

# UP IN SMOKE: WHY REGULATING SOCIAL MEDIA LIKE BIG TOBACCO WON'T WORK (YET!)

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## INTRODUCTION

In May of 2021, Frances Haugen resigned from her job at Facebook.<sup>1</sup> Her resignation was not newsworthy. But what she did after she resigned ignited a firestorm of news articles<sup>2</sup> and numerous Senate hearings.<sup>3</sup> Before leaving Facebook, Ms. Haugen had collected hundreds of internal documents demonstrating Facebook knew its products could be harmful to users.<sup>4</sup> Upon leaving the company, she leaked the files to the *Wall Street Journal* (WSJ) to be

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1 See Cat Zakrzewski & Cristiano Lima, *Former Facebook Employee Frances Haugen Revealed as 'Whistleblower' Behind Leaked Documents that Plunged the Company into Scandal*, WASH. POST (Oct. 4, 2021), <https://www.washingtonpost.com/technology/2021/10/03/facebook-whistleblower-frances-haugen-revealed/> [<https://perma.cc/TF9Q-B89S>].

2 See Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead.*, WALL ST. J. (Sept. 15, 2021), [https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215?mod=article\\_inline](https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215?mod=article_inline) [<https://perma.cc/Z5KJ-RFPN>]; Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt*, WALL ST. J. (Sept. 13, 2021), [https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353?mod=article\\_inline](https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353?mod=article_inline) [<https://perma.cc/N3SJ-RTTD>]; Kevin Roose, *Facebook Is Weaker than We Knew*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/10/04/technology/facebook-files.html> [<https://perma.cc/WHY5-8BFB>].

3 See *infra* notes 9–10, 138.

4 See Adam Satariano & Mike Isaac, *Facebook Whistle-Blower Brings Campaign to Europe After Disclosures*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/25/business/frances-haugen-facebook.html> [<https://perma.cc/QM7P-LB9V>].

published.<sup>5</sup> Five months after her quiet resignation from Facebook, Ms. Haugen, who earned the title the “Facebook whistleblower,” was asked to testify before Congress.<sup>6</sup>

During her testimony before the Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Data Security, Ms. Haugen urged lawmakers to regulate social media companies like tobacco: “When we realized tobacco companies were hiding the harms it caused, the government took action. . . . I implore you to do the same here.”<sup>7</sup> Ms. Haugen was not the first critic of social media companies to compare the social media industry to the tobacco industry.

In recent years, lawmakers, academics, and tech executives have likened social media companies to tobacco companies. In an email to the *WSJ*, United States Senator Richard Blumenthal wrote, “Facebook seems to be taking a page from the textbook of Big Tobacco—targeting teens with potentially dangerous products while masking the science in public.”<sup>8</sup> In a recent Senate hearing, Senator Blumenthal said, “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.”<sup>9</sup> At the same hearing, Senator Edward Markey also likened social media to tobacco products, saying that “Instagram is that first childhood cigarette, meant to get teens hooked early . . .

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5 See Zakrzewski & Lima, *supra* note 1. The *Journal’s* series of articles based on the documents Haugen leaked are now known as “The Facebook Files.” See generally *The Facebook Files*, WALL ST. J., <https://www.wsj.com/articles/the-facebook-files-11631713039> [<https://perma.cc/Y9XF-U87W>].

6 See Zakrzewski & Lima, *supra* note 1.

7 *Hearing Before the Subcomm. on Consumer Prot., Product Safety & Data Sec. of the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (Oct. 4, 2021) (statement of Frances Haugen, Former Facebook Emp.) [hereinafter *Written Statement of Frances Haugen*] (this hearing has not been officially published yet, but both the video recording of the hearing and Ms. Haugen’s written statement can be found at <https://www.commerce.senate.gov/2021/10/protecting%20kids%20online:%20testimony%20from%20a%20facebook%20whistleblower> [<https://perma.cc/WZ2F-PS8E>]).

8 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](https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7&mod=article_inline) [<https://perma.cc/PQW2-2942>].

9 *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.) (this hearing has not been officially published yet, but the video recording of Senator Blumenthal’s statement, can be viewed at <https://www.commerce.senate.gov/2021/9/protecting-kids-online-facebook-instagram-and-mental-health-harms> [<https://perma.cc/R3QP-9Q7F>] starting at 50:53).

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.”<sup>10</sup>

Academics have also likened the harms of social media to the harms of tobacco. In an opinion piece, Joan Donovan and Jennifer Nilsen—who are researchers at Harvard’s Shorenstein Center on Media, Politics, and Public Policy—likened the harms of vaccine misinformation on social media to the harms of second-hand smoke.<sup>11</sup> Writing for the *Harvard Business Review*, professors from MIT and Harvard argued that social media companies should follow the path of tobacco companies and begin self-regulating.<sup>12</sup>

Even tech executives and venture capitalists have posited that social media and tobacco companies are similar. During an interview in 2018, Marc Benioff—the CEO of Salesforce—argued that social media companies should be regulated like cigarette companies.<sup>13</sup> Benioff said, “I think that you do it exactly the same way that you regulated the cigarette industry. Here’s a product: Cigarettes. They’re addictive, they’re not good for you.”<sup>14</sup> Roger McNamee—an early investor in Facebook—urged that, “[t]he challenges posed by internet platform monopolies require new approaches beyond antitrust enforcement. We must recognise and address these challenges as a threat to public health. One possibility is to treat

10 See, *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. Edward Markey, Member, Subcomm. on Consumer Prot., Product Safety & Data Sec.) (this hearing has not been officially published yet, but the video recording of Senator Markey’s statement, can be viewed at <https://www.commerce.senate.gov/2021/9/protecting-kids-online-facebook-instagram-and-mental-health-harms> [https://perma.cc/R3QP-9Q7F] starting at 1:37:14).

11 Joan Donovan & Jennifer Nilsen, *Facebook, Twitter and Other Social Media Companies Need to Be Treated like Big Tobacco*, NBCNEWS (July 15, 2021), <https://www.nbcnews.com/think/opinion/facebook-twitter-other-social-media-companies-need-be-treated-big-nca1274000> [https://perma.cc/XZ8M-972E] (noting that the ubiquitous spread of misinformation on social media, especially as it pertains to the COVID-19 vaccine, is “like secondhand smoke . . . [i]t causes harm to the public’s health”).

12 See Michael A. Cusumano, Annabelle Gawer & David B. Yoffie, *Social Media Companies Should Self-Regulate. Now.*, HARV. BUS. REV. (Jan. 15, 2021), <https://hbr.org/2021/01/social-media-companies-should-self-regulate-now> [https://perma.cc/PMZ5-V38E].

13 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> [https://perma.cc/N3ED-TCT2].

14 *Id.*

social media in a manner analogous to tobacco and alcohol, combining education and regulation.”<sup>15</sup>

Lawmakers, pundits, and tech executives’ assertion that social media should be regulated like tobacco in order to protect American teenagers is oversimplistic. While the comparison makes for a good sound bite for the press, the argument disregards the inherent differences between regulating a physical product that has no constitutional protection and a virtual product that can implicate both users’ and social media companies’ First Amendment rights. This paper will identify and analyze some of the main pillars of the tobacco regulatory scheme and apply them to social media products. In Part I, I will define social media and provide a summary of documented harms, or lack thereof, that are correlated to teenage social media use. I will then make an argument for why the federal government would be interested in regulating the industry as opposed to encouraging teenagers to remove themselves from the platforms. In Part II, I will provide a brief summary of the tobacco regulatory scheme, both past and present. I will demonstrate how the tobacco regulatory scheme developed over decades and how it has been constitutionally challenged. In Part III, I will analyze two pillars of the tobacco regulatory scheme—age restrictions on access and mandated health warnings—and apply them to social media products. In doing so, I will demonstrate that there will likely be constitutional challenges if either of these provisions were adopted. Finally, in Part IV, I will offer a brief legislative recommendation in order to avoid future constitutional challenges to a potential social media regulatory scheme.

## I. SOCIAL MEDIA, TEENAGE USE, AND WHY QUITTING IS HARD

A thorough analysis of the philosophical (and frankly, esoteric) debate surrounding social media definitions is beyond the scope of this paper.<sup>16</sup> Like the statutory definition of cigarettes,<sup>17</sup> a definition of social media should draw upon the common features of popular social media platforms without listing the actual platform themselves. For the purposes of this paper, I will rely on a definition of a single

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15 See Roger McNamee, *Why Not Regulate Social Media like Tobacco or Alcohol?*, GUARDIAN (Jan. 29, 2018), <https://www.theguardian.com/media/2018/jan/29/social-media-tobacco-facebook-google> [<https://perma.cc/BB7W-23LW>].

16 I note the definition challenge because it presents the first challenge for regulators who are trying to regulate “social media.” It is likely that different stakeholders will arrive at different conclusions regarding what qualifies as social media.

17 See 15 U.S.C. § 1332(1) (2018).

category of social media: social networking sites.<sup>18</sup> danah boyd<sup>19</sup> and Nicole Ellison’s foundational work, *Social Network Sites: Definition, History, and Scholarship*, offers a clear and operative definition for the purpose of this paper.<sup>20</sup> They define social networking sites as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”<sup>21</sup> Moreover, boyd and Ellison’s definition encapsulates the major social media platforms that American teenagers overwhelmingly use.<sup>22</sup> Without exception, these platforms allow for users to create profiles, follow other users, and view other users’ content.<sup>23</sup>

### A. *The Harms of Teenage Social Media Use*

A concerted and comprehensive effort to regulate tobacco did not emerge in the United States until after the Surgeon General’s landmark 1964 report, *Smoking and Health*, demonstrated that smoking caused a plethora of diseases and teenage tobacco use was especially dangerous.<sup>24</sup> Unlike the government’s research on tobacco, there is not a definitive report assessing the harms of social

18 I will use “social networking sites” and “social media” interchangeably. However, it is imperative to note that social media can encapsulate a broader spectrum of platforms.

19 The author purposefully de-capitalizes her name.

20 danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT.-MEDIATED COMM’N 210 (2008). danah boyd has been called “[t]he clear pioneer in the study of social media” and *Social Network Sites: Definition, History, and Scholarship* has been considered “the most influential paper to date” on the subject. DANIEL MILLER, ELISABETTA COSTA, NELL HAYNES, TOM McDONALD, RAZVAN NICOLESCU, JOLYNNA SINANAN, JULIANO SPYER, SHRIRAM VENKATRAMAN & XINYUAN WANG, *HOW THE WORLD CHANGED SOCIAL MEDIA* 9–10 (2016) (footnote omitted).

21 boyd & Ellison, *supra* note 20, at 211. boyd and Ellison also note that “[t]he nature and nomenclature of these connections may vary from site to site.” *Id.*

22 See MONICA ANDERSON & JINGJING JIANG, PEW RSCH. CTR., *TEENS, SOCIAL MEDIA AND TECHNOLOGY* 2018 at 2 (2018); Felix Richter, *7 in 10 American Teens Use TikTok*, STATISTA (Nov. 6, 2020), <https://www.statista.com/chart/22446/most-used-social-media-platforms-by-us-teens/> [<https://perma.cc/RR5Z-Q7JC>] (demonstrating the dramatic rise of TikTok use by teenagers since 2018).

