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Schools vs. Social Media: Can Mass Litigation Reign in Big Tech and Save the Kids?

I. Introduction

On January 6, 2023, Seattle School District No. 1 filed a complaint in federal court against several of the most prominent social media companies in the world, such as TikTok, Google (over YouTube), Meta (over Facebook and Instagram), and Snapchat (collectively, “Defendants”).¹ The complaint alleges that Defendants are responsible for creating a mental health crisis among American youths by targeting children in “particularly effective and harmful” ways with their social media apps.² Specifically, the complaint argues that Defendants seek to maximize the time users spend on their social media platforms by “purposely designing, refining, and operating them to exploit the neurophysiology of the brain’s reward systems to keep users coming back, coming back frequently, and staying on the respective platforms for as long as possible.”³ The resulting overuse and addiction to Defendants’ platforms, the complaint contends, has caused or at least exacerbated the nation’s youth mental health crisis.⁴ The District cites the fact that King County, Washington, where the Plaintiff School District is located, has “seen drastic increases in suicides, attempted suicides, and mental-health related ER visits” from children.⁵ Consequently, because King County schools ultimately provide mental health services to those children, the School

¹ Complaint at 1, Seattle Sch. Dist. v. Meta Platforms, Inc., No. 2:23-cv-00032 (W.D. Wash. 2023).

² *Id.*

³ *Id.*

⁴ *Id.* at 2.

⁵ *Id.* at 3.

District claims that Defendants should be held liable for the costs associated therein.⁶ The School District brings this claim under the tort of public nuisance, arguing that Defendants’ social media platforms have “affect[ed] equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal”—the definition of public nuisance under Washington law.⁷ As of February 2024, 200 more school districts from across the country have joined Seattle School District No. 1 as plaintiffs against Big Tech⁸, forming ongoing widespread litigation against the social media companies.⁹

Common among the various complaints from the school districts is the assertion that the school districts simply do not have the resources to allocate towards addressing the “youth mental health crisis.” The San Mateo County Board of Education, for example, explains in its complaint to a California District Court that “operating under pre-crisis budgets” has caused San Mateo schools to “scramble[] to reallocate resources to address the mental health crisis.”¹⁰ The complaint further claims that San Mateo schools have “diverted time and funds to hire additional health care professionals” as well as trained existing teachers and staff “to educate students on their mental health, to develop mental health curriculum and materials, and to keep students and parents notified and informed about any mental health issues that arise.”¹¹

Here, Plaintiffs cite the welfare of the school communities; Seattle School Districts specifically reference the \$5 million they had to allocate towards funding for children’s mental

⁶ *Id.* at 85.

⁷ Complaint at 85, *Seattle v. Meta* (W.D. Wash. 2023) (quoting RCW § 7.48.130).

⁸ For the purposes of this paper, “Big Tech” will only refer to major social media companies, the most prominent of whom comprise the defendants in most of the lawsuits being brought forth by school districts.

⁹ Arianna Prothero, *School District Lawsuits Against Social Media Companies Are Piling Up*, EDUCATIONWEEK (Jan. 31, 2024) <https://www.edweek.org/policy-politics/school-district-lawsuits-against-social-media-companies-arepilingup/2024/01#:~:text=More%20than%20200%20school%20districts,the%20youth%20mental%20health%20crisis.>

¹⁰ Complaint at 68-69, *San Mateo Board of Ed. v. YouTube, LLC*, No. 3:23-cv-01108 (N.D. Cal. 2023).

¹¹ *Id.* at 69.

health.¹² Other research illustrates that a significant number of schools are not confident that they are able to do enough to look out for students' mental health: out of the 96 percent of schools that provided mental health services for their students, "roughly half (56 percent) of public schools moderately or strongly agreed that they could effectively provide mental health services to all students in need."¹³ The complaint also cites several "collateral issues" like vandalism, property damage, and increased need for student disciplinary action as part of the negative effects arising from students' addiction to social media.¹⁴

With these lawsuits, the collective School Districts seek not only to gain monetary compensation, but to also influence the larger battle against social media addiction and the ever-worsening youth mental health crisis. As Chris Thomas, a professor of educational leadership and policy at University of Florida, explains, "these [lawsuits] are as much about legal success as they are about shaping issues and winning in the court of public opinion. That is part of the strategy around the lawsuits, even if they have tough hills to climb legally."¹⁵

This Comment will consider the merits of that strategy by examining whether this widespread litigation is the optimal route towards much-needed social media regulation, or whether new or existing regulatory laws are better-equipped to handle Big Tech. While it is likely that the School Districts' lawsuits will not be successful due to the robustness of Defendants' anticipated defenses and because of the difficulty in proving a definitive causal link between social media and mental health, these lawsuits may be an important first step. Part II of this Comment will begin with a discussion of how Big Tech's unceasing efforts to create an addictive product

¹² See Complaint, *Seattle v. Meta* (W.D. Wash. 2023).

¹³ *Roughly Half of Public Schools Report That They Can Effectively Provide Mental Health Services to All Students In Need*, NAT'L CTR. EDUC. STAT. (May 31, 2022), https://nces.ed.gov/whatsnew/press_releases/05_31_2022_2.asp.

¹⁴ Complaint at 69, *San Mateo v. YouTube* (2023).

¹⁵ Prothero, *supra* note 9.

have undeniably influenced youth mental health, and end with the history of the public nuisance tort. Part III will then delve into the merits of the School Districts’ litigation and analyze Section 230 immunity¹⁶ as it applies to social media. It will then outline how First Amendment concerns, which may at first appear to be a hindrance, will help to tailor any future legislation towards focusing on limiting Big Tech’s predatory practices. Finally, this Comment will conclude in Part IV by reiterating the need for administrative and legislative regulation, and the importance of these lawsuits in shifting public opinion towards achieving that goal.

II. Background

A. The Addictive Impact of Social Media

Social media use has proliferated since the 2000s, causing a significant cultural shift in the way people across the globe are able to communicate.¹⁷ In 2021, 72 percent of all Americans used social media, compared to just 5 percent in 2005.¹⁸ Specifically among American teenagers aged thirteen to seventeen, 95 percent reported using YouTube, 67 percent used TikTok, 62 percent used Instagram, 59 percent used Snapchat, and 32 percent used Facebook—all forms of social media that comprise the Defendants in the School Districts’ lawsuit.¹⁹ Social media has further entrenched itself in teenagers’ lives because of easy access to internet and technology, with 95 percent of teenagers having access to smartphones and 46 percent saying that they are “almost constantly” online.²⁰ Black and Hispanic teenagers comprise a significantly larger share of that

¹⁶ Communications Decency Act of 1996, 47 U.S.C. § 230.

¹⁷ See BILL KOVAARIK, *REVOLUTIONS IN COMMUNICATION: MEDIA HISTORY FROM GUTENBERG TO THE DIGITAL AGE* (2d ed. 2016).

¹⁸ *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

¹⁹ Emily Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/>.

²⁰ *Id.*

46 percent than white teenagers.²¹ Common among all demographics of teenagers, however, is that usage of fast-paced apps like TikTok or Snapchat has increased significantly, whereas usage of slower-paced apps such as Facebook or Twitter has decreased drastically.²²

Consequently, there has been a recent push by commentators to acknowledge social media overuse as an addiction similar to tobacco and opioid addiction. By doing so, they hope to re-center the conversation on Big Tech's predatory practices, rather than treat social media dependency as a personal moral failing.

In the 2010s, cognitive scientist Dr. Harry Brignull coined the term "dark patterns" to describe deceptive and unfair digital practices by designers.²³ Nowadays, the term is used widely in the media, academia, and even Congress.²⁴ Since Big Tech has a financial interest in making sure attention from minors does not fade away, it utilizes these dark patterns to keep them addicted.²⁵ Rather than directly charge users for using social media, companies instead sell advertising on their platforms based on specific users' data, demographic profile, and internet browsing history.²⁶ As a result, the longer that users stay engaged on any particular social media platform, the greater the chances that they will see more ads, earning profits for the social media company.²⁷ As Justin Rosenstein, a former Facebook engineer speaking in the documentary *The Social Dilemma*, put it: "[social media users] are the product. [Their] attention is the product, being sold to advertisers."²⁸ In the same documentary, Tim Kendall, a former Facebook executive,

²¹ *Id.*

²² *Id.*

²³ See Harry Brignull, *Dark Patterns: Dirty Tricks Designers Use to Make People Do Stuff*, 90 PERCENT OF EVERYTHING (July 8, 2010), <https://www.90percentofeverything.com/2010/07/08/dark-patterns-dirty-tricks-designersuse-to-make-people-do-stuff/>.

