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Senator Thomas Umberg, Chair
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AB 1394 (Wicks)
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SUBJECT

Commercial sexual exploitation: child sexual abuse material: civil actions

DIGEST

This bill requires social media platforms to provide a reporting mechanism for suspected child sexual abuse material and requires them to permanently block the material, as provided. The bill prohibits platforms from knowingly, recklessly, or negligently facilitating, aiding, or abetting commercial sexual exploitation of minors.

EXECUTIVE SUMMARY

Child sexual abuse material (CSAM) generally refers to any visual depiction of sexually explicit conduct involving a minor. CSAM is widely distributed online. In 2021 alone, more than 29 million reports of suspected child sexual exploitation were reported by online platforms.

This bill seeks to address the incidence of CSAM on social media platforms in two distinct ways. First, the bill requires platforms to establish a mechanism for minor users to report suspected CSAM they are depicted in and requires the platforms to collect information from and report information to those users. The platform is required to permanently delete the CSAM. Platforms in violation are subject to civil liability including statutory damages of up to $250,000 per violation.

Second, the bill prohibits social media platforms from knowingly, recklessly, or negligently facilitating, aiding, or abetting commercial sexual exploitation of minors. "Facilitate, aid, or abet" means to deploy a system, design, feature, or affordance that is a substantial factor in causing minor users to be victims of commercial sexual exploitation. Violations are subject to statutory damages of up to $4,000,000 but no less than $1,000,000 for each act of exploitation. The bill provides a safe harbor where the platform has undertaken quarterly audits and corrected designs, algorithms, practices, affordances, and features that risk violation, as provided.

This bill is co-sponsored by the Children's Advocacy Institute, Common Sense Media, and the American Association of University Women California. It is supported by various advocacy groups, including Jewish Family and Children's Services. It is opposed by a coalition of organizations, including TechNet and the California Chamber of Commerce.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Provides that no provider or user of a website shall be treated as the publisher or speaker of any information provided by another information content provider, and that no provider of a website shall be held liable on account of any action voluntarily taken in good faith to restrict the availability of materials that the provider determines to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. (47 U.S.C. § 230(c) (Section 230).)

2) Provides that no cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with Section 230. (47 U.S.C. § 230(e).)

3) Authorizes any person who, while a minor, was a victim of a violation of 18 U.SC. § 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, to sue in any appropriate United States District Court and provides for recovery of the actual damages such person sustains or liquidated damages in the amount of $150,000, and the cost of the action, including reasonable attorney's fees and other litigation costs reasonably incurred. The court may also award punitive damages and such other preliminary and equitable relief as the court determines to be appropriate. There is no statute of limitations for such actions. (18 U.S.C. § 2255.)

4) Provides a right to free speech and expression. (U.S. Const., 1st amend; Cal. Const., art 1, § 2.)

5) Recognizes certain judicially created exceptions to the rights of freedom of speech and expression. (*E.g.*, *Virginia v. Black* (2003) 538 U.S. 343, 359.)

6) Defines "child pornography" as any visual depiction of sexually explicit conduct, where any of the following is true:
   a. The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

b. The visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.
c. The visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. (18 U.S.C. § 2256.)

Existing law:

1) Defines "commercial sexual exploitation" as an act committed for the purpose of obtaining property, money, or anything else of value, in exchange for, or as a result of, a sexual act of a minor or a nonminor dependent. The definition includes the following crimes:
   a) sex trafficking of a minor,
   b) pimping of a minor,
   c) pandering of a minor,
   d) procurement of a child under 16 years of age for lewd and lascivious acts,
   e) solicitation of a child for an act of prostitution, and
   f) sexual exploitation of a minor. (Civ. Code § 3345.1.)

2) Defines "social media platform" as a public or semipublic internet-based service or application that has users in California and that meets both of the following criteria:
   a) A substantial function of the service or application is to connect users in order to allow them to interact socially with each other within the service or application. (A service or application that provides email or direct messaging services does not meet this criterion based solely on that function.)
   b) The service or application allows users to do all of the following:
      i. Construct a public or semipublic profile for purposes of signing into and using the service or application.
      ii. Populate a list of other users with whom an individual shares a social connection within the system.
      iii. Create or post content viewable by other users, including on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users. (Bus. & Prof. Code § 22675(e).)

3) Defines "social media company" as a person or entity that owns or operates one or more social media platforms. (Bus. & Prof. Code § 22675(d).)

4) Defines "obscene matter" as matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive

way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value. (Pen. Code § 311.)

5) Prohibits a person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. (Pen. Code § 647(j)(4)(A).)

This bill:

1) Requires a social media platform to provide, in a form that is reasonably accessible to users, a means for a user who is a California resident to report material to the platform that the user reasonably believes meets all of the following criteria:
   a) The reported material is CSAM;
   b) The reporting user is an identifiable minor depicted in the reported material;
   c) The reported material is displayed, stored, or hosted on the social media platform.