23 See FACEBOOK, <https://www.facebook.com/> [<https://perma.cc/48EX-9XEM>]; INSTAGRAM, <https://www.instagram.com/> [<https://perma.cc/RPZ2-7V5V>]; SNAPCHAT, <https://www.snapchat.com/> [<https://perma.cc/UF9Z-YB3V>]; TIKTOK, <https://www.tiktok.com> [<https://perma.cc/AHX9-4HR3>]; TWITTER, <https://twitter.com/> [<https://perma.cc/25BP-BZMF>]; YOUTUBE, [youtube.com](https://www.youtube.com) [<https://perma.cc/3GEP-WWJB>]. There are additional social media platforms that have similar features, but the above-mentioned platforms are the sites most frequently used by American teenagers.

24 See *infra* notes 81–85 and accompanying text.

media on teenagers. Current studies of social media and its harmful effects can only demonstrate correlative relationships. However, while there may be spurious factors that impact the relationship between social media and its alleged harmful effects,<sup>25</sup> researchers are finding that social media use likely has some negative impact on teenagers' mental and physical well-being.<sup>26</sup>

Teenage social media use has been tied to increased feelings of inferiority. Internal Facebook research published by the *WSJ* has demonstrated that Facebook found that forty percent of teens who used Instagram said they began to feel "unattractive" after using the app.<sup>27</sup> The internal research also found that roughly twenty-five percent of teenage users who stated that they felt "not good enough" trace that feeling back to Instagram.<sup>28</sup> Greg Lukianoff and Jonathan Haidt, in their seminal book, *The Coddling of the American Mind*, argue that another one of social media's consequences is that teenage girls are now "bombarded with images of girls and women whose beauty is artificially enhanced, making girls ever more insecure about their own appearance."<sup>29</sup> Indeed, research has found that females may suffer more from the negative effects of social media use than

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25 See Hayeon Song, Anne Zmyslinski-Seelig, Jinyoung Kim, Adam Drent, Angela Victor, Kikuko Omori & Mike Allen, *Does Facebook Make You Lonely? A Meta Analysis*, 36 *COMPUTS. HUM. BEHAV.* 446, 451 (2014) (finding that a correlation between loneliness and Facebook use did not necessarily demonstrate that Facebook caused loneliness but instead suggested Facebook might attract people who are already lonely).

26 See Hunt Allcott, Luca Braghieri, Sarah Eichmeyer & Matthew Gentzkow, *The Welfare Effects of Social Media*, 110 *AM. ECON. REV.* 629, 672 (2020) (finding that spending four weeks away from Facebook "improves subjective well-being and substantially reduces post-experiment demand, suggesting that forces such as addiction . . . may cause people to use Facebook more than they otherwise would"); Holly B. Shakya & Nicholas A. Christakis, *Association of Facebook Use with Compromised Well-Being: A Longitudinal Study*, 185 *AM. J. EPIDEMIOLOGY* 203, 203 (finding that "Facebook was negatively associated with well-being" after compiling data on 5208 subjects' self-reported physical health, mental health, life satisfaction, and body mass index); Morten Tromholt, *The Facebook Experiment: Quitting Facebook Leads to Higher Levels of Well-Being*, 19 *CYBERPSYCH., BEHAV. & SOC. NETWORKING* 661, 661 (2016) (finding that participants who took a break from Facebook experienced an increase in life satisfaction and positive emotions); Jean M. Twenge, Thomas E. Joiner, Megan L. Rogers & Gabrielle N. Martin, *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6 *CLINICAL PSYCH. SCI.* 3, 3 (2017) ("Adolescents who spent more time on new media (including social media and electronic devices such as smartphones) were more likely to report mental health issues . . .").

27 See Wells et al., *supra* note 8.

28 See *id.*

29 GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND* 155 (2018).

males.<sup>30</sup> However, for both males and females, the negative impact of social media use on self-esteem is worse than the effects of other media.<sup>31</sup> Researchers have found that adolescents who spend an hour on social media suffer from a greater decrease in self-esteem than those who spend an hour playing video games or general computer use.<sup>32</sup>

More concerning than increased feelings of inferiority is the rise of depression in American teenagers. 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.<sup>33</sup> These “iGen adolescents” report more mental health issues and experience higher rates of suicide than either Millennials or Gen X’ers did at their age.<sup>34</sup> 2010 also marked an increase in adolescent use of social media and electronic devices and a decrease in “nonscreen activities such as in-person social interaction, print media, sports/exercise, and attending religious services, activities negatively correlated with depressive symptoms.”<sup>35</sup> Researchers concluded that this increase in screen time on new media beginning in 2010 impacted adolescents’ mental well-being.<sup>36</sup> Jean M. Twenge, who led the previously cited study, further argued in her book, *iGen*, that:

The sudden, sharp rise in depressive symptoms occurred at almost exactly the same time that smartphones became ubiquitous

30 See *id.* at 154–55 (suggesting that the accelerated deterioration of mental health among younger women may be the result of their increased negative psychological response to feelings of being left out after constantly seeing people having fun on social media and their own reliance on “relationally’ aggressive” tactics to intentionally remind other girls that that they are being excluded on purpose (quoting Nicki R. Crick & Jennifer K. Grotpeter, *Relational Aggression, Gender, and Social-Psychological Adjustment*, 66 CHILD DEV. 710, 710 (1995))); Twenge et al., *supra* note 26, at 8–13 (suggesting that female middle and high school students experienced higher rates of depressive symptoms associated with social media use than their male counterparts).

31 See Elroy Boers, Mohammad H. Afzali, Nicola Newton & Patricia Conrod, *Association of Screen Time and Depression in Adolescence*, 173 JAMA PEDIATRICS 853, 857 (2019).

32 See *id.* at 856–57. This study also found that an hour spent watching television led to an *increase* in self-esteem for teenagers. *Id.*

33 Twenge et al., *supra* note 26, at 13.

34 *Id.*

35 *Id.*

36 See *id.* at 15. “New media screen time is both associated with mental health issues and increased over this time period. Thus, it seems likely that the concomitant rise of screen time and adolescent depression and suicide is *not* coincidental.” *Id.* (emphasis added). These researchers also accounted for economic recession indicators, a cause of depression, and found that these indicators were “not positively correlated” while “smartphone adoption and social media use . . . were positively correlated” with mental health issues. *Id.* at 13.

and in-person interaction plummeted. That seems like too much of a coincidence for the trends not to be connected, especially because spending more time on social media and less time on in-person social interaction is correlated with depression.<sup>37</sup>

Again, teenage females seem to be suffering more than teenage males. Twenge notes that between 2012 and 2015 the rise in depression increased by twenty-one percent in males whereas depression in females increased by fifty percent—more than double that of males.<sup>38</sup> Additionally, social media platforms are a conduit for cyberbullying which has been shown to have more deleterious effects on the mental well-being of young people than traditional bullying.<sup>39</sup>

Social media use may also have a negative effect on users' nutritional habits, cognitive efficiency, and sleep patterns. One study found that using Instagram had a significant relationship to symptoms of Orthorexia Nervosa, a type of eating disorder in which a person becomes so obsessed with eating healthy that it can lead to "significant dietary restrictions [and] malnutrition."<sup>40</sup> The study's researchers posited that social media "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 users believing a behaviour is more prevalent or normal than is actually the case . . . ."<sup>41</sup> Social media use may also impact a person's memory,<sup>42</sup> and addictive-like social media use by teenagers also correlates to increased attention

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37 JEAN M. TWENGE, IGEN 104 (2017).

38 *Id.* at 102–03.

39 See Mitch van Geel, Paul Vedder & Jenny Tanilon, *Relationship Between Peer Victimization, Cyberbullying, and Suicide in Children and Adolescents: A Meta-Analysis*, 168 JAMA PEDIATRICS 435, 438 (2014) (finding that young victims of cyberbullying were three times as likely to entertain suicidal ideations as compared to traditional bullying victims who were only two times as likely); George Kritsotakis, Maria Papanikolaou, Emmanouil Androulakis & Anastas E. Philalithis, *Associations of Bullying and Cyberbullying with Substance Use and Sexual Risk Taking in Young Adults*, 49 J. NURSING SCHOLARSHIP 360, 364 (2017) (finding that females who were victims of cyberbullying in middle or high school had higher odds for drug use and males who were cyberbully victims were more prone to smoke).

40 Pixie G. Turner & Carmen E. Lefevre, *Instagram Use is Linked to Increased Symptoms of Orthorexia Nervosa*, 22 EATING & WEIGHT DISORDERS 277, 279, 281 (2017).

41 *Id.* at 282.

42 See Neika Sharifian & Laura B. Zahodne, *Social Media Bytes: Daily Associations Between Social Media Use and Everyday Memory Failures Across the Adult Life Span*, 75 J. GERONTOLOGY, SERIES B: PSYCH. SCIS. & SOC. SCIS. 540, 540 (2020) (finding that on days when a user's "social media use was high, individuals reported more memory failures" and "higher previous-day social media use was associated with more memory failures on the subsequent day").



deficits later on.<sup>43</sup> Excessive social media use can also negatively impact a teenager’s sleep habits.<sup>44</sup> A study found that teenagers who used social media daily were nineteen percent more likely to not get the proper amount of sleep for their age.<sup>45</sup>

Beyond the serious effects social media use might have on mental and physical health, social media platforms also expose teenagers to mature and explicit content. The degree of exposure to mature content is amplified by social media companies’ sophisticated, interest-based algorithms that predict and deliver related content to the user.<sup>46</sup> The *WSJ* found that “TikTok can quickly drive minors—among the biggest users of the app—into endless spools of content about sex and drugs.”<sup>47</sup> Albeit not scientific, the *WSJ* conducted an experiment on TikTok to test how the algorithms curated adult content for teenage users.<sup>48</sup> For the experiment, the *WSJ* created dozens of automated accounts that were registered as thirteen-to-fifteen-year-olds and searched different adult material on the app to see what TikTok’s “powerful algorithms” curated for a hypothetical teenage user.<sup>49</sup> The results were troubling. One thirteen-year-old’s 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.”<sup>50</sup> The algorithm also displayed 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.”<sup>51</sup> A study published in 2020 found that adolescents who spent an hour on social media generated more positive social views of

43 See Maartje Boer, Gonneke Stevens, Catrin Finkenauer & Regina van den Eijnden, *Attention Deficit Hyperactivity Disorder-Symptoms, Social Media Use Intensity, and Social Media Use Problems in Adolescents: Investigating Directionality*, 91 *CHILD DEV.* e853, e854, e860, e864 (2020). This longitudinal study of eleven-to-fifteen-year-old adolescents also found that this correlation was “unidirectional” in that increased attention deficits did not lead to an increase in social media use problems. See *id.* at e863–64.

44 See TWENGE, *supra* note 37, at 113 (“Many iGen’ers are so addicted to social media that they find it difficult to put down their phones and go to sleep when they should.”).

45 See *id.* at 115.

46 See Sang Ah Kim, Note, *Social Media Algorithms: Why You See What You See*, 2 *GEO. L. TECH. REV.* 147, 148–151 (2017) (explaining generally how social media algorithms work and their purpose within social media platforms’ business models).

47 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> [https://perma.cc/7HZ4-C3V5].