²⁴ Lauren E. Willis, *Deception by Design*, HARV. J. L. & TECH. 34, 115, 116 (2020).

²⁵ Samuel M. Roth, *Data Snatchers: Analyzing TikTok's Collection of Children's Data and Its Compliance with Modern Data Privacy Regulations*, 22 J. HIGH TECH. L. 1, 19–22 (2021).

²⁶ *Id.*

²⁷ *Id.*

²⁸ THE SOCIAL DILEMMA, 14:11-14:20 (Netflix 2020).

revealed that his company sought this attention via a strategy that aimed to “figure out how to get as much of [the user’s] attention as we possibly can. How much time can we get you to spend? How much of your life can we get you to give to us?”²⁹ Former Facebook President Sean Parker was similarly blunt in an interview where he launched a scathing attack on social media’s exploitation of children:

The thought process that went into building these applications . . . was all about: “How do we consume as much of your time and conscious attention as possible?” . . . We needed to sort of give you a little dopamine hit every once in a while . . . And that’s going to get you to contribute more content . . . [We were] exploiting a vulnerability in human psychology.³⁰

Social media companies utilize several different methods to achieve this leveraging of human behavior and psychology for financial interests.³¹ One of them, cited in the Seattle School District’s Complaint, is the use of endless scrolling and refreshing.³² Tristian Harris, a former design ethicist at Google, likened the use of never-ending content streams on social media apps to slot machines in casinos, where consumers are deliberately led down a constant feedback loop that rewards attention.³³ He explained that this method is designed to “keep [users] scrolling, and purposely eliminate any reason for [them] to pause, reconsider or leave.”³⁴ In contrast to activities like reading a book or watching a movie—“experiences that [are] bounded and finite”—social media companies have created a “bottomless flow that keeps going” by requiring user input in a

²⁹ *Id.* at 13:52-14:05.

³⁰ Mike Allen, *Sean Parker Unloads on Facebook: “God Only Knows What It’s Doing to Our Children’s Brains,”* AXIOS (Nov. 9, 2017), <https://www.axios.com/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-1513306792-f855e7b4-4e99-4d60-8d51-2775559c2671.html> [<https://perma.cc/2HWW-NAN8>] (quoting Sean Parker, former president of Facebook).

³¹ Haley Sweetland Edwards, *You’re Addicted to Your Smartphone. This Company Thinks It Can Change That,* TIME (Apr. 13, 2018), <https://time.com/5237434/youre-addicted-to-your-smartphone-this-company-thinks-it-can-change-that/> (“Every major consumer tech company operating today . . . uses some form of persuasive technology. Most of the time, the goal is unambiguous: the companies want to get us to spend as much time as possible on their platforms.”).

³² Complaint at 19, *Seattle v. Meta* (W.D. Wash. 2023).

³³ Von Tristan Harris, *The Slot Machine in Your Pocket*, SPIEGEL INT’L (July 27, 2016), <https://www.spiegel.de/international/zeitgeist/smartphone-addiction-is-part-of-the-design-a-1104237.html>.

³⁴ *Id.*

way that binge-watching television, for example, does not.³⁵ Psychologists describe this as entering a “flow state,” and have found it to be linked to problematic overuse of social media.³⁶

Another tool social media companies use to manipulate users is the concept of social reciprocity.³⁷ Reciprocity, in the context of human behavior and psychology, refers “to exchange between two or more actors, generally (though not always) for mutual benefit. In social life, positive forms of reciprocity, such as kindness in response to previous kindness, are considered the very ‘starting mechanism’ through which personal relations are established.”³⁸ Put another way, people are intrinsically motivated to respond to an action with a similar action. On social media platforms, this powerful motivation is exploited most commonly through the concept of “likes.”³⁹ When someone else gives a “like” to something a user has posted, that user then feels obligated, under the psychological guise of forming genuine human connection, to reciprocate by “liking” something from that person in return.⁴⁰ Used in tandem with push notifications,⁴¹ this is another powerful tool to keep users returning to social media apps.

A third popular tactic employed by social media companies is the concept of intermittent variable rewards.⁴² Again, slot machines provide an apt comparison: consumers pull a lever to either win a prize, or nothing at all.⁴³ The variableness and delay of the reward are crucial, as they

³⁵ *Id.*

³⁶ Gino Gugushvili et al., *Facebook Use Intensity and Depressive Symptoms: A Moderated Mediation Model of Problematic Facebook Use, Age, Neuroticism, and Extraversion* at 3, BMC PSYCH. 10, 279 (2022).

³⁷ Complaint at 19, *Seattle v. Meta* (W.D. Wash. 2023).

³⁸ Seth C. Lewis, *Reciprocity as a Key Concept for Social Media and Society*, 1 SOC. MEDIA + SOC’Y 1,1 (2015).

³⁹ *Id.*

⁴⁰ *Id.* The Complaint also cites a well-known study from 1976 by Phillip R. Kunz and Mary Woolcott, in which Kunz sent unprompted Christmas greeting cards with a photo of his family and a personal note to complete strangers; those strangers reciprocated by sending him greeting cards back, and only a few even asked Kunz who he was.

⁴¹ Alerts on our phones that populate the screen and usually require some sort of action to make them go away.

⁴² See, e.g., Julian Morgans, *The Secret Ways Social Media is Built for Addiction*, VICE (May 17, 2017), <https://www.vice.com/en/article/vv5jkb/the-secret-ways-social-media-is-built-for-addiction>.

⁴³ *Id.*

work to create a sense of craving while doling out dopamine-triggering stimuli.⁴⁴ Robert Sapolsky, Professor of Biology and Neurology at Stanford University, explains that “dopamine is not about pleasure, it’s about the anticipation of pleasure. It’s about the pursuit of happiness.”⁴⁵ This pursuit occurs on social media apps when users swipe down to refresh their feed, eagerly awaiting new content.⁴⁶ In the few seconds that it takes for a user’s social media feed to be repopulated with fresh images, tweets, videos, or other posts, their brain is reacting in the same way as a gambling addict turning the lever on a slot machine.⁴⁷ Making the user have to physically interact with his phone in order to generate new content also functions as a way to heighten that addictive feeling.⁴⁸

Big Tech has been overwhelmingly successful⁴⁹ in employing these dark patterns: research has discovered that there is an “addictive paradigm” when evaluating social media users’ behaviors.⁵⁰ The Bergen Social Media Addiction Scale,⁵¹ created to help quantify addictive behavior, became widespread in its use among researchers and mental health professionals.⁵² Subsequently, in 2023, the California State University estimated that 33.19 million Americans

⁴⁴ FORA.tv, *Dopamine Jackpot! Sapolsky on the Science of Pleasure*, YOUTUBE (Mar. 2, 2011), <https://www.youtube.com/watch?v=axrywDP9Ii0>.

⁴⁵ *Id.*

⁴⁶ Julian Morgans, *The Secret Ways Social Media is Built for Addiction*, VICE (May 17, 2017), <https://www.vice.com/en/article/vv5jkb/the-secret-ways-social-media-is-built-for-addiction>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Social media companies have become some of the wealthiest companies in the world. *See* Salvador Rodriguez, *Facebook Closes Above \$ 1 Trillion Market Cap for the First Time*, CNBC (June 28, 2021), <https://www.cnbc.com/2021/06/28/facebook-hits-trillion-dollar-market-cap-for-first-time.html>; Jeran Wittenstein, *Snap Hits \$ 100-Billion Market Value After Doubling in Four Months*, L.A. TIMES (Feb. 22, 2021), <https://www.latimes.com/business/story/2021-02-22/snap-hits-100-billion-market-value>.

⁵⁰ Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 LEWIS & CLARK L. REV. 1159, 1161 (2023) (citing Hunt Allcott, Matthew Gentzkow & Lena Song, *Digital Addiction* 29 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28936, 2022) (finding that “self-control problems magnified by habit formation might be responsible for 31 percent of social media use”)).

