

The Children Are Not for Sale: Stamping Out the Monetized Sharenting Entertainment Industry and Rehabilitating Parental Rights

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INTRODUCTION

Saving the children is once again on the sociopolitical docket, and the legislature has an opportunity to enact legislation that might actually save children.¹ A pertinent child welfare concern shared by psychologists, child advocates, and the Federal Government today is an increasing youth mental health crisis and overwhelming evidence that social media use is a primary cause. Meta has even joined the cause,² launching a public relations campaign voicing its openness to congressional reform.³ Additionally, the bipartisan “Kids Online Safety Act” is pending in both the Senate and House of Representatives as parallel bills Senate Bill 1409 and House Bill 7891, respectively.⁴ This is a bipartisan effort to pass evidence-based regulation aimed at protecting children by

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1. *Two U.S. Senators Set to Introduce ‘Kids Online Safety Act’*, REUTERS (Feb. 16, 2022), <https://www.reuters.com/world/us/two-us-senators-set-introduce-kids-online-safety-act-2022-02-16/> [<https://web.archive.org/web/20240917213625/https://www.reuters.com/world/us/two-us-senators-set-introduce-kids-online-safety-act-2022-02-16/>].

2. Meta is one of the largest social media companies in the world, owning Facebook, Instagram, and WhatsApp.

3. Antigone Davis, *Parenting in a Digital World Is Hard. Congress Can Make It Easier*, META (Nov. 15, 2023), <https://about.fb.com/news/2023/11/online-teen-safety-legislation-is-needed/> [<https://perma.cc/KK2M-4ZVJ>] [<https://web.archive.org/web/20240917214534/https://about.fb.com/news/2023/11/online-teen-safety-legislation-is-needed/>].

4. *See* S. 1409, 118th Cong. (2023–24); H.R. 7891, 118th Cong. (2023–24).

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supporting parental rights.⁵ Despite this progress, there is one extremely big gap in this piece of legislation that runs the risk of undermining it entirely: a generational gap.

Children who were raised on the internet are now parenting on the internet. When a parent posts pictures, videos, or publicly discusses their child in detail online, this is called “sharenting.”⁶ In practice, sharenting can refer to a range of content. Some forms include high levels of child participation, such as scripted skits with their parents.⁷ Others involve passive participation, such as parents incorporating filming into their daily routines.⁸ Online posts divulging stories with identifiable information or repurposing of already existing photos of the child is a common form of sharenting.⁹ Scholars in law and psychology problematize excessive sharenting for contributing to harm already associated with general childhood internet use: reputational harm, privacy risks, vulnerability to harassment and cyberbullying, or simply amplified general embarrassment.¹⁰ Although those sound like harms a parent would intuitively avoid, the unregulated rollout of the internet is likely to blame for the public’s unhealthy relationship with it.

As technology rapidly developed over the past several decades, the social role of the internet has been a loose cannon. Sociological shifts in internet use impacted different age demographics at different developmental moments. For example, the Millennial generation ranges from people born in roughly 1981 through 1996, and Generation Z

5. See Press Release, Todd Young, U.S. Senator for Indiana, Young, Colleagues Introduce Bipartisan Kids Online Safety Act (May 4, 2023), <https://www.young.senate.gov/newsroom/press-releases/young-colleagues-introduce-bipartisan-kids-online-safety-act/> [https://perma.cc/K658-WZM2] [https://web.archive.org/web/20241122221508/https://www.young.senate.gov/newsroom/press-releases/young-colleagues-introduce-bipartisan-kids-online-safety-act/].

6. *Sharent*, DICTIONARY.COM, <https://www.dictionary.com/browse/sharent> [https://perma.cc/SBD8-FGZK] [https://web.archive.org/web/20240917221044/https://www.dictionary.com/browse/sharent] (last visited Sept. 25, 2024); *Sharenting* (*n.*), OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/sharenting_n?tl=true, [https://perma.cc/UB8K-Z9TH] [https://web.archive.org/web/20241111204056/https://www.oed.com/dictionary/sharenting_n?tl=true] (last visited Oct. 10, 2024).

7. Referred herein as “family vlog[ging]”.

8. This is also a form of family vlogging.

9. See, e.g., Christie Tate, *My Daughter Asked Me To Stop Writing About Motherhood. Here’s Why I Can’t Do That*, WASH. POST (Jan. 3, 2019), <https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that/> [https://web.archive.org/web/20240918004428/https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that/].

10. See, e.g., Amanda G. Riggio, *The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493 (2021); Jessica Pacht-Friedman, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 361 (2022); Melanie N. Fineman, *Honey, I Monetized the Kids: Commercial Sharenting and Protecting the Rights of Consumers and the Internet’s Child Stars*, 111 GEO. L.J. 847 (2023); Neyza Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD & FAM. L.J. 85 (2020); Charlotte Yates, “Kidfluencing”: *Protecting Children by Limiting the Right To Profit From “Sharenting”*, 25 VAND. J. ENT. & TECH. L. 845 (2023).

(“Gen Z”) ranges from people born in 1997 through 2012.¹¹ At-home computer use increased rapidly in the 1990s, with internet access in American households rising from two percent in 1992 to twenty-six percent in 1998.¹² By 2007, sixty-four percent of teens ages twelve through seventeen reported engaging in some form of content creation, ranging from blogs to online communities to publishing works of art.¹³ That same year, Facebook started incorporating user data into a user-targeted advertising structure and YouTube introduced in-video advertisements and its paid Partner Program.¹⁴ The average teen’s diary and locker room discussion became a marketplace overnight without any real means of understanding the implications of this shift. This same cohort is now in their twenties, thirties, and forties. Many still use social media as a form of diary or group discussion, but now the topics of discussion include their children. Although this narrative thread is not the only explanation for the proliferation of sharenting, a successful legislative agenda that aims to protect children’s online safety needs to take the history of the internet into account.

An unregulated internet helped create a generation of parents primed to share an unsafe amount of information about their family life and seamlessly transitioned into an infrastructure that facilitates monetizing that habit.¹⁵ Increasingly, parents who post pictures and videos of their kids are gaining lucrative mass followings for the content they post.¹⁶ Parents can profit off of this following by teaming up with a given social media platform to get a share of related ad revenue from the platform, or get paid directly by companies to discuss products in their family posting.¹⁷ Parents can also use a subscription model in which followers pay to get bonus content, though Meta announced efforts to crack down on this specific method in response to criticism that its predominant content and clientele sexualize children.¹⁸ When follower counts start

11. Michael Dimock, *Defining Generations: Where Millennials End and Gen Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), <https://www.pewresearch.org/short-reads/2019/01/17/where-millennials-end-and-generation-z-begins/> [https://perma.cc/L5HD-BBPT] [https://web.archive.org/web/20240918010109/https://www.pewresearch.org/short-reads/2019/01/17/where-millennials-end-and-generation-z-begins/].

12. Maria C. Papadakis, *Complex Picture of Computer Use in the Home Emerges*, NAT’L SCI. FOUND. (Mar. 31, 2000), <https://www.nsf.gov/statistics/issuebrf/sib00314.htm> [https://perma.cc/9SXE-B9H5] [https://web.archive.org/web/20240918010250/https://www.nsf.gov/statistics/issuebrf/sib00314.htm].

13. *More Teens Are Creating and Sharing Material on the Internet*, PEW RSCH. CTR. (Dec. 19, 2007), <https://www.pewresearch.org/internet/2007/12/19/more-teens-are-creating-and-sharing-material-on-the-internet/> [https://perma.cc/3SBQ-QEF7] [https://web.archive.org/web/20240918203315/https://www.pewresearch.org/internet/2007/12/19/more-teens-are-creating-and-sharing-material-on-the-internet/].

14. *Facebook To Use Personal Information To Target Advertisements* (Nat’l Pub. Radio broadcast Aug. 28, 2007); Guzman, *supra* note 10, at 94.

15. See generally, Riggio, *supra* note 10.

16. See Sapna Maheshwari, *Online and Earning Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> [https://web.archive.org/web/20240918204412/https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html].

17. *Id.*

18. See Michael H. Keller & Jennifer Valentino-DeVries, *Instagram and Facebook Subscriptions Get New Scrutiny in Child Safety Suit*, N.Y. TIMES (Feb. 26, 2024), <https://nytimes.com/2024/02/26/us/instagram->

reaching the thousands or millions, children can turn into an online celebrities. Child-rearing is becoming a form of self-expression in an era in which online self-expression is a viable career option, all while more and more commerce is online.¹⁹ The result is a new entertainment industry in which parents combine their parental liberties and freedom of expression to commodify their parent-child relationship: the Monetized Sharenting²⁰ Industry.²¹

This Note argues that Congress should enact a wholesale ban on Monetized Sharenting content online.²² It supplements various proposals in legal scholarship addressing sharenting in general and rejects proposals suggesting that children's

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[<https://web.archive.org/web/20240918204716/https://www.nytimes.com/2024/02/26/us/instagram-facebook-children-subscriptions-predators.html>]; Jeff Horwitz & Katherine Blunt, *Meta Staff Found Instagram Tool Enabled Child Exploitation. The Company Pressed Ahead Anyway*, WALL ST. J. (Feb. 22, 2024), <https://www.wsj.com/tech/meta-staff-found-instagram-subscription-tool-enabled-child-exploitation-the-company-pressed-ahead-anyway-a18e81e6>

[<https://web.archive.org/web/2024111204841/https://www.wsj.com/tech/meta-staff-found-instagram-subscription-tool-enabled-child-exploitation-the-company-pressed-ahead-anyway-a18e81e6>]; Jessica Longbottom, *Parents Still Selling Revealing Content of Their Kids on Instagram, Despite Meta's Promises To Ban the Practice*, ABC NEWS (Aug. 8, 2024), <https://www.abc.net.au/news/2024-08-09/instagram-meta-monetised-child-influencer-account-ban/104190956> [<https://perma.cc/29KN-VPDN>]

[<https://web.archive.org/web/20240918205515/https://www.abc.net.au/news/2024-08-09/instagram-meta-monetised-child-influencer-account-ban/104190956>].

19. Michelle Faverio & Monica Anderson, *For Shopping, Phones Are Common and Influencers Have Become a Factor—Especially for Young Adults*, PEW RSCH. CTR. (Nov. 21, 2022), <https://www.pewresearch.org/short-reads/2022/11/21/for-shopping-phones-are-common-and-influencers-have-become-a-factor-especially-for-young-adults/> [<https://perma.cc/WK7V-NSXE>] [<https://web.archive.org/web/20240918205709/https://www.pewresearch.org/short-reads/2022/11/21/for-shopping-phones-are-common-and-influencers-have-become-a-factor-especially-for-young-adults/>].

20. *Sharenting* will refer to any online content a parent or guardian publicly posts that reveals their child's face or identifiable image/footage, or any identifying or patently sensitive information. Identifying information includes, but is not limited to, the child's first, middle, and last name; date of birth; municipality; home address; current or scheduled location; and name of school. Patently sensitive information includes medical information; names of friends, acquaintances, and teachers; sexual orientation; or any information about the child that the parent/guardian knows or should have known will inflict emotional distress upon the child were the parent/guardian to discuss it online.

21. This Note will only frame the issue around Industrial-Level Monetized Sharenting, rather than small-scale, though some of these harms will overlap. For legal scholarship discussing the privacy and emotional harm of small-scale or non-monetized sharenting, see, e.g., Holly Kathleen Hall, *Oversharenting: Is It Really Your Story To Tell?*, 33 J. MARSHALL J. INFO. TECH. & PRIV. L. 121 (2018); Keltie Haley, *Sharenting and the (Potential) Right To Be Forgotten*, 95 IND. L.J. 1005 (2020); Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017); Kate Hamming, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U. L. REV. 1033 (2020); Shannon Sorensen, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 CHILD. LEGAL RTS. J. 156 (2020).