48 See *id.*

49 *Id.*

50 *Id.*

51 *Id.* (emphasis added).

alcohol consumption and subsequently used alcohol more than adolescents who watched an hour of television.<sup>52</sup> Moreover, social media posts of young people with alcohol are overwhelmingly displayed in a positive manner.<sup>53</sup>

Although this Section has outlined some of the most serious documented harms tied to teenage social media use, it is unfair to hold that social media is entirely destructive. Like many technologies in the modern world, social media can provide benefits to users as well. Social media can leave teenagers feeling more connected to friends, catalyze interactions with diverse people, and provide a sense of support in difficult times.<sup>54</sup> A survey found that twenty-four percent of teenage girls who participate in online groups find that these groups play a “major role in helping them get through tough times” compared to only fourteen percent of males.<sup>55</sup> Teenagers have also leveraged social media to grow their own businesses,<sup>56</sup> and have utilized platforms to organize global advocacy movements.<sup>57</sup> However, it is still contested whether these benefits outweigh the harms.<sup>58</sup>

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52 See Elroy Boers, Mohammad H. Afzali & Patricia Conrod, *A Longitudinal Study on the Relationship Between Screen Time and Adolescent Alcohol Use: The Mediating Role of Social Norms*, PREVENTATIVE MED., Mar. 2020, at 1, 4–5.

53 See Hanneke Hendricks, Bas Van den Putte, Winifred A. Gebhardt & Megan A. Moreno, *Social Drinking on Social Media: Content Analysis of the Social Aspects of Alcohol-Related Posts on Facebook and Instagram*, J. MED. INTERNET RSCH., June 2018, at 206, 206 (finding in one study that ninety-seven percent of alcohol posts “depict alcohol in a positive social context”).

54 See MONICA ANDERSON & JINGJING JIANG, PEW RSCH. CTR., *TEENS’ SOCIAL MEDIA HABITS AND EXPERIENCES 2–3* (2018) (finding that, of teenagers ages thirteen-to-seventeen-years-old, 81% feel social media makes them “more connected to their friends,” 69% think social media helps them “interact with a more diverse group of people,” and 68% “feel as if they have people who will support them through tough times”).

55 See *id.* at 18.

56 See Savannah Sicurella, *When Second Hand Becomes Vintage: Gen Z Has Made Thrifting a Big Business*, NPR (June 18, 2021), <https://www.npr.org/2021/06/18/1006207991/when-second-hand-becomes-vintage-gen-z-has-made-thrifting-a-big-business> [<https://perma.cc/BA6D-RATE>] (highlighting how teenagers and early twenty-somethings are using social media and other apps to promote and sell thrifted clothes).

57 See Greta Thunberg (@gretathunberg), INSTAGRAM (Nov. 12, 2021), <http://www.instagram.com/p/CWKtsTZMOZt> [<https://perma.cc/X3WZ-XCVU>].

58 See Cal Newport, *The Question We’ve Stopped Asking About Teen-Agers and Social Media*, NEW YORKER (Nov. 9, 2021), <https://newyorker.com/culture/office-space/the-question-weve-stopped-asking-about-teen-agers-and-social-media> [<https://perma.cc/B4AV-NFU5>] (highlighting the division among scholars and pundits about research on social media and its harms on teenagers).

### B. Regulation over “Freedom-of-Choice”

Lawmakers’ assertions that social media platforms should be regulated like Big Tobacco may seem like a drastic step. A simple alternative is to encourage teenagers who do not want to expose themselves to social media’s harms to remove themselves from the platforms. After all, no one is *forcing* them to use the product. A similar argument regarding cigarettes emerged from the tobacco industry in the mid 1970s.<sup>59</sup> This “freedom-of-choice” rhetoric emphasizes the value of consumer choice as essential to liberty, and it is a prominent defense that the tobacco companies have also used for decades.<sup>60</sup> However, such arguments are not as convincing when they are applied to teenage decisionmaking.<sup>61</sup> While some teenagers may have the maturity and capacity to remove themselves from social media and its potentially harmful effects, adolescent biology is working against them. Daniel Aaron, an attorney at the Food and Drug Administration (FDA), summarizes the scientific research on why freedom-of-choice arguments should not apply to teenagers as it pertains to tobacco use:

Freedom-of-choice arguments become weaker on learning that most tobacco use begins under age 18. It is well accepted that youth do not possess the same levels of self-control, knowledge about the world, or maturity to act in their best interest. Arguably, the reason that most tobacco use starts before age 18 (and especially before age 26) is a fundamentally human and biological lack of brain maturity . . . . 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.<sup>62</sup>

The “Facebook Files” revealed that Facebook is well aware that its products are practically irresistible to teenagers.<sup>63</sup> A researcher at

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59 See Pamela Mejia, Lori Dorfman, Andrew Cheyne, Laura Nixon, Lissy Friedman, Mark Gottlieb & Richard Daynard, *The Origins of Personal Responsibility Rhetoric in News Coverage of the Tobacco Industry*, 104 AM. J. PUB. HEALTH 1048, 1048 (2014).

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

61 See *id.* at 878.

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

63 See Wells et al., *supra* note 8.

Facebook, in summarizing the company's research for fellow colleagues, stated that “[t]eens told us that they don’t like the amount of time they spend on the app but feel like they have to be present.”<sup>64</sup> The researcher also noted that teens “often feel ‘addicted’ and know that what they’re seeing is bad for their mental health but feel unable to stop themselves.”<sup>65</sup> Internal Facebook anecdotes like this are especially concerning when coupled with research that demonstrates that adolescents are sixty-six percent more likely to have one “suicide-related” outcome if they spend five hours or more a day on electronic devices as opposed to adolescents who spend one hour a day.<sup>66</sup>

Moreover, social media companies are some of the wealthiest companies in the world,<sup>67</sup> and their business models rely on inducing users to spend as much time as possible on their platforms.<sup>68</sup> In an interview for the documentary *The Social Dilemma*, Justin Rosenstein—a former Facebook Engineer—bluntly said, “[w]e’re the product. Our attention is the product, being sold to advertisers.”<sup>69</sup> Sean Parker, the first president of Facebook, was also forthright about Facebook’s business model and strategy. He said:

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?’ . . . [W]e need[ed] 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.<sup>70</sup>

Tim Kendall—a former executive at Facebook—explained Facebook’s strategy was to “figure out how to get as much of [the user’s] attention as we possibly can. How much time can we get you

64 *Id.*

65 *Id.*

66 See Twenge et al., *supra* note 26.

67 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> [<https://perma.cc/TRW2-E2LV>]; 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> [<https://perma.cc/P6WA-AN8N>].

68 See Kim, *supra* note 46, at 147–48 (“[S]ocial media companies derive profit from having users stay ‘engaged’ on their platform. . . . The longer a user stays engaged, the more exposure advertisements receive.”).

69 THE SOCIAL DILEMMA 14:11–14:20 (Netflix 2020).

70 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).

to spend? How much of your life can we get you to give to us?”<sup>71</sup> In order to accomplish this goal, social media companies rely on teams of engineers and designers to leverage behavioral psychology to make their platforms as addictive as possible to users.<sup>72</sup>

Teenagers’ diminished ability to resist the addictive features of social media, combined with social media companies’ business model, is concerning enough. However, it gets worse. Social media companies like Facebook *need* teenage users and will spend hundreds of millions of dollars in advertising to lure them to their platforms.<sup>73</sup> According to an internal marketing presentation, Facebook views the loss of teenage users as an “existential threat.”<sup>74</sup> The company even planned to release a version of Instagram for preteens as part of a strategy to introduce Facebook products to younger users before they were enticed by competing platforms like Snapchat or TikTok.<sup>75</sup> This strategy of targeting young users is also a common strategy for tobacco companies.<sup>76</sup> Tobacco companies understand that it is the youth who “represent the next generation of adult smokers.”<sup>77</sup> Similarly, social media companies understand that getting younger users addicted to their products early is vital to their long-term

71 THE SOCIAL DILEMMA, *supra* note 69, at 13:52–14:05.

72 *See id.* at 26:48–27:02 (highlighting a former Google designer explaining how tech companies use behavior psychology to make their platforms as addictive as possible); *see also* Kim, *supra* note 46, at 148 (“To keep users engaged for as long and as frequently as possible, social media platforms want to make their news feeds interesting and relatable to users.”); 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/> [https://perma.cc/TD5M-HRG2] (“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.”).

73 *See* Sheera Frenkel, Ryan Mac & Mike Isaac, *Instagram Struggles with Fears of Losing Its ‘Pipeline’: Young Users*, N.Y. TIMES (Oct. 16, 2021), <https://www.nytimes.com/2021/10/16/technology/instagram-teens.html> [https://perma.cc/VH25-J5F6]. In 2018, Facebook planned to use almost its entire global marketing budget to target teenagers. *Id.*

74 *Id.* (quoting an internal Facebook marketing presentation).

75 *See* Georgia Wells & Jeff Horwitz, *Facebook’s Effort to Attract Preteens Goes Beyond Instagram Kids, Documents Show*, WALL ST. J. (Sept. 28, 2021), <https://www.wsj.com/articles/facebook-instagram-kids-tweens-attract-11632849667> [https://perma.cc/LYW7-4Y5A]. Facebook went so far as to explore whether “playdates” could be a “growth lever” for their products. *See id.*

76 *See* Aaron, *supra* note 60, at 884 (“Youth are impressionable. Youth are targeted by tobacco companies. And it is during youth that most tobacco use begins.”).

77 *Id.* at 880; *see also id.* at 880–85 (citing internal tobacco company documents that demonstrate the importance of getting young users addicted to tobacco products and highlighting the importance of marketing traditional and e-cigarettes to young people).

financial prosperity.<sup>78</sup> Because young Americans may not have the capacity to resist using social media platforms—and social media companies have a strong monetary interest ensuring teenagers engage with their products as much as possible despite the potential risks—it is reasonable for lawmakers to pursue a regulatory scheme in order to protect young users from the dangers of social media. But does the tobacco regulatory scheme offer an effective regulatory blueprint, as lawmakers, tech titans, and academics seem to suggest?

## II. THE TOBACCO REGULATORY SCHEME, PAST AND PRESENT

### A. *Federal Tobacco Regulation from 1964 to 1995*

The tobacco regulatory scheme in the United States is both storied and multifaceted.<sup>79</sup> In 1964, after years of scientific debate and efforts by the tobacco industry to undermine medical research,<sup>80</sup> the Surgeon General published *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*.<sup>81</sup> The advisory committee, which consisted of ten medical experts, took two years to review comprehensive studies on the effects of smoking and compile the findings into a foundational report.<sup>82</sup> The committee found that “[c]igarette smoking is causally related to lung cancer . . . the magnitude of the effect of cigarette smoking far

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78 See Wells & Horwitz, *supra* note 75 (“Inside [Facebook], teams of employees have for years been laying plans to attract preteens . . . spurred by fear that Facebook could lose a new generation of users critical to its future.”).

79 See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“Owing to its unique place in American history and society, tobacco has its own unique political history.”), *superseded by* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, div. A, 123 Stat. 1776 (2009) (codified in scattered sections of 15 U.S.C. and 21 U.S.C.). See generally ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* (2007) (documenting the development of tobacco regulatory scheme throughout the twentieth century).

80 See generally BRANDT, *supra* note 79, at 159–207 (discussing early medical studies in the 1950s which showed a correlative connection between smoking and disease and the tobacco industry’s attempts to undermine such findings).

81 SURGEON GEN.’S ADVISORY COMM. ON SMOKING AND HEALTH, U.S. DEP’T OF HEALTH, EDUC., & WELFARE, PUB. NO. 1103, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964) [hereinafter SURGEON GENERAL’S REPORT].