⁵¹ *See generally*, Cecilie Schou Andreassen, Torbjørn Torsheim, Geir Scott Brunborg & Ståle Pallesen, *Development of a Facebook Addiction Scale*, 110 PSYCH. REPS. 501 (2012).

⁵² *See, e.g.*, Chung-Ying Lin, Anders Brostrom, Per Nilsen, Mark D. Griffiths & Amir H. Pakpour, *Psychometric Validation of the Persian Bergen Social Media Addiction Scale Using Classic Test Theory and Rasch Models*, 6 J. BEHAV. ADDICTIONS 620 (2017).

were addicted to social media.⁵³ In November 2021, the *Wall Street Journal* revealed in “The Facebook Files”⁵⁴ that Meta's own internal research identified 12.5 percent of its users engaging in “compulsive” use of social media that impacted their sleep, work, parenting, or relationships.⁵⁵

B. Social Media Addiction’s Negative Impact on Youth Mental Health

While the addictive potential of social media has become an issue for all Americans, children are even more at risk of becoming addicted as they generally lack the maturity and capacity to remove themselves from it.⁵⁶ Daniel Aaron, an attorney at the Food and Drug Administration (“FDA”), used scientific research to explain how adolescent biology is working against teenagers:

During the teenage years and beyond, there are three important brain changes worth highlighting. The first is resistance to peer pressure, which has a critical learning period between the ages 14 and 18. However, this resistance continues to be developed into college years and beyond. The second change is development of the pre-frontal cortex, which is responsible for higher-order thinking, planning, and impulse inhibition; the pre-frontal cortex is only half-developed by age 18. Third, the brain's reward system accelerates in the teenage years and reaches an adult level around age 25.⁵⁷

In leaked communication to a colleague, a Meta researcher summarized the troubling dilemma that adolescents face: “teens told us that they don't like the amount of time they spend on the app but feel like they have to be present.”⁵⁸ The researcher further noted that teens “often feel ‘addicted’ and know that what they're seeing is bad for their mental health but feel unable to stop

⁵³ Kent S Hoffman, *Social Media Addiction Statistics*, ADDICTIONHELP (Aug. 15, 2023), <https://www.addictionhelp.com/social-media-addiction/statistics/>.

⁵⁴ See generally, *The Facebook Files*, WALL ST. J., <https://www.wsj.com/articles/the-facebook-files-11631713039> (last visited Mar. 11, 2024). The Facebook Files is a compilation of *Wall Street Journal* articles describing Facebook's harms and is “based on a review of internal Facebook documents, including research reports, online employee discussions and drafts of presentations to senior management.” *Id.*

⁵⁵ Georgia Wells, Deepa Seetharaman & Jeff Horwitz, *Is Facebook Bad for You? It Is for About 360 Million Users, Company Surveys Suggest*, WALL ST. J. (Nov. 5, 2011, 11:09 AM), https://www.wsj.com/articles/facebook-bad-for-you-360-million-users-say-yes-company-documents-facebook-files-11636124681?mod=hp_lead_pos7.

⁵⁶ See Daniel G. Aaron, *Tobacco Reborn: The Rise of E-Cigarettes and Regulatory Approaches*, 25 LEWIS & CLARK L. REV. 827, 875–76 (2021).

⁵⁷ *Id.* at 878–79 (footnotes omitted).

⁵⁸ *Id.*

themselves.”⁵⁹ Social media companies knowingly prey on this “fear of missing out” from teens who are increasingly reliant on staying online. This leads to an unhealthy cycle of dependency.

The overuse of social media by teens has been inextricably linked to psychological injuries and adverse mental health by various studies.⁶⁰ Researchers have found that while moderate social media usage can be beneficial to some adolescents, higher social media usage causes a sharp increase in depression.⁶¹ After decades of declining rates of depression and suicide among American adolescents, there was an increase in “depressive symptoms, suicide-related outcomes, and suicide deaths” between 2010 and 2015, coinciding with the rise of smartphones and social media.⁶² The Centers for Disease Control (“CDC”) reported a 146 percent increase in rates of suicide in the twelve to sixteen age group from 2008 to 2020, and a 57 percent increase in the ten to twenty-four age group overall.⁶³

Furthermore, social media affects teens’ “nutritional habits, cognitive efficiency, and sleep patterns.”⁶⁴ More leaked documents from “The Facebook Files” proved that Meta was aware that female adolescent users were much likelier to struggle with eating disorders if they spent time on Instagram.⁶⁵ One study theorized that eating disorders are likelier because Instagram “encourages selective exposure, as users choose which accounts they wish to follow, and so are then continually exposed to the type of content these accounts produce. This limited exposure in turn may lead to

⁵⁹ *Id.*

⁶⁰ See Jean M. Twenge, *Increases in Depression, Self Harm, and Suicide Among U.S. Adolescents After 2012 and Links to Technology Use: Possible Mechanisms*, 2 PSYCHIATRIC RSCH. CLINICAL PRAC. 19 (2020).

⁶¹ *Id.*

⁶² See Anita Balakrishnan, *Facebook Should Be Regulated like a Cigarette Company, Says Salesforce CEO*, CNBC (Jan. 23, 2018), <https://www.cnbc.com/2018/01/23/salesforce-ceo-marc-benioff-says-regulate-facebook-like-tobacco.html>.

⁶³ *Fatal Injury Reports, National, Regional and State, 1981-2020*, CTRS.. FOR DISEASE CONTROL: WEB-BASED STAT. QUERY & REPORTING SYS., <https://wisqars.cdc.gov/fatal-reports> (last visited Mar. 10, 2024).

⁶⁴ Ian McKay, *Up in Smoke: Why Regulating Social Media Like Big Tobacco Won’t Work (Yet!)*, 97 NOTRE DAME L. REV. 1669, 1692 (2022).

⁶⁵ Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sep. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7&mod=article_inline.

users believing a behaviour is more prevalent or normal than is actually the case.”⁶⁶ Social media addiction affects sleeping patterns in teens as well, since they “are so addicted to social media that they find it difficult to put down their phones and go to sleep when they should,” with daily users up to 19 percent more likely to not get the proper amount of sleep for their age.⁶⁷

Children’s unwitting exposure to violent, sexual, or otherwise inappropriate content comprises another dangerous aspect of social media. In one experiment, the *Wall Street Journal* created several different accounts on TikTok and entered their ages as thirteen to fifteen, aiming to see how easy it was for adult content to appear on the main feed.⁶⁸ In the end, one account was shown “569 videos about drug use, references to cocaine and meth addiction, and promotional videos for online sales of drug products and paraphernalia.”⁶⁹ TikTok’s “powerful algorithm” also curated more than “100 videos from accounts recommending paid pornography sites and sex shops. Thousands of [other videos] were from creators who labeled their content as for adults only.”⁷⁰ The *Wall Street Journal* concluded that “TikTok can quickly drive minors - among the biggest users of the app - into endless spools of content about sex and drugs.”⁷¹ While it is true that thirteen to fifteen tends to be a prime age for adolescents looking for information about sex and mere exposure in and of itself is not evil, TikTok’s content appeared with no content warning labels and after no indication from the account that it was seeking this type of content.⁷²

C. Burgeoning Consciousness and Recent Attempts to Regulate

⁶⁶ Pixie G. Turner & Carmen E. Lefevre, *Instagram Use is Linked to Increased Symptoms of Orthorexia Nervosa*, 22 *EATING & WEIGHT DISORDERS* 277, 279, 282 (2017).

⁶⁷ JEAN M. TWENGE, *IGEN* 113 (2017).