2) Requires a social media platform to do all of the following:
   a) Permanently block the reported material from being viewable if the material is both CSAM and is displayed, stored, or hosted on the platform.
   b) Collect information reasonably sufficient to enable the social media platform to contact a reporting user.
   c) Contact a reporting user in writing by a method chosen by the user.
   d) Provide written confirmation to a reporting user that the social media platform received the report within 24 hours of when the material was first reported that informs the reporting user of the schedule of regular written updates that the social media platform is required to make pursuant hereto.
   e) Provide a written update to the reporting user as to the status of the social media platform’s handling of the reported material seven days after the written confirmation was provided and every seven days thereafter until the final written determination is provided.
   f) Issue a final written determination to the reporting user stating one of the following:
      i) The reported material has been determined to be CSAM and has been blocked on the social media platform.
      ii) The reported material has been determined not to be CSAM.
      iii) The reported material has been determined not to be displayed, stored, or hosted on the social media platform.

   g) Comply with these requirements no later than 30 days after the date on which the material was first reported, or within 60 days with notice, as provided.

3) Makes a social media company that fails to comply with the above liable to a reporting user for all of the following:
   a) Any actual damages sustained by the reporting user as a result of the violation;
   b) Statutory damages of no more than $250,000, or if the platform has permanently blocked the material, as provided, no more than $125,000, per violation, considering the willfulness and severity of the violation and whether the platform has previously violated this law;
   c) Costs of the action, together with reasonable attorney's fees;
   d) Any other relief that the court deems proper.

4) Creates a rebuttable presumption that the reporting user is entitled to statutory damages if a social media platform fails to comply with the requirements in 2).

5) Prohibits a social media platform from knowingly, recklessly, or negligently facilitating, aiding, or abetting commercial sexual exploitation. Requires a court to award statutory damages of at least $1 million but no more than $4 million for each act in violation, except it shall award $5 million for knowing or reckless violations.

6) Provides that "facilitate, aid, or abet" means to deploy a system, design, feature, or affordance that is a substantial factor in causing minor users to be victims of commercial sexual exploitation.

7) Provides a safe harbor from liability for facilitating, aiding, or abetting commercial sexual exploitation where the platform demonstrates all of the following:
   a) The social media platform instituted and maintained a program of at least quarterly audits of its designs, algorithms, practices, affordances, and features to detect designs, algorithms, practices, affordances, or features that have the potential to cause or contribute to violations.
   b) The social media platform corrected, within 30 days of the completion of an audit, any design, algorithm, practice, affordance, or feature discovered by the audit to present more than a de minimis risk of violating these provisions, and any correction has endured without interruption and is in full force and effect.
   c) The audit included the participation of an independent nonprofit or law enforcement agency expert in the prevention of the commercial sexual exploitation of minors and an officer thereof verifies that the platform provided that person access to the platform's personnel, data, records, and technology as required for the nonprofit or law enforcement agency expert to confirm the results and the completion of the corrections.

d) The platform provided to each member of its board of directors a true and correct copy of each audit within 30 days of completion accompanied by a description of any corrections made.

8) Excludes a standalone direct messaging service that provides end-to-end encrypted communication from the definition of social media platform, which otherwise cross references that already in statute.

9) Defines "child sexual abuse material" as either child pornography or obscene matter that depicts a minor personally engaging in, or personally simulating, sexual conduct. "Child pornography" and "obscene matter" have the same meaning as existing federal and state law, respectively.

10) Includes non-waiver and severability clauses.

11) Makes various findings and declarations regarding the sexual abuse, exploitation, and trafficking of children on social media platforms.

COMMENTS

1. The scourge of child sexual abuse material

Globally, the volume of CSAM increased dramatically during the pandemic as both children and predators spent more time online than ever before.[1] Child protection experts, including the anti-child-trafficking organization Thorn and INHOPE, a global network of CSAM hotlines, predict the problem will only continue to grow.[2] In 2020 alone, the Meta family of social media platforms reported over 20 million instances of child exploitative content.[3] The National Center for Missing and Exploited Children (NCMEC) reported a 97.5 percent increase in reports compared to 2019, and speculated the increase was possibly spurred by risks to children who are isolated at home with abusers and more online than ever during the COVID-19 pandemic.

While the problem is global, the United States is a substantial locus of it. Research indicates that the United States hosts more CSAM online than any other country in the world.[4] The country accounted for 30 percent of the global total of CSAM URLs at the

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[1] Rhiannon Williams, *The US now hosts more child sexual abuse material online than any other country* (April 26, 2023) MIT Technology Review, https://www.technologyreview.com/2022/04/26/1051282/the-us-now-hosts-more-child-sexual-abuse-material-online-than-any-other-country/. All internet citations are current as of July 2, 2023.

[2] *Ibid.*

[3] Samantha Cole, *Facebook Reported 20 Million Instances of Child Sexual Abuse in 2020* (February 24, 2021) Motherboard, Tech by Vice, https://www.vice.com/en/article/7k9an4/facebook-pornhub-child-abuse-content-ncmec-report-2020.