82 See *id.* at 7–9; BRANDT, *supra* note 79, at 219–230 (summarizing the formation and research approach of the advisory committee). The committee explained that the most significant evidence of the effects of smoking on human health were found “through clinical and pathological observations of conditions occurring in men, women, and children in the course of their lives, and by the application of epidemiological and statistical methods by which a vast array of information has been assembled and analyzed.” SURGEON GENERAL’S REPORT, *supra* note 81, at 6 (emphasis added).

outweighs all other factors.”<sup>83</sup> Additionally, the report highlighted that smoking causes a plethora of other diseases, including chronic bronchitis, emphysema, cardiovascular diseases, peptic ulcers, and lip and esophagus cancers.<sup>84</sup> Ultimately, the report declared that “[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.”<sup>85</sup>

A year after the Surgeon General’s report, Congress passed the Federal Cigarette Labeling and Advertising Act (FCLAA).<sup>86</sup> The FCLAA declared it “unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: ‘Caution: Cigarette Smoking May Be Hazardous to Your Health.’”<sup>87</sup> The Act required that “[s]uch statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.”<sup>88</sup> One of the stated purposes of the FCLAA was to protect “commerce and the national economy” from “diverse, nonuniform, and confusing cigarette labeling and advertising regulations.”<sup>89</sup> Therefore, Congress sought to preempt any state or federal agency from requiring different advertising or labeling restrictions.<sup>90</sup>

Approximately four years after the passage of the FCLAA, Congress passed the Public Health Cigarette Smoking Act of 1969 (PHCSA).<sup>91</sup> Unlike the watered-down warning language of the

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83 SURGEON GENERAL’S REPORT, *supra* note 81, at 31.

84 *Id.* at 31–32, 337. The committee found the only benefit that smoking might provide was in the area of contentment as it pertains to mental health. *Id.* at 32. However, the committee found “no basis for a judgment which would weigh benefits against [the] hazards of smoking as it may apply to the general population.” *Id.*

85 *Id.* at 33.

86 *See* Federal Cigarette Labeling & Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C §§ 1331–1338). However, the tobacco industry had a strong influence throughout the lawmaking process. *See* BRANDT, *supra* note 79, at 256 (“[The FCLAA] emerged from Congress bearing the fingerprints of the tobacco industry and its remarkably able, if heavy handed, lobby.”).

87 Federal Cigarette Labeling & Advertising Act of 1965 § 4. The required language was far less forceful than the findings of the Surgeon General’s report. The use of “may be” in the warning “made it a warning in name only, all but officially retracting the findings of the surgeon general’s committee.” BRANDT, *supra* note 79, at 256.

88 Federal Cigarette Labeling & Advertising Act of 1965 § 4.

89 *Id.* § 2.

90 *See id.* § 5. This preemption led to the Supreme Court striking down a Massachusetts statute that placed restrictions on the proximity of cigarette advertisements to places such as parks and schools. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

91 Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–1339).

FCLAA, the PHCSA mandated that all cigarette packages must be labeled with the phrase: “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.”<sup>92</sup> However, the PHSCA maintained the FCLAA’s mandated style and layout of the warning label.<sup>93</sup>

Over the next two decades, Congress passed a few other notable pieces of federal legislation. Congress enacted the Comprehensive Smoking Education Act of 1984 (CSEA) with the express aim of “making Americans more aware of any adverse health effects of smoking.”<sup>94</sup> Additionally, the CSEA expanded mandated warning labels to both advertisements and to outdoor billboards.<sup>95</sup> In 1986, Congress extended many of the requirements of the CSEA and the FLCAA to smokeless tobacco through the Comprehensive Smokeless Tobacco Health Education Act of 1986.<sup>96</sup>

The 1990s ushered in increased federal involvement in tobacco regulation at the state level. The Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act of 1992 incentivized states to enforce minimum age requirements on tobacco products by offering grant funding for special prevention programs.<sup>97</sup> This incentive worked, and by 1993 every U.S. state had increased its minimum age requirement to at least eighteen years old.<sup>98</sup>

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92 Public Health Cigarette Smoking Act of 1969 § 4.

93 *Compare* Federal Cigarette Labeling & Advertising Act of 1965 § 4, *with* Public Health Cigarette Smoking Act of 1969 § 4.

94 Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 2, 98 Stat. 2200, 2200 (1984) (codified as amended at 15 U.S.C. § 1331). The Act funded and streamlined further research on the effects of cigarette smoking and provided cigarette companies with four options for the mandated warning labels on their products. *See* Comprehensive Smoking Education Act §§ 3(a)–(b), 4(a)(1). The options were: “SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy”; “SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health”; “SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight”; “SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.” Comprehensive Smoking Education Act § 4(a).

95 *See* Comprehensive Smoking Education Act § 4.

96 *See* Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (codified as amended at 15 U.S.C §§ 4401–4408).

97 *See* Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 323, 394 (1992) (codified as amended at 42 U.S.C. § 300x-26) (“[T]he Secretary [of Health and Human Services] may make a grant . . . only if the State involved has . . . a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18.”).

98 Dorie E. Apollonio & Stanton A. Glantz, *Minimum Ages of Legal Access for Tobacco in the United States from 1863 to 2015*, 106 AM. J. PUB. HEALTH 1200, 1204 (2016).



### B. *The FDA Attempts to Take Charge*

In 1996, the FDA issued a final rule entitled “Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents.”<sup>99</sup> The rule was an attempt by the FDA to assert jurisdiction over tobacco products and tobacco advertisements.<sup>100</sup> The FDA determined that “cigarettes and smokeless tobacco are intended to affect the structure or function of the body, within the meaning of the [Federal Food, Drug, and Cosmetic Act of 1938’s] definitions of ‘drug’ and ‘device.’”<sup>101</sup>

The final rule prohibited the sale of tobacco products to persons under the age of eighteen, required tobacco retailers to verify a buyer’s age by a photo ID, and forbade free samples of tobacco products or the use of vending machines to sell tobacco products in establishments where people under the age of eighteen were allowed.<sup>102</sup> In justifying its decision to regulate tobacco, the FDA stated that it determined the “restrictions to reduce the use of cigarettes and smokeless tobacco by individuals under the age of 18 while leaving these products on the market for adults—is the available option that is the most consistent with both the [FDCA] and the agency’s mission to protect the public health.”<sup>103</sup>

However, the Supreme Court disagreed with the FDA’s self-perceived power to regulate tobacco. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court held—in a 5–4 decision—that Congress “clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”<sup>104</sup> In writing for the majority, Justice O’Connor noted that “Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products . . . and repeatedly acted to preclude any agency from exercising significant policy-making

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99 See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897).

100 *Id.* at 44,396–97.

101 *Id.* at 44,397; see also Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127–29 (1999) (summarizing the FDA’s approach and justification for establishing its final rule to regulate tobacco), *superseded by* 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.); C. STEPHEN REDHEAD & VANESSA BURROWS, CONG. RSCH. SERV., RL32619, FDA REGULATION OF TOBACCO PRODUCTS: A POLICY AND LEGAL ANALYSIS 5 (2007) (outlining the statutory justification that the FDA relied on in its issuance of the final rule in 1996).

102 See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,399.

103 *Id.* at 44,398.

104 *Brown & Williamson*, 529 U.S. at 126.

authority in the area.”<sup>105</sup> The Court found that Congress had enacted six statutes since 1965 concerning tobacco regulation “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority” to regulate tobacco.<sup>106</sup> Moreover, Congress had rejected bills that would have given the FDA jurisdiction over tobacco regulation.<sup>107</sup> After the Supreme Court eviscerated the FDA’s perceived power to regulate the tobacco industry, it became clear that it would be the responsibility of Congress to spearhead any amendments to the federal regulatory scheme.<sup>108</sup>

Nine years after the Supreme Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.*, Congress finally responded by passing the Family Smoking Prevention and Tobacco Control Act (TCA) in June 2009.<sup>109</sup> The TCA explicitly provides the FDA with the authority to regulate tobacco products pursuant to the Federal Food, Drug, and Cosmetic Act and recognized the agency as “the primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products.”<sup>110</sup> Congress’s intent to prevent young people from using tobacco is unequivocal. The first stated finding of the TCA reads, “[t]he 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.”<sup>111</sup> Moreover, the second stated purpose of the Act was to ensure that the FDA “has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people.”<sup>112</sup> Congress noted that reducing minors’ tobacco use by fifty percent would prevent “10,000,000 of today’s children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death” and save over seventy-five billion dollars in healthcare costs.<sup>113</sup> The passage of the TCA marked a significant new assertion of tobacco regulation by the federal government and its

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105 *Id.* at 159–160.

106 *Id.* at 144.

107 *See id.*; *see also id.* at 125 (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988))).

108 *See REDHEAD & BURROWS, supra* note 101, at 10 (noting that no new authority to regulate tobacco will be granted to the FDA “unless Congress enacts legislation to give the agency unambiguous statutory authority over such products”).

109 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.).

110 *Id.* § 3(1).

111 *Id.* § 2(1).

112 *Id.* § 3(2).

113 *Id.* § 2(14).

executive agency, the FDA.<sup>114</sup> The TCA is a culmination of decades of legislation and litigation,<sup>115</sup> and supplements tobacco legislation from the latter half of the twentieth century in order to create a comprehensive regulatory scheme.<sup>116</sup>

### C. *The Current Regulatory Landscape*

The main provisions of the federal tobacco regulatory scheme are found in 15 U.S.C. §§ 1331–1341 and 21 U.S.C. §§ 387–387u. There are four main categories of the current federal tobacco regulatory scheme intended to prevent minors from using tobacco products that could also apply to a social media regulatory scheme: (1) age restrictions on access, (2) mandated health warnings, (3) research and mandated information collection, and (4) product safety standards.<sup>117</sup> For the purposes of this paper, I will analyze the technical and legal implications of the first two categories.<sup>118</sup>

#### 1. Age Restrictions on Tobacco Use

Pursuant to its granted authority under the TCA, the FDA established rules “in order to reduce the number of children and adolescents who use [tobacco] products.”<sup>119</sup> Under the FDA’s rule, tobacco retailers play a major role as intermediaries in preventing minors from accessing tobacco.<sup>120</sup> The FDA requires that no retailer

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114 See Ricardo Carvajal, David Clissold & Jeffrey Shapiro, *The Family Smoking Prevention and Tobacco Control Act: An Overview*, 64 FOOD & DRUG L.J. 717, 717 (2009) (“[T]he [TCA] marks a dramatic shift in the relationship between the federal government and the tobacco industry.”); Arlen W. Langvardt, *Tobacco Advertising and the First Amendment: Striking the Right Balance*, 5 WM. & MARY BUS. L. REV. 331, 411 (2014) (“[T]he TCA marked a significant expansion and ramping-up of the government’s regulatory regime.”).

115 See Aaron, *supra* note 60, at 833 (“The [TCA] was the culmination of a decade-long legal battle over the future of tobacco.” (footnote omitted)).

116 See Langvardt, *supra* note 114, at 411 (explaining that the TCA was not the government’s first attempt to regulate health warnings and advertisements).

117 Each state also has its own tobacco regulations—especially as it pertains to taxation on tobacco products. See *The Tax Burden on Tobacco, 1970–2019*, CDC, <https://chronicdata.cdc.gov/Policy/The-Tax-Burden-on-Tobacco-1970-2019/7nwe-3aj9/data> [<https://perma.cc/QGP3-S5VE>] (compiling the tax burden on tobacco in all fifty states from 1970 to 2019).

