

**Written Testimony of Gaia Bernstein, Technology Privacy and Policy Professor at Seton Hall University School of Law, Before the Vermont Senate Committee on Economic Development, Housing and General Affairs, February 23, 2023**

Good morning senators and thank you for having me. I am Gaia Bernstein. I am a law professor and Co-Director of the Institute for Privacy Protection and the Gibbons Institute of Law Science and Technology at Seton Hall Law School. I am also the author of the book: “Unwired: Gaining Control over Addictive Technologies.” From 2017-2019, I founded and ran a school outreach program for students and parents about technology overuse.

I am going to focus my comments on the regulation of addictive technologies. I will first discuss how and why technology companies are designing their products to addict kids, and actually all of us. I will then explain why laws like the Vermont Kids Code are vital for reducing kids time on screens. Finally, I will explain why this law and other laws regulating addictive designs do not violate the First Amendment.

To begin, why and how is the tech industry designing addictive products? While most industries rely on physical materials as their resources, the tech industry is different. We are its resources. It gives us Gmail for free and Instagram for free, but we pay with our time and our data. Tech companies need to keep us on for as long as possible so they can collect as much data as they can on us and then again keep us on so they can target advertising at us because their revenues depend on us purchasing the services and products advertised. They make especially large profits from keeping our kids online. A recent study revealed that social networks alone make eleven billion dollars a year from revenues derived from minors.

To keep us on for as long as possible the tech industry manipulates our deepest human vulnerabilities. For example, they take away our stopping cues through a design feature called the infinite scroll. If you go on Instagram or Twitter there is never an end to a page, you keep going and going, there is no natural place to stop. The design is based on a well-known psychology experiment. Researchers gave one group a regular bowl of soup, and they gave another group a bottomless bowl of soup. The group that got the bottomless bowl ate 73% more soup and didn't even realize it. They had no stopping cues. By using the infinite scroll, the tech industry took away our stopping signals all over the Internet.

Second, why are laws like the Vermont Kids Code vital? We all know how much time kids spend on screens. And you are hearing from distinguished experts about the impact. Laws regulating addictive technologies are important if we want to start seeing kids' screen time go down instead of constantly rising.

In my book about addictive technologies, I studied the battles of the past against harmful products; the battle against tobacco; against junk food. I also looked at the tech industry and the fight to protect privacy. My research shows that there is a repeating cycle.

When an industry produces a harmful product, and the truth starts leaking out, we enter the science wars. Researchers publish studies showing the product is harmful and the industry challenges the research and funds its own studies to refute it. The science wars can and often do take years. They

end when governmental bodies and medical associations issue proclamations warning of the danger. At that point the industry changes course. Industries typically use two strategies. First, they try to shift the responsibility for the harm to their consumers. Second, they come up with their own solutions to the problem to avoid regulation. For example, when smokers sued the tobacco industry, cigarette companies argued that the smokers chose to smoke and, therefore, they were responsible for their health problems. The tobacco industry also came up with solutions, like the filtered cigarette, which it advertised as exactly what the doctor prescribed!

So where is the fight to contain addictive technologies in this cycle? I believe that the science wars are beginning to wind down. The tech industry is finding it harder to refute the significant evidence of harms, especially on kids' mental health and cognitive development. We are starting to see important proclamations like the Surgeon General's recent advisory about the harms of social media to kids.

The technology industry is now engaging in the two strategies I described. Tech companies are trying to put the responsibility on us, especially on parents for the time their kids spend online. They do so by giving parents digital wellbeing tools – like parental controls that don't work. The idea is that if parents have the tools and their kids still spend so much time online, then the parents are to blame.

By producing digital well-being tools, the tech industry also tried to show that it is regulating itself and does not need to be regulated. It gave us tools like screen time on our iPhone; or notifications of time spent on Instagram that teens easily dismissed. These tools were not effective because they were not meant to be. They did not go to the heart of the addictive features, for example by eliminating the infinite scroll.

Unless forced to, the tech industry will not make any changes that affect the addictive design. It has no incentive to change because this will undermine its business model. It will continue to hail the flag of self-regulation. But only legal pressure will create change. And to be clear, change does not mean that we need to throw out our screens and connectivity and go back to the twentieth century. But it does mean redesigning the technologies so they will no longer contain addictive features that keep us and especially our kids online for so many hours a day.

By enacting the Kids Code Vermont will join the movement to create change. Adopting a duty of care will require the tech industry to assess whether their products are designed to promote the best interests of their young users. Addictive features that manipulate kids to stay on screens for so many of their waking hours do not under any account do so.

In the last part of my comments, I want to address the First Amendment challenges. As you know the technology industry challenged a similar law - the California Age Appropriate Design Act -- on First Amendment grounds. This is not surprising. In recent years, corporations exceedingly use the First Amendment as a legal sword to avoid regulation. But we must remember that the First Amendment was crafted to protect freedom of speech not abusive designs.

Laws that impose on tech companies a duty of care not to harm kids do not regulate speech or content. They are in essence a set of safety regulations like those regulating the paint on kids' toys.

Going back to my example of the infinite scroll; regulating a design feature that does not let you ever get to the end of the page does not burden expressive speech.

The tech industry's argument that laws regulating harm to kids violate the First Amendment is out of line with deeply embedded legal traditions. States have always used their police power to protect kids' health and well-being. If states cannot do so, will they no longer be able to prohibit kids from gambling? From buying cigarettes? From vaping?

I would like to end on a personal note, taking off my law professor hat for a moment. I am also the mother of three kids who were born into an era of online connectivity, smartphones and social media. My kids' generation has been in front of screens for over a decade, plus a pandemic, and they are paying the price for this. We need to act fast. We do not have the extra time to wait. I hope Vermont will join the movement by adopting the Kids Code. Thank you.