22. For Sharenting to become *Monetized*, it means any form of revenue linked to the sharenting content or its user profile, either directly or by public association. This means in addition to platform-based partnerships and direct sponsorships from brands, accounts and posts with sharenting content that also link or promote additional avenues of funding count as Monetized Sharenting (e.g., an author posting sharenting content on the same user profile on which they primarily used to promote their book online).

participation in Monetized Sharenting be regulated like child actors.²³ Part I will provide a brief history of parental rights and introduction to the Child Wellbeing Framework of children's rights as it applies to the issue of sharenting, current court holdings on the constitutionality of limiting free speech to advance the state interest of child welfare, and the developing bipartisan legislative agenda around childhood social media use (currently referred to as Kids Online Safety Act). Part II will use a "Child Wellbeing" lens to analyze how anachronistic assumptions made in the Kids Online Safety Act about Millennial/Gen Z parents run a risk of compounding Monetized Sharenting's current harm towards kids and ultimately undermine the stability of parental rights by sharpening the divide between the parent and child's interests. Part III will argue that a federal legislative ban on Monetized Sharenting content is legally justifiable under the current state of family law and relevant areas of First Amendment law. This Note predicts that a wholesale federal ban with the brunt of liability placed on online platforms and advertisers is the most effective way to mitigate the harm of parental social media use on children, and will ultimately protect parental rights of younger generations of families and the individual free speech liberties of parents. It is urgent for lawmakers to recognize that the current political push for social media regulation presents an opportunity to stamp out an abusive industry before too many economic interests are tied to it.

I. PART I: BACKGROUND

A. BALANCING PARENTS' RIGHTS AND CHILDREN'S WELLBEING

A ban on Monetized Sharenting will create limitations on two distinct personal liberties for parents: their parental liberties and their freedom of speech. Courts and legislatures have limited the scope of parental liberties of raising children as they see fit, establishing a state interest in protecting child welfare.²⁴ This yielded mixed results in protecting children's wellbeing.²⁵ It gave the government a way to protect children, but resulted in disproportionate family breakdown among poor, Black, and Indigenous families.²⁶ The process of establishing the state's interest in child welfare included disentangling parents' parental liberty from their other liberties, such as freedom of

23. For prior discussion on a child-labor approach to regulating Monetized Sharenting, see, e.g., Katherine Wirvin, *A Star Is Born: Lack of Income Rights for Entertainment's Newest Stars, "Kidtubers"*, 76 FED. COMM'NS. L.J. 61 (2023); Katherine LePage, *From Playtime To Paychecks: How Parents of Child Influencers Continue To Evade Child Labor Laws*, 24 J. HIGH TECH. L. 741 (2023); Amber Edney, *"I Don't Work for Free": The Unpaid Labor of Child Social Media Stars*, 32 U. FLA. J.L. & PUB. POL'Y 547 (2022); Note, *Sharenting Is Here To Stay, so Now What?*, 45 SEATTLE U. L. REV. 1229 (2023); Tabetta Bennett, *Child Entertainers and Their Limited Protections: A Call For an Interstate Compact*, 9 CHILD & FAM. L.J. 131 (2021); Erin E. O'Neill, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing*, 72 STAN. L. REV. ONLINE 42 (2019).

24. See *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

25. See generally Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020).

26. *Id.* at 1389.

expression. The history of the government and the courts' strengths and weaknesses around protecting children's wellbeing needs to be a policy consideration in and of itself in order to make a ban on Monetized Sharenting an agent of family stability and equity. The legal distinction between parental liberty and free speech liberty provides a Monetized Sharenting ban the structural integrity it needs to be benevolent and enforceable.

1. The Evolution of Family Law into the Child Wellbeing Approach

Some courts and legislatures appear to be moving toward a more balanced approach to child welfare, looking to empirical research when assessing harm and wellbeing.²⁷ When making policy or legal decisions around child welfare, it is useful to understand the legal and social history. Balancing the personal liberty interest of parents and guardians with the state's interest in the child's wellbeing is a nuanced and difficult task that courts and legislatures have struggled with over the past century.²⁸ Clare Huntington and Elizabeth Scott's Child Wellbeing Framework is an approach to the legal status of children that rejects this dichotomy.²⁹ Under the Child Wellbeing approach to child welfare, the state, the parent, and the child all have a mutual interest in the child's wellbeing.³⁰ The parent's individual liberty interest in their parenthood rests in the wellbeing of the child.

Although there has been progress in balancing out the tensions of past child welfare regimes, they still characterize some assumptions and case law today. Up until the twentieth-century, common law implicitly treated the parent-child relationship as if the child were the parent's property.³¹ Eventually, a progressive movement in government set up institutions and laws at the end of the nineteenth century and throughout the beginning of the twentieth century—setting up child welfare agencies, restricting child labor, and requiring children attend school.³² Courts explicitly recognized the state's interest in child welfare and its ability to limit parental liberties.³³ The Supreme Court emphasized that the state had an interest in the wellbeing of children because a “democratic society rests, for its continuance, upon a healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”³⁴

Although the infrastructure for helping children was significant, its execution led to some negative outcomes for children and families. As Huntington and Scott point out, many child welfare policies were disproportionately used against poor, Black, Native American, and Native Alaskan families.³⁵ Many legal scholars note that state

27. *Id.* at 1398.

28. *See generally id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1380; Sorensen, *supra* note 21, at 157.

32. Huntington & Scott, *supra* note 25, at 1381; Jonathan Grossman, *Fair Labor and Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22 (1978).

33. *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158, 168–69 (1944).

34. *Id.*

35. Huntington & Scott, *supra* note 25, at 1388–89.

intervention sometimes break up families for parental behavior that is not categorically abusive but rather culturally offensive to middle class sensibilities.³⁶ Even as child welfare made a shift to recognizing children as individuals with their own rights rather than as a manifestation of state interest, inequitable outcomes persisted.³⁷ Children were treated both as incapable of making adult decisions in some contexts, while having a certain level of individual interest and responsibility as a citizen in others. Contradictions in the law made young people legally vulnerable to harsh punishment during the tough-on-crime era.³⁸ Courts and legislatures struggled to develop a coherent legal definition of childhood that protects them from harm while also keeping their autonomy and individual rights intact.

Huntington and Scott posit that a Child Wellbeing conception of legal childhood is a viable path forward to fixing the state of family law.³⁹ Increasingly, legislators are looking more toward empirical research on childhood development in the fields of psychology and biology, providing a path forward for a more objective assessment of child welfare.⁴⁰ The Child Wellbeing framework prescribes: (1) an emphasis on empirical research in regulation; (2) an increased recognition of the collective self-interest we as a society have in the wellbeing of children; and (3) recognizing and remedying the threat of racial and class bias to the legitimacy of state regulation of children.⁴¹ This approach also favors respecting the social role of parents and giving them support rather than crisis intervention. Not only does this help parents, but it is a more effective approach to helping children, as it prevents harm and provides the stability of keeping their family intact—which is empirically proven to correlate to better developmental outcomes. It identifies the child’s wellbeing as a shared mutual interest between the state, the child, and the parent (with parental liberty characterized as stake in the child’s wellbeing). The zig-zagged history of children in the law has the potential to support a more holistic child welfare framework, but also leaves the door open for further incoherence in the law, depending on how it is applied moving forward.

36. *Id.* at 1397.

37. *Id.* at 1385 (explaining that the push for children’s individual rights coincided with the tough on crime era, leading to “procedural due process rights for juveniles in delinquency proceedings, but also . . . to sweeping punitive changes in the 1980s and 1990s. In both the juvenile justice and child welfare systems, critics challenged the harmful impact of state intervention on families and children of color.”).

38. These changes continued the trend of inequitable outcomes by economic status and race. *Id.* at 1388.

39. *Id.* at 1456.

40. *Id.* at 1398.

41. *Id.*

2. The Separation Between a Parent's Liberties of Self-Expression and their Child

Courts treat a parent's liberty of raising their child as they see fit as a separate freedom from their individual First Amendment freedoms. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Supreme Court established the liberty for parents to make decisions about their child's education and upbringing.⁴² Because the issue of the case concerned a state law prohibiting religious schools, the Court had an opportunity to discuss First Amendment concerns, but limited the discussion to the liberty interest of how one raises their child.⁴³ The Court did not make any assessment as to whether or not a child's upbringing could be a component of one's freedom of expression.

The Court made an explicit separation between a parent's individual First Amendment religious protection and their liberty to raise their child in *Prince v. Massachusetts*.⁴⁴ In *Prince*, a mother was charged with violating a state child labor law when she brought her children with her to preach and pass out religious print-outs on the street.⁴⁵ The Supreme Court upheld this conviction.⁴⁶ In addition to strengthening the state's interest in child welfare and limiting the scope of parental liberties over upbringing, this had two implications for a parent's First Amendment rights. The first, more general First Amendment takeaway from *Prince*, is that the state can limit a parent's freedom of religious expression if it interferes with a compelling state interest.⁴⁷ The second, more nuanced takeaway, is that it drew a clear line between the parent's parental liberty interest from their First Amendment interest. According to the court, the mother in *Prince* claimed that the child labor law in question was a state incursion on "acts said to be a rightful exercise of *her* religious convictions."⁴⁸ The Court nonetheless posed the legal question around violation of two distinct liberties: the parent's liberty of dictating their child's upbringing, and the child's liberty to exercise their religion.⁴⁹ The extent of the overlap between the mother's religion and the child's upbringing was the right to encourage them to exercise their religious beliefs.⁵⁰ At no point does the Court engage with the notion that the parent's upbringing of the child constitutes a form of expression for the purposes of First Amendment protections. Although this detail is typically not what scholars note as the primary holding of *Prince*,

42. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

43. *See Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).

44. *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944).

45. *Id.* at 161–162.

46. *Id.* at 171.

47. *Id.* at 166. For application of *Prince* to limiting parental religious expression, see, e.g., *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016); *Doe v. Christie*, 33 F. Supp. 3d 518, 528–529 (D.N.J. 2014), *aff'd sub nom. Doe* ex rel. *Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015).

48. *Prince*, 321 U.S. at 159 (emphasis added).

49. *Id.* at 164.

50. *Id.* at 165.

courts have applied this component of the ruling, re-enforcing a refusal to collapse parental liberty into a parent's First Amendment claim.⁵¹

The Court also notes the inherent risk of the particular form of religious expression. Proselytizing religion on the street has a potential for inciting ire from strangers, which may pose a type of harm to the child that cannot be prevented by parental supervision.⁵² Just because the First Amendment protects a parent's right to engage in a form of risky expression does not mean they have the right to subject their child to the same risk.⁵³ Therefore, *Prince* established that the state can encroach on a parent's First Amendment rights if they interfere with the state's interest of protecting child welfare, and precludes parents from incorporating child-rearing activities as a form of constitutionally protected expression.

B. FREE SPEECH LIMITS TO PROTECT CHILD PSYCHOLOGICAL WELLBEING

A ban on Monetized Sharenting needs its own First Amendment assessment because its ban would impact multiple parties. Although parents will be the primary gatekeepers of production, social media companies and advertisers help create the market for it and contribute to distribution. A federal statute holding these entities liable for Monetized Sharenting needs to overcome the general First Amendment interests of anyone involved in production or distribution—not just in the family law context. Under current applicable legislation, social media's liability for approving illegal or harmful forms of expression for advertisement revenue remains an unanswered question.⁵⁴ Although commercial speech does not traditionally have as strong First Amendment protections as non-commercial speech, its protections have slowly increased such that legislation around monetization should be prepared to pass intermediate or strict scrutiny.⁵⁵ The history of child pornography bans serves as a reference point for when courts permit legislative limits on free speech in order to protect child welfare. Lower courts have generally upheld convictions on the distribution of morphed child porn, defining a child's protection from psychological, emotional, and reputational harm as a discrete state interest, giving insight to how long-accepted limits on free speech may be applied in the digital era.⁵⁶

51. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 104 (1st Cir. 2008).