118 Analyzing the other two provisions would be impractical given the current lack of evidence establishing the government’s interest in regulating social media to protect teenagers as I will demonstrate in Part III. Moreover, instead of analyzing the third category, I recommend that this category should be the first step in bolstering the government’s social media regulatory scheme as demonstrated in Part IV.

119 21 C.F.R. § 1140.2 (2021).

120 See *id.* § 1140.14(a)(1).

sell tobacco products to anyone under eighteen,<sup>121</sup> and retailers must also verify a purchaser's age through valid photo identification that includes a date of birth for any purchaser who looks under the age of twenty-six.<sup>122</sup> Additionally, the FDA requires that retailers may only sell cigarettes “face-to-face . . . without the assistance of any electronic or mechanical device.”<sup>123</sup> In 2019, Congress raised the mandatory minimum age to twenty-one years old, making it illegal for any American under the age of twenty-one to buy *any* tobacco products—including hookah, e-cigarettes, and cigars.<sup>124</sup>

## 2. Mandated Health Warnings

Perhaps the most controversial portions of the tobacco regulatory scheme are its restrictions on labeling.<sup>125</sup> The TCA requires tobacco manufacturers to place one of nine warning labels on tobacco packaging, and the Act mandates that these warnings rotate quarterly.<sup>126</sup> Tobacco companies are also required to submit a plan to the Secretary of Health and Human Services on how they will rotate the different warning labels.<sup>127</sup> In addition to new warnings, the TCA established even more specific display requirements for the mandated labels and for advertisements.<sup>128</sup> Among the mandates, the TCA establishes exact font sizes for warning labels and advertisements, the color of the font and background of the labels, and the proportion of the space on a package or label that must be dedicated to the warning.<sup>129</sup> The TCA also requires the inclusion of “color graphics depicting the negative health consequences of smoking to accompany the label statements,” and the content of these graphics are at the discretion of the FDA.<sup>130</sup>

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121 *See id.* The age limit was raised to twenty-one in 2019. *See infra* note 124.

122 21 C.F.R. § 1140.14(a)(2)(i)–(ii).

123 *Id.* § 1140.14(a)(3). There is an exception to this rule for establishments that never allow minors to enter the premises. *See id.* § 1140.16(c)(2)(ii).

124 *See* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 603(a), 133 Stat. 2534, 3123 (2019) (codified at 21 U.S.C. § 387f(d)).

125 *See* Carvajal et al., *supra* note 114, at 731 (“The statutory restrictions [of the TCA] so impinge upon a manufacturer’s ability to market and promote new tobacco products . . . that they have prompted litigation challenging their constitutionality.”).

126 *See* 15 U.S.C. § 1333(a)(1), (c)(2) (2018); Langvardt, *supra* note 114, at 347 (“These warnings preserve the general thrust of the rotating warnings previously required, but the new list expands the number of warnings in the rotation.”).

127 *See* 15 U.S.C. § 1333(c)(2).

128 *See id.* § 1333(a)(2), (b)(1)–(3), (c)(1)–(2), (d).

129 *See id.* § 1333(a)(2), (b)(2).

130 *See id.* § 1333(d). These graphics became a significant factor in challenging the legality of these warning and advertising mandates. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1219 (D.C. Cir. 2012) (finding that the FDA did not provide sufficient

The next Part explores the technical possibilities and legal challenges of applying these two categories of the tobacco regulatory scheme to social media companies for the purpose of protecting American adolescents.

### III. ADOPTING A SOCIAL MEDIA REGULATORY FRAMEWORK BASED ON THE TOBACCO REGULATORY SCHEME

Regarding tobacco regulations, Congress maintains that it is imperative that “commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.”<sup>131</sup> An effective social media regulatory scheme would also likely have to be federal in nature. With fifty distinct state jurisdictions in the United States, a patchwork approach would likely undermine the statutory schemes of states that attempt to regulate teenage social media use.<sup>132</sup> For instance, through a virtual private network (VPN), a teenager in state *X*, where there are strict social media regulations for teenagers, could access a social media site by pretending to be in state *Y*, rendering state *X*'s regulatory scheme virtually meaningless.<sup>133</sup> Therefore, this analysis will focus solely on a federal regulatory scheme.

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evidence that graphic images would reduce smoking); *see infra* notes 210–24 and accompanying text.

131 *See* 15 U.S.C. § 1331(2).

132 Senator Blumenthal, when he was the Attorney General of Connecticut, recognized the difficulty that the internet imposed on state-level enforcement regimes regarding adolescent tobacco use. He argued that:

[H]igher taxes do not address a growing problem—increasing sales through mail order of cigarettes and tobacco products, especially over the Internet. These sales raise two profound concerns: uncontrolled youth access and evasion of state taxes. The access problem is obvious—many children have easy access to the Internet, and our investigations . . . have shown that Internet tobacco sales outlets almost never make a meaningful effort to enforce age restrictions. In addition, these outlets generally neither sell properly taxed cigarettes nor properly report their sales to state taxing authorities. While it is unclear how many children are ordering cigarettes over the Internet, we know anecdotally how easily kids can purchase them. We also know that some illegal bulk Internet purchasers have made their untaxed purchases for the purpose of illegal resale, and those persons are likely to be just as willing to sell to minors as they are to break other laws.

Richard Blumenthal, Commentary, *Tobacco Control: A State Perspective*, 3 YALE J. HEALTH POL'Y, L., & ETHICS 151, 154 (2002).

133 *See* Max Eddy, *What Is a VPN, and Why You Need One*, PCMAG (Aug. 12, 2021), <https://www.pcmag.com/how-to/what-is-a-vpn-and-why-you-need-one> [<https://perma.cc/AEV8-CZH6>] (“With a VPN, you can connect to a server in a different country and spoof

### A. *Barring Teenage Access to Social Media*

In order to prevent teenagers from accessing and consuming tobacco products, the tobacco regulatory scheme requires purchasers to present valid government identification.<sup>134</sup> If a purchaser is not twenty-one, they are completely forbidden from purchasing tobacco in the United States.<sup>135</sup> While effective for preventing access to a physical product like tobacco, applying a similar age restriction to social media is more complicated. Major social media companies allow a user to choose their age when making an account and do not verify that the user is telling the truth.<sup>136</sup> Therefore, in order to create an effective restriction on social media access for teenagers, social media companies will need to institute a more robust age verification process. However, doing so could create both technical and legal challenges.

Requiring social media users to verify their age through official forms of identification is the most analogous to the tobacco regulatory scheme. From a technical perspective, verifying a user's age in order to restrict access to social media platforms is now possible.<sup>137</sup> Unlike the tobacco regulatory scheme—which places the responsibility on the intermediary-retailer to enforce age restrictions on tobacco access—an age restriction on social media would likely be enforced by the social media companies themselves.<sup>138</sup> Other

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your location. If you're outside the US, you can VPN back to a familiar location and access the internet (mostly) as usual. You can also do it in reverse. From the comfort of your home, you can pop over to a far-away VPN server, perhaps to access streaming video unavailable in the US.”).

134 See *supra* notes 121–23 and accompanying text.

135 See *supra* note 124 and accompanying text.

136 See Parni Diwanji, *How Do We Know Someone Is Old Enough to Use Our Apps?*, META (July 27, 2021), <https://about.fb.com/news/2021/07/age-verification/> [<https://perma.cc/9WKR-667G>]; see also FACEBOOK, <https://www.facebook.com/signup> [<https://perma.cc/8WUN-PTQW>]; TIKTOK, <https://www.tiktok.com/signup/phone-or-email> [<https://perma.cc/4KXY-J3SL>].

137 See David McCabe, *Anonymity No More? Age Checks Come to the Web*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/technology/internet-age-check-proof.html> [<https://perma.cc/K7KB-S3G3>].

138 Under the Children's Online Privacy Protection Act (COPPA), social media platforms already must regulate based on the age of users. See 15 U.S.C. §§ 6501–6506 (2018). However, instead of verifying the age of users under thirteen and following the provisions of COPPA, some social media companies simply restrict users under thirteen from using any of their services. See Shannon Finnegan, Comment, *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

countries already require that certain websites verify a user's age through government identification.<sup>139</sup> American companies like Google and Tinder are complying with these mandates abroad.<sup>140</sup>

Meta<sup>141</sup> has created a mechanism through Instagram to verify and store the identification of suspicious users.<sup>142</sup> The company verifies accounts that it deems to be suspicious by requesting government issued identification, or a combination of other identifying material, in order to authenticate a user's identity.<sup>143</sup> Instagram explains that in most cases a user will "need to provide [Instagram] a copy of something with your full name and photo on it or something that includes your full name and indicates your age."<sup>144</sup> While assuring users that it doesn't intend for identity verification to impact more than a small number of its users,<sup>145</sup> Instagram's policy proves that it is capable of collecting and verifying the identities and ages of its users. However, Meta also announced that instead of collecting and verifying users' IDs, it is pursuing a verification scheme built on artificial intelligence.<sup>146</sup> According to the company, this technology will scan for multiple signals that a user is under eighteen years old despite the age they reported when they made their account.<sup>147</sup>

websites." (footnote omitted)). *But see Hearing Before the Subcomm. on Consumer Prot., Product Safety & Data Sec. of the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (Oct. 26, 2021) (statement of Michael Beckerman, Vice President and Head of Pub. Pol'y, Americas, TikTok) [hereinafter *Written Statement of Michael Beckerman*] ("[I]f an individual registers for TikTok as under the age of 13, they are directed to TikTok for Younger Users, a curated viewing experience with stringent safeguards and privacy protections . . .") (this hearing has not been officially published yet, but both the video recording of the hearing and Mr. Beckerman's written statement can be found at <https://www.commerce.senate.gov/2021/10/protecting-kids-online-snapchat-tiktok-and-youtube> [<https://perma.cc/T48B-7J7T>]).

139 *See McCabe, supra* note 137 (highlighting the use of mandated age verification to view certain adult material in countries like United Kingdom, Germany, and France).

140 *Id.* (demonstrating how Google has implemented age verification for adult material on YouTube in the United Kingdom and Tinder requires age verification in Japan pursuant to Japanese law).

141 Facebook changed its name to "Meta" in October 2021. *See Mike Isaac, Facebook Renames Itself Meta*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/10/28/technology/facebook-meta-name-change.html> [<https://perma.cc/22M5-JKMF>].

142 *See Introducing New Authenticity Measures on Instagram*, INSTAGRAM (Aug. 13, 2020), <https://about.instagram.com/blog/announcements/introducing-new-authenticity-measures-on-instagram/> [<https://perma.cc/XM6W-CRGU>].

143 *See id.*; *What Types of ID Does Instagram Accept?*, INSTAGRAM, <https://help.instagram.com/271237319690904/> [<https://perma.cc/9WFR-837L>].

144 *What Types of ID Does Instagram Accept?*, *supra* note 143.

145 *See Introducing New Authenticity Measures on Instagram, supra* note 142.

146 *See Diwanji, supra* note 136.

