SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 435 (Cortese)
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Fiscal: Yes
Urgency: No
CK

SUBJECT

Civil law: personal rights: online sex trafficking: sexual photographs

DIGEST

This bill establishes a cause of action for making, obtaining, or distributing a moving or still photograph of a person in which the person is naked or where it is sexual in nature, as provided. The bill provides for enhanced statutory penalties for failing to remove such material from distribution within two days of claimed infringement.

EXECUTIVE SUMMARY

Numerous state and federal laws, both civil and criminal, establish penalties for the creation, distribution, and possession of certain sexually explicit or obscene material. For instance, in California, recently enacted laws specifically provide private causes of action against those creating and/or distributing sexually explicit material without the consent, as provided, of the depicted individuals. This includes actions involving explicit "deep fake" material and so called "revenge porn."

This bill extends the laws to create a cause of action for the creation, obtainment, or distribution, including through uploading, publishing, or republishing of "actionable material." This is broadly defined to include any material that depicts a person naked or that is sexual in nature, and that either depicts a minor or was created, obtained, or distributed without or beyond the express permission or knowledge of the depicted person, as provided. Proponents argue that this bill is necessary to combat online sexual exploitation and trafficking. Other stakeholders have raised concerns about the breadth and vagueness of the definitions involved, including concerns that the bill may run afoul of the First Amendment and other federal laws, including Section 230 of the Federal Communications Decency Act.

This bill is sponsored by the California Women's Law Center and supported by a variety of stakeholders. It is opposed by several groups, including the Media Coalition.

PROPOSED CHANGES TO THE LAW

Existing state law:

1) Creates a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration without that person's consent, knowing, or where they should have reasonable known, that the other person had a reasonable expectation that the material would remain private, and causes the other person to suffer damages. (Civ. Code § 1708.85(a).)

2) Defines "intimate body part" as any portion of the genitals, and, in the case of a female, also includes any portion of the breast below the top of the areola, that is uncovered or visible through less than fully opaque clothing. (Civ. Code § 1708.85(b).)

3) Exempts the person distributing material from liability pursuant to the above under any of the following circumstances:
    a) the distributed material was created under an agreement by the person appearing in the material for its public use and distribution or otherwise intended by that person for public use and distribution;
    b) the person possessing or viewing the distributed material has permission from the person appearing in the material to publish by any means or post the material on an Internet Web site;
    c) the person appearing in the material waived any reasonable expectation of privacy in the distributed material by making it accessible to the general public;
    d) the distributed material constitutes a matter of public concern;
    e) the distributed material was photographed, filmed, videotaped, recorded, or otherwise reproduced in a public place and under circumstances in which the person depicted had no reasonable expectation of privacy; or
    f) the distributed material was previously distributed by another, except where the person has received notice from the depicted individual to cease distribution, as specified. (Civ. Code § 1708.85(c).)

4) Authorizes the court to award specified remedies and to issue a temporary restraining order, or a preliminary injunction or a permanent injunction against the defendant, ordering the defendant to cease distribution of material. (Civ. Code § 1708.85(d), (e).)

5) Provides an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered

depiction ("depicted individual") a cause of action against a person who does either of the following:

a) creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure; or,
b) intentionally discloses sexually explicit material that the person did not create and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material. (Civ. Code § 1708.86.)

6) Defines "sexually explicit material," for the purposes of the above action, to mean any portion of an audiovisual work that shows the depicted individual performing in the nude or appearing to engage in, or being subjected to, sexual conduct, as those terms are defined. (Civ. Code § 1708.86(a).)

7) Exempts a person from liability in the above action if the person discloses the sexually explicit material in the course of reporting unlawful activity; exercising the person's law enforcement duties; or in hearings, trials, or other legal proceedings. The person is also exempt if the material is any of the following:
   a) a matter of legitimate public concern;
   b) a work of political or newsworthy value or similar work; or
   c) a commentary, criticism, or disclosure that is otherwise protected by the California Constitution or the United States Constitution. (Civ. Code § 1708.86(c).)

8) Authorizes the court to award specified remedies to a prevailing plaintiff that suffers harm, including economic and noneconomic damages or statutory damages. (Civ. Code § 1708.86.)

9) Prohibits a person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. (Pen. Code § 647(j).)

10) 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).)

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).)

This bill:

1) Authorizes a person to bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, attorneys' fees and costs, and other appropriate relief, including statutory damages, against any person or entity that engages in "online sex trafficking" by making, obtaining, or distributing "actionable material." This includes uploading or reuploading, or in any manner publishing or republishing actionable material with notice of claimed infringement.