52. *Prince*, 321 U.S. at 169–70.

53. *Id.* at 170 (“Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”).

54. See *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (per curiam).

55. See Nathan Cortez & William M. Sage, *The Disembodied First Amendment*, 100 WASH. U. L. REV. 707, 709 (2023) (“The Court’s initial instinct to apply intermediate scrutiny to corporate commercial speech gradually mutated to ‘heightened’ scrutiny and *de facto* strict scrutiny.”); *Commercial Speech*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/commercial_speech [https://perma.cc/RK82-9MTT] [https://web.archive.org/web/20240916150153/https://www.law.cornell.edu/wex/commercial_speech] (last visited Sept. 23, 2024).

56. See, e.g., *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020); *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012).

56. *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

1. The Child Pornography Laws: The State's Ability To End Exploitative Industry To Protect Children's Psychological Welfare

Laws against child pornography are the most clear-cut example of states encroaching on free speech rights in order to stamp out an industry that psychologically harms children. *New York v. Ferber* is the foundation of jurisprudence regarding the constitutionality of state and federal bans on distributing child pornography.⁵⁷ In writing the opinion of the Court, Justice White emphasized the importance of the state interest in protecting the physical *and* emotional wellbeing of children, applying these as examples of the state interest established in *Prince*.⁵⁸ Although he states that the Court need not second-guess legislative judgment, he nonetheless gives insight into the type of evidence they considered in establishing a justification for the state's interest in preventing the production and distribution of child pornography.⁵⁹ The Court cites academic and clinical journals about developmental psychology, as well as literature cited by the Department of Health and Human Services ("HHS").⁶⁰ A lot of the literature cited discusses the social and emotional impact of the recording and distribution more than the actual physiological impact of the sexual act that was recorded.⁶¹ Although the Court is clear that this statute is a means of putting a stop to the act of sexual exploitation, it acknowledges the additional harm that the distribution itself creates. It also notes the link between the distribution network creating the economic incentive to engage in the illegal activity of production, asserting that drying up the market demand is a valid way for the state to stop harmful conduct.⁶²

The Court's Opinion then made two somewhat contradicting points that left the Justices divided in various Concurrences. First, Justice White states that, because the goal of the state is to prevent child exploitation, it does not matter whether the pornography is "patently offensive," and emphasizes that it is irrelevant to the child whether or not there are societal benefits to their exploitation—the harm is there regardless.⁶³ He then turns around and incorporates the lack of societal benefit as part of his analysis.⁶⁴ He rounds this out by concluding that certain content bans on free speech are sometimes permissible if the evil outweighs the expressive interest.⁶⁵ In her Concurrence, Justice O'Connor asserts that the holding of this case indicates that the statute in question could be applied to child pornography that had societal benefit, pointing out that making exceptions would ultimately police speech further, subjecting it to specific tastes and sensibilities.⁶⁶ By contrast, Justices Brennan, Marshall, and

57. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234–35 (2002).

58. *New York v. Ferber*, 458 U.S. 747, 757–59 (1982).

59. *Id.*

60. *Id.* at 9–10.

61. See, e.g., *id.* at 10.

62. *Id.* at 760.

63. *Id.* at 761.

64. *Id.* at 762–63.

65. *Id.* at 763–64.

66. *Id.* at 774–75 (O'Connor, J., concurring).

Stevens only concur in the judgment, stating that distribution of child pornography as phrased in the statute may be protected under the First Amendment if it served as a contribution to art, literature, or science.⁶⁷ Although the opinion of the Court held that distributing child pornography was categorically not protected by the First Amendment, and therefore not subject to a balancing test,⁶⁸ some of the Concurring opinions implied that a balancing test might be more appropriate.⁶⁹ Under either analysis, the Court determined that the First Amendment did not protect an industry predicated on abuse to children, citing the state's interest in the wellbeing of children.⁷⁰

It is not yet clear whether protecting children from psychological and reputational harm permits categorical ban of certain types of speech, or if it merely triggers a balancing test. In the 1990s, Congress expanded the scope its child pornography legislation in response to the proliferation of new forms of sexual child content as more Americans had internet access. In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down sections of the Child Pornography Prevention Act, which banned computer animated or adult-acted simulated depictions of children engaging in sexual acts.⁷¹ The Court explained that the categorical ban of real child pornography in *Ferber* was justified because there was a direct harm against the children being exploited in its production and circulation.⁷² It briefly suggested that the section banning morphed child pornography may be treated the same as *Ferber*, but it did not engage in the legal question, as it was not relevant to the case.⁷³

Morphed child pornography is an image or video in which a real child's face is edited onto a body engaging in a sexual act.⁷⁴ There is a circuit split regarding whether or not a categorical exemption from First Amendment protections apply to these images as it does in *Ferber*.⁷⁵ The majority rule is that the reputational and emotional harm to the child constitutes a sufficient enough state interest to categorically exclude morphed

67. *Id.* at 776 (Brennan, J., and Marshall, J. concurring in judgment) (“[A]pplication of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment ... For the Court’s assumption of harm to the child resulting from the ‘permanent record’ and ‘circulation’ of the child’s ‘participation,’ lacks much of its force where the depiction is a serious contribution to art or science.”); *id.* at 778–80 (Stevens, J., concurring in judgment) (Justice Stevens’s primary concern seemed to be distinguishing those participating in the child pornography industry from those using the material to create legislation or study human behavior—which could remedy the very harm that it causes—however he also noted that “it is at least conceivable that a serious work of art” could also receive First Amendment protection if done in the proper setting).

68. *Id.* at 764 (White, J.) (“When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.”).

69. *Id.* at 776 (Brennan, J., and Marshall, J. concurring in judgment).

70. *See id.* at 775 (O’Connor, J., concurring).

71. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

72. *Id.* at 249.

73. *Id.* at 242.

74. *See* Taylor Comerford, *No Child Was Harmed in the Making of This Video: Morphed Child Pornography and the First Amendment*, 62 B.C.L. REV. E-SUPPLEMENT II.-323 (2021).

75. *Id.*

pornography.⁷⁶ The minority rule, solely found in the Eighth Circuit, is that a First Amendment balancing test must be applied because there is no underlying crime of child sexual activity involved in the creation of morphed child pornography.⁷⁷ However, the state's interest in protecting a child from emotional and reputational harm was compelling enough to pass strict scrutiny and overcome a First Amendment challenge.⁷⁸ The Supreme Court has yet to rule on whether or not the First Amendment protects the creation or distribution of media that creates reputational or emotional harm to the child without a long-held crime underlying the production process. However, the current circuit majority holding is that this type of media is not protected under the First Amendment.⁷⁹ And in the event that it is protected, prevention of reputational and emotional harm appears to be a strong enough state interest to overcome its vulnerability to an assessment of competing personal liberty interests.

The legal context of child pornography and morphed child pornography is relevant to assessing the constitutionality of a ban on Monetized Sharenting. Most of the harm Monetized Sharenting inflicts on children is psychological and reputational. Child pornography is tied to sexual abuse—an act that by itself is both physically and mentally harmful to children. Banning Monetized Sharenting will rely on courts taking seriously the psychological and emotional harms it purports to protect against in *Ferber*. Furthermore, although limitations to commercial speech traditionally only need to stand up to intermediate scrutiny under the First Amendment, standards on commercial speech tend to fluctuate, making the court's assessment of children's psychological wellbeing a more useful frame of reference for shaping a constitutionally defensible ban on Monetized Sharenting. In anticipation of a legal challenge from large social media companies, it is worth investigating whether or not a ban would pass strict scrutiny, or even if the harm in question warrants a categorical exclusion from First Amendment protection similar to child pornography.

76. *Id.*; *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020); *Doe v. Boland*, 698 F.3d 877,883 (6th Cir. 2012).

77. *United States v. Anderson*, 759 F.3d 891, 895 (8th Cir. 2014).

78. *Id.* at 895–96.

79. Taylor Comerford, *No Child Was Harmed in the Making of This Video: Morphed Child Pornography and the First Amendment*, 62 B.C.L. REV. E-SUPPLEMENT II.-323, II.-325 (2021).

C. THE CURRENT LEGAL AND POLITICAL LANDSCAPE ON CHILDHOOD SOCIAL MEDIA USE

1. Federal Legislation and Regulation of Children's Use of Social Media Platforms Heavily Rely on Parental Liberties and Judgment

There are numerous pieces of federal legislation aimed at protecting children from the harms of social media. The Kids Online Safety Act⁸⁰ appears to be set to pass.⁸¹ KOSA was originally introduced to the Senate in May of 2023, and is now on the legislative calendar for 2024 after some amending.⁸² A parallel bill was introduced in the House of Representatives in April of 2024 as House Bill 7891.⁸³ This bipartisan effort aims to regulate social media companies such that they take reasonable measures to mitigate online harms against users under the age of thirteen.⁸⁴ Under the current drafting of the Senate bill, KOSA calls for social media companies to mitigate the following online harms:

- (1) Consistent with evidence-informed medical information, the following mental health disorders: anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors.
- (2) Patterns of use that indicate or encourage addiction-like behaviors.
- (3) Physical violence, online bullying, and harassment of the minor.
- (4) Sexual exploitation and abuse.
- (5) Promotion and marketing of narcotic drugs (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), tobacco products, gambling, or alcohol.
- (6) Predatory, unfair, or deceptive marketing practices, or other financial harms.⁸⁵

80. Note that the pending Senate Bill and House Resolution, both entitled the Kids Online Safety Act ("KOSA"), are nearly identical in content. The primary difference is that currently House Bill 7891 has more safeguards for the business interest of social media start-ups. Hereinafter, "KOSA" will refer to both bills and legislative agendas, noting differences between the Senate and House legislation when relevant.

81. Christiano Lima-Strong, *Senate Poised To Pass Biggest Piece of Tech Regulation in Decades*, WASH. POST (Feb. 15, 2024), <https://www.washingtonpost.com/technology/2024/02/15/kids-online-safety-act-kosa-senate/> [<https://web.archive.org/web/2024111212942/https://www.washingtonpost.com/technology/2024/02/15/kids-online-safety-act-kosa-senate/>].

82. S. 1409, 118th Cong. (2023–24).

83. H.R. 7891, 118th Cong. (2023–24).

84. S. 1409 § 2; S. 1409, 118th Cong. KOSA Summary (2023–24) <https://www.congress.gov/bill/118th-congress/senate-bill/1409> [<https://web.archive.org/web/20240916100725/https://www.congress.gov/bill/118th-congress/senate-bill/1409>] (last visited Sept. 16, 2024).

85. S. 1409 § 3(a)(1)–§ 6. Note that corresponding House Bill 7891 Section 102(a) duty of care list does not include a corresponding subsection to Senate Bill 1409 Section 3(a)(6): "Predatory, unfair, or deceptive marketing practices, or other financial harms."