147 *Id.*

While age verification is technically possible, absolute restrictions on teenage access to social media (similar to an absolute restriction on tobacco) may violate the First Amendment. Unlike access to tobacco, freedom of speech is a constitutionally protected right.<sup>148</sup> There is no doubt that social media platforms are now a massive forum for the exchange of ideas and general communication.<sup>149</sup> In *Packingham v. North Carolina*, the Supreme Court held that a North Carolina statute completely barring sex offenders from accessing and using social media platforms violated their First Amendment rights.<sup>150</sup> Justice Kennedy, writing for the majority, reasoned that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”<sup>151</sup>

In reaching its conclusion, the *Packingham* Court assumed that banning sex offenders from accessing social media was a content neutral restriction on speech; therefore, intermediate scrutiny applied.<sup>152</sup> But for a statute to survive intermediate scrutiny, it “must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”<sup>153</sup> Moreover, it is the government’s burden to prove that statute is “necessary or legitimate” to government’s purpose.<sup>154</sup> The Court recognized that child sex abuse is a serious crime, and the North Carolina legislature had a legitimate interest in protecting children from sexual assault.<sup>155</sup> However, the “assertion of a valid governmental interest ‘cannot, in every context, be insulated from all constitutional protections.’”<sup>156</sup>

*Packingham* established some degree of a First Amendment right to access social media.<sup>157</sup> But the Court only held that a *complete ban* on access was unconstitutional, “leaving open the questions of how

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148 See U.S. CONST. amend. I.

149 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))).

150 *Id.*

151 *Id.*

152 *Id.* at 1736.

153 *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)).

154 *Id.* at 1737.

155 See *id.* at 1736.

156 *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 563 (1969)).

157 See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1611 (2018) (highlighting that *Packingham* may serve as a “new basis to argue that [social media] platforms perform quasi-municipal functions”).



robust that access must be or where in the internet pipeline a choke point must lie in order to abridge a First Amendment right.”<sup>158</sup>

Like the North Carolina statute analyzed in *Packingham*, a statute that completely excluded teenagers from accessing social media platforms would likely be constitutionally challenged. The *Packingham* Court found that the statute enacted “a prohibition unprecedented in the scope of First Amendment speech it burdens.”<sup>159</sup> If a statute that banned twenty thousand people in a single state from social media access was considered an unprecedented prohibition,<sup>160</sup> it is not unreasonable to assume that a statute that prohibits over seventy million Americans under the age of eighteen from any type of access to social media would raise significant constitutional issues.<sup>161</sup> Moreover, unlike North Carolina’s substantial government interest in preventing child sex crimes, the government has yet to demonstrate that (1) social media causes serious harms to teenagers<sup>162</sup> and (2) the government has a substantial interest in preventing those harms. Even if the government possessed a legitimate interest in restricting social media use, a complete ban on teenage access—like a complete ban on tobacco products—would likely burden far more speech than necessary to advance the government’s interest. As noted above, social media can be beneficial to teenagers in certain circumstances<sup>163</sup>—unlike tobacco use—and a complete ban would “bar[] access to what for many are the principal sources for knowing current events . . . speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”<sup>164</sup>

158 *Id.*; see also *Packingham*, 137 S. Ct. at 1737 (“[T]his opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue.”).

159 *Packingham*, 137 S. Ct. at 1737.

160 See *id.* at 1734.

161 See *Population Under 18 Years by Age*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=under%2018&tid=ACSSE2019.K200102> (last visited Feb. 12, 2022) (demonstrating the number of Americans under the age of eighteen as of 2019).

162 See *supra* notes 25–26 and accompanying text; *infra* note 229.

163 See *supra* notes 54–58 and accompanying text; see also *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 Antigone Davis, Glob. Head of Safety, Facebook) [hereinafter *Written Statement of Antigone Davis*] (“Among those teenage girls who said they had felt sadness in the past month, 57% said Instagram made things better, and 34% said Instagram had no impact. 9% said Instagram made it worse.”) (this hearing has not been officially published yet, but both the video recording of the hearing and Ms. Davis’s written statement can be found at <https://www.commerce.senate.gov/2021/9/protecting-kids-online-facebook-instagram-and-mental-health-harms> [https://perma.cc/R44P-655M]).

164 *Packingham*, 137 S. Ct. at 1737.

However, there is well-established precedent that American children are not guaranteed the same level of First Amendment protections as adults. As the Supreme Court held in *Prince v. Massachusetts*, the government's power "to control the conduct of children reaches beyond the scope of its authority over adults."<sup>165</sup> If the government seeks to only restrict social media access for Americans under the age of eighteen, this precedent potentially bolsters the government's interest in restricting social media use for all minors.<sup>166</sup>

In *Ginsberg v. New York*, the Supreme Court held that a New York statute barring the sale of sexually explicit material to minors under the age of seventeen did not violate the First Amendment.<sup>167</sup> While the statute effectively limited minors' access to certain speech, the Court found that there were two prevailing interests that justified the state's power to regulate for "[t]he well-being of its children."<sup>168</sup> First, the Court held that parents have the authority to "direct the rearing of their children" and a restriction on access to obscene material could properly advance the interest of caretakers responsible for a child's well-being.<sup>169</sup> Second, the Court found the government also possesses "an independent interest in the well-being of its youth."<sup>170</sup> This interest allows the government to "'protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men [and women] and citizens.'"<sup>171</sup>

The *Ginsberg* Court determined it only had to analyze whether it was rational for the New York legislature to conclude that banning access to obscene material would prevent the "abuse" of the youth.<sup>172</sup> The Court was incredibly deferential to the New York legislature.<sup>173</sup> In justifying the restriction, the Court reasoned it was not necessary to prove by "scientific fact" that obscene material would impair "the

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165 *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

166 *But see* *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) ("Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise.").

167 390 U.S. 629, 637 (1968).

168 *Id.* at 639.

169 *See id.* ("The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.").

170 *Id.* at 640.

171 *Id.* at 640–41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

172 *See id.* at 641.

173 *See id.* at 641–43.

ethical and moral development” of young people and create a “clear and present danger” to New Yorkers.<sup>174</sup> Furthermore, the Court was untroubled that there were no causative findings that obscene material harmed children.<sup>175</sup> The majority noted that the “growing consensus of commentators is that ‘while these studies all agree that a causal link [between obscene material and harm to children] has not been demonstrated, they are equally agreed that a causal link has not been disproved either.’”<sup>176</sup> Instead, the Court noted that—unlike the content in *Meyer v. Nebraska*<sup>177</sup>—exposing minors to “sex material” could reasonably be found to be harmful.<sup>178</sup>

While *Ginsberg* may provide the government with more leeway to inhibit minors’ access to social media, that leeway may be significantly restrained by marked differences between the New York statute in *Ginsberg* and a federal statute barring access to social media. First, the *Ginsberg* Court analyzed a law that addressed obscene material—a category of content that is not protectable under the First Amendment.<sup>179</sup> A regulation barring minors’ access to social media—like the complete restriction on tobacco purchases—would also limit a minor’s access to content that is reasonably not obscene.<sup>180</sup> Moreover, the New York law *Ginsberg* analyzed only prohibited obscene material that was “utterly without redeeming social importance for minors.”<sup>181</sup> While there is obscene material on social media,<sup>182</sup> a complete restriction would also prohibit minors from accessing content that arguably has tremendous “redeeming social importance.” For instance, banning all minors from social media would prevent them from conveniently interacting with the content from social advocates like Greta Thunberg<sup>183</sup> or Malala

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174 *Id.* at 641 (quoting N.Y. PENAL LAW § 484-e (McKinney 1965)).

175 *See id.* at 641–43.

176 *Id.* at 642 (quoting C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 52.)

177 262 U.S. 390, 400 (1923) (holding that children’s exposure to the German language “cannot reasonably be regarded as harmful”).

178 *Ginsberg*, 390 U.S. at 641.

179 *See id.*; *Miller v. California*, 413 U.S. 15, 23 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”).

180 For an example of content that is reasonably not obscene, see Geordi La Corgi & Scotty (@lacorgi), INSTAGRAM, <https://www.instagram.com/lacorgi/> [<https://perma.cc/87DJ-CAJ5>] (featuring hundreds of photos of cute Corgis).

181 *Ginsberg*, 390 U.S. at 646.

182 *See supra* notes 49–51 and accompanying text.

183 *See* Greta Thunberg (@gretathunberg), INSTAGRAM, <https://www.instagram.com/gretathunberg/> [<https://perma.cc/MG9W-9CQ4>] (documenting the advocacy efforts of a teenage climate activist).

Yousafzai.<sup>184</sup> The *Ginsberg* Court also recognized that prohibiting sales of sexually explicit material to minors did not ban parents from purchasing the material for their children and giving it to them.<sup>185</sup> If Congress enacted a complete access restriction to social media for minors and did not allow parents to give their children access, that would be a marked difference from the New York statute and could be viewed unfavorably by the courts.<sup>186</sup>

Furthermore, requiring a robust age verification mechanism on social media sites could impact American adults' access to social media. If every adult must input a government ID to verify their age, it could restrict many citizens who, for whatever reason, do not have proper identification for accessing social media sites.<sup>187</sup> Moreover, VPNs allow minors to access social media platforms from other countries, therefore social media companies would likely have to verify *every* user in *every* country in order to restrict American minors' access. This could have a significant, negative impact on marginalized populations around the globe.<sup>188</sup> In *Butler v. Michigan*, a case decided over a decade before *Ginsberg*, the Court struck down a Michigan statute that limited adult access to constitutionally protected material.<sup>189</sup> The Court held that by limiting adults' access to constitutionally protected speech, the law went too far in its efforts to protect children.<sup>190</sup> As the *Butler* Court said, "[s]urely, this is to burn the house to roast the pig."<sup>191</sup> Requiring *every* user to verify their age on social media is akin to burning down the house to roast

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184 See Malala (@malala), INSTAGRAM, <https://www.instagram.com/malala/> [<https://perma.cc/8HE5-YVJ5>] (documenting the advocacy efforts of a girls' education advocate).

185 *Ginsberg*, 390 U.S. at 639.

186 See *Reno v. ACLU*, 521 U.S. 844, 865 (1997) (finding that the Communications Decency Act differed from the New York statute analyzed in *Ginsberg* in numerous ways, one being that it impacted the communications and conduct between parents and their children).

187 This could disproportionately harm minorities in America. See BRENNAN CTR. FOR JUST., *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3* (2006) (finding that 25% of voting-age African American citizens did not possess a government-issued ID compared to 8% of white voting-age citizens).

188 See Diwanji, *supra* note 136 ("ID collection isn't a fair or equitable solution, nor is it foolproof. Access to government IDs varies depending on where you live in the world, as does the information contained in an ID such as a birthday."); Vjayanti T. Desai, Anna Diofasi & Jing Lu, *The Global Identification Challenge: Who Are the 1 Billion People Without Proof of Identity?*, WORLD BANK: VOICES (Apr. 25, 2018), <https://blogs.worldbank.org/voices/global-identification-challenge-who-are-1-billion-people-without-proof-identity> [<https://perma.cc/4X23-EW3K>] (highlighting studies conducted by the World Bank that find that an estimated one billion people do not have any type of identification).

189 See 352 U.S. 380, 382–84 (1957).

190 See *id.* at 383–84.

191 *Id.* at 383.

the pig, especially given that the government has yet to establish that social media use poses a significant threat to teenager well-being.<sup>192</sup> The holding in *Butler*—coupled with *Packingham*'s recognition of some degree of a First Amendment right to access social media—could create significant legal issues for a regulatory scheme because it would likely require social media companies to verify *all* users, regardless of their age.