[4] *See* fn. 1.

end of March 2022, according to the Internet Watch Foundation, a UK-based organization that works to spot and take down abusive content.[5]

A number of factors have been identified to explain this reality:

> [T]he rapidly growing CSAM problem in the US is attributable to a number of more long-term factors. The first is the country's sheer size and the fact that it's home to the highest number of data centers and secure internet servers in the world, creating fast networks with swift, stable connections that are attractive to CSAM hosting sites.
>
> The second is that the vast scale of CSAM dwarfs the resources dedicated to weeding it out. This imbalance means that bad actors feel they're able to operate with impunity within the US because the chance of them getting in trouble, even if caught, is "vanishingly small," says Hany Farid, a professor of computer science at the University of California, Berkeley, and the co-developer of PhotoDNA, a technology that turns images into unique digital signatures, known as hashes, to identify CSAM.
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> Similarly, while companies in the US are legally required to report CSAM to the National Center for Missing & Exploited Children (NCMEC) once they've been made aware of it or face a fine of up to $150,000, they're not required to proactively search for it.
>
> Besides "bad press" there isn't much punishment for platforms that fail to remove CSAM quickly, says Lloyd Richardson, director of technology at the Canadian Centre for Child Protection. "I think you'd be hard pressed to find a country that's levied a fine against an electronic service provider for slow or non-removal of CSAM," he says.

2. <u>Platform liability for failing to address CSAM</u>

This bill seeks to address this problem in two distinct ways. The first is by requiring a reporting mechanism be created for users with attendant obligations on the social media platform to investigate and remove suspected CSAM. The second is by imposing civil liability on platforms for knowingly, recklessly, or negligently facilitating, aiding, or abetting commercial sexual exploitation of minors through their systems, designs, features, or affordances.

a. Reporting mechanism

The bill requires a social media platform to establish a mechanism for minor users to report CSAM they are identifiably depicted in that is on the platform. CSAM includes

[5] *Ibid.*

"child pornography," as defined in federal law, and obscene matter, as defined in the Penal Code, that depicts a minor personally engaging in, or personally simulating, sexual conduct.

The social media platform is required to get the preferred contact information of the minor reporting the CSAM and provide written confirmation, within 24 hours, that the report was received, as well as notice of the platform's reporting requirements imposed by this bill. The platform is then required to provide the minor weekly updates until a final written determination is issued. That determination must either state the reported material was determined to be CSAM and was blocked; it was determined not to be CSAM; or it was determined not to be displayed, stored, or hosted on the platform. All of this must occur within 30 days, unless certain extenuating circumstances exist warranting an additional 30 days with notice to the minor, as provided.

If the reported material is in fact CSAM displayed, stored, or hosted on the social media platform, the social media platform is required to "permanently block" the material from being viewable. The coalition in opposition raises concerns with this provision:

> [W]e believe there needs to be some clarification that platforms are only required to permanently block the material reported and not altered versions or reproductions. We believe this was the intent of the recent amendments but want to ensure that companies are able to comply with a realistic standard. Currently, platforms and their automated systems are highly effective at identifying CSAM that has been assigned a hash value by NCMEC's CyberTipline or Take it Down programs. In the vast majority of cases, that material is prevented from upload or removed before any user ever sees it. However, alterations or reproductions can get around those hash values, and in those instances, platforms cannot guarantee the ability to permanently block that new content. It seems that the intent of the amendments was to require a new report for alterations or reproductions rather than impose liability on a platform for them. If that is the case, we believe this should be fairly easy to clarify.

The coalition requests that the bill differentiate from the original reported "instance" of CSAM from other instances of it that may be altered or reproduced. Opposition also argues that some of the provisions included in the reporting mechanism section are difficult to abide by and has requested amendments to streamline the process.

In response to these concerns, the author has agreed to the following amendments:

> Amendment
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> Amend Section 3273.61(a)-(d) to read:
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> A social media platform shall do all of the following:

(a) Provide, in a ~~form~~ mechanism that is reasonably accessible to users, a means for a user who is a California resident to report material to the social media platform that the user reasonably believes meets all of the following criteria:

(1) The reported material is child sexual abuse material.

(2) The reporting user is an identifiable minor depicted in the reported material.

(3) The reported material is displayed, stored, or hosted on the social media platform.

(b) Collect information reasonably sufficient to enable the social media platform to contact, pursuant to subdivision (c), a reporting user.

(c) A social media platform shall contact a reporting user in writing by a method, including, but not limited to, ~~a mailing address,~~ a telephone number for purposes of sending text messages, or an email address, that meets both of the following criteria:

(1) The method is chosen by the reporting user.

(2) The method is not a method that is within the control of the social media company that owns or operates the social media platform.

(d)(1) Permanently block the instance of reported material from being viewable on the social media platform if the reported material meets both of the following criteria:

(i) There is a reasonable basis to believe the reported material is child sexual abuse material.

(ii) The reported material is displayed, stored, or hosted on the social media platform.

(iii) The report contains basic identifying information, such as an account identifier, sufficient to permit the social media platform to locate the reported material. No specific piece of information shall be required by social media platforms for purposes of this subdivision.

(2) Make reasonable efforts to remove and block other instances of the same reported material from being viewable on the social media platform.[6]

[6] This includes conforming amendments that include other references to "instances" but do not make any changes to subdivisions (e) through (h) of this section.

A social media platform in violation is liable to a reporting minor for actual damages, costs and fees, and other appropriate relief. In addition, a platform is liable for statutory damages of no more than $250,000 per violation. However, the cap is $125,000 if the platform permanently blocked the reported material before the complaint is filed. The court is instructed to set the amount based on a consideration of the willfulness and severity of the violation and any history of violations. The bill establishes a rebuttable presumption that statutory damages are warranted if the platform fails to carry out its obligation in communicating with the reporting minor and permanently blocking the reported material.