KOSA requires that social media companies implement features that enable parents to monitor use time and control privacy setting of the child's account.⁸⁶ Neither bill acknowledges the parent's use of social media and how that might impact the stated purpose of the legislation. This aligns with prior online regulation, as the Children's Online Privacy Protection Act ("COPPA"), which aimed to protect children's online privacy and protect them from misleading commercial practices achieved some of its aims by requiring social media companies to get consent from parents in order to collect certain kinds of data.⁸⁷ One of KOSA's strengths is that its stated government interest advances the empirical knowledge that is compatible with the Child Wellbeing framework. KOSA instructs the Federal Trade Commission ("FTC") to collaborate with the National Academy of Sciences and the Secretary of Health and Human Services to establish ongoing research into the efficacy of the legislation, and to identify other harms created by social media use.⁸⁸

KOSA, though controversial, has received a lot of momentum. It has received a lot of support from the medical and psychiatric fields, including the American Psychiatric Association.⁸⁹ Advocates for civil liberties came out against KOSA for data privacy and speech concerns, as well as concerns for worsening abusive situations for children who do not have an alternative way to communicate with others.⁹⁰ Social media companies seem to be engaging in some pushback, but appear to want to be on the side of parental rights. For example, a former Meta employee testified to Congress that Meta had data indicating harms to children and used that data in their profit calculus rather than in their user experience policy.⁹¹ A week after this testimony, Meta announced a public campaign of expressing a desire to collaborate with Congress on social media reform to promote parental rights, while rejecting its approach to regulation.⁹² On the national political stage, there seems to be no discussion of regulating parental distribution of content and information of minors on their own social media platforms.

86. S. 1409 § 6.

87. Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6501–6505 (1998).

88. S. 1409 § 7(a)–(h); H.R. 7891 § 106(a).

89. Lauren Feiner, *Lawmakers Update Kids Online Safety Act To Address Potential Harms, but Fail To Appease Some Activists, Industry Groups*, CNBC (May 2, 2023), <https://www.cnbc.com/2023/05/02/updated-kids-online-safety-act-aims-to-fix-unintended-consequences.html> [https://perma.cc/6QYR-QRAD] [https://web.archive.org/web/20240918220939/https://www.cnbc.com/2023/05/02/updated-kids-online-safety-act-aims-to-fix-unintended-consequences.html].

90. Lauren Feiner, *Kids Online Safety Act May Harm Minors, Civil Society Groups Warn Lawmakers*, CNBC (Nov. 28, 2022), <https://www.cnbc.com/2022/11/28/kids-online-safety-act-may-harm-minors-civil-society-groups-warn.html> [https://perma.cc/MZE3-FETZ] [https://web.archive.org/web/20240925175026/https://www.cnbc.com/2022/11/28/kids-online-safety-act-may-harm-minors-civil-society-groups-warn.html].

91. *Social Media and the Teen Mental Health Crisis: Hearing Before the S. Comm. on Privacy, Technology, and the Law*, 118th Cong. (2023) (testimony of Arturo Bejar, former Director of Engineering for Protect and Care, Facebook); Katie Paul, *Former Meta Employee Tells Senate Company Failed To Protect Teens' Safety*, REUTERS (Nov. 7, 2023), <https://www.reuters.com/technology/cybersecurity/former-meta-employee-tells-senate-company-failed-protect-teens-safety-2023-11-07/> [https://web.archive.org/web/20240110105152/https://www.reuters.com/technology/cybersecurity/former-meta-employee-tells-senate-company-failed-protect-teens-safety-2023-11-07/].

92. Davis, *supra* note 3.

2. State-Level Legislative Movements To Regulate Monetized Sharenting

Legislative movements on the state-level are primarily led by teens and explicitly address the issue of the Monetized Sharenting Industry. The state-level approach is regulating the industry with child labor laws similar to state laws regulating traditional entertainment industries.⁹³ Illinois, followed recently by California, are the only two states to date that have passed a law guaranteeing that children who participate in monetized online content will receive a cut of the revenue received.⁹⁴ The sponsor of the bill brought it to the state legislature after a fifteen-year-old from his district raised concern about the exploitative nature of the Monetized Sharenting Content she saw online.⁹⁵ This law originally had provisions requiring family vloggers to register their channels and gave children the right to request the social media platform to delete all content of them when they turn eighteen, but both of these were stripped from the bill before passing.⁹⁶ With the advocacy of eighteen-year-old Chris McCarty, a similar bill was proposed in Washington state, with both the wage structure and option to remove content in adulthood—however, it stalled in the state legislature.⁹⁷ McCarty also founded Quit Clicking Kids, an organization that spreads awareness of Monetized Sharenting and promotes support similar state bills under review.⁹⁸ Most recently, a California bill was signed into law, but is also limited in scope to monetary interest alone.⁹⁹ All state legislation appears to be aimed at regulating this parental conduct, rather than banning it. Although this does help mitigate financial harm and may act as a deterrent to some Sharenters, it does not get at the root of the problem: the inherently harmful nature of the Monetized Sharenting Industry.

II. PART II: ISSUE—THE MONETIZED SHARENTING INDUSTRY

The state, parents, and children all have an interest in shutting down the Monetized Sharenting Industry. This section will first go through harms to the child's wellbeing

93. Claire Savage & The Associated Press, *New Law Entitles Child Social Media Influencers To a Percentage of Earnings: It's a New World*, FORTUNE (Aug. 12, 2023), <https://fortune.com/2023/08/12/new-law-entitles-child-social-media-influencers-to-percentage-of-earnings-kidfluencers-sharenting/> [https://perma.cc/8BWP-5QE6] [https://web.archive.org/web/20240921072349/https://fortune.com/2023/08/12/new-law-entitles-child-social-media-influencers-to-percentage-of-earnings-kidfluencers-sharenting/].

94. *Id.*; Trần Nguyễn, *Parents will have to set aside some earnings for child influencers under new California Law*, NBC BAY AREA (Sept. 29, 2024), <https://www.nbcbayarea.com/news/california/child-influencer-earnings-new-laws/366321/> [https://perma.cc/KFW4-649V] [https://web.archive.org/web/20241110232658/https://www.nbcbayarea.com/news/california/child-influencer-earnings-new-laws/366321/].

95. Savage, *supra* note 93.

96. *Id.*

97. *Id.*; H.B. 1627, 68th Leg., Reg. Sess. (Wash. 2024).

98. QUIT CLICKING KIDS, <https://quitclickingkids.com/> [https://perma.cc/JMK7-PFJY] <https://quitclickingkids.com/> [https://web.archive.org/web/20240808003944/https://quitclickingkids.com/] (last visited Sept. 27, 2024).

99. S.B. 764, 88th Leg., Reg. Sess. (Ca. 2024); Nguyễn, *supra* note 94.

associated with Monetized Sharenting. That is, harms that are associated with publicly distributing sensitive information about one's child to the general public online for monetary gain. Second, it will assess the parent's speech and parental liberties and societal benefits that a First Amendment analysis of a Monetized Sharenting ban would need to address in the event that courts subject it to a balancing test. Third, it will use the Child Wellbeing framework of family law to explain why the Kids Online Safety Act and its accompanying political movement runs the risk of proliferating the harms of the Monetized Sharenting Industry.

A. THE HARMS OF THE MONETIZED SHARENTING INDUSTRY DIRECTLY CONTRADICT THE CHILD, STATE, AND PARENT'S INTERESTS IN THE CHILD'S WELLBEING

The harms to children associated with creation and distribution of Monetized Sharenting content are extensive enough to either justify a categorical exclusion from First Amendment protection or to pass a First Amendment balancing test at any level of scrutiny. Creation and distribution of this content is empirically and anecdotally associated with emotional and reputational harm, such as the child's emotional distress resulting from personal information shared or increased exposure to online predators. Furthermore, it fundamentally increases the risk of harm that the federal government is currently seeking to mitigate under proposed legislation like KOSA.¹⁰⁰ It also runs the risk of escalating parental behavior to a point of abuse that might not otherwise occur. By taking away children's autonomy over how they present themselves online, it negatively impacts their ability to develop the digital citizenship necessary to be an informed citizen in a twenty-first century democracy.¹⁰¹ The Monetized Sharenting Industry is a type of speech that is directly linked to emotional and reputational harm, justifying a government prohibition.

1. Monetized Sharenting Increases the Risk of Harm that Congress Seeks to Mitigate in Prior and Currently Pending Legislation

In theory and in practice, Monetized Sharenting contradicts the government's evidence-based approach to protecting child wellbeing online. KOSA aims to prevent cyber-bullying, harassment or sexual exploitation, and mental health issues.¹⁰² COPPA, although mostly targeted at the use of data for commercial purchases, aims to protect

100. S. 1409, 118th Cong. KOSA Summary (2023–24) <https://www.congress.gov/bill/118th-congress/senate-bill/1409> [<https://web.archive.org/web/20240916100725/https://www.congress.gov/bill/118th-congress/senate-bill/1409>] (last visited Sept. 16, 2024).

101. Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age*, 125 PENN ST. L. REV. 773 (2021).

102. S. 1409, 118th Cong. § 3 (2023–24) ("Duty of Care"); H.R. 7891, 118th Cong. § 102 (2023–24) ("Duty of Care").

children's online privacy.¹⁰³ As part of the Monetized Sharenting Industry, parents engage in mass distribution of their child's sensitive and identifiable information—a practice that government agencies and legislators link to increased likelihood of online harm to children.

Under the current drafting of KOSA, Congress delegates HHS as an agency to research the type of harm to children facilitated by social media companies.¹⁰⁴ HHS shares many resources for preventing online exploitation and harassment. These resources encourage both parents and children not to publicly share information such as routine location, detailed information about interpersonal relationships, birthday, and sometimes pictures of themselves.¹⁰⁵ Based on decades of research, the Center for Missing and Exploited Children advises that publicly posting details about a child's interests and activities enable bad actors to more effectively groom and coerce children into exploitative online relationships.¹⁰⁶ Online predators can use a child's interests or personal issues that children present themselves as relatable or supportive. One former Monetized child recalls strangers online using information about her interests and personal issues discussed in her mom's blog to try to start relationships with her.¹⁰⁷ Any item of personal or sensitive information provides a foot in the door for those engaging in online exploitation of children.

As Monetized Sharenting moves from written blog format to a high frequency churn of picture and video format, an increased risk of in-person harm such as harassment or abduction is added to the mix. A current trend in Monetized Sharenting includes making videos breaking down parenting routines.¹⁰⁸ On-the-go images of a family's daily routine can result in unintentional distribution of geolocation.¹⁰⁹ For

103. See Children's Online Privacy Protection Rule, 78 Fed. Reg. 4008 (Jan. 17, 2013) (to be codified at 16 C.F.R. pt. 312).

104. Kids Online Safety Act, S. 1409, 118th Cong. § 7(a) (2024).

105. See NETSMARTZ, TEACHING MODERN SAFETY INTO THE CLOUD, NAT'L CTR FOR MISSING AND EXPLOITED CHILDREN (Presenter's Guide) (2019), Available at <https://www.missingkids.org/netsmartz/resources> [hereinafter NetSmartz 2019]; NETSMARTZ, INTERNET SAFETY: PARENTS, GUARDIANS, COMMUNITIES, NAT'L CTR FOR MISSING AND EXPLOITED CHILDREN (Presenter's Guide) (2023), Available at <https://www.missingkids.org/netsmartz/resources> [hereinafter NetSmartz 2023]; *What Should I Teach My Child About Safe Online Behavior*, COMMON SENSE MEDIA (July 25, 2022), <https://www.commonsensemedia.org/articles/what-should-i-teach-my-child-about-safe-online-behavior> [https://perma.cc/Z6WV-Z3WJ] [https://web.archive.org/web/20240920215216/https://www.commonsensemedia.org/articles/what-should-i-teach-my-child-about-safe-online-behavior].