### B. Mandated Warning Labels on Social Media Products

One of the most visible results of the tobacco regulatory scheme is the proliferation of warning labels on tobacco products and advertisements. From a technical perspective, it is possible to place warning labels on a social media platform. Social media companies could code their products to present a required warning label before the user begins consuming content or even in while viewing content.<sup>193</sup> In October 2021, Douyin, the Chinese version of TikTok, began inserting mandatory pauses in users' video feeds.<sup>194</sup> During the pause, video messages appear “which remind users to ‘put down the phone’, ‘go to bed’ or [that they have] ‘work tomorrow.’”<sup>195</sup> The videos last for five seconds and cannot be skipped.<sup>196</sup> Moreover, unlike tobacco warning labels that are printed on packaging and released into the stream of commerce, social media warning labels could be dynamic and leverage the data social media companies collect in order to target users with an applicable and impactful warning message.<sup>197</sup> Social media companies tout how their products

192 See *supra* notes 25–26 and accompanying text; *infra* note 232.

193 Social media companies could treat a mandatory warning like an advertisement and insert the warning into a user's feed in a similar manner as an advertisement.

194 See Tracy Qu, *TikTok's China Sibling Douyin Launches Mandatory Five-Second Pauses in Video Feed to Curb User Addiction*, S. CHINA MORNING POST (Oct. 22, 2021), <https://www.scmp.com/tech/policy/article/3153292/tiktoks-china-sibling-douyin-launches-mandatory-five-second-pauses> [<https://perma.cc/B6SZ-ZSMJ>].

195 *Id.*

196 See *id.*

197 See Leslie K. John, Tami Kim & Kate Barasz, *Ads That Don't Overstep*, HARV. BUS. REV., Jan.–Feb. 2018, at 62, 62–64, (“Research has shown that digital targeting meaningfully improves the response to advertisements and that ad performance declines when marketers' access to consumer data is reduced.”); see also Written Statement of Antigone Davis, *supra* note 163, at 2–3 (explaining how Facebook and Instagram can tailor content based on the age of the user); Written Statement of Michael Beckerman, *supra* note 138, at 2 (explaining how TikTok can automatically direct users who search suicide on the app to specific resources to support them). See generally *Small Business: Advertise*, META, <https://www.facebook.com/business/small-business/advertise> [<https://perma.cc/44LA-2NU3>] (highlighting how Facebook can collect data on users in order to deliver impactful messaging and advertising).

give advertisers robust analytics regarding the effectiveness of their ad purchases.<sup>198</sup> Similarly, social media companies would be able to track the deterrent effect of warning labels rather quickly, compared to complex longitudinal studies of tobacco warning labels which can lead to spurious results.<sup>199</sup>

While technologically possible, requiring warning labels on social media products will be legally onerous. Two tobacco-related cases highlight the difficulty regulators will face if they attempt to enforce a mandatory disclosure regime for social media companies. After the passage of the TCA, tobacco companies asserted that the Act's provision requiring persuasive graphics about the dangers of smoking on cigarette packaging was a violation of their First Amendment rights. The two cases, *Discount Tobacco City & Lottery, Inc. v. United States*<sup>200</sup> and *R.J. Reynolds Tobacco Co. v. FDA*,<sup>201</sup> led to a circuit split over which commercial speech test should apply—ultimately leading one circuit to hold that the provision was legal and the other to hold the provision was unconstitutional.

In *Discount Tobacco City & Lottery, Inc. v. United States*, the Sixth Circuit Court of Appeals determined that the Supreme Court's test articulated in *Zauderer v. Office of Disciplinary Counsel*<sup>202</sup> was applicable to the mandated graphics on cigarette packaging.<sup>203</sup> Under *Zauderer*,

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198 See TIKTOK FOR BUS., <https://www.business-tiktok.com/retargetvisitor/> [<https://perma.cc/U9AC-4YVH>] (“TikTok Ads Manager offers you an unmissable opportunity to engage with your target audience while running [Return On Investment] focussed [sic] campaigns.”); *View Results on Your Facebook Ad in Ads Manager*, META, <https://www.facebook.com/business/tools/ads-manager> [<https://perma.cc/98XH-NF9Y>] (select “Learn more” under “Get real-time insights”) (highlighting all the performance metrics that Facebook and Instagram can measure, including how an advertisement performs based on a user's age and gender).

199 See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 716–19 (2012) (highlighting numerous studies of the effectiveness of warning labels on deterring youth tobacco consumption); see also *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1219 (D.C. Cir. 2012), *overruled in part by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (disparaging Canadian and Australian studies on the effectiveness of graphic warnings on tobacco packaging by finding that these studies only demonstrated that they could be correlative rather than causative). The results from digital social media studies could also be spurious but with the ability to track behavior in real time on social media platforms, researchers could gain a better understanding into how delivered warnings impact a user in the immediate moments after exposure and whether repeated exposure leads to less usage of their accounts.

200 674 F.3d 509 (6th Cir. 2012).

201 696 F.3d 1205.

202 See 471 U.S. 626 (1985).

203 *Discount Tobacco*, 674 F.3d at 561. The court emphasized that it did not analyze the actual content of the graphics chosen by the FDA; instead it analyzed whether any type of required disclosure in the form of graphics could be legal. See *id.* at 558–59.

in order for a required disclosure to be constitutional it must concern “purely factual and uncontroversial information” and the disclosure requirements must be “reasonably related to the State’s interest in preventing deception of consumers.”<sup>204</sup> First, the *Discount Tobacco* court determined that graphic warnings about the harms of tobacco use could “clearly be a factual and accurate disclosure.”<sup>205</sup> Next, the court addressed the second step required under *Zauderer*: whether “graphic and textual warnings that convey factual information about the health risks of tobacco use are reasonably related to the purpose of preventing consumer deception.”<sup>206</sup> In finding that the graphic warnings were reasonably related, the *Discount Tobacco* court highlighted the “decades-long” campaign by tobacco companies to deceive users about the risks of tobacco use.<sup>207</sup> The majority also pointed to studies that showed traditional warning labels were no longer as effective in warning users about the dangers of smoking.<sup>208</sup> Moreover, the court pointed to studies in other countries which had adopted graphic warnings and found “substantial evidence to support the conclusion that larger warnings incorporating graphics would promote greater public understanding of the health risks of using tobacco.”<sup>209</sup>

Just four months after the Sixth Circuit upheld the TCA’s required disclosures, the D.C. Circuit struck down the disclosures on First Amendment grounds in *R.J. Reynolds Tobacco Co. v. FDA*.<sup>210</sup> Unlike the Sixth Circuit, the *R.J. Reynolds* court determined that the *Zauderer* test was not applicable because the graphic warnings did not “constitute the type of ‘purely factual and uncontroversial’ information . . . to which the *Zauderer* standard may be applied.”<sup>211</sup> Instead, the court found that the graphics did not convey “any warning information” and were “unabashed attempts to evoke emotion . . . and browbeat [tobacco] consumers into quitting.”<sup>212</sup> Therefore, the D.C. Circuit opted to analyze the required disclosures under the more stringent *Central Hudson* test.<sup>213</sup>

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204 *Zauderer*, 471 U.S. at 651.

205 *Discount Tobacco*, 674 F.3d at 559.

206 *See id.* at 562.

207 *Id.*

208 *See id.* at 563. The court noted that the warning label text had not been updated since 1984 and the warnings are “easily overlooked.” *Id.*

209 *Id.* at 566.

210 *See* 696 F.3d 1205, 1222 (D.C. Cir. 2012).

211 *Id.* at 1216 (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)); *see also id.* (“The disclosures approved in *Zauderer* . . . were clear statements that were both indisputably accurate and not subject to misinterpretation by consumers.”).

212 *Id.* at 1216–17.

213 *See id.* at 1217.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court articulated a four-part test to determine whether certain commercial speech is protected from government interference by the First Amendment.<sup>214</sup> First, the commercial speech must concern lawful activity and not be misleading.<sup>215</sup> Second, the government's interest in regulating the commercial speech must be substantial.<sup>216</sup> If both elements are satisfied, courts must determine "whether the regulation directly advances the governmental interest asserted."<sup>217</sup> Finally, the regulation cannot be "more extensive than is necessary to serve that interest."<sup>218</sup>

Under a *Central Hudson* analysis, the D.C. Circuit found that the FDA's regulations could be assumed to be substantial.<sup>219</sup> However, the *R.J. Reynolds* court found that the FDA failed to demonstrate that the graphic warning requirements would "directly advance the asserted interest."<sup>220</sup> The majority noted that it was the government's burden to justify a restriction on commercial speech.<sup>221</sup> The court found, however, that the FDA did not provide a "shred of evidence" that graphic warnings would "directly advance' its interest in reducing the number of Americans who smoke."<sup>222</sup> Moreover, the FDA did not show that graphic warnings "have *directly caused* a material decrease in smoking rates,"<sup>223</sup> and the court criticized the FDA's reliance on Canadian and Australian studies that did not demonstrate that graphic warnings "*actually* led to a reduction in smoking rates."<sup>224</sup> Following the D.C. Circuit's decision, the FDA delayed the implementation of the mandated graphics and conducted new studies.<sup>225</sup> New graphics have yet to be implemented.<sup>226</sup>

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214 447 U.S. 557, 566 (1980).

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *See* *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1218 (D.C. Cir. 2012).

220 *See id.* at 1219.

221 *See id.* at 1218.

222 *Id.* at 1219.

223 *Id.*

224 *See id.*

225 *See* Gregory Curfman, *Graphic Cigarette Warning Labels, the First Amendment, and Public Right to Accurate Public Health Information: Graphic Cigarette Warning Labels Back Under Legal Scrutiny*, JAMA HEALTH F., Sept. 2021, at 1, 4 ("[I]n response to the opinion of the DC Circuit, the FDA has undertaken further extensive studies to create, in collaboration with a professional medical illustrator, 13 new graphic warning labels.").

226 *See* Order at 1, *R.J. Reynolds Tobacco Co. v. FDA*, No. 20-cv-00176 (E.D. Tex. Nov. 12, 2021), ECF No. 93 (delaying the implementation of new graphics until January 9, 2023).



Mandatory warnings disclosing the harms of teenage social media use would likely fail both the *Zauderer* test and the *Central Hudson* test. First, under *Zauderer*, the government would have to demonstrate that the required warning disclosure contained “purely factual and uncontroversial information.”<sup>227</sup> Unlike research on tobacco use,<sup>228</sup> there is a dearth of factual findings that social media use *causes* harm.<sup>229</sup> Studies have only demonstrated a correlative relationship between adolescent social media use and its harmful effects.<sup>230</sup> In contrast, it is unequivocal that tobacco use is harmful, and that finding is supported by decades of research.<sup>231</sup> Not only is it not “purely factual” that adolescent social media use causes harms, it is not “uncontroversial.”<sup>232</sup> In response to a comparison between the Big Tobacco and social media companies, Andy Stone, a Facebook spokesperson, called the comparison “absurd” and argued that “[s]ocial media helps people connect and small businesses thrive. Instead of making false equivalencies, the focus should be on updated regulation to address privacy, data portability, content standards and elections.”<sup>233</sup> Therefore, a hypothetical disclosure that appeared on a teenager’s social media feed that read “WARNING: SOCIAL MEDIA USE IS HARMFUL TO YOUR HEALTH” would not be purely factual nor uncontroversial pending research that firmly established causation.