Opposition argues that public enforcement would be a better method in place of the right of action the bill grants to the minors depicted in CSAM. They argue the bill could lead to "uneven policy outcomes" and that the private enforcement makes it "difficult for platforms to implement lessons learned from litigation."

b. Liability for commercial sexual exploitation of a minor

The second method for holding platforms accountable is creating liability for commercial sexual exploitation. Existing law defines "commercial sexual exploitation" as an act committed for the purpose of obtaining property, money, or anything else of value in exchange for, or as a result of, a sexual act of a minor or nonminor dependent, including an act that constitutes a violation of specified laws, including:

- Sex trafficking of a minor.
- Pimping of a minor.
- Pandering of a minor.
- Procurement of a child under 16 years of age for lewd and lascivious acts.
- Solicitation of a child for specified purposes in violation of the law.
- An act of sexual exploitation.

The bill prohibits a social media platform from knowingly, recklessly, or negligently facilitating, aiding, or abetting commercial sexual exploitation of minors. "Facilitate, aid, or abet" means to deploy a system, design, feature, or affordance that is a substantial factor in causing minor users to be victims of commercial sexual exploitation. According to the Judicial Council of California Civil Jury Instructions:

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.
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> [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.][7]

[7] 1 CACI 430 (2023).

Opposition argues that this standard "is an incredibly low bar, and combined with the massive penalties it will encourage a flood of litigation leading to unintended consequences."

A civil action can be brought by, or on behalf of, or for the benefit of, a person who is a minor and is a victim of commercial sexual exploitation facilitated, aided, or abetted by a social media platform. The court is directed to award statutory damages against a platform in violation of no more than $4 million but not less than $1 million for each act of commercial sexual exploitation facilitated, aided, or abetted by the social media platform. Where the violation is found to be knowing or reckless, a court must award statutory damages of $5 million.

The bill provides a safe harbor by which a platform can avoid liability by carrying out at least quarterly audits of its designs, algorithms, practices, affordances, and features to detect designs, algorithms, practices, affordances, or features that have the potential to cause or contribute to violations. Those found to post a more than de minimis risk of violating the law must be corrected within 30 days. In addition, any correction must have endured without interruption and is in full force and effect.

To successfully take advantage of the safe harbor, the platform must ensure that an independent nonprofit or law enforcement agency expert participated in the audit and an officer of that nonprofit or the law enforcement agency expert verifies that the platform provided that person access to its personnel, data, records, and technology as required to confirm the results and the completion of the corrections. As a final step, the platform must have provided each member of its board of directors a copy of each audit within 30 days of the audit being completed accompanied by a description of any corrections made.

Writing in opposition, a coalition of technology and business groups argues this effectively prohibits direct messaging:

> Despite recent amendments excluding standalone direct messaging from the bill, AB 1394 still applies to direct messaging that is integrated into a social media platform. AB 1394 effectively prohibits the use of any feature or design, including direct messaging, that could be misused in violation of our rules to victimize children and imposes a penalty of between $1 million and $5 million for each violation. Simply offering direct messaging makes our platforms liable. In order to avoid this liability and continue offering direct messaging, companies would have no choice but to access, monitor, and moderate content in direct and private messages. That is impossible for sites that encrypt messages.

In response, the author has agreed to amend the definition of "social media platform" to exclude not only a standalone direct messaging service that provides end-to-end

encrypted communication but also the portion of a multi-service platform that uses end-to-end encrypted communication.

The American Association of University Women California, a co-sponsor of the bill, writes in support:

> AB 1394 responds to the soaring rates of child sexual exploitation and child sex trafficking online by amending current law to hold social media platforms accountable when the platforms knowingly or negligently facilitate child exploitation or trafficking. Social media platforms would be subject to significant statutory damages for survivors who would be authorized to file claims against the platform. Survivors would also be able to require any images and videos that remain on the platform to be rendered invisible. A platform's failure to follow this requirement would be subject to additional penalties.

A coalition of groups in support, including Jewish Family and Children's Services, writes: "AB 1394 would amend existing law permitting survivors to sue those that trafficked or exploited them to include large social media platforms. It would also permit suits against platforms that refuse a child and/or guardian's demand to render their images and videos invisible."

3. Legal considerations

As with most of the legislation seeking to govern the moderation or prohibition of internet content, legal questions arise around whether the specific approach of any proposed law runs afoul of the First Amendment or is preempted by Section 230.

a. First Amendment

The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits Congress or the states from passing any law "abridging the freedom of speech."[8] "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[9] However, while the amendment is written in absolute terms, the courts have created a handful of narrow exceptions to the First Amendment's protections, including "true threats,"[10] "fighting words,"[11] incitement to imminent lawless action,[12] defamation,[13] and obscenity.[14]

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[8] U.S. Const., 1st & 14th amends.
[9] *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.
[10] *Snyder v. Phelps* (2011) 562 U.S. 443, 452.
[11] *Cohen v. California* (1971) 403 U.S. 15, 20.
[12] *Virginia v. Black* (2003) 538 U.S. 343, 359.
[13] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 383.
[14] *Ibid.*

