11072 (2024).

44. *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010); Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 786–87, 799 (2011).

45. *See Brown*, 564 U.S. at 789.

46. *See id.*

47. *Id.* at 790.

appears."[48] California had attempted "to create a wholly new category of content-based regulation that is permissible only for speech directed at children," but the Court held that "[s]peech 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."[49] In response to the state's argument that the violent video games targeted by the statute should be acknowledged as a new category of unprotected speech, the Court reasoned that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[50] The Court expounded further, stating "California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none."[51]

Also of interest is *FCC v. Pacifica Foundation*, where the Supreme Court found that the Federal Communications Commission ("FCC") could lawfully regulate indecent broadcasting, reasoning that broadcasting was afforded "the most limited First Amendment Protection" of all media forms.[52] Key to this finding was the fact that broadcasting is (or was at the time) "uniquely pervasive" and "uniquely accessible to children."[53] *Pacifica* remains good law, and while the later case *Sable Communications of California, Inc. v. FCC*[54] (where the Court struck down a ban on indecent and obscene commercial telephone messages) is seen by many as a narrowing of the *Pacifica* holding, there are key differences which are relevant to the SAFE for Kids Act. First, the law in *Sable* applied to all indecent messages regardless of whether children or adults received them.[55] Second, the Court

48. *Id.* (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (internal quotations omitted)).

49. *Id.* at 794–795.

50. *Brown,* 564 U.S. at 792 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

51. *Id.* at 795.

52. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

53. *Id.* at 748–49.

54. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

55. *See id.* at 127; *see also* ERIC N. HOLMES, CONG. RSCH. SERV., CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT, R47049 (2022).

contrasted private telephone communications to the pervasive attributes of broadcasting.[56]

Finally, the jurisprudence of commercial speech is integral to the discussion of the legality of the SAFE for Kids Act. Commercial speech is speech that merely proposes a commercial transaction or "expression related solely to the economic interests of the speaker and its audience," which has historically received less constitutional protection than other forms of expression.[57] In *Central Hudson*, the Supreme Court stated "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."[58] However, if restrictions on commercial speech are targeted as nonmisleading speech concerning a lawful activity, they are typically afforded a sort of intermediate scrutiny, whereby the state "must assert a substantial interest to be achieved by restrictions on commercial speech" with the restrictions at issue "designed carefully to achieve the state's goal."[59] *Central Hudson* set out a four-part analysis for addressing challenges to commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[60]

B. Free Speech & the Internet—the CDA & COPA

Multiple pieces of significant federal legislation targeting minors' access to obscene material online have been struck down by the courts over the years, including the Communications Decency Act ("CDA") in 1997, which met its demise in *Reno v. American Civil Liberties*

56. *See Sable*, 492 U.S. at 127–28.

57. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

58. *Id.* at 563.

59. *Id.* at 564.

60. *Id.* at 566.

Union,[61] and the Child Online Protection Act ("COPA"), which was subject to a decade-long legal challenge that resulted in two Supreme Court decisions[62] before eventually being ruled unconstitutional by the Eastern District of Pennsylvania in a decision[63] upheld by the Third Circuit in *American Civil Liberties Union v. Ashcroft*[64] and allowed to stand when the Supreme Court denied certiorari in 2009.[65]

The CDA was a congressional response to concern relating to the prevalence of internet pornography.[66] The CDA outlawed the knowing use of an interactive computer service to send or display obscene content to minors.[67] Importantly, in *Reno*, the Court found that the unique qualities of broadcast that were integral to the *Pacifica* holding "are not present in cyberspace."[68] Ultimately, the CDA was found to be a content-based restriction that impermissibly infringed free speech rights and it failed to hold up to strict scrutiny.[69]

COPA was passed in response to the *Reno* decision.[70] Congress attempted to narrow its restrictions to meet the standard set out by the Court in *Reno*, creating criminal penalties for "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[71] COPA defined material harmful to minors in part by reference to contemporary community standards, which was an attempt to track the Supreme Court's own definition of obscenity in prior caselaw.[72] Like the CDA, COPA was found to be a content-based restriction and was struck down after being subjected to strict scrutiny.

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61. Reno v. Am. C.L. Union, 521 U.S. 844, 885 (1997).

62. Ashcroft v. Am. C.L. Union, 535 U.S. 564 (2002); Ashcroft v. Am. C.L. Union, 542 U.S. 656 (2004).

63. Amer. C.L. Union v. Gonzales, 478 F. Supp. 2d 775, 816–21 (E.D. Pa. 2007).

64. Amer. C.L. Union v. Mukasey, 534 F.3d 181, 207 (3d Cir. 2008).

65. Amer. C.L. Union v. Mukasey, 555 U.S. 1137 (2009) (mem.); *see also* HOLMES, *supra* note 55 (discussing the circumstances and legal reasoning relating to *Ashcroft* and *Reno*).

66. *See* HOLMES, *supra* note 55.

67. *See id.*

68. Reno v. Am. C.L. Union, 521 U.S. 844, 868–69 (1997).

69. *See id.* at 879.

70. *See* HOLMES, *supra* note 55 (citing H.R. REP. NO. 105-775, at 5 (1998)).

71. 47 U.S.C. § 231(a)(1).

72. *See id*. at § 231(e)(6); *see also* Miller v. California, 413 U.S. 15, 28 (1973).

C. Addictive Feeds as Speech

So, what type of speech is an addictive feed, and how should we expect courts to view the SAFE for Kids Act's restrictions on dissemination of addictive feeds to minors? The answer is not clear-cut, and there are a number of contrasting, compelling arguments.