Moreover, required disclosure must be “reasonably related to the State’s interest in preventing deception of consumers.”<sup>234</sup> The *Discount Tobacco* court held that the required disclosure “has to advance the purpose only slightly.”<sup>235</sup> However, in *Discount Tobacco*, the required graphics’ purpose was “to prevent consumers from being misled about the health risks of using tobacco.”<sup>236</sup> Without

227 *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

228 *See supra* notes 81–85 and accompanying text.

229 *See* Amy Orben & Andrew K. Przybylski, *Screens, Teens, and Psychological Well-Being: Evidence from Three Time-Use-Diary Studies*, 30 *PSYCH. SCI.* 682, 682 (2019) (“There is little clear-cut evidence that screen time decreases adolescent well-being.”).

230 *See id.*; *supra* notes 25–26 and accompanying text.

231 *See* SURGEON GENERAL’S REPORT, *supra* note 81. *See generally* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 199, at 13–111.

232 *See* Orben & Przybylski, *supra* note 229, at 682 (arguing that studies that have demonstrated screen-time decreases adolescent well-being “are based on single-country, exploratory studies that rely on inaccurate but popular self-report measures”).

233 Cecilia Kang, *Lawmakers See Path to Rein in Tech, but It Isn’t Smooth*, *N.Y. TIMES* (Oct. 12, 2021), <https://www.nytimes.com/2021/10/09/technology/facebook-big-tobacco-regulation.html> [<https://perma.cc/85BH-UQKJ>].

234 *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

235 *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 557 (6th Cir. 2012).

236 *Id.* at 561.

findings that social media use causes significant harms to teenagers, the government does not have an interest in preventing users from being misled because there is not enough evidence that they are actually being misled.<sup>237</sup>

As of now, a mandated social media disclosure would not contain purely factual and uncontroversial information. Therefore, the required speech would likely be subject to a *Central Hudson* analysis.<sup>238</sup> The social media mandate would likely fail immediately. Whereas in *R.J. Reynolds* the court could assume that the government had a substantial interest in regulating speech, given the harms of tobacco and the stated purposes of the TCA, such a substantial interest does not exist yet for regulating social media.<sup>239</sup> As the *R.J. Reynolds* court asserted, “[t]he government bears the burden of justifying its attempt to restrict commercial speech and its burden is not light.”<sup>240</sup> Under a *Central Hudson* analysis, the court cannot “supplant the precise interests put forward by the State with other suppositions.”<sup>241</sup> Therefore, the government must demonstrate that it has a substantial interest in regulating teenage social media use in order to compel social media companies to place a warning on their products. Moreover, like the TCA empowered the FDA to create the actual content of the required disclosures,<sup>242</sup> it is likely that the content and method of delivery of a mandatory disclosure on social media would be delegated to a federal agency. If a federal agency were to establish the required disclosures, that would trigger 5 U.S.C.

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237 Other circuits have found that the purpose of the disclosure does not need to be solely about preventing consumer deception. The Second Circuit, in addressing whether a mandatory warning that lamps containing mercury must be labeled as such, held that a disclosure does not need to prevent customer deception per se. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107, 115 (2d Cir. 2001). The court found that the purpose of the mandate was to reduce the amount of mercury in the environment and that the disclosure was “inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products.” *Id.* at 115. Therefore, the “reasonable relationship [was] plain.” *Id.* In that case, however, it was factual that certain lamps contained mercury. *See id.* at 107. Even if a mandated social media warning was “inextricably intertwined with the goal of increasing consumer awareness,” without establishing that there were harms that needed to be mitigated, and that consumers needed to be aware of those harms, there is no reasonable relationship between the state’s interest and a mandated disclosure.

238 *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (discussing why compelled speech that is not purely factual and uncontroversial cannot be analyzed under *Zauderer* and why a *Central Hudson* analysis is appropriate).

239 *See id.* at 1218 (highlighting the demonstrated and evidence-backed purposes of the TCA and FDA graphic regulations).

240 *Id.* at 1218 (citation omitted) (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

241 *Edenfield*, 507 U.S. at 768.

242 *See supra* note 130 and accompanying text.

§ 706 on judicial review of the agency's actions.<sup>243</sup> Whatever agency is tasked with crafting social media warnings would have to prove that the agency's action was "supported by substantial evidence."<sup>244</sup> Again, without substantial evidence that social media use causes harms, the government will fail to show that there is a compelling government interest in regulating social media through compelled speech.

Moreover, even if there was found to be a compelling government interest in regulating social media, the government would need to prove that the mandated warning "directly advances the governmental interest asserted."<sup>245</sup> The Supreme Court has held that the *Central Hudson* test places a heavy burden on the government to prove *both* its substantial interest *and* that its regulation is an effective way to address that interest:

[T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech *must demonstrate that the harms it recites are real* and that its restriction will in fact alleviate them to a material degree."<sup>246</sup>

Once again, the government does not possess the evidence it needs in order to justify that the "harms it recites are real" and that social media warnings will "alleviate them to a material degree."

For the foregoing reasons, a social media regulatory scheme will likely not overcome constitutional hurdles until the government can establish that it has a substantial government interest. Without this substantial government interest, attempts to restrict American adolescents' access to social media and/or mandating warning disclosures regarding the harms of social media use will likely be successfully challenged by social media companies who have a vested interest in attracting young users and keeping them as engaged as possible.<sup>247</sup>

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243 See 5 U.S.C. § 706 (2018) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

244 See *id.* § 706(2)(E) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . .").

245 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

246 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (emphasis added) (citation omitted) (quoting *Edenfield*, 507 U.S. at 767, 770–771).

247 See *supra* notes 68–72 and accompanying text.

#### IV. WHERE DO LAWMAKERS GO FROM HERE?

With the above-mentioned regulatory provisions likely to be challenged, where do regulators go from here? It is evident from the discussion above that the federal government likely does not have enough data or causative findings to demonstrate that social media use is harmful to teenagers.<sup>248</sup> While there are plenty of correlative studies and anecdotal accounts of the harms that social media poses, there has yet to be a landmark report like the 1964 Surgeon General's *Smoking & Health* report.<sup>249</sup> That report definitively catalyzed the beginning of the tobacco regulatory scheme.<sup>250</sup> Similarly, regulators should pursue a comprehensive report regarding social media products.

Frances Haugen, during her congressional testimony, lamented the lack of insight that the government has into the operations and data compiled by social media companies.<sup>251</sup> Unlike tobacco products that can be independently tested, Ms. Haugen argued that it is currently impossible to verify the claims companies like Facebook make about their products. She said:

When the tobacco companies claimed that filtered cigarettes were safer for consumers, it was possible for scientists to independently invalidate that marketing message and confirm that in fact they posed a greater threat to human health. But today we can't make this kind of independent assessment of Facebook. We have to just trust what Facebook says is true—and they have repeatedly proved that they do not deserve our blind faith.<sup>252</sup>

If the federal government is interested in pursuing a more robust social media regulatory scheme, it should start with aggressive research. The TCA provides a blueprint for mandating information from private companies regarding the effects their products have on users. In order to keep Congress informed, tobacco companies must provide the federal government with “[a]ny or all documents . . .

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248 See Laurence Steinberg, Opinion, *Does Instagram Harm Girls? No One Actually Knows*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/10/opinion/instagram-facebook-mental-health-study.html> [<https://perma.cc/KEY6-39UW>] (“[The] correlation between Instagram use and self-reported psychological distress is concerning. But such a finding should be used as a starting point for research, not as a conclusion. Psychological research has repeatedly shown that we often don’t understand ourselves as well as we think we do.”).

249 See SURGEON GENERAL’S REPORT, *supra* note 81.

250 See BRANDT, *supra* note 79, at 242–43 (highlighting the lack of tobacco regulation before the 1964 Surgeon General’s report and noting that the first regulations appeared because of the report).

251 See Written Statement of Frances Haugen, *supra* note 7, at 3.

252 *Id.* (footnote omitted).

relating to research activities, and research findings, conducted, supported, or possessed by the manufacturer . . . on the health, toxicological, behavioral, or physiologic effects of tobacco products.”<sup>253</sup> Tobacco manufacturers are now also required to register annually with the FDA.<sup>254</sup> Additionally, tobacco companies must maintain records and “provide such information, as the Secretary [of Health and Human Services] may by regulation reasonably require to . . . protect public health.”<sup>255</sup> Generally speaking, a social media regulatory scheme could start with similar requirements. By gaining access to the plethora of data that social media companies possess, the government will have the verifiable information needed to test the hypothesis that social media use endangers teenagers’ health. Moreover, the information may prove that there are only negligible harms to teenagers and, therefore, a regulatory scheme is not necessary.

Recently, the Surgeon General issued an advisory regarding social media platforms’ amplification of vaccine and COVID-19 misinformation.<sup>256</sup> In the advisory he called on social media platforms to “[g]ive researchers access to useful data to properly analyze the spread and impact of misinformation.”<sup>257</sup> While the Surgeon General was only focused on a single harmful effect of social media, the advisory signals that the Surgeon General may be treating social media as a harmful product that must be studied in order to protect the public’s health. Lawmakers could explicitly empower the Surgeon General with the authority to pursue further research on the harmful effects of social media.<sup>258</sup> Furthermore, empowering the Surgeon General would put social media companies on notice and may lead to companies pursuing a more effective self-regulatory scheme to stave off federal regulations.

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253 See 21 U.S.C. § 387d(b)(1) (2018).

254 See *id.* § 387c(b).

255 See *id.* § 387i(a).

256 See U.S. SURGEON GEN., CONFRONTING HEALTH MISINFORMATION: THE U.S. SURGEON GENERAL’S ADVISORY ON BUILDING A HEALTHY INFORMATION ENVIRONMENT (2021).

257 *Id.* at 12.

258 Another interesting approach would be to leverage the information privacy regulatory regime in order to effectuate more protections for teenage social media users. By increasing the minimum age under COPPA, social media companies would likely have to be more diligent about how it protects its teenage users. A Senate bill introduced in 2019 proposed increasing the minimum age to sixteen. See S. 748, 116th Cong. § 3(a)(19) (2019). While beyond the scope of this Note, a later version of this work may investigate the effectiveness of this approach.

## CONCLUSION

Lawmakers, pundits, and tech executives' assertions that social media should be regulated like tobacco is oversimplistic and disregards the inherent difference between regulating a physical product that has no constitutional protection and a virtual product that can implicate First Amendment rights. While the "Facebook Files" have sparked critiques and Senate hearings, there has yet to be strong, causal evidence that social media is so harmful that the government need intervene to protect adolescent Americans. Nevertheless, these social media companies—and the potential harms of their products—deserve further scrutiny and research. Lawmakers must remember that the tobacco regulatory scheme evolved over decades—and is *still* being constitutionally challenged. Creating a robust statutory scheme to regulate a multibillion-dollar industry takes time, patience, and diligence.

In a quiet moment of reflection during his recent comedy special for Netflix, Bo Burnham, a comedian and social critic, reflected on our collective embrace of social media companies over the past decade.<sup>259</sup> He said, "maybe allowing giant digital media corporations to exploit the neurochemical drama of our children . . . maybe that was a bad call by us."<sup>260</sup> Something similar could have been said about cigarettes and children's lungs in the 1950s. Fortunately, unlike the tobacco regulatory scheme, lawmakers are not waiting decades to act.

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259 See BO BURNHAM: INSIDE (Netflix 2021).

260 *Id.*