106. See NetSmartz 2019, *supra* note 105.

107. *Featuring Kids Is Good Business for Influencer Parents, but at the Cost of Their Future*, NPR (July 9, 2023) [hereinafter, NPR], <https://www.npr.org/transcripts/1186674958> [https://perma.cc/243B-ZWVR] [https://web.archive.org/web/20240919185135/https://www.npr.org/transcripts/1186674958].

108. See Stephanie Sy & Sam Weber, *Momfluencers' Urged to Stop Showing Kids on Social Media To Protect Their Privacy*, PBS (Feb. 13, 2024), <https://www.pbs.org/newshour/show/momfluencers-urged-to-stop-showing-kids-on-social-media-to-protect-their-privacy> [https://web.archive.org/web/20240920234828/https://www.pbs.org/newshour/show/momfluencers-urged-to-stop-showing-kids-on-social-media-to-protect-their-privacy].

109. The Senate defines geolocation as "information sufficient to identify street name and name of a city or town." S. 1409, 118th Cong. § 2(4) (2023–24). The House of Representatives defines geolocation as

example, one Monetized Sharenter posts videos on Instagram of her family's "Sunday Routine" to her following of over half of a million Instagram users, also publicly accessible to users outside of her following.¹¹⁰ One Sunday Routine video included a clip of her four-year-old son at hockey practice, followed by a shot of the outside of the diner where the family went to brunch afterwards.¹¹¹ With a quick internet search of the name of the diner seen in the video, anyone can find the location of the only diner in the country under this name, along with a local hockey rink a few blocks away. Within minutes, anyone with internet access knows what this child looks like, along with his age, first name, and an educated guess of his—if not exact—geolocation every Sunday morning during hockey season.¹¹² Similarly, one former Monetized child recalls a time that a stranger online told her that he saw her out in public, which, in addition to safety concerns, ended up marking the beginning of anxiety issues for this child.¹¹³ Even if children escape these types of harm, privacy issues associated with publishing identifying information can follow children into adulthood. One study predicts that by 2030, every year hundreds of millions of dollars' worth of identity-theft damages will be attributed to information shared online by parents.¹¹⁴ Even Monetized Sharenting content that seemingly involves little participation on the child's end can still severely increase the risk of harm that the federal government is seeking to avoid.

"information that identifies the location of an individual, but with a precision of less than 5 miles." H.R. 7891, 118th Cong. § 201(2) (2023–24).

110. See generally Brooke Raybould (@BrookeRaybould), INSTAGRAM, <https://www.instagram.com/brookeraybould/> [<https://perma.cc/CF7D-3HHM>] (last visited Nov. 22, 2024) (Brooke Raybould's Instagram account has roughly 782,000 followers, and is viewable by anyone with an Instagram account because the privacy setting is off. Her posts include a variety of "routine" videos and parenting tips. The profile description includes a link to her website and her highlight reels include links to sponsored discount codes).

111. Brooke Raybould (@BrookeRaybould), *Sports Sunday! Double Tap if You Can Relate*, INSTAGRAM (Jan. 9, 2024), https://www.instagram.com/reel/C140D_cOKju/?utm_source=ig_web_copy_link [<https://perma.cc/4EJ3-VLQS>] [https://web.archive.org/web/20240927202917/https://www.instagram.com/reel/C140D_cOKju/] (last visited Oct. 6, 2024) (The cited Instagram post contains a video with clips of Raybould's family accompanied by her voiceover commentary and written closed captions describing her schedule from the time each family member wakes up. One clip shows her son at a hockey rink activity with other children, accompanied by Raybould mentioning his first name and age. This is shortly followed by a clip that pans over the exterior of a diner with a fascia sign in view, with a voiceover about the family going out for breakfast. It then cuts to the family eating inside of a diner with menus that match the outside signage. Each of her four sons' faces are fully visible at least once in the video.).

112. See S. 1409 § 2(4) (defining geolocation as "information sufficient to identify street name and name of a city or town").

113. Fortesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made Into Content*, TEEN VOGUE (Mar. 10, 2023), <https://www.teenvogue.com/story/influencer-parents-children-social-media-impact> [<https://web.archive.org/save/https://www.teenvogue.com/story/influencer-parents-children-social-media-impact>].

114. See Mark Travers, *2 Major Risks Linked With 'Sharenting' Your Kids' Lives on Social Media*, FORBES (June 17, 2023), <https://www.forbes.com/sites/traversmark/2023/06/17/2-major-risks-linked-with-sharenting-your-kids-lives-on-social-media/?sh=7de7aff562e2> [<https://perma.cc/BQ9X-HBNW>] [<https://web.archive.org/web/20240920234527/https://www.forbes.com/sites/traversmark/2023/06/17/2-major-risks-linked-with-sharenting-your-kids-lives-on-social-media/?sh=7de7aff562e2>].

In addition to grooming, sharing personal information can increase risks of cyberbullying. The HHS defines cyberbullying as “sending, posting, or sharing negative, harmful, false, or mean content about someone else. [Cyberbullying] can include sharing personal or private information about someone else causing embarrassment or humiliation.”¹¹⁵ Monetized Sharenting Content has led to both cyberbullying and in-person bullying, with strangers writing mean comments about children and school peers bullying children based on the sharenting content they viewed online.¹¹⁶ In fact, some have argued that certain sharenting content should be treated as a form of bullying as a matter of policy.¹¹⁷ Some former Monetized children described behavior that could plausibly fall under the HHS’s definition of cyberbullying, including sharing information that they find embarrassing or untrue.¹¹⁸ Monetized Sharenting increases the risk of cyberbullying by prompting it to a wide audience, and possibly perpetrates it on its own.

The federal government’s policy around online social media use is rooted in empirical data that sets up a clearly defined and substantial government interest as applicable to a First Amendment test. By deferring to developmental research, it is also compatible with the Child Wellbeing approach to family law. When assessing the government’s ability to limit this type of speech, it is important to note the direct overlap between the empirical research used to identify harm and the characteristics inherent to the form of speech.

2. Links Between Monetized Sharenting Entertainment and Child Abuse

In addition to incentivizing new forms of harmful behavior by parents, Monetized Sharenting shows preliminary signs of link to behaviors already considered abusive. Because the success of Monetized Sharenting relies on views and engagement, there is a monetary incentive to create content that amasses more views.¹¹⁹ A lot of the literature that government entities on youth and social media use discuss the negative effects of upsetting online content on mental health, and also acknowledge that social media companies are businesses designed to promote engagement rather than wellbeing.¹²⁰ The underlying assumption indicates that there is a link between high engagement and upsetting content.¹²¹ Without addressing Monetized Sharenting, the

115. *What Is Cyberbullying*, STOPBULLYING.GOV, <https://www.stopbullying.gov/cyberbullying/what-is-it> [https://perma.cc/L2SG-CTH3] [https://web.archive.org/web/20240920235359/https://www.stopbullying.gov/cyberbullying/what-is-it] (last visited Sept. 20, 2024).

116. *See* Latifi, *supra* note 113.

117. *See* Note, *supra* note 23, at 1237.

118. *See, e.g.*, Latifi, *supra* note 113; NPR, *supra* note 107.

119. *See* Maheshwari, *supra* note 16.

120. *See, e.g.*, OFF. OF SURGEON GEN., U.S. DEP’T. OF HEALTH & HUM. SERVS., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL’S ADVISORY 9 (2023) [hereinafter, SOCIAL MEDIA ADVISORY].

121. *See* Sarah Oh, *The Most ‘Engaging’ Social Media Content Is the Worst for You*, FORBES (Sept. 1, 2023), <https://www.forbes.com/sites/sarahoh/2023/09/01/the-most-engaging-social-media-content-is-the->

government has not grappled with the market corollary of this issue: If you want your social-media content to get a lot of engagement, make it upsetting.

Preliminary empirical and anecdotal data supports a link between abusive parental behavior and online engagement. One analysis of content posted by TikTok users showed a dramatic increase in views and likes on videos featuring a parent engaging in emotional abuse toward their children, as opposed to a video featuring children without abusive behavior.¹²² Parents who enter the Monetized Sharenting Industry are therefore entering into a market that rewards posting abusive behavior. Anecdotal evidence from other platforms hosting Monetized Sharenting content follows suit with this phenomenon. One Sharenting couple lost custody of their children for their YouTube channel series with a “family prank” theme. Some of these videos involved staging fake break-ins in which the father drew out a gun, lying to a child about being adopted, and in pushing one child to the ground and filming the child’s subsequent crying fit despite the child asking him to put the camera away.¹²³ This channel had hundreds of thousands of subscribers and millions of views, making it a financially lucrative following. Although this type of content is not the only content that gets a large following, it is one of the well-known originating genres of the Monetized Sharenting Industry.¹²⁴ The paid subscription model in which parents use a social media platform’s subscription feature to sell exclusive content of their children modeling bikinis and leotards is increasing in popularity—a phenomenon that Meta was reluctant to acknowledge and is struggling to address.¹²⁵ This is an entertainment industry that structurally makes experimenting with abusive behavior an economically rational choice for parents.

3. Monetized Sharenting May Encourage Dysfunctional Childhood Development

Monetized Sharenting inherently warps two forms of development: (1) the parent-child relationship; and (2) the child’s digital citizenship and footprint. Although there may be more than one way to have a healthy parent-child relationship, Monetized Sharenting incentivizes a dynamic known to be correlated with negative

worst-for-you/?sh=4bf5af311627 [https://perma.cc/6349-9XFR]
[https://web.archive.org/web/20240921000234/https://www.forbes.com/sites/sarahoh/2023/09/01/the-most-engaging-social-media-content-is-the-worst-for-you/?sh=4bf5af311627].

122. Bri Stormer et al., *Caregiver Psychological Maltreatment Behaviors Toward Children on TikTok*, 24 CHILD MALTREATMENT 587, 587 (2023).

123. Mahita Gajanan, *YouTube Star DaddyOfFive Loses Custody of 2 Children Shown in ‘Prank’ Videos*, TIME (May 3, 2017), <https://time.com/4763981/daddyofive-mike-martin-heather-martin-youtube-prank-custody/> [https://perma.cc/M5G8-XSG4]
[https://web.archive.org/web/20240921000526/https://time.com/4763981/daddyofive-mike-martin-heather-martin-youtube-prank-custody/]; Philip DeFranco, *WOW... We Need To Talk About This*, YOUTUBE (Apr. 17, 2017), <https://www.youtube.com/watch?v=fvoLmsXKkYM> [https://perma.cc/EAM7-5FLC]
[https://web.archive.org/web/20240921000853/https://www.youtube.com/watch?v=fvoLmsXKkYM].

124. See, e.g., Note, *supra* note 23, at 1231.

125. See Horwitz & Blunt, *supra* note 18; Longbottom, *supra* note 18.

developmental outcomes, and children featured in both monetized and non-monetized sharenting have come forward and attested to the harm they feel it has caused to their relationship with their parents and their childhood.¹²⁶ Monetized Sharenting also precludes children from organically forming a sense of autonomy in their digital citizenship and profile, which is becoming an increasingly substantive wellbeing interest in the twenty-first century.¹²⁷

Social media use has pros and cons, yielding mixed effects on mental health for users of any age. The user experience, rather than the length of time spent on social media, tends to determine the impact this has on the user's mental health.¹²⁸ Fixating on comparing status and quantitative interactions such as "likes" is one form of social media experience that is highly correlated with symptoms of depression, anxiety, body image concerns, and general decrease in self-esteem.¹²⁹ In the context of Monetized Sharenting, any form of financial success comes from views, likes, and subscriber counts—focusing on these metrics are inherently part of the user experience. This has two potential impacts. One, if the child is aware of the Monetized Sharenting arrangement, and has access to social media, they are likely to engage in the type of status comparison that mental health professionals warn may yield long-term self-image impacts. Two, even in the case that the child is unable to access the online content, there is a financial incentive to engage in parenting behaviors that negatively impact child development according to empirical developmental knowledge.