⁶⁸ Rob Barry, Georgia Wells, John West, Joanna Stern & Jason French, *How TikTok Serves up Sex and Drug Videos to Minors*, *WALL ST. J.* (Sept. 8, 2021), <https://www.wsj.com/articles/tiktok-algorithm-sex-drugs-minors-11631052944>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

The level of research, data, and growing concern about social media culminated in the release of the U.S. Surgeon General’s advisory opinion, titled *Protecting Youth Mental Health*, in December 2021.⁷³ The report warned of a growing mental health crisis among adolescents, and attributed it partially to the overuse of social media.⁷⁴ Specifically, the U.S. Surgeon General called to attention the worrying statistics regarding teens’ mental health:

From 2009 to 2019, the proportion of high school students reporting persistent feelings of sadness or hopelessness increased by 40%; the share seriously considering attempting suicide increased by 36%; and the share creating a suicide plan increased by 44%. Between 2011 and 2015, youth psychiatric visits to emergency departments for depression, anxiety, and behavioral challenges increased by 28%.⁷⁵

This report, coming not long after the release of the Facebook Files, granted universal attention on the issues regarding unrestricted social media usage and awareness of the youth mental health crisis. There had already been a public congressional hearing and testimony by Mark Zuckerberg, CEO of Meta (then Facebook), regarding Facebook’s data privacy concerns back in 2018.⁷⁶ This time, however, the conversation was focused on how best to reign in social media and protect the youth.⁷⁷

Eager to take regulatory action, lawmakers compared social media companies to the tobacco industry in the 20th century, with U.S. Senator Richard Blumenthal (D-CT) writing in September 2021 that “Facebook seems to be taking a page from the textbook of Big Tobacco -

⁷³ U.S. SURGEON GEN., ADVISORY: PROTECTING YOUTH MENTAL HEALTH 25 (2021).

⁷⁴ *Id.*

⁷⁵ *Id.* at 8.

⁷⁶ *Protecting Kids Online: Instagram and Reforms for Young Users: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Data Sec. of the S. Comm. on Com., Sci., & Transp.*, 117th Cong. (Dec. 8, 2021) (statement of Adam Mosseri, Head of Instagram, Meta Platforms Inc.); *Protecting Kids Online: Testimony from a Facebook Whistleblower: Hearing Before the S. Subcomm. on Consumer Prot., Prod. Safety, & Data Sec.*, 117th Cong. (Oct. 4, 2021) (statement of Frances Haugen).

⁷⁷ *Id.*

targeting teens with potentially dangerous products while masking the science in public.”⁷⁸ Then, in a later Senate hearing, Senator Blumenthal further argued that “Facebook has taken Big Tobacco’s playbook, it has hidden its own research on addiction, and the toxic effects of its products . . . and it has weaponized childhood vulnerability against children themselves.”⁷⁹ Fellow U.S. Senator Ed Markey (D-MA) called Instagram “that first childhood cigarette, meant to get teens hooked early . . . and ultimately endangering their health. Facebook is just like Big Tobacco, pushing a product that they know is harmful to the health of young people . . . so Facebook can make money.”⁸⁰

There were also calls for legislative action.⁸¹ In February 2022, U.S. Senators Richard Blumenthal and Marsha Blackburn (R-TN) introduced the Kids Online Safety Act, which aimed to curtail the hazards posed to children by social media.⁸² While the Act failed to pass in the 117th Congress, it is not expected to be the last attempt to legislate against Big Tech.⁸³ In August 2022, the California legislature passed the California Age-Appropriate Design Code Act (“CAADCA”), requiring platforms to “prioritize the privacy, safety, and well-being of children over commercial interests” when the two conflict in cases involving users under eighteen.⁸⁴ That law is due to be in effect in July 2024.⁸⁵ In January 2024, California proposed further legislation that would work

⁷⁸ Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sep. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7&mod=article_inline

⁷⁹ *Hearing Before the Subcomm. on Consumer Prot., Product Safety & Data Sec. of the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (Sept. 30, 2021) (Statement of Sen. Richard Blumenthal, Chairman, Subcomm. on Consumer Prot., Product Safety & Data Sec.).

⁸⁰ *Id.*

⁸¹ Press Release, Sen. Richard Blumenthal, Blumenthal & Blackburn Introduce Comprehensive Kids' Online Safety Legislation (Feb. 16, 2022), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-blackburn-introduce-comprehensive-kids-online-safety-legislation>.

⁸² *Id.*

⁸³ Rebecca Klar, *Bills to Boost Kids' Online Safety Advance in Senate with Bipartisan Support*, HILL (July 27, 2022), <https://thehill.com/policy/technology/3576234-bills-to-boost-kids-online-safety-advance-in-senate-with-bipartisan-support/>.

⁸⁴ CAL. CIV. CODE § 1798.99.29(a), (b) (West 2022).

⁸⁵ *Id.*

in tandem with CAADCA, named the Social Media Youth Addiction Law.⁸⁶ This new bill would force social media apps to only show chronological-based feeds to minors, rather than “addictive” ones.⁸⁷ The bill defines “addictive feeds” as websites or online and mobile applications in which media generated or shared by users are “recommended, selected, or prioritized for display to a user based on information provided by that user, or otherwise associated with the user or the user’s device[.]”⁸⁸ The bill would also limit the use of push notifications during certain hours of the day.⁸⁹ Currently, only New York has proposed similar legislation, while other states like Utah have passed laws that are even more restrictive on social media access for children.⁹⁰

More recently, The Federal Trade Commission (“FTC”) has tried to limit Big Tech’s use of dark patterns by curbing how minors’ data can be monetized.⁹¹ In December 2023, the FTC proposed changes to the rules underlying the Children’s Online Privacy Protection Act of 1998 (“COPPA”), a federal law that restricts the tracking of children by social media apps and digital advertising networks.⁹² One change would require certain online services to turn off targeted advertising by default for children under thirteen, and prohibit them from using a child’s cellphone number to induce more screentime.⁹³ As a result, the online services would “no longer be able to use personal data to bombard young children with push notifications.”⁹⁴ Since the use of targeted ads is one of the foremost ways in which Big Tech makes money, cutting off push notifications

⁸⁶ Social Media Youth Addiction Law, CA SB976 (2024).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Bryan Schott, *Utah faces new lawsuit over social media restrictions for minors. Here’s why.*, THE SALT LAKE TRIBUNE (Dec. 18, 2023), <https://www.sltrib.com/news/politics/2023/12/18/utah-faces-new-lawsUIT-over-social/>.

⁹¹ Natasha Singer, *U.S. Regulators Propose New Online Privacy Safeguards for Children*, THE NEW YORK TIMES (Dec. 20, 2023), <https://www.nytimes.com/2023/12/20/technology/ftc-regulation-children-online-privacy.html>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

and access to children's personal data may prove to be an effective method of regulating dark patterns.

Technically, under COPPA, social media apps are already forbidden from using or sharing children's first names, addresses, and phone numbers without a parent's permission.⁹⁵ But instead of verifying the age of users under thirteen and following the provisions of COPPA, some social media companies blanketly restrict users under thirteen from using any of their services.⁹⁶ This serves as a convenient loophole for the social media companies, who do not have to require verification, and can feign ignorance when confronted with users under thirteen who simply lied about their age when signing up to use that platform.⁹⁷ In fact, Amazon, Microsoft, Google, and TikTok have already paid millions in fines to settle charges regarding this collective failure to set up effective age-gating systems.⁹⁸ Lina M. Khan, the chair of the FTC, explained that by "requiring firms to better safeguard kids' data, [the FTC's] proposal places affirmative obligations on service providers and prohibits them from outsourcing their responsibilities to parents."⁹⁹ In this way, the FTC also seeks to recenter the mental health narrative on Big Tech's practices rather than the habits of children.

Some commentators have argued that legislative enactment and administrative enforcement will not be effective.¹⁰⁰ Matthew Bergman, professor and founder of the Social Media Victims Law Center in Seattle, contends that those methods of regulation will only quell

⁹⁵ *Id.*

⁹⁶ Shannon Finnegan, *How Facebook Beat the Children's Online Privacy Protection Act: A Look into the Continued Ineffectiveness of COPPA and How to Hold Social Media Sites Accountable in the Future*, 50 SETON HALL L. REV. 827, 828 (2020) ("[Facebook has] effectively managed to circumvent the requirements imposed on websites under COPPA by simply banning users under the age of thirteen from their websites. This restriction does not adequately prevent children from accessing their websites.").

⁹⁷ *See id.*

⁹⁸ *Supra* Singer, note 91.

⁹⁹ *Supra* Singer, note 91.