Expression on the internet is given the same measure of protection granted to in-person speech or statements published in a physical medium.[15] Accordingly, a social media user may generally post content and comments free from government regulation, but may incur civil or criminal liability if their comment falls within one of the First Amendment exceptions. At the same time, social media platforms themselves—as private businesses—are not subject to the constraints of the First Amendment and may limit or prohibit users' speech on their sites as they see fit.[16]

The United States Supreme Court has held that posting on social networking and/or social media sites constitutes communicative activity protected by the First Amendment.[17] As a general rule, the government "may not suppress lawful speech as the means to suppress unlawful speech."[18]

A constitutional challenge to a restriction on speech is generally analyzed under one of two frameworks, depending on whether the courts deem it to be "content neutral" or "content based," i.e., targeting a particular type of speech. A law is content neutral when it "serves purposes unrelated to the content of the expression."[19] On the other hand, a law is content based when the proscribed speech is "defined solely on the basis of the content of the suppressed speech."[20]

If a law is determined to be content neutral it will be subject to intermediate scrutiny, which requires that the law "be 'narrowly tailored to serve a significant government interest.' "[21] In other words, the law "'need not be the least restrictive or least intrusive means of' serving the government's interests," but "'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"[22]

If a restriction on speech is determined to be content based, it will be subject to strict scrutiny.[23] A restriction is content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."[24] Content-based restrictions subject to strict scrutiny are "presumptively

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[15] *Reno v. ACLU* (1997) 521 U.S. 844, 870.
[16] *E.g.*, *Hudgens v. NLRB* (1976) 424 U.S. 507, 513. Some have argued that certain social media platforms are so essential to the freedom of expression that they should be treated as common carriers subject to the First Amendment.
[17] *E.g.*, *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735-1736.
[18] *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 255; see also *United States v. Alvarez* (2012) 567 U.S. 709, 717 (Supreme Court "has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage…[based on] an ad hoc balancing of relative social costs and benefits' " [alterations in original]).
[19] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.
[20] *FCC v. League of Women Voters* (1984) 468 U.S. 364, 383.
[21] *Packingham*, *supra*, 137 S.Ct. at p. 1736.
[22] *McCullen v. Coakley* (2014) 573 U.S. 464, 486 (*McCullen*).
[23] *Id.* at p. 478.
[24] *Id.* at p. 479.

unconstitutional."[25] A restriction can survive strict scrutiny only if it uses the least-restrictive means available to achieve a compelling government purpose.[26]

Although this bill is a content-based regulation, as it requires examination of whether the content is CSAM, the targeted speech arguably falls within an exception to the First Amendment.

The United States Supreme Court in *Miller v. California*, (1973) 413 U.S. 15, 24, established the prevailing three-prong test for determining whether certain material should be deemed obscenity and therefore unprotected speech.

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

However, the court revisited the issue when the alleged obscene material was CSAM:

> The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the "sensibilities of unwilling recipients" from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.[27]

Among the reasons laid out by the court are the states' clear interest in safeguarding the physical and psychological well-being of minors; the fact that "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children"; and the "value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."

The court then laid out the scope of this new exception and the modified *Miller*-standard to be applied:

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[25] *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2226 (*Reed*).
[26] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.
[27] *New York v. Ferber* (1982) 458 U.S. 747, 756.

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.
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> The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.[28]

Here the material at issue is one of two things. The first is "child pornography" as defined under federal law. "Child pornography" includes any visual depiction of sexually explicit conduct, where any of the following is true:

- The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.
- The visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.
- The visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[29]

The second category of CSAM under the bill involves "obscene material." This is defined as matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.[30] The definition itself is based off of the *Miller* standard. However, it is only considered CSAM under the bill when the obscene matter depicts a minor personally engaging in, or personally simulating, sexual

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[28] *Id.* at 764-65. It should also be noted that the United States Supreme Court in *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 239, ruled that the federal Child Pornography Prevention Act's ban on virtual child pornography was unconstitutionally overbroad as it proscribed speech which was neither child pornography nor obscene.
[29] 18 U.S.C. § 2256.
[30] Pen. Code § 311.

conduct. This material arguably meets the *Ferber* standard and falls outside of First Amendment protection.

However, a coalition of business and technology groups argues that the bill still fails to pass constitutional muster because it creates a chilling effect on lawful speech and will result in takedowns of protected material for fear of the massive civil liability that could result:

> AB 1394 raises several constitutional concerns and its overbreadth creates a significant chilling effect on lawful speech. For example, Section 2 of the bill creates a strong incentive to over-remove content any time a request is submitted. Platforms deal with millions of pieces of content every single day. If confronted with a notice to take down content, they will err on the side of caution and remove it due to the significant liability exposure. . . .
>
> To the extent that this bill creates a de facto ban on users under the age of 18, AB 1394 also directly interferes with expressive rights of the minors who will be banned from social media services. As the Supreme Court emphasized in *Packingham v. North Carolina*, 582 U.S. ___, 137 S.Ct. 1730 (2017): "For many," social media platforms "are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge," such that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 1737. To the extent that AB 1394 has the practical effect of foreclosing minors' access to social media "altogether" (e.g., because AB 1394 makes it practically impossible for social media platforms to offer their services to children in California), the law would raise grave concerns under the First Amendment.
>
> Children have First Amendment rights both to receive information and to express themselves. While protecting children from self-harm is an important interest, AB 1394 makes no attempt to even reasonably scope the restrictions on social media platforms to that goal, let alone to "narrowly tailor" the law as the Constitution requires. Accordingly, broad regulations restricting youth expression have been struck down on First Amendment grounds. Holding unconstitutional a California law prohibiting the sale of violent video games to minors the Supreme Court declared that, "whatever the challenges of applying the Constitution to ever advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."[31]