Opponents of the SAFE for Kids Act will point out that addictive feeds clearly do not seem to rise to the level of obscenity, defamation, fraud, fighting words, true threats, speech integral to criminal conduct or child pornography, and therefore addictive feeds constitute protected speech. Further, under *Brown*, it seems clear that addictive social media feeds would fail to gain recognition as a new category of unprotected speech, given the lack of longstanding tradition specifically relating to minors' access to social media feeds.

Those seeking to challenge the SAFE for Kids Act will also argue that the restrictions are content based, since the entire purpose of the SAFE for Kids Act is to restrict minors' access to addictive feeds specifically because of the personalized nature of those feeds, which can be framed as the content of the feeds, which is a factor that would favor the application of strict scrutiny to the law. Because the SAFE for Kids Act creates a burden on all free speech by requiring every covered user to go through an age verification process to access addictive feeds, opponents will argue that the restrictions are not narrowly tailored to achieving the state's goal. And in light of *Reno* and *Ashcroft*, there is good reason to believe that opponents of the SAFE for Kids Act can convince a court that the law's restrictions are content-based regulations.[73]

Finally, opponents of the SAFE for Kids Act will argue that addictive feeds are not commercial speech. Despite the fact that their primary purpose is to generate user engagement, and as a result, advertising revenue, the content of social media feeds includes plenty of expressive, artistic and even educational material (even if that material is frequently interrupted by ads).[74] Therefore, addictive feeds are not merely expression related solely to the economic interests of the speaker and its audience, but an intermingling of speech related to economic interests and essential, protected expression.

New York State, in defending potential legal challenges to the SAFE for Kids Act, would argue that addictive feeds constitute commercial speech. A significant portion of current-day social media feeds

73. *See Reno* 521 U.S. at 885; *see also* Amer. C.L. Union v. Ashcroft, 322 F.3d 240, 271 (3d Cir. 2003).

74. *See* ECON. JUST. DIV., OFF. OF THE N.Y. ATT'Y GEN., *supra* note 18, at 22.

is advertising, and indeed it seems that curating advertisements that are more likely to generate ad revenue is a primary driver for media operators to utilize user data to curate feeds in the first place.[75] Further, proponents of the SAFE for Kids Act will argue that addictive feeds are not "non-misleading" commercial speech, but are instead speech that is more likely to deceive the public than to inform it—exactly the type of speech that the *Central Hudson* Court described as undeserving of constitutional protection.[76] Even if a court were to find that addictive feeds constitute commercial speech deserving of protection, New York need only satisfy intermediate scrutiny,[77] and can argue that protecting minors from the harmful effects of addictive feeds is a substantial state interest, and that the SAFE for Kids Act is designed carefully to meet that goal by limiting the prohibition on speech to the dissemination to minors.

If a court were to find that the regulations in the SAFE for Kids Act were *not* commercial speech, then proponents of the law would argue that the restrictions in the act are akin to broadcasting, as legally regulated by the FCC under *Pacifica*.[78] Like broadcasting, social media is inarguably pervasive in today's culture—perhaps even more pervasive than broadcasting was in 1978. And like the regulation that the Supreme Court upheld in *Pacifica*,[79] the restrictions in the SAFE for Kids Act are targeted specifically at speech directed at children. These are compelling similarities that were both key factors to the Court's justification for allowing the restriction on speech to stand in *Pacifica*. While this argument seems compelling, it faces the obvious issue that the Supreme Court found that broadcasting was dissimilar to internet transmission.[80] But the internet is ever evolving, and the pervasiveness of social media use today is drastically different than "cyberspace" in 1997, making this argument ripe for a good dusting off.

Even if proponents of the SAFE for Kids Act are unable to convince a court that addictive feeds are commercial speech, or that

75. *See* Staff, *Study Highlights Frequency Of Ads On Popular Social Media Platforms*, PPAI (Aug. 11, 2020), https://www.ppai.org/media-hub/study-highlights-frequency-of-ads-on-popular-social-media-platforms/ (on file with Syracuse Law Review).

76. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

77. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

78. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

79. *See id.* at 748–49.

80. Reno v. Am. C.L. Union, 521 U.S. 844, 868–69 (1997).

Reno's understanding of the pervasiveness of the internet is drastically outdated, there is a compelling argument that "addictive feeds" are broadly defined without reference to the message or viewpoint offered in any particular feed, and the focus of the definition is the harmful effects that *any* personalized feed can have on minors. In other words, there are convincing reasons to believe that the SAFE for Kids Act's regulations are content-neutral, meaning that an intermediate form of scrutiny may apply. Further, it must be noted that the restrictions on addictive feeds provided to minors only prohibit addictive feeds without the consent of the minor's parents. Unlike the broad restrictions that were scrutinized in *Reno* and *Ashcroft*, the restrictions on speech here are not absolute, as a parent may lawfully decide to allow a minor to access addictive feeds.

CONCLUSION

The SAFE for Kids Act seeks to address a modern problem and is likely to face legal challenges brought based on age-old legal principles. First Amendment jurisprudence is complex and multi-faceted. While the Supreme Court has weighed in on important free speech issues in this context in the not-too-distant past, the context of cyberspace is ever-evolving at a rapid pace, and legislatures must weigh a plethora of considerations as they seek to tackle new issues that arise.

There is no clear answer as to how the constitutional issues implicated by the SAFE for Kids Act should be resolved. Legislatures are tasked with solving the problems of today in a legal landscape that is slow to adapt. But times have so changed since the most integral decisions in this space were decided that the issues raised by the SAFE for Kids Act seem ripe for a re-examination in the courts.

As the Proposed Rules approach finalization and final rules are adopted, we will be keeping our eyes on any challenges to the SAFE for Kids Act, which are likely to generate fascinating decisions that expand our understanding of the key constitutional right to free speech.