Development of self-esteem and self-image during childhood and adolescence has repercussions lasting into adulthood, with poor self-esteem linked to dysfunctional behavior and psychiatric difficulties.¹³⁰ Empirical developmental research shows that parenting style has a notable influence a child's development of self-esteem.¹³¹ Many studies link low self-esteem with a child's perception of overly-controlling parental behavior and a lack of emotional support.¹³² Poor self-esteem is also correlated to

126. See Rachel L. Harris & Lisa Tarchak, *Mom and Dad, It's My (Digital) Life*, N.Y. TIMES (Sept. 2, 2019), <https://www.nytimes.com/2019/09/02/opinion/children-internet-privacy.html?smid=url-share> [<https://web.archive.org/web/20240921001524/https://www.nytimes.com/2019/09/02/opinion/children-internet-privacy.html?smid=url-share>].

127. For discussion on internet use and development of self, see Andrea M. Matwyshyn, *Generation C: Childhood, Code, and Creativity*, 87 NOTRE DAME L. REV. 1979 (2012). For discussion on the overlap between online development and democracy, see Brescia, *supra* note 101.

128. Zara Abrams, *How Can We Minimize Instagram's Harmful Effects?* 53 MONITOR ON PSYCH. 30 (2021); Jean Twenge & Eric Farley, *Not All Screen Time Is Created Equal: Associations with Mental Health Vary by Activity and Gender*, 56 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 207, 208 (2021).

129. Abrams, *supra* note 128.

130. Anne-Marie Boudreault-Bouchard et al., *Impact of Parental Emotional Support and Coercive Control on Adolescents' Self-Esteem and Psychological Distress: Results of a Four-year Longitudinal Study*, 36 J. ADOLESCENCE 695, 696 (2013); Guy Roth et al., *The Emotional and Academic Consequences of Parental Conditional Regard: Comparing Conditional Positive Regard, Conditional Negative Regard, and Autonomy Support as Parenting Practices*, 45 DEV'L PSYCH. 1119 (2009); Nantje Otterpohl et al., *Clarifying the Connection Between Parental Conditional Regard and Contingent Self-esteem: An Examination of Cross-lagged Relations in Early Adolescence*, 89 J. PERSONALITY 986, 986–87 (2021).

131. Boudreault-Bouchard et al., *supra* note 130, at 696–97.

132. *Id.* at 695.

parents engaging too much in conditional parental regard.¹³³ Conditional parental regard is characterized by a noticeable increase level of affection or attention in response to desired behavior or a withdraw of the same in response to undesired behavior.¹³⁴ It is possible some parents who engage in Monetized Sharenting will not show disapproval or withdraw affection if children do not participate or yield lower view counts. However, habitually viewing metrics of an internet audience of the child's behavior structurally creates a situation that would incentivize a parent to engage in criticism or over-controlling behavior over the child's daily life that they might not otherwise.

Preliminary evidence suggests Monetized Sharenting does directly impact parent-child relationships and may prompt developmentally inadvisable parenting behaviors. Some formerly Monetized children have anonymously come forward saying that they feel resentful towards their parents for the dynamic the productions and distribution created.¹³⁵ This included pressure to continue with the business from their parents when they do not engage in filming or they express that they want to quit.¹³⁶ This is a fairly straightforward example of conditional parental regard.¹³⁷ Another former Monetized child complained about the complete lack of autonomy over her digital footprint.¹³⁸ Infringements on autonomy like this can undermine perceptions of parental emotional support.¹³⁹ It appears to be too soon to empirically assess long-term impacts of Monetized Sharenting on parent-child relationships, but literature on traditional child entertainers is relevant. One study assessing over seventy famous former child performers found that parents who served as their child's professional managers are more likely to be perceived as less caring and overcontrolling by their child than those who were not their managers.¹⁴⁰ One developmental psychologist with expertise in children in media points out that in traditional media industries, parents are most protective when they serve as a buffer between the producers and the wellbeing of the child—a dynamic that erodes when parents act as producers in a Monetized Sharenting context.¹⁴¹

In the twenty-first century, researchers and advocates increasingly identify navigating the internet as part of childhood development.¹⁴² Some legal scholars have suggested that digital online childhood should have a legally protected status, because

133. Otterpohl et al., *supra* note 130, at 988.

134. *Id.* at 987.

135. Latifi, *supra* note 113.

136. *Id.*

137. Roth et al., *supra* note 130 (defining conditional parental regard); Otterpohl et al., *supra* note 130.

138. NPR, *supra* note 107.

139. Roth et al., *supra* note 130.

140. L.J. Rapport & M. Meleen, *Childhood Celebrity, Parental Attachment, and Adult Adjustment: The Young Performers Study*, 70 J PERSONALITY ASSESSMENT 484, 484 (1998).

141. NPR, *supra* note 107.

142. See generally AM. ACAD. PEDIATRICS, *Center of Excellence on Social Media and Youth Mental Health*, AAP, <https://www.aap.org/en/patient-care/media-and-children/center-of-excellence-on-social-media-and-youth-mental-health/> [https://perma.cc/3U59-9HHD] [https://web.archive.org/web/2024111221153/https://www.aap.org/en/patient-care/media-and-children/center-of-excellence-on-social-media-and-youth-mental-health/] (last visited Sept. 23, 2024).

experimenting with communication and creativity online is a part of learning how to be a member of society in the twenty-first century.¹⁴³ Other legal scholars have suggested that online communication has affected political organization and created new ways to express freedom of association.¹⁴⁴ In interacting online and developing a digital persona, one develops social capital that can better help them engage in a democracy.¹⁴⁵ Government agencies and advocacy organizations concerned with children's health and safety around internet use emphasize the importance of parents in both promoting responsible internet use and facilitating healthy socialization with their peers over the internet.¹⁴⁶ By modeling risky social media use and making decisions about their child's digital citizenship, Monetized Sharenters disrupt their children's digital development.

Monetized Sharenting can also cause severe reputational damage by creating an unflattering digital footprint. Many colleges and employers look at a candidate's online presence during the admissions and hiring processes.¹⁴⁷ One former Monetized child no longer goes by their legal name because they do not want their digital footprint following them.¹⁴⁸ One child, in reference to regular sharenting, recalled a time where her dad shared a picture of awards received by an organization she led.¹⁴⁹ She was concerned that it would come across as her taking credit for a project that a team of forty people worked on, which could have had reputational repercussions.¹⁵⁰ Children have a material interest in their digital autonomy. If their digital footprint does not accurately represent who they are, this can have social, professional, and emotional harm. In addition to the state's interest in protecting a child from reputational harm, the state also has an interest in the internet's impact on the job market. If parents distort their child's digital footprint, colleges and employers may be assessing candidates based on inaccurate information.

143. Matwyshyn, *supra* note 127, at 2009, 2017, 2011–12.

144. Brescia, *supra* note 101, at 813–15, 829.

145. *Id.* at 816–18.

146. See, e.g., SOCIAL MEDIA ADVISORY, *supra* note 120, at 17; OFF. OF SURGEON GEN., U.S. DEP'T. OF HEALTH & HUM. SERVS., PROTECTING YOUTH MENTAL HEALTH: U.S. SURGEON GENERAL'S ADVISORY, 16–18 (2021); NETSMARTZ 2023, *supra* note 105, at 14.

147. Kaplan Test Prep Survey: Social Media Checks by College Admissions Officers Decline Due to Savvier Applicants and Shifting Attitudes, KAPLAN (Nov. 27, 2018), <https://www.kaptest.com/blog/press/2018/11/27/> [<https://perma.cc/7MVV-L7S7>]

[<https://web.archive.org/web/2024111221732/https://www.kaptest.com/blog/press/2018/11/27/>]; 70% of Employers Are Snooping Candidates' Social Media Profiles, CAREER BUILDER, <https://www.careerbuilder.com/advice/blog/social-media-survey-2017>

[<https://web.archive.org/web/2024111221717/https://www.careerbuilder.com/advice/blog/social-media-survey-2017>] (last visited Oct. 18, 2024); 7 in 10 Hiring Managers Admit To Spying on Social Media To Get Answers To Illegal Interview Questions, RESUME BUILDER (June 12, 2023), <https://www.resumebuilder.com/7-in-10-hiring-managers-admit-to-spying-on-social-media-to-get-answers-to-illegal-interview-questions/> [https://web.archive.org/web/2024000000000*/https://www.resumebuilder.com/7-in-10-hiring-managers-admit-to-spying-on-social-media-to-get-answers-to-illegal-interview-questions/] (last visited Oct. 18, 2024).

148. Latifi, *supra* note 113.

149. Harris & Tarchak, *supra* note 126.

150. *Id.*

When parents are in a position of producing and monetizing content of their child, their success in the industry in which they work hinges on engaging in parent-child relationships that empirical research has links to dysfunctional development. This is in direct conflict with their parental liberties as justified through a child wellbeing framework.

B. POSSIBLE INDIVIDUAL AND SOCIAL VALUE SUPPORTING FIRST AMENDMENT PROTECTIONS FOR MONETIZED SHARENTING

Although the harms linked to Monetized Sharenting are aligned with harm prevention that previously justified a categorical First Amendment exemption, it is still possible that courts will assess the social value of Monetized Sharenting.¹⁵¹ This Section will describe the social value Monetized Sharenting provides and analyze the boundaries between parental liberties and individual free speech rights of the parents.

There is an inherent tension between the rights of an individual to parent and their right to free speech. This is especially true in the digital era, where sharing content online is now a viable career option for creatives.¹⁵² If someone has used the internet to express their life experiences for years, it seems that discussing their experience as a parent would naturally fall in line with that. One Monetized Sharenter and author, Christie Tate, published an article discussing her experience of her daughter confronting her over articles the mother had written online featuring the daughter's picture, name, and stories about her life.¹⁵³ After her daughter demanded that she stop, Tate explained in her article that she was unable to do so.¹⁵⁴ As an author, she makes her living writing about her experiences, which involves her experiences being a mother—which is directly linked to information about her daughter. She went on to explain that because she is a writer, editing out her daughter from her experiences would be akin to “amputating” a part of her.¹⁵⁵ She also implied that a societal demand for her to not write about her daughter undervalued her creative labor—dismissing the value that her writing on parenthood and motherhood offers.¹⁵⁶

There is an individual freedom of speech value to Monetized Sharenting, as well as a broader social value. In response to the backlash to Tate's article, another Sharenter and author, Stephanie Sprenger, pointed out that this type of writing does not only

151. See *Counterman v. Colorado*, 600 U.S. 66, 73–74 (2023) (reiterating the findings of *United States v. Stevens*, 559 U.S. 460, 470 (2010), holding that typically categorical exclusions from First Amendment protections provide low social value).

152. See, e.g., Jill Blackmore Evans, *The Artists Making a Living (or Trying To) with Patreon*, *FORMAT* (Oct. 26, 2018), <https://www.format.com/magazine/features/art/artists-making-living-patreon> [<https://perma.cc/UMW6-WFKM>] [<https://web.archive.org/web/2024111223958/https://www.format.com/magazine/features/art/artists-making-living-patreon>].