¹⁰⁰ Bergman, *supra* note 50.

the most “egregious” hazards arising out of social media use, and “do nothing to compensate victims of social media product defects and very little to create enduring economic incentives for companies to proactively research and design safer products.”¹⁰¹ He advocates for a “products liability regime” so that the burden of safety is placed on manufacturers.¹⁰² Until then, he argues, social media companies will not have adequate incentive to protect consumers.¹⁰³

Regulatory efforts like the FTC’s and California’s bills that have occurred after Prof. Bergman’s article, however, may provide the desired effect because they seek to specifically undercut Big Tech’s bottom line. They focus on Big Tech’s use of dark patterns by limiting targeted ads, push notifications, and addictive feeds. Restricting these most egregious moneymaking schemes is powerful because these predatory practices exist due to the financial incentives they provide. Furthermore, litigation based around the tort of public nuisance has a history of enforcing compliance from large companies, most notably with Big Tobacco and Big Pharma. Therefore, it is important to consider the merits of the School District’s complaints.

D. Public Nuisance in the Regulatory Context

The chief argument of the School Districts’ suits against Defendants is that the Defendants have infringed upon the health and safety of the public with their addictive, dangerous platforms.¹⁰⁴ This, the School Districts argue, is a “public nuisance.”¹⁰⁵ While the tort of public nuisance was initially conceived in medieval England as a way for the Crown to remove impediments from the roadways, it has developed substantially since then, and become well-known for the kind of

¹⁰¹ Bergman, *supra* note 50, at 1167.

¹⁰² Bergman, *supra* note 50, at 1194.

¹⁰³ Bergman, *supra* note 50, at 1194.

¹⁰⁴ Complaint at 85, *Seattle v. Meta* (W.D. Wash. 2023).

¹⁰⁵ *Id.*

litigation the School Districts are pursuing.¹⁰⁶ In the last century in America, public nuisance was increasingly used for litigation involving water pollution, greenhouse gases and climate change, and even predatory lending.¹⁰⁷ Most crucially, it “provided the architecture for the lawsuits that impelled the tobacco industry to historic settlements of \$246 billion with all fifty states” in 1998.¹⁰⁸ Academics have called the latter “one of the most significant settlement agreements in American product liability jurisprudence” because of the debilitating impact it had on Big Tobacco’s ability to spread harm.¹⁰⁹

Recently, public nuisance formed the framework for the much-publicized opioid litigation against Big Pharma, culminating in 2019’s \$6 billion settlement with Purdue Pharma, which is currently subject to review by the U.S. Supreme Court.¹¹⁰ Furthermore, in December 2022, several school districts across the U.S. settled a public nuisance claim against one of the major manufacturers of e-cigarettes for \$1.2 to \$1.7 billion.¹¹¹ As Leslie Kendrick, Professor of Law at the University of Virginia School of Law, writes in the *Yale Law Journal*: “In the past decades, [public nuisance] has generated thousands of lawsuits in which state officials have sued private companies for the negative impact of their products or activities on public health and welfare. Through these actions, public nuisance has influenced American tort litigation and exerted an undeniable regulatory impact.”¹¹²

¹⁰⁶ See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979) (“The earliest [public nuisance] cases appear to have involved purprestures, which were encroachments upon the royal domain or the public highway and could be redressed by a suit brought by the King.”).

¹⁰⁷ Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L. J. 702, 706 (2023).

¹⁰⁸ *Id.*

¹⁰⁹ Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 136 (2018).

¹¹⁰ Kendrick, *supra* note 107, at 705.

¹¹¹ Prothero, *supra* note 9.

¹¹² Kendrick, *supra* note 107, at 705.

Since public nuisance is a state tort, it is defined differently across the U.S., but in general, it always “refers to any conduct that interferes with the rights of the public.”¹¹³ Its broad language is what allows it to be used in anything from neighbors bickering about rocks blocking the road to large swathes of the population trying to take on multi-billion dollar corporations.¹¹⁴ This affords a unique opportunity for communities to have a direct say in health issues that are permeating the public consciousness, like secondhand smoke, the opioid crisis, vaping, and now the youth mental health crisis. On the occasions that public nuisance torts do work for the plaintiffs, “[they] manage[] to alleviate risks or harms to public interests and to require actors to internalize the public costs of their activities.”¹¹⁵

Thus, it is easy to see why School Districts here are seeking to use the tort of public nuisance: in addition to recovering costs, they hope to influence future policymaking by generating public pressure against Big Tech. Professor Thomas from the University of Florida, speaking within the context of these lawsuits, notes that public nuisance complaints “are an interesting marriage of the executive using the judiciary to approach regulatory change” that arise because of “inadequate attention from the legislature or other governing bodies.”¹¹⁶ Whether the lawsuits are successful is “only one way of measuring success.”¹¹⁷ He reasons that if the litigation spurs on lawmakers or causes social media companies to change their practices more dramatically, the School Districts would be satisfied.¹¹⁸ As long as “the lawsuits are creating public awareness, that constitutes a win.”¹¹⁹

¹¹³ *Public Nuisance*, LEGAL INFO. INST. (July 20, 2020), https://www.law.cornell.edu/wex/public_nuisance.

¹¹⁴ See Kendrick, *supra* note 107.

¹¹⁵ Kendrick, *supra* note 107, at 790.

¹¹⁶ Prothero, *supra* note 9.

¹¹⁷ Prothero, *supra* note 9.

¹¹⁸ Prothero, *supra* note 9.

¹¹⁹ Prothero, *supra* note 9.

A similar “win” was apparent when school districts brought public nuisance suits in 2020 against Juul, the primary maker of e-cigarettes, ostensibly seeking to recover costs from expending resources on policing e-cigarette use among students.¹²⁰ Following years of negative press, the rate of vaping among high school students halved in between 2019 and 2023.¹²¹ Juul eventually withdrew many of its flavored products from the market.¹²² It was forced to surrender billions in settlements to the school districts, and agreed to refrain from marketing to youths.¹²³ Here, the School Districts are hoping for a similar chilling effect on social media overuse. If Big Tech is made to engage in costly litigation, bad press, and potential settlements, then the lawsuits may pay off.

For that to happen, though, the School Districts still need to first have a strong claim. Most public nuisance lawsuits are unsuccessful, and jurisdictions vary in how they choose to apply the doctrine, leading to uncertainty and varying outcomes.¹²⁴ Whereas the litigation against e-cigarettes had precedent with massive lawsuits against tobacco companies, the claims by School Districts here are novel. Thus, proving a nexus between social media addiction and a mental health crisis may prove more difficult than demonstrating the link between smoking and health issues. Lastly, when Big Tech has been challenged in the past, Section 230 immunity from the Communications Decency Act has been insurmountable for plaintiffs.¹²⁵

III. Analysis

¹²⁰ Prothero, *supra* note 9.

¹²¹ Christina Jewett, *Juul Reaches \$462 Million Settlement With New York, California and Other States*, THE NEW YORK TIMES (April 12, 2023) <https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-california.html>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Kendrick, *supra* note 107, at 790.

¹²⁵ *See* Bergman, *supra* note 50.

Social media usage, in its current state, requires some form of intervention to keep children safe from the ever-worsening consequences on their mental health. Federal and legislative efforts have progressed in recent years, but some laws are already facing backlash, both from the public and in courts, due to First Amendment concerns.¹²⁶ This section will first analyze the merits of the School Districts’ complaints and contrast them with past complaints against tobacco, pharmaceutical, and e-cigarette companies. Then, this section will use past lawsuits against social media giants as evidence that courts may not be favorable to the Plaintiffs here. Finally, it will conclude with a discussion of the efficiency of legislation or litigation in their regulatory capacity, and the First Amendment issues that social media regulation may face in the future.

A. The School Districts’ Complaints Can Be Compared with Past Tobacco and Opioid Litigation.

In formulating the crux of their Complaint¹²⁷, the School Districts make several allegations to prove the existence of a public nuisance against the Defendant social media companies.¹²⁸ The complaint starts by stressing that “public nuisance is one which affects equally the rights of an entire community or neighborhood.”¹²⁹ Plaintiffs then allege that Defendants have “created a mental health crisis in [] Public Schools, injuring the public health and safety in Plaintiff’s community and interfering with the operations, use, and enjoyment of the property of [] Public Schools.”¹³⁰ The contention of “interfering with the operations, use, and enjoyment of the property” uses the most traditional understanding of public nuisance, and one that is not analogous

¹²⁶ See Schott, *supra* note 90.