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[31] *Citing Brown v Entertainment Merchants Ass'n*, (2011) 564 U.S. 786, 790.

b. Conflict with Section 230 of the Communications Decency Act, 47 U.S.C. § 230

In addition to the First Amendment, the other primary source governing content on social media is Section 230. Section 230 does not apply to the *users* of social media (or the internet generally), but rather applies to the *platforms themselves*. In the early 1990s, prior to the enactment of Section 230, two trial court orders—one in the United States District Court for the Southern District of New York, and New York state court—suggested that internet platforms could be held liable for allegedly defamatory statements made by the platforms' users if the platforms engaged in any sort of content moderation (e.g., filtering out offensive material).[32] In response, two federal legislators and members of the burgeoning internet industry crafted a law that would give internet platforms immunity from liability for users' statements, even if they might have reason to know that the statements might be false, defamatory, or otherwise actionable.[33] The result—Section 230—was relatively uncontroversial at the time, in part because of the relative novelty of the internet and in part because Section 230 was incorporated into a much more controversial internet regulation scheme that was the subject of greater debate.[34]

Section 230 begins with findings and a statement of policy that extol the value of the internet and the intention to let the internet develop without significant government regulation.[35] The crux of Section 230 is then laid out in two parts. The first provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[36] The second provides a safe harbor for content moderation, by stating that no provider or user shall be held liable because of good-faith efforts to restrict access to material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[37] Together, these two provisions give platforms immunity from any civil or criminal liability that could be incurred by user statements, while explicitly authorizing platforms to engage in their own content moderation without risking that immunity.

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[32] *See Cubby, Inc. v. Compuserve, Inc.* (S.D.N.Y. 1991) 776 F.Supp. 135, 141; *Stratton Oakmont v. Prodigy Servs. Co.* (N.Y. Sup. Ct., May 26, 1995) 1995 N.Y. Misc. LEXIS 229, *10-14. These opinions relied on case law developed in the context of other media, such as whether book stores and libraries could be held liable for distributing defamatory material when they had no reason to know the material was defamatory. (*See Cubby, Inc.*, 776 F. Supp. at p. 139; *Smith v. California* (1959) 361 U.S. 147, 152-153.)

[33] Kosseff, The Twenty-Six Words That Created The Internet (2019) pp. 57-65.

[34] *Id.* at pp. 68-73. Section 230 was added to the Communications Decency Act of 1996 (title 5 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56), which would have imposed criminal liability on internet platforms if they did not take steps to prevent minors from obtaining "obscene or indecent" material online. The Supreme Court invalidated the CDA, except for Section 230, on the basis that it violated the First Amendment. (*See Reno*, *supra*, 521 U.S. at p. 874.)

[35] 47 U.S.C. § 230(a) & (b).

[36] *Id.*, § 230(c)(1).

[37] *Id.*, § 230(c)(1) & (2).

Section 230 specifies that it does not preempt federal criminal laws, but that "[n]o cause of action may be brought and no liability may be imposed under any State law that is inconsistent with this section."[38]

Section 230 uses terminology generally applicable in defamation cases (e.g., "publisher," "speaker"), but courts interpreting Section 230 did not limit its application to the defamation context. Instead, courts have applied Section 230 in a vast range of cases to immunize internet platforms from "virtually all suits arising from third-party content."[39] Courts have even extended Section 230 immunity to situations where the platform's moderator affirmatively solicited the information, selected the user's statement for publication, and/or edited the content.[40]

A coalition of industry groups, including NetChoice, believes the bill as written is preempted by Section 230:

> Section 230 of the Communications Decency Act (47 U.S.C. §230) generally protects platforms from liability for content that users generate with limited exceptions. This protection enables platforms to host third party content and to moderate third-party content on their platforms without fear of liability.
>
> Without the protections of Section 230, the internet ecosystem would be dramatically different with a limited ability for users to post, share, read, view, and discover the content of others.
>
> Fortunately, Section 230 explicitly preempts state laws such as AB 1394 that would conflict with this protection. This bill creates liability for platforms based on third party content by applying to any feature that allows users to encounter content. It effectively assumes all features are harmful and imposes liability on a site for offering any of those potentially harmful features. Platforms' algorithms and features that allow users to encounter or share content from other users are inextricably linked to the underlying content. It would also impose liability for failure to remove content, which the Ninth Circuit has held falls squarely within the preemption of Section 230. Therefore, by imposing liability on platforms for their moderation decisions and content serving features, AB 1394 conflicts with Section 230 and is likely preempted.

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[38] *Id.*, § 230(e)(1) & (3).

[39] Kosseff, *supra*, fn. 13, at pp. 94-95; *see, e.g.*, *Doe v. MySpace Inc.* (5th Cir. 2008) 528 F.3d 413, 421-422; *Carfano v. Metrospalsh.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125; *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 333-334.