153. Tate, *supra* note 9.

154. *Id.*

155. *Id.*

156. *Id.*

benefit the writer, but the audience.¹⁵⁷ She explains that parents and mothers who are confused and isolated can find support from people who are writing about their parenting experiences online.¹⁵⁸ Indeed, there is some empirical data to back this up.¹⁵⁹ It follows that people engaging in this work should be compensated. This is especially true considering how increasingly difficult it is to raise a family on just one income.¹⁶⁰ The individual and social benefit of Monetized Sharenting is strong, but it collapses the parent's parental liberty interest with a First Amendment interest by assuming that it is has either a mutually beneficial or de minimis effect on their child's development.

C. FEDERAL AND STATE LEGISLATION DO NOT ADEQUATELY PROTECT AGAINST HARMS OF MONETIZED SHARENTING

Current legislative campaigns around social media and child wellbeing fail to protect against Monetized Sharenting. Although KOSA acknowledges known risks of social media use, it categorically presupposes that parents will have better judgment about mitigating those risks, despite documentation that common uses by parents contribute to some of the same risks.¹⁶¹ For example, the federal government has acknowledged the phenomenon of children being harmed or injured by recreating dangerous TikTok trends, but fails to identify the “prank” genre of Monetized Sharenting.¹⁶²

Due to a generational gap between the authors of the bill, who are in their seventies, and the younger generation of parents, they may not realize how ubiquitous maladaptive relationships with social media are among parents. The risks of harm this regulation aims to address are characteristic of some Millennial/Gen Z childhoods. Many parents who are now Monetized Sharenters of young children likely developed their understanding of the internet before mental health effects on youth were being fully evaluated. This leaves current children vulnerable to parents' bad decision-making.

Under this current approach of mitigating harm against children, harmful behavior will only be addressed through crisis intervention.¹⁶³ Relying on this crisis intervention approach is in direct conflict with the harm prevention approach that the Child Wellbeing framework prescribes and KOSA seeks to implement. It also runs the risk

157. Stephanie Sprenger, *Enough with the Attacks on “Mommy Bloggers”*, (Jan. 10, 2019), <https://stephaniesprenger.com/enough-with-the-attacks-on-mommy-bloggers/> [https://web.archive.org/web/2024000000000*/https://stephaniesprenger.com/enough-with-the-attacks-on-mommy-bloggers/].

158. *Id.*

159. See Ria Novianti et al., *Sharenting: Sharing for Healing. Can Parents Do Gain Better Mental Health?*, 45 J. PUB. HEALTH, 398, 398–99 (2023).

160. *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RSCH. CTR. (Nov. 4, 2015), <https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/> [<https://perma.cc/YE59-DY8W>] [<https://web.archive.org/web/20240919184130/https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/>].

161. See, e.g., Hall, *supra* note 21, at 122–23.

162. SOCIAL MEDIA ADVISORY, *supra* note 120, at 23 nn.45–46.

163. See, e.g., Gajanan, *supra* note 123.

of furthering inequities that have traditionally harmed families and children. Taking a case-by-case basis approach of penalizing sharenting behavior may ultimately incorporate cultural sensibilities into shaping definitions of abuse. This is the exact type of inequity that the Child Wellbeing framework identifies as harmful.

Some literature already suggests that there is a lagging effect on learning about online safety precautions, with poorer people being less likely to have access to online safety training and programming.¹⁶⁴ Establishing a ban on Monetized Sharenting would help prevent reliance on crisis-intervention, both mitigating harm to the child and protecting parental liberty interests long-term by not having their parental right revoked.

Although state legislation may mitigate harm by regulating the monetary interest around Monetized Sharenting, it does not address the root of the problem that young people are concerned about: the distribution of the content, and the industry itself. As one former Monetized child put it, “[a]ny amount of money you receive will be greatly overshadowed by years of suffering,” and another echoing this sentiment, stating that nothing their parents do now can take away the years of work they put in.¹⁶⁵ Regulating the Monetization might deter some parents from engaging in it, but it does not eliminate the harm. The Industry is the harm, and regulatory agendas run the risk of legitimizing an inherently harmful business.

III. PART III: THE CASE FOR BANNING MONETIZATION

The Monetized Sharenting Industry harms children and parents. This Section will first propose a loose outline of what a ban on Monetized Sharenting might look like. It will discuss the legal justification for the limitations on free speech it will impose on parents. It will then explain why this legislative approach is a crucial component of preventing online harms to children by their parents.

A. OUTLINE OF PROPOSED BAN ON MONETIZED SHARENTING

Congress should pass a statute banning the creation and distribution of Monetized Sharenting. The foundational premise of the bill establish that no social media platform shall allow a guardian or anyone serving in loco parentis to create and digitally distribute monetized content of their children’s private information or digital personhood. It should impose a duty of care to actively seek out instances of Monetized Sharenting, and remove posts or accounts that violate the ban. Implementation should be accompanied by a robust public health campaign to notify the public of this new change, and the reasons for it.¹⁶⁶ The brunt of the regulation and enforcement should

164. Candice L. Odgers & Michaeline R. Jensen, *Annual Research Review: Adolescent Mental Health in the Digital Age: Facts, Fears, and Future Directions*, 61 J. CHILD PSYCH. & PSYCHIATRY 336 (2020).

165. Latifi, *supra* note 113.

166. For further discussion on a public health approach to Monetized Sharenting, see Steinberg, *supra* note 21.

target social media companies. KOSA can serve as a good regulatory structure for the bill, combining the researching and regulatory capabilities of the HHS and FTC.¹⁶⁷

First, a compulsory implementation of no Monetized Sharenting in each social media company's terms of service. Once this goes into effect, all companies are required to send special clear and conspicuous notice to their users.¹⁶⁸ Parents, guardians, and anyone supervising anyone serving in loco parentis may not profit off of identifiable or sensitive information they distribute of their child on social media. For the purposes of the statute, identifiable information should include: image or footage of the child's face; image or footage of distinctive physical characteristics; first, middle, and last name; date of birth; municipality; home address; current or scheduled location; name of school; medical information; full legal names of friends, acquaintances, and teachers; or sexual orientation. (A special exception regarding medical condition can be made for websites like GoFundMe.) This list is in part based on the type of information that HHS-recommended resources on internet safety, such as The Center for Missing Children, discourage children from sharing online.¹⁶⁹ It is also based on what children themselves have expressed. Many former Monetized children have made simple demands that their name and photo not be used when parents discuss them online.¹⁷⁰ Others have asked that parents not discuss personal matters. This definition also precludes the production of family prank videos. It leaves enough wiggle room for parents to make money off of writing or content about parenting their children so long as they do not disclose information that could lead a stranger back to their child, or cause reputational harm should someone in their community find out about their parents' content.

This definition of what content cannot be monetized is a key component of the legislation because it is based on a combination of empirical data and of children's self-advocacy. It serves the First Amendment purpose of being tailored to the state's interests because it limits banned content to that which is empirically shown to cause harm, and permits some forms of commercial parental expression.¹⁷¹ It also comports with the Child Wellbeing approach to legal childhood, as it is based on developmental knowledge from the applicable fields of childhood development.¹⁷² The fact that children themselves are speaking out about this further supports the notion that this is linked to Child Wellbeing—it is not the government imposing a cultural standard, it is children asking the government to protect them from a current cultural standard.¹⁷³

167. Kids Online Safety Act, S. 1409, 118th Cong. § 12 (2023–24); H.R. 7891, 118th Cong. § 11 (2023–24).

168. Both COPPA and KOSA set the precedent of regulating services of social media companies. See generally Kids Online Safety Act, S. 1409, 118th Cong. § 12 (2023); Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2013).

169. See, e.g., Tate, *supra* note 9; NPR, *supra* note 107.

170. Harris & Tarchak, *supra* note 126.

171. The allowed forms of parental expression would not identify the child or publicize sensitive information.

172. See Huntington & Scott, *supra* note 25, at 1435.

173. Although teens have been running a campaign for regulating monetized sharenting, rather than banning it, their own commentary on their reasoning suggests they are using it as a blunt instrument for

Focusing on demonetization is another core component of the legislation. It keeps the regulation in the domain of commercial speech, therefore giving it more flexibility if it faces First Amendment challenges in court. Furthermore, it avoids criminalization or civil liability for parents who genuinely use social media similarly to how some people use holiday cards or photo albums. It also gets at some of what is fueling this phenomenon—the monetary incentive for social media companies to promote this content.¹⁷⁴ As a demonetization effort, a social media company should take the following actions on account with the above-listed identifiable information:

(1) Company may not collect advertising revenue off of the content this user posts.

(2) Company may not permit user to upload commercial links, discount codes, or commercially sponsored content in posts, comments, bios, direct messages, or any other means of commercial interaction the platform facilitates.

(3) Company may not allow profile to use any form of “subscription” feature.

(4) Company may not sell user data from this account.

This behavior represents the most common current forms of monetization of Sharenting content, but the FTC should be vigilant about new forms that arise, in addition to checking for compliance. The FTC should conduct an annual audit of the top fifty social media companies engaged into commercial activity, or any social media company identified as a “high impact online company” as outlined by the current draft of House Bill 7891.¹⁷⁵ A fine should be imposed, calculated based off of the number of violations the FTC identifies, tailored to the revenue of the social media company that year. Additional penalties will be imposed if a social media company fails to decrease the number of monetized sharenting accounts. The FTC should also do research on forms of online, social-media based activity so congress can update the statute as necessary, similar to the research regime outlined in KOSA.¹⁷⁶

All parties will be liable, with different degrees of liability. Social media companies and companies reaching out for sponsorship will bear the brunt of the liability. Parents will not be held liable unless they establish a pattern of repeat offenses after repeated notification. They will initially receive a notice from the government with information about the illegality of Monetized Sharenting and its known harms. This prioritization

deterrence, rather than pushing it as their preferred policy. *See* Latifi, *supra* note 113 (noting one teen testifying in favor of a Washington State Bill HB 1727 that regulates monetized children’s compensation with personal testimony and emphasis on the psychological and emotional issue of digital footprints).

174. Social media companies are generally known to promote or favor influencers. *See, e.g.*, Elizabeth Dwoskin, *YouTube’s Arbitrary Standards: Stars Keep Making Money Even After Breaking the Rules*, WASH. POST (Aug. 18, 2019), <https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/> [https://web.archive.org/web/20240927135944/https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/].

175. H.R. 7891, 118th Cong. § 101(5)(A)–(C) (2023–24) (defining a high impact online company as an online platform that “generates \$2,500,000,000 or more in annual revenue, including the revenue generated by any affiliate of such covered platform; or . . . has 150,000,000 or more global monthly active users for not fewer than 3 of the preceding 12 months on the online product or service of such covered platform; and . . . constitutes an online product or service that is primarily used by users to access or share, user-generated content.”).

176. *See* Kids Online Safety Act, S. 1409, 118th Cong. § 12 (2023–24).

of liability is important for preserving parental rights for parents who break this law out of ignorance or economic desperation in order to avoid the inequities that the Child Wellbeing Framework aims to prevent.

This ban would be its own bill, but in the meantime, Congress should incorporate research into monetized sharenting into the language of KOSA in order to instruct the relevant regulatory agencies to look into the effects of Sharenting and Monetized Sharenting into the research it is already prescribing them to investigate.

B. LEGAL DEFENSE OF MONETIZED SHARENTING BAN

1. The Type of Harm Presented by the Monetized Sharenting Industry Overcomes General First Amendment Claims

A ban on Monetized Sharenting is legally permissible because it would serve a harm prevention function that constitutes a rational link to a substantial government interest. The Monetized Sharenting Industry poses unique harms that are directly linked to the types of abuse that courts have held as justification for both categorical exclusions from First Amendment protections and for passing First Amendment balancing tests under intermediate and strict scrutiny. In *Ferber*, the Supreme Court noted the link between the commercial industry of distributing child pornography and its production of abusive material.¹⁷⁷ As discussed in Part II, Monetized Sharenting is similar in that it creates and promotes abusive conditions. Parents are incentivized to engage in high-risk online behavior that can and does directly harm their child. Some of these harms are already legally established as abuse, while some are matters of public health and safety that Congress is currently in the process of addressing through legislation.