¹²⁷ For clarity purposes, this section will use the complaint filed by Seattle School Districts, the very first one of its kind made against social media companies. Other school districts’ complaints may be slightly different, but overall make the same arguments.

¹²⁸ Complaint at 85, *Seattle v. Meta* (W.D. Wash. 2023).

¹²⁹ *Id.* (quoting RCW 7.48.130).

¹³⁰ *Id.* at 86.

to the Big Tobacco litigation from the 1990s, nor the opioid litigation from the 2000s.¹³¹ It evokes classic cases from tort law where excessive noise from an adjacent factory,¹³² or foul smells from an area down the street,¹³³ interfere with the general public’s ability to enjoy themselves within their homes. In the present case, it is difficult to see how social media could be analogized to those instances, or how it specifically could be said to interfere with the enjoyment of property.

Conversely, “injuring the public health and safety in Plaintiff’s community” is a similar claim to the successful opioid and tobacco litigations.¹³⁴ Smoking presented well-documented risks to people in the vicinity of the smoker, and opioids were easily spread through oversaturated and overprescribed communities to destructive effect.¹³⁵ The School Districts face an uphill battle if they hope to compare the negative health effects of social media addiction to smoking or opioid addiction. The latter two have directly caused death and injury through the danger inherent to the product, whereas the link between social media and injury is far more attenuated. Furthermore, there is less public consensus over the harms of social media. Some commentators continue to argue that there does not exist a valid link between social media and negative impacts on health.¹³⁶ It is important to note too that social media, when not being overused, does provide some value to teenagers’ lives.¹³⁷ A lot depends, then, on the weight federal courts will put on considering outside factors that comprise a child’s mental health. While the statistics paint an overwhelmingly poor depiction of social media, many outside factors that could go into something like a child

¹³¹ Nora Freeman Engstrom & Robert L Rabin, *Pursuing Public Health Through Litigation: Lessons From Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021).

¹³² See *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 231 (Cal. 1982).

¹³³ See *Brown v. Cnty. Comm. of Scioto Cnty.*, 87 Ohio App. 3d 704 (Ct. App. Ohio 1993).

¹³⁴ Complaint at 85, *Seattle v. Meta* (W.D. Wash. 2023).

¹³⁵ See Engstrom, *supra* note 131.

¹³⁶ Amy Roder, *Social Media Use can be Positive for Mental Health and Well-being*, HARV. SCH. OF PUB. HEALTH (Jan. 6, 2020), <https://www.hsph.harvard.edu/news/features/social-media-positive-mental-health/>.

¹³⁷ Bekalu et al., *Association of Social Media Use With Social Well-Being, Positive Mental Health, and Self-Rated Health: Disentangling Routine Use From Emotional Connection to Use*, 46 HEALTH EDUC. & BEHAV. (2019).

committing suicide. Put more bluntly, social media is not being listed as a cause of death, whereas lung cancer and drug overdoses are. Consequently, Defendants will hope that courts may be hesitant to take a substantial leap from past public nuisance decisions based purely on the injuries caused (or not caused) by social media.

But this may not be as substantial a leap as it appears. Plaintiffs point out that the “harm to youth mental health and the corresponding impacts to public health, safety, and the welfare of the [] Public Schools community outweighs any social utility of Defendants’ wrongful conduct.”¹³⁸ They argue that “but for Defendants’ actions, Plaintiff’s students would not use social media platforms as frequently or long as they do today” or “be deluged with exploitive and harmful content to the same degree.”¹³⁹ This argument focuses the issue on Defendants’ use of dark patterns. While courts may be hesitant to accept that social media addiction causes poor mental health outcomes, they cannot deny that Defendants are engaging in practices that the FTC, Congress, and mental health experts alike agree are harmful.

More crucially, these dark patterns mirror Big Tobacco and Big Pharma’s advertising practices that were widely at-issue in the successful tobacco and opioid litigation. The Complaint specifically focuses on the marketing by Defendants: “Defendants knew or reasonably should have known that their design, promotion, and operation of their platforms would cause students to use their platforms excessively . . . and that their active efforts to increase youth use of their platforms were causing harm to youth and to schools.”¹⁴⁰ This excerpt asserts that the social media companies, especially Meta,¹⁴¹ have continued to use bad-faith marketing tactics when knowing

¹³⁸ Complaint at 3, *Seattle v. Meta* (W.D. Wash. 2023).

¹³⁹ *Id.* at 87.

¹⁴⁰ *Id.*

¹⁴¹ As discussed earlier, Meta was exposed from The Facebook Files as having at least some knowledge of the harmful effects of its platforms.

their product is harmful.¹⁴² In the past, public nuisance claims have been alleged against both tobacco and pharmacy companies for exaggerating and lying about their products while marketing them.¹⁴³ As one *Stanford Law Review* article explains, “in green-lighting OxyContin in 1995, the FDA permitted Purdue Pharma to make an unusual, untested, and in retrospect fateful claim: that the delayed-release nature of OxyContin's formula was ‘believed to reduce’ its appeal to drug abusers compared with shorter-acting painkillers.”¹⁴⁴ This claim, as we know now, turned out to be false.¹⁴⁵

Similarly, in May 1994, Mississippi Attorney General Michael Moore filed the first state lawsuit against the tobacco industry, with its chief complaint “detailing the tobacco industry’s decades-long effort to mislead the public about the harms of smoking cigarettes and argu[ing] that tobacco companies, rather than taxpayers, should be responsible for Medicaid and other health care expenditures incurred by the state in treating tobacco-related disease.”¹⁴⁶ Furthermore, Big Pharma has faced claims of fraud and false advertising for its part in the opioid crisis, with its business practices being categorized as “deceptive.”¹⁴⁷ In those fraud claims, sometimes brought in connection with Medicaid claims or consumer protection laws, “governments charged that companies made false representations about their products’ addictiveness and effectiveness, all calculated to mislead the state, prescribers, and the public.”¹⁴⁸

With the tobacco and pharmacy industries, there was decades’ worth of evidence that consumers and healthcare providers had been lied to, which does not exist with social media.

¹⁴² Complaint at 87, *Seattle v. Meta* (W.D. Wash. 2023).

¹⁴³ Engstrom, *supra* note 131.

¹⁴⁴ *Id.* at 308.

¹⁴⁵ *Id.*

¹⁴⁶ Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons From the Tobacco Wars*, PUB. HEALTH RPTR. (Jan. 22, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5871135/>.

¹⁴⁷ Rebecca Haffajee et al., *Drug Companies’ Liability for the Opioid Epidemic*, N. ENGL. J. OF MED. (Dec. 14, 2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7479783/>.

¹⁴⁸ *Id.*

There is, nonetheless, obvious evidence that some social media companies knew exactly how addictive their products were.¹⁴⁹ Meta executives specifically talked about trying to exploit human psychology to hook consumers on their product.¹⁵⁰ More examples are bound to be uncovered in the discovery phase as these lawsuits move forward. Like tobacco companies that did not adequately disclose health concerns on their products, Defendants have made false or misleading statements concerning the safety and use of their social media platforms.¹⁵¹ Courts will have to decide whether the fact that Big Tech may not necessarily have known that the level of addiction to their product would correlate to negative health outcomes is enough to defeat Plaintiff's claims.

B. In Recent Similar Lawsuits Against Social Media, Section 230 Immunity Has Proved Insurmountable, and so Plaintiffs Will Have to Dodge it.

Plaintiffs anticipate that Defendants will bring up Section 230 Immunity¹⁵² as a defense.¹⁵³ Section 230 of 1996's Communications Decency Act ("CDA") is a relic of the early days of the Internet, when optimism over the future of the internet's possibilities was abundant.¹⁵⁴ Section 230 was enacted in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*¹⁵⁵, where a New York court held that an online bulletin board could be held strictly liable for third parties' defamatory posts.¹⁵⁶ The court rejected the defendant's argument that it was a mere "distributor" of third-party content, holding that the defendant's screening and editing of posts made it a primary publisher and therefore vicariously liable for defamatory content on its platform.¹⁵⁷ Congress was

¹⁴⁹ *Id.*

¹⁵⁰ *The Facebook Files*, *supra* note 54.

¹⁵¹ Complaint at 81, *San Mateo v. YouTube* (2023).