[40] *See, e.g.*, *Jones v. Dirty World Entertainment Recordings LLC* (6th Cir. 2014) 755 F.3d 398, 415; *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1030-1031; *cf. Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44, 51-52.

A brief look at recent, relevant case law is necessary to assess these Section 230 concerns.

First, the Ninth Circuit Court of Appeals in *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1100-01 established the prevailing three-part test for certain claims pursuant to Section 230: "[I]t appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."

A pair of highly anticipated companion cases were recently decided by the Supreme Court in May 2023, *Gonzalez v. Google LLC* (2023) 143 S. Ct. 1191, and *Twitter, Inc. v. Taamneh* (2023) 143 S. Ct. 1206, which presented the highest court with the task of determining the scope of Section 230's protective shield and the valid bases for holding platforms liable for content and conduct carried out on their platforms. The cases below were brought by the families of several victims of ISIS attacks in various parts of the world. The defendants were several social media platforms. The court in the *Gonzalez* decision declined to address the relevant Section 230 concerns. However, the Court in *Taamneh*, while not discussing Section 230 application at all, provided some arguably useful guidance:

> In this case, the failure to allege that the platforms here do more than transmit information by billions of people—most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas—is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted ISIS' acts. A contrary conclusion would effectively hold any sort of communications provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That would run roughshod over the typical limits on tort liability and unmoor aiding and abetting from culpability.[41]

Particularly relevant here, since its passage, Congress has created one exemption to Section 230 to allow online platforms (including social media platforms) to be held liable for online content promoting or facilitating sexual exploitation or sex trafficking of children.[42] This exemption was enacted in 2018, as part of the Stop Enabling Sex Traffickers Act and the Allow States to Fight Online Sex Trafficking Act (SESTA-FOSTA) legislation package.[43] The Ninth Circuit has recently analyzed the scope of the SESTA-FOSTA exception:

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[41] *Taamneh*, 143 S. Ct. at 1213.
[42] *Id.*, § 230(e)(5).
[43] *See* P.L. 115-164, 113 Stat. 1253. It should be noted that the United States Government Accountability Office (GAO) found that SESTA-FOSTA made it more difficult for law enforcement to gather information about actual sex trafficking, and the main effect of it was to cause online platforms to shut down pages featuring legitimate activities for fear of liability. *See* GAO Report to Congressional Committees, *Sex*

> In 2018, Congress amended section 230 by passing FOSTA. Pub. L. No. 115-164, 132 Stat. 1253. Among other things, FOSTA provides that section 230 immunity does not apply to certain sex trafficking claims. Pursuant to 47 U.S.C. § 230(e)(5)(A), "[n]othing in [section 230] . . . shall be construed to impair or limit . . . any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title." In turn, this provision of FOSTA incorporates two sections of the Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C. § 1589 et seq. First, section 1595 of the TVPRA provides a civil cause of action for violations of the federal trafficking laws. 18 U.S.C. § 1595(a). It permits trafficking victims to sue the perpetrators of their trafficking as well as anyone who "knowingly benefits . . . from participation in a venture which that person knew or should have known" was engaged in sex trafficking. *Id.*
>
> Section 1591, on the other hand, is the federal criminal child sex trafficking statute. Like section 1595, section 1591 covers both perpetrators and beneficiaries of trafficking. *Id.* § 1591(a). However, the standard for beneficiary liability pursuant to section 1591 is higher: to be held criminally liable as a beneficiary, a defendant must have actual knowledge of the trafficking and must "assist[], support[], or facilitat[e]" the trafficking venture. *Id.* § 1591(e)(4).
>
> In sum: websites are generally immune from liability for user-posted content, but that immunity does not cover civil child sex trafficking claims if the "conduct underlying the claim" violates 18 U.S.C. §1591.[44]

The court concluded that "it is clear that FOSTA requires that a defendant-website violate the criminal statute by directly sex trafficking or, with actual knowledge, 'assisting, supporting, or facilitating' trafficking, for the immunity exception to apply."[45]

This bill establishes liability for facilitating, aiding, or abetting commercial sexual exploitation. However, the standard that it applies is knowingly, recklessly, or negligently. Given the case law interpreting Section 230 and its exemptions, this standard is arguably extremely susceptible to challenge. In order to more closely tailor the basis for liability to the Supreme Court's guidance, the author has agreed to amend the bill to limit liability in the latter section of the bill to where a platform *knowingly*

Trafficking: Online Platforms and Federal Prosecutions, No. 21-385 (June 2021), pp. 20-25, https://www.gao.gov/assets/gao-21-385.pdf. Congress has also altered the liability of Section 230 with respect to hosting copyrighted material by allowing platforms to be held liable for users' copyright violations unless the platform blocks access to alleged infringing material upon receiving a notice of infringement. *See* 17 U.S.C. § 512, the Digital Millennium Copyright Act (DCMA).

[44] *Does v. Reddit, Inc.* (9th Cir. 2022) 51 F.4th 1137, 1140-41.

[45] *Id.* at 1145.

facilitates, aids, or abets commercial sexual exploitation, and removes the reckless and negligence bases:

<u>Amendment</u>

Amend Section 3345.1(g)(1)-(2) as follows:

(g) (1) A social media platform shall not knowingly~~, recklessly, or negligently~~ facilitate, aid, or abet commercial sexual exploitation.