In *Ferber*, the Court emphasized the reputational and emotional harm of the distribution of child pornography. Although categorical exclusions from First Amendment protections are typically rooted in long-standing tradition, the Court's focus on this type of harm leaves the door open for such an exemption to apply to behavior that does not necessarily have the same ubiquitous cultural disapproval that child pornography has. Perhaps as the distribution of child pornography is categorically not protected speech, Monetized Sharenting could also be categorically excluded. Although it is related to child pornography, circuit court decisions on morphed child pornography suggest that courts do take seriously psychological harms that certain types of speech create for children.

Furthermore, the evidence that the Supreme Court looks to in *Ferber* to justify the state's interest in protecting children from the harm of child pornography mirrors the type of evidence that currently exists regarding the harms described in this note. For example, the Court references materials distributed by HHS reports, which involve fairly similar references to current government agencies' information on the harms of

177. *New York v. Ferber*, 458 U.S. 747, 760–63 (1982).

online safety.¹⁷⁸ The court also emphasizes the harm that is tied to the circulation of harmful material and the trauma that comes from this.¹⁷⁹ The same holds true for the harm of sharenting: the distress and psychological harm comes from the distribution and preservation of the harmful experience. When taking the consideration of the inherent tie between the harm caused by the perpetuation of such an industry, the courts should feel empowered to define Monetized Sharenting as a form of speech which does not benefit from First Amendment protection. However, if even if they refuse to do so, the harms associated with Monetized Sharenting still constitute a substantial enough interest to pass intermediate or strict scrutiny.

2. Parents' First Amendment Rights Are Separate and Second To Their Parental Rights and Obligations

In the event that the court does not determine that Monetized Sharenting is exempt from First Amendment protection, the Court's decision in *Prince v. Massachusetts* still justifies a Monetized Sharenting ban.¹⁸⁰ *Prince* sets the foundation for separating an individual's freedom of speech from their freedom to raise their child as they choose.¹⁸¹ A legislative approach to banning Monetized Sharenting would build off that framework and apply a similar legal issue to a modern context: establishing that one's child is not, legally speaking, an expression of one's self.

Looking back to the example of the Sharenter and author, Christie Tate: She claimed that a restriction on sharing information about her child would be akin to amputating a part of herself.¹⁸² However, this argument does not take into account that with her Monetized Sharenting, she is amputating a part of her child's identity and ability to express herself. Tate could have expressed herself without using her daughter's name and image, something that her daughter ultimately asked of her, and a sentiment that many children of Monetized Sharenters have echoed.¹⁸³ Furthermore, *Prince* indicates not only that the state's interest in a child's wellbeing can limit a parent's First Amendment rights, but reiterates that one's child is not a component of their freedom of expression. Just because Tate is creating a highly personal digital footprint of her own life in a very high-risk digital world does not mean she can make the same decision for her child. As stated in *Prince*, "[p]arents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹⁸⁴

The social value of Monetized Sharenting can still exist while staying in compliance with this proposed law. In fact, the Monetized Sharenting Industry somewhat frustrates

178. *Id.* at 9–10.

179. *Id.* at 757–62.

180. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

181. *Id.* at 170.

182. Tate, *supra* note 9.

183. *See id.*; NPR, *supra* note 107.

184. *Prince*, 321 U.S. at 170.

its own social benefit. If the goal is to provide advice to parents and assure them that they are not a bad parent, that goal is undermined if the process incorporates developmentally harmful parenting behavior. In Tate's case, the majority of her writing would likely be permitted under the proposed statute if she had never shared her daughter's real name and pictures. These modifications can be applied even in the video context of Monetized Sharenting. Although the previously noted "Sunday Routine" video would not be permitted, it may have been had the mother kept shots of her children or their locations out of the screen. Other parent influencers have managed to achieve the same effect while protecting their children's identities. One online mom influencer posts videos such as "breakfast in the trailer park as a 23-year-old mom of 4."¹⁸⁵ Her children's faces do not appear once on her social media account, and she blurs them if they ever step into frame. She appears to be cultivating a community of parents thanking her for her affordable cooking tips. It is authentic and relatable content that appears to fill a similar social role to the previously-discussed Sunday Routine video. She currently has about half a million followers on Instagram and over one million on TikTok.¹⁸⁶ This illustrates how the personal and social benefits of monetizable public self-expression of parenthood experiences could survive a ban of the Monetized Sharenting Industry. Under such a ban, non-monetized sharenting would be permissible, as would monetized independent expressions of parenting experiences.

C. POLICY ARGUMENT FOR MONETIZED SHARENTING BAN

By making the images and recordings of the child's face, voice, and name unmonetizable (both by advertiser sponsorship and monetizing platform tools), this creates clear line separating the boundary between a parent's right to self-expression and the parents' parental rights. This line is artificial, but it does serve a function. Deciding on a case-by-case basis what sharenting constitutes abusive content has high potential for inequitable enforcement. Engaging in such an enforcement scheme is exactly the type of appraisal of taste that Justice O'Connor wanted to address in her

185. Alexandra Blogier, *23-Year-Old "Trailer Park" Mom of 4 Shares What She Feeds Her Kids Every Day*, YOUR TANGO (Oct. 20, 2023), <https://www.yourtango.com/entertainment/23-year-old-trailer-park-mom-4-shares-what-she-feeds-her-kids-every-day> [https://perma.cc/KEC3-BRAL] [https://web.archive.org/web/2024111224323/https://www.yourtango.com/entertainment/23-year-old-trailer-park-mom-4-shares-what-she-feeds-her-kids-every-day]; Nadeena Jerome, *Taste Tots, I'm a Mom of Four Who Lives in a Trailer Park at 22*, U.S. SUN (June 20, 2023), <https://www.the-sun.com/lifestyle/8411295/mom-of-four-trailer-park-easy-go-to-meal/> [https://perma.cc/744C-L6VE] [https://web.archive.org/web/20240919185722/https://www.the-sun.com/lifestyle/8411295/mom-of-four-trailer-park-easy-go-to-meal/].

186. Christa Celia (@christacelia), TIKTOK, <https://www.tiktok.com/@christacelia?lang=en> [https://perma.cc/D6LW-5AX8] [https://web.archive.org/web/20240919185916/https://www.tiktok.com/@christacelia?lang=en] (last visited Sept. 17, 2024); Christa Celia (@christacelia), INSTAGRAM, <https://www.instagram.com/christaceliaa/reels/?hl=en> [https://perma.cc/NWT4-6UUS] [https://web.archive.org/web/20240927015405/https://www.instagram.com/accounts/login/?next=https%3A%2F%2Fwww.instagram.com%2Fchristaceliaa%2Ffreels%2F%3Fhl%3Den&is_from_rle] (last visited Sept. 17, 2024).

Ferber concurrence: Weighing the social benefit with the abusive behavior can lead to social sensibilities determining that some abusive material has value, and is therefore not subject to law enforcement.¹⁸⁷ As applied to Monetized Sharenting, this might result in enforcement against one type of content over another simply because one gets labeled “tacky” while the other is labeled “cute,” despite both types inflicting similar harm on the child. Such a legal scheme would likely result in the enforcement of middle-class sensibilities that has led to inequitable outcomes in family law.¹⁸⁸ Indeed, preliminary studies suggest that such inequities may present themselves further down the line, as there appears to be a lag in online safety information resources for families from lower economic statuses.¹⁸⁹ It is quite possible that this will lead to different cultural sensibilities about what type of Sharenting content is “worth” the internet safety risks, across socioeconomic lines. A categorical ban on Monetized Sharenting is the only way for the state to maintain an interest in the wellbeing of the child while empowering parental liberty. A categorical exclusion from First Amendment protection cuts out a factor that breeds the extremes of a generation of parents with maladaptive internet use. Stamping out this industry will prevent the proliferation of this abuse and may have the trickle-down effect of curbing sharenting impulses in general.

A ban on monetization also serves a practical preventative function by getting rid of the incentive of garnering an audience.¹⁹⁰ This allows parents to use social media to share family photos, which although still yielding risk of psychological harm, is much less likely to cause harm than a commercialized audience. This protects the child from harm, and protects the parents’ interests by eliminating an easily accessible source of revenue that may prompt a parent to engage in harmful or abusive behavior that the parent would otherwise not have engaged in. Ultimately, this may help preserve their parental rights.

This approach has an accommodating function of not punishing today’s parents for regulatory failings of their childhood. Teaching children responsible internet use is a parenting standard that will likely become the norm over time. As the law does seem to be shifting toward a Child Wellbeing framework, developmental psychology will probably start shaping various reasonableness standards for parents. Technology and the way it is used progresses so rapidly that the same website can serve a fundamentally different social function within a decade. Parents are going to make some mistakes, and most of these mistakes should go unpunished. But the United States needs to decide now that such mistakes will not be an entertainment industry.

187. See *New York v. Ferber*, 458 U.S. 747, 774–75 (1982) (O’Connor, J., concurring) (“[T]he Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph ‘edifying’ or ‘tasteless.’ The audience’s appreciation of the depiction is simply irrelevant to New York’s asserted interest in protecting children from psychological, emotional, and mental harm.”).

188. Huntington & Scott, *supra* note 25, at 1388–89.

189. Odgers & Jensen, *supra* note 164, at 345.

190. See Yates, *supra* note 10, at 845.

IV. CONCLUSION

The state, parents, and children all have an interest in establishing healthy norms and standards when it comes to a child's development of digital identity. The Monetized Sharenting Industry completely undermines this goal and destabilizes all relationships in the process. The process of producing and circulating this type of content directly contributes to well-documented psychological and reputational harm. In its monetized form, this harm is unique enough to warrant a categorical exclusion from First Amendment protection and severe enough to constitute a rational government interest justifying legislation banning it. No matter what type of scrutiny is applied, a legislative ban is legally defensible. Furthermore, such a ban would ultimately preserve family stability and prevent inequities that might arise from a crisis intervention or a case-by-case assessment of instances of Monetized Sharenting.

Although a ban on Monetized Sharenting should not be the only approach to mitigating the harms of general non-monetized sharenting (ideally, other proposals suggesting the right to be forgotten or a right to sue parents for harmful sharenting would also be considered),¹⁹¹ it is a key step. KOSA has created a rare political opportunity: a moment of strong bipartisan cooperation to regulate some of the most influential actors in the technological industries that shape our everyday life. The government needs to act quickly to prevent the Monetized Sharenting Industry from becoming as established as the film industry. If the federal government does not acknowledge the creation of this abusive industry that was born out of decades of unregulated social media use, they will never be able to effectively protect children from online harm.

191. See, e.g., Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers,"* 169 U. PA. L. REV. 577 (2021); Leah Plunkett, *To Stop Sharenting & Other Children's Privacy Harms, Start Playing: A Blueprint for a New Protecting the Private Lives of Adolescents and Youth (PPLAY) Act*, 44 SETON HALL LEGIS. J. 457 (2020); Haley, *supra* note 21; Hamming, *supra* note 21; Kodie McGinley, *"Take Your Pictures, Leave Your (Digital) Footprints": Increasing Privacy Protections for Children on Social Media*, 53 GOLDEN GATE U. L. REV. 199 (2023); Bennett, *supra* note 23.