¹⁵² Communications Decency Act, 47 U.S.C. § 230(c)(1)

¹⁵³ Complaint at 83, *Seattle v. Meta* (W.D. Wash. 2023).

¹⁵⁴ Farhad Manjoo, *Jurassic Web: The Internet of 1996 Is Almost Unrecognizable Compared with What We Have Today*, SLATE (Feb. 24, 2009, 5:33 PM), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html>.

¹⁵⁵ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

¹⁵⁶ Bergman, *supra* note 50.

¹⁵⁷ *Stratton v. Prodigy*, No. 31063/94 (1995).

motivated to override this decision and enacted Section 230 “to promote the continued development of the Internet and other interactive computer services and ‘preserve the vibrant and competitive free market’” that existed for the Internet.¹⁵⁸

Specifically, Section 230 provides immunity from liability to “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.”¹⁵⁹ It arises mainly in circumstances where an unsuspecting internet user is subject to some form of negative experience, like receiving life-threatening messages and verbal abuse by another internet user.¹⁶⁰ In that scenario, the provider of the forum on which the exchange took place would be shielded from liability for what was said, because it came from a third party.¹⁶¹ If it happened on Instagram, for example, Instagram would be shielded from being held liable from any resulting civil action.¹⁶²

Here, the School Districts are quick to assert that they are not attempting to hold Defendants liable as the publishers or speakers of any information provided by third parties.¹⁶³ The Plaintiffs allege that instead, social media companies are liable for designing their platforms to knowingly push harmful third-party content onto youth, and for manipulating them into seeing that content for extended periods of time.¹⁶⁴ They argue that because Defendants’ algorithms are “procedural rather than substantive-based and are content-neutral,” Section 230 immunity should not apply.¹⁶⁵

¹⁵⁸ Bergman, *supra* note 50 at 1179. *See also*, 47 U.S.C. § 230(b)(1), (2).

¹⁵⁹ Complaint at 83, *Seattle v. Meta* (W.D. Wash. 2023).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Complaint at 74, *San Mateo v. YouTube* (2023).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 75.

This contention makes logical sense. The addictive, manipulative design of Defendants' products is what is being disputed, not the content those products display.

The third-party content on social media, however, is intrinsically tied to the harmful nature of social media addiction in a manner unique from how cigarettes and psychiatric drugs are tied to nicotine and opioid addiction. Big Tech is not manufacturing the things that youth are seeing on social media. Cyberbullying¹⁶⁶ on social media, for example, remains a leading cause of harassment suffered by teenagers.¹⁶⁷ It contributes to the negative mental health effects that teenagers suffer.¹⁶⁸ Yet Defendants are shielded, via Section 230 immunity, from being held liable for that cyberbullying because they are merely distributors, not publishers, of that content.

Conversely, Big Tobacco and Big Pharma are collective stand-ins for corporations that *were* directly creating the products for which addiction became an issue. There is no equivalent of Section 230 protection for cigarettes because tobacco companies are fully responsible for the products. This creates a clearer nexus between the conduct of those companies and the consequent harm of addiction. Thus, the School Districts' argument that Defendants should not be liable for cyberbullying, but rather liable for pushing a product, using nefarious methods, onto vulnerable teenagers while knowing that it would expose them to harmful content like cyberbullying, may not hold much relevance to courts.¹⁶⁹

Therefore, whether courts favor the School Districts in this litigation depends heavily on how the courts choose to construe Section 230 of the CDA. Unfortunately for the School Districts, courts have historically interpreted this statute very broadly, making internet companies practically

¹⁶⁶ Defined by Pew Research Center as offensive name-calling, spreading of false rumors, receiving unwanted explicit images, stalking, physical threats, and having explicit images shared without consent.

¹⁶⁷ Emily Vogels, *Teens and Cyberbullying 2022*, PEW RESEARCH CENTER (Dec. 15, 2022) <https://www.pewresearch.org/internet/2022/12/15/teens-and-cyberbullying-2022/>.

¹⁶⁸ *Id.*

¹⁶⁹ Complaint at 75, *San Mateo v. YouTube* (2023).

impenetrable.¹⁷⁰ A string of holdings from landmark cases have “produced an immunity from liability that is far more sweeping than anything the law’s words, context, and history support.”¹⁷¹ In *Doe v. MySpace*, for example, the Fifth Circuit held that the defendant website was not liable for a minor’s sexual assault by a predator that the minor had met on the defendant website, dismissing the plaintiff’s argument that “fail[ed] to implement basic safety measures to protect minors” as just “merely another way of claiming that [MySpace] was liable for publishing the communications.”¹⁷² Despite public outcry,¹⁷³ courts continued to hold firm in this ruling in *Force v. Facebook, Inc.*, where the plaintiffs alleged that Facebook had provided a forum for overseas terrorist groups to recruit Americans to do their bidding, leading to attacks against five Americans.¹⁷⁴ The Second Circuit held that Facebook was still acting in its role as a publisher despite designing an algorithm that specifically fed misinformation and recommended third parties to the perpetrators, and so was shielded from liability: “we find no basis . . . for concluding that an interactive computer service is not the ‘publisher’ of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer’s interests.”¹⁷⁵

It is in this context that social media would be implicated by the School Districts.¹⁷⁶ Social media apps like TikTok, Instagram, X (formerly Twitter), Snap, all use algorithms to target material to show to users.¹⁷⁷ When those users are children, they may come across material that is inappropriate or harmful in other ways. The School Districts argue that students are being

¹⁷⁰ Bergman, *supra* note 50 at 1180.

¹⁷¹ 3 Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans* § 230 Immunity, 86 FORDHAM L. REV. 401, 406 (2017).

¹⁷² *Doe v. MySpace, Inc.*, 528 F.3d 413, 418–20 (5th Cir. 2008)

¹⁷³ Bergman, *supra* note 50, at 1183 (noting the dissatisfaction from jurists, legal scholars, and other Americans alike).

¹⁷⁴ *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019).

¹⁷⁵ *Id.* at 66.

¹⁷⁶ Complaint at 83, *Seattle v. Meta* (W.D. Wash. 2023).

¹⁷⁷ *Id.*

harmful by being recommended harmful material in this manner, such as images that promulgate eating disorders to young girls.¹⁷⁸

It is unlikely that courts will undo decades of broadly construing Section 230 immunity to hold that the School Districts' lawsuits fall outside of its purview. In fact, the Supreme Court had the chance to do so in early 2023 in *Gonzalez v. Google*, another terrorism-related case that implicated YouTube.¹⁷⁹ Rather than reach the issue of Section 230 Immunity to clarify or amend the doctrine, the Court decided the matter on other grounds and failed to expound upon Section 230.¹⁸⁰ Consequently, the School Districts are unlikely to win this litigation in courts. Nonetheless, these lawsuits may be successful in creating public awareness and spurring on much-needed legislation.

IV. Legislation is the Optimal Route Forward as Long as Lawmakers are Mindful of First Amendment Concerns.

The School Districts can still achieve stricter regulation of social media by encouraging more legislation against Big Tech, but most lawmakers are bound to encounter First Amendment challenges because they may implicate freedom of speech and freedom of access to the internet. This is not necessarily a negative—minors deserve to have First Amendment protections, and any checks from the judicial system against the lawmaking process will ensure that regulatory legislation against social media is not overly-broad. Despite the severe consequences of overuse caused by social media companies' practices, social media platforms can serve as a forum for the

¹⁷⁸ *Id.* at 84.

¹⁷⁹ *Gonzalez v. Google*, 598 U. S. 617, 622 (2023).