(2) ~~(A) For a violation of this subdivision that is knowing or reckless, a court shall award statutory damages of five million dollars ($5,000,000).~~

~~(B)~~ For a violation of this subdivision ~~that is not described in subparagraph (A)~~, a court shall award statutory damages not exceeding four million dollars ($4,000,000) and not less than one million dollars ($1,000,000) for each act of commercial sexual exploitation facilitated, aided, or abetted by the social media platform.[46]

SUPPORT

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3strands Global Foundation
American Association of University Women - California
Children’s Advocacy Institute
Common Sense Media
Fairplay
Jewish Family and Children's Services of San Francisco, the Peninsula, Marin and Sonoma Counties

OPPOSITION

California Chamber of Commerce
Civil Justice Association of California
Computer and Communications Industry Association
Electronic Frontier Foundation
NetChoice
TechNet

[46] These amendments do not make any changes to the other paragraphs of this subdivision or the other subdivisions of this section.

RELATED LEGISLATION

Pending Legislation:
SB 287 (Skinner, 2023) subjects social media platforms to civil liability for damages caused by their practices, affordances, designs, algorithms, or features, as provided. It provides a safe harbor where certain auditing practices are carried out. SB 287 is currently on the Senate Floor.

SB 646 (Cortese, 2023) creates liability for the distribution of certain "actionable material," which includes illicit pictures of minors and images or depictions of minors that serve as the basis for criminal and civil liability at the federal level. SB 646 is currently in the Assembly Appropriations Committee.

SB 680 (Skinner, 2023) is substantially similar to SB 287. SB 680 is currently in the Assembly Privacy and Consumer Protection Committee.

SB 764 (Padilla, 2023) prohibits a social media platform from adopting or implementing a policy or practice related to the targeting of content to minors that prioritizes user engagement of minor users over the safety, health, and well-being of the minor users if the social media platform knows or, should know that it has caused harm to minor users or it is reasonably foreseeable that it will cause harm to minor users. SB 764 is currently pending before the Senate Judiciary Committee.

SB 845 (Stern, 2023) requires large social media platforms, as defined, to create, maintain, and make available to third-party safety software providers a set of real-time application programming interfaces, through which a child or a parent or legal guardian of a child may delegate permission to a third-party safety software provider to manage the child's online interactions, content, and account settings on the large social media platform on the same terms as the child, and for other purposes. SB 845 is pending before the Senate Judiciary Committee.

AB 955 (Petrie-Norris, 2023) makes the sale of fentanyl on a social media platform a crime punishable by imprisonment in a county jail for three, six, or nine years (higher than the existing penalty for selling fentanyl, which is imprisonment in a county jail for two, three, or four years). AB 955 is pending before the Assembly Public Safety Committee.

Prior Legislation:
SB 1056 (Umberg, Ch. 881, Stats. 2022) required a social media platform, as defined, to clearly and conspicuously state whether it has a mechanism for reporting violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed.

AB 587 (Gabriel, Ch. 269, Stats. 2022) required social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis.

AB 1628 (Ramos, Ch. 432, Stats. 2022) required a social media platform, as defined, that operates in this state to create and publicly post a policy statement including specified information pertaining to the use of the platform to illegally distribute controlled substances, until January 1, 2028.

AB 2273 (Wicks, Ch. 320, Stats. 2022) established the California Age-Appropriate Design Code Act, placing a series of obligations and restriction on businesses that provide online services, products, or features likely to be accessed by a child.

AB 2408 (Cunningham, 2022) would have prohibited a social media platform from using a design, feature, or affordance that the platform knew, or which by the exercise of reasonable care it should have known, causes child users to become addicted to the platform. AB 2408 died in the Senate Appropriations Committee.

AB 2571 (Bauer-Kahan, Ch. 77, Stats. 2022) prohibits firearm industry members from advertising or marketing, as defined, firearm-related products to minors. This bill restricts the use of minors' personal information in connection with marketing or advertising firearm-related products to those minors.

AB 2879 (Low, Ch. 700, Stats. 2022) requires a social media platform to disclose its cyberbullying reporting procedures in its terms of service and to have a mechanism for reporting cyberbullying that is available to individuals whether or not they have an account on the platform.

AB 1114 (Gallagher, 2021) would have required a social media company located in California to develop a policy or mechanism to address content or communications that constitute unprotected speech, including obscenity, incitement of imminent lawless action, and true threats, or that purport to state factual information that is demonstrably false. AB 1114 died in the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

SB 388 (Stern, 2021) would have required a social media platform company, as defined, that, in combination with each subsidiary and affiliate of the service, has 25,000,000 or more unique monthly visitors or users for a majority of the preceding 12 months, to report to the Department of Justice by April 1, 2022, and annually thereafter, certain information relating to its efforts to prevent, mitigate the effects of, and remove potentially harmful content. SB 388 died in the Senate Judiciary Committee.

PRIOR VOTES:

Assembly Floor (Ayes 77, Noes 0)
Assembly Judiciary Committee (Ayes 10, Noes 0)
Assembly Privacy and Consumer Protection Committee (Ayes 8, Noes 0)
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