



MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: October 16, 2023

RE: OPPOSITION TO SB 22 P.N. 1099 (HUGHES)

Bill summary: [SB 22](#) (PN 1099) would amend [Title 50](#) (Mental Health) to restrict access to social media by minors (under 16 years old) in the following ways:

1. Prohibits social media companies from “intentionally, knowingly, recklessly or negligently cause or encourage a minor to access content which the social media companies know or should have known subjects one or more minors to harm that is detrimental to the physical health, mental health or the wellbeing of a minor or that creates a reasonable likelihood of bodily injury or death to the minor.” This includes actual damages and punitive damages. A social media company can defend itself by showing it made a good faith effort to protect the minor from harm.
2. Requires the express consent of parents for minors to create social media accounts. The Office of the Attorney General will post consent forms online for parents to submit. The OAG will then send the completed forms to each social media platform. Parents can later revoke this consent, which requires that the account be suspended, disabled, or deleted.
3. Grants parents access to the privacy settings of their children’s social media accounts and to set limits on their account.
4. If social media companies fail to follow the consent requirements, the bill allows companies to be sued by the Attorney General with statutory damages and a potential injunction for repeated violations.
5. Prohibits social media companies from using the minor’s data for any for-profit purpose, including selling it, mining it, or using it for targeted advertising. This also includes an action permitting statutory damages and an injunction.
6. Requires social media platforms to create procedures to remove a minor’s data and delete it at the request of the minor or parent. This includes an action permitting statutory damages that accrue each day the social media platform does not comply.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 22.

SB 22 would threaten the First Amendment rights of young people.

Some parental consent requirements already exist in current law. COPPA ([Children's Online Privacy Protection Rule](#)) protects the privacy of people under 13 by [requiring parental consent](#) before certain private information is collected about them. COPPA’s concern, however, is with privacy and the exploitation of children’s data. Under recently proposed parental verification legislation like SB 22, the government’s interest is in protecting children from viewing harmful content—but 99.9% of that content is likely legal speech, and therefore these laws affect First Amendment rights.

The Supreme Court has repeatedly recognized that states and Congress cannot use concerns about children to ban them from expressing themselves or accessing information. Most recently in [Brown v. EMA](#), the Court ruled that while the State might have “the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their

children are forbidden to attend, . . . it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent" (564 U.S. 786, 795 n.3). In other words, although states and Congress can give parents tools to help, **the state cannot substitute itself for parents and prohibit all minors from engaging in First Amendment activity.**

SB 22 will likely have dire consequences for young people, especially vulnerable youth.

While SB 22's intent to prevent harassment, exploitation, and mental health trauma for minors is laudable, this bill will likely result in dire, even if unintended, consequences for young people.

SB 22 would prohibit social media companies/platforms from causing harm to minors, which effectively would require them to employ broad filters to limit minors' access to certain online content. Content filtering is notoriously imprecise; [filtering used by schools](#) and [libraries](#) in response to the [Children's Internet Protection Act](#) has curtailed access to critical information such as sex education or [resources for LGBTQ+ youth](#). Online services would face substantial pressure to over-moderate, including from Attorneys General—on both sides of the aisle—seeking to score political points. At a time when books with LGBTQ+ themes are being [banned from school libraries](#) and people providing healthcare to trans children are being falsely accused of "[grooming](#)," SB 22 would cut off vital access to information for vulnerable youth.

SB 22 would define causing "harm" to minors in broad, subjective, and unenforceable ways.

SB 22 includes extremely problematic and vague criteria to hold social media companies and/or platforms liable for damages. Specifically, SB 22 would prohibit a social media company or a social media platform from "intentionally, knowingly, recklessly or negligently cause or encourage a minor to access content which the social media companies know or should have known subjects one or more minors to harm that is detrimental to the physical health, mental health or the wellbeing of a minor or that creates a reasonable likelihood of bodily injury or death to the minor."

- Who decides what constitutes risk of harm? Some might say anything involving LGBT people causes harm to their children; history lessons about slavery could harm a child's wellbeing; or content involving hunting with a firearm might adversely affect a child's mental health. **The standard is so vague and subjective that it is incapable of objective enforcement, leading to overbroad censorship that would likely violate the First Amendment to the U.S. Constitution.**
- Moreover, how can this kind of harm be anticipated or predicted? Harm will certainly differ from person to person and could include an endless range of content. This provision is also incapable of reasoned and objective enforcement.

SB 22 begs important monitoring, implementation, and enforcement questions.

Under Section 1132 (Prohibitions) in SB 22, it is unclear how the mining or sale of data will be monitored or how these provisions will be enforced. SB 22 includes exemptions for its data mining restrictions, including the use of age and location data "for purposes of personalized recommendations related to age-appropriate content" and data "necessary to protect minors from viewing harmful content." How are social media companies making these distinctions, and who at the companies are making these decisions?

Additionally, SB 22 would allow social media companies to use data for personalized recommendations **only** if the minor opts in (recommended content based on what friends are sharing, content based on timeliness or recency, content based on the quality or veracity of linked content, etc.). SB 22 suggests that social media companies "may provide a prominent, accessible and responsive tool for a user who is a minor to opt in to the use of search and watch history for use in personalized recommendation systems," but this, of course, assumes that each social media company has the ability to parse its users in this manner, and that each

company has the capacity to overhaul the entirety of its data functionality to comply with a Pennsylvania-specific requirement.

Finally, it is not clear whether, how, or to what extent social media companies can be regulated at the state level. SB 22 joins [similar efforts](#) in states like [Arkansas](#), [Ohio](#), [Connecticut](#), [Texas](#), [New Jersey](#), [Louisiana](#), and most recently, [Utah](#), that have introduced bills requiring social media companies to adhere to a wide variety of restrictions, content moderation, and other limitations, all with their own penalties. In fact, SB 22 would require each social media company to “post in a conspicuous place on each of their social media platforms notice that express consent by the minor’s parent or legal guardian shall be required prior to opening an account. Any electronic consent included in a social media platform must include the same information as required by the form developed by the Attorney General’s office under subsection (b).” Expecting all social media companies to include Pennsylvania-required information on their consent forms is unrealistic. And creating a 50-state patchwork of regulations is an unworkable, if legally sustainable, solution.

Rather than age-gating privacy settings and safety tools to apply only to minors, legislators should instead focus on ensuring that all users, regardless of age, benefit from strong privacy protections by [passing comprehensive privacy legislation](#).

For these reasons, we urge you to oppose Senate Bill 22.