¹⁸⁰ *Id.*

exchange of ideas and communication, and in many instances furnish safe spaces for marginalized groups.¹⁸¹

There have already been numerous legislative efforts against social media in recent years.¹⁸² The more restrictive of these laws are being challenged in courts on First Amendment grounds. Utah’s Social Media Regulation Act, which came into effect on March 1, 2024, requires parents to give permission for a minor to open a social media account and verify the age of all users.¹⁸³ Tech companies have moved to block it, arguing that the Act “restricts who can express themselves, what can be said, and when and how speech on covered websites can occur” which the First Amendment does not allow.¹⁸⁴ In another case, Big Tech successfully challenged an Arkansas law that would have required children under the age of eighteen to get parental permission before accessing most social media platforms.¹⁸⁵ In blocking the law, the Arkansas District Court called it unconstitutional, and said that it infringed upon First Amendment rights because it would burden access to speech for both minors and adults.¹⁸⁶

The Supreme Court has historically deferred to the First Amendment in access-to-internet cases.¹⁸⁷ In *Packingham v. North Carolina*, for example, the Supreme Court held that a North Carolina statute completely barring convicted sex offenders from accessing and using social media platforms violated their First Amendment rights.¹⁸⁸ Justice Kennedy, writing for the majority,

¹⁸¹ See generally *Theorising Social Media, Politics and the State: An Introduction*, in *SOCIAL MEDIA, POLITICS AND THE STATE: PROTESTS, REVOLUTIONS, RIOTS, CRIME AND POLICING IN THE AGE OF FACEBOOK, TWITTER, AND YOUTUBE 3* (Daniel Trottier & Christian Fuchs eds., 2015).

¹⁸² See *supra* at Part II: Background.

¹⁸³ Schott, *supra* note 90.

¹⁸⁴ Complaint at 2, *Netchoice, LLC v. Reyes*, No. 2:23-cv-00911 (D. Utah 2023).

¹⁸⁵ Schott, *supra* note 90.

¹⁸⁶ Schott, *supra* note 90.

¹⁸⁷ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (“[Social Media] websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997))).

¹⁸⁸ *Id.*

reasoned that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”¹⁸⁹ The Court accepted that the North Carolina legislature had a valid governmental interest in keeping sex offenders away from social media, but that “assertion of a valid governmental interest ‘cannot, in every context, be insulated from all constitutional protections.’”¹⁹⁰ *Packingham* established something of a First Amendment right to access social media, and called the North Carolina statute’s ban an “unprecedented prohibition.”¹⁹¹ It also established that for any legislation to survive, it must pass “intermediate scrutiny” by not “burden[ing] substantially more speech than is necessary to further the government’s legitimate interests.”¹⁹² Moreover, it reiterated that it is the government’s burden to prove that the statute is “necessary or legitimate” to the government’s purpose.¹⁹³

Government regulation of the Tobacco Industry in the context of keeping cigarettes away from minors illustrates an example of regulatory legislation that passes the Supreme Court’s intermediate scrutiny. The foremost way in which the tobacco regulatory scheme came to exert influence on cigarette sellers regarding children was through the Family Smoking Prevention and Tobacco Control Act (“TCA”), passed in June 2009.¹⁹⁴ The TCA was explicitly focused on reducing the spread of harms to young people, with the first line of the Act reading “the use of tobacco products by the Nation’s children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults.”¹⁹⁵ Two of the methods of control outlined in the Act were (1) age restrictions on tobacco use—enforced by requiring buyers

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1737.

¹⁹² *Id.*

¹⁹³ *See Packingham v. North Carolina*, 137 S. Ct. at 1737 (2017).

¹⁹⁴ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 15 U.S.C. and 21 U.S.C.).

¹⁹⁵ *Id.* § 2(1).

to show government photoidentification¹⁹⁶—and (2) mandated health warnings labeled visibly on the packaging of the cigarettes.¹⁹⁷

Lawmakers can enact age restrictions on social media access, but so far it appears that courts are unwilling to allow the requirement of government photoidentification.¹⁹⁸ The Arkansas District Court stated that requiring users to comply with age-verification requirements by providing state-approved documents would impose “significant burdens on their ability to view constitutionally protected speech.”¹⁹⁹ Even apart from First Amendment concerns, parents may be unwilling to give verifiable consent for their children to access the internet by uploading photoidentification. In fact, civil liberties groups like the ACLU and Electronic Frontier Foundation filed an amicus brief in the Arkansas case in support of Big Tech’s injunction request, fearing that minors and adults alike would lose key free speech protections.²⁰⁰ Chief among the ACLU’s concerns was that users would lose all anonymity when engaging in political or artistic expression.²⁰¹

Recently, in November 2023, Meta offered support for requiring parental approval for people under sixteen to use the Instagram app without requiring identification.²⁰² Meta’s model, rather than have the parent sign their consent and provide verification, would instead simply alert the parent with a notification if their under-sixteen child attempted to download the app.²⁰³ From there, parents can decide whether to approve the download.²⁰⁴ This allows parents to have

¹⁹⁶ 21 C.F.R. § 1140.14(a)(2)(i)-(ii).

¹⁹⁷ See 15 U.S.C. § 1333(c)(2).

¹⁹⁸ Schott, *supra* note 90.

¹⁹⁹ Rebecca Kern, *Judge blocks law requiring parental consent for kids to use social media*, POLITICO (Aug. 31, 2023) <https://www.politico.com/news/2023/08/31/judge-arkansas-law-parental-consent-social-media-00113696>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Antigone Davis, *Parenting in a Digital World Is Hard. Congress Can Make It Easier.*, META (Nov. 15, 2023) <https://about.fb.com/news/2023/11/online-teen-safety-legislation-is-needed/>.

²⁰³ *Id.*

²⁰⁴ *Id.*

oversight without sacrificing privacy, and, since it is a procedure coming from the company, would not be subject to court challenges or First Amendment concerns.²⁰⁵

Self-regulating policies like this demonstrate how public pressure has produced results in just a few months' time. It is also proof that lawmakers need to focus on legislation that impacts Big Tech's practices and manipulative use of dark patterns (like the FTC and California's CAADCA) rather than trying to impose limits on what minors can access themselves. Gradually, as First Amendment challenges do away with overly-strict laws borne more out of moral panics than the aim to regulate Big Tech, and litigation like the School Districts' increases public awareness of the harms of social media addiction, the youth mental health crisis will decline.

IV. Conclusion

There is a youth mental health crisis occurring in America, and social media addiction has played a significant role in exacerbating it. Big Tech companies use dark patterns to psychologically manipulate impressionable children into spending more and more time on their social media apps, and then reap the financial benefits. School districts across the country have been negatively impacted by these practices, and consequently are the ones leading the fight to regulate Big Tech by following in the footsteps of tobacco, opioid, and e-cigarette litigation.

Because Section 230 immunity will probably be an insurmountable hurdle, the School Districts are unlikely to win the lawsuit. Nonetheless, creating public awareness and spurring on legislative efforts that regulate Big Tech will still be a win for the School Districts. Legislation and administrative enforcement will be successful if it focuses on reducing the pervasive use of dark patterns by social media companies. The FTC's proposed changes to COPPA and California's social media laws would reduce the leeway companies have in designing addictive

²⁰⁵ *Id.*

products that they know to be harmful. On the other hand, overly restrictive laws like Utah's and Arkansas' that require photoidentification to use social media are misguided at best and covert attempts to control what kind of content children can see at worst. They are rightly challenged for infringing upon First Amendment rights.

In her book *Unwired*, Professor Gaia Bernstein writes about the difficulties that society faces in overcoming self-blame for falling victim to the insidious, predatory marketing techniques of Big Tech.²⁰⁶ Becoming addicted to addicting products is not a personal or moral failure, she asserts, but rather the natural consequence of social media companies gaining too much control over people's lives.²⁰⁷ Professors Engstrom and Rabin note the same trend in fighting Big Tobacco and Big Pharma, writing:

The fact of the matter is that the American public has a deeply ingrained sense of, and devotion to, independence and freedom of choice. And, in the face of those cultural norms, a tobacco plaintiff who is aware of the risk but smokes anyway, and the opioid addict who consciously overmedicates (and engages in pill crushing or doctor shopping to boot), continue to be blamed and stigmatized by the American public. Indeed, in opinion polls, respondents continue to insist that tobacco use is the choice of the individual smoker, and respondents have *consistently* blamed smokers--rather than cigarette companies--for smoking-related deaths.²⁰⁸

Although it may not be successful in courts, the School Districts' litigation is an attempt at reframing the narrative and shifting the paradigm of how the public sees social media.

²⁰⁶ GAIA BERNSTEIN, *UNWIRED: GAINING CONTROL OVER ADDICTIVE TECHNOLOGIES*, Amazon (2023).

²⁰⁷ *Id.*

²⁰⁸ Nora Freeman Engstrom & Robert L Rabin, *Pursuing Public Health Through Litigation: Lessons From Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021).