2) Defines "actionable material" to mean any moving or still photograph in any technological form, regardless of whether it has been altered, of a person, or their identifiable likeness, in which they are naked or that is sexual in nature, for which either of the following is true:
    a) it was coerced, made, or obtained by trickery or subterfuge, or stolen, made, or distributed without the knowledge or without or beyond the express permission, freely given, of the person in the photograph, or the person whose identifiable likeness appears in the photograph; or,
    b) it is of a person who was less than 18 years of age at the time it was created.

3) Requires all persons or entities in possession or control of actionable material that contains a minor to immediately, upon receipt of notice from that person, remove the material or disable its distribution, and all copies shall be destroyed or returned to the person, without regard to any permission previously given by anyone for its creation or distribution.

4) Provides that statutory damages in the amount of $100,000 shall be awarded to a prevailing plaintiff to be paid by the defendant for failing to remove, and cease distribution of, the material within two business days after notice of claimed infringement was received by the defendant. If the plaintiff was a minor at the time the material was created, the amount is doubled. If the material about which the defendant received notice is removed, or access is disabled, within two business days, no civil liability or statutory damages shall be available.

5) Exempts from liability a person capturing or distributing actionable material in the following circumstances:

    a) the distributed image was created in agreement or with the understanding that it was created for public use or distribution;
    b) the person possessing or viewing the distributed image has permission to publish it by any means from the person depicted;
    c) the person depicted in the image had no reasonable expectation of privacy in the distributed image based on the manner or location it was captured or by previously making it accessible to the general public; or,
    d) the distributed image is related to a matter of public concern.

6) Requires a person or entity that operates an online service or internet website that is available in California to publicly list an agent for notification of claimed violation.

7) Authorizes the Attorney General to commence an action to enforce this section against any person or entity that engages in repeated violations, and to levy fines commensurate with the statutory damages provided, payable to the person in the actionable material.

8) Provides that its provisions are severable should any provision or application be held invalid.

COMMENTS

1. Stated intent of the bill

According to the author:

> Sex trafficking, with unwilling victims of all ages including children, is a major issue in our state, and the internet is its biggest platform. Sixty-nine million videos as well as other online child sexual abuse material was reported to the United States authorities last year alone. Content that is uploaded to the internet each day includes rape, child rape, "revenge pornography," and other forms of sexual assault – and websites are profiting off this abuse with this content receiving billions of advertisement impressions each day.
>
> The Ending Online Sexual Trafficking and Exploitation Act is the first bill of its kind in the nation to tackle online sexual exploitation and trafficking, giving victims, including children, more civil causes of action against the distribution of naked or sexual photographs and video.
>
> This bill would allow a victim of online sexual trafficking to bring a civil action for damages against any person or entity that makes, obtains, uploads, re-uploads, or distributes in any form, non-consensual, sexual content. This includes content where a victim was under 18, or if a person is coerced, tricked, or circulated in any way without the victim's freely given permission.
>
> SB 435 also requires that any online service that breaks this law must disclose this violation publicly on their website and allows the Attorney General to pursue repeat violators.
>
> The internet shouldn't be a free forum for sexual abuse. Victims of online sex trafficking deserve legal recourse, so that it can be eradicated entirely. It is time to put an end to human trafficking in the digital age.

2. <u>Existing laws combatting nonconsensual, sexually explicit material</u>

In response to concerns about nonconsensual sexual content being made, coerced, or distributed, a number of existing laws impose both civil and criminal liability for those responsible. In California, the Criminal Code already prohibits surreptitiously recording others in various states of undress as well as the distribution of images of intimate body parts or sexually explicit content where the person depicted intended such material to remain private. (Pen. Code § 647(j).)

In recent years, the Legislature has established civil causes of action for similar content. For instance, California's so-called "revenge porn" statute, provides a cause of action against a person that intentionally distributes a sexually explicit photograph, film, videotape, or recording of another, without the other's consent, where the person knew, or reasonably should have known, that the other person had a reasonable expectation that the material would remain private and the other person suffers harm. (Civ. Code §

1708.85.) In response to the rise of so-called "deep fakes," California law also provides a cause of action against persons that create or intentionally disclose sexually explicit material of another where the other person appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction. (Civ. Code § 1708.86.) The claim only lies where the person creating and intentionally disclosing the material knows or reasonably should know the depicted individual did not consent to its creation or disclosure, or where a person simply disclosing the material knows the depicted individual did not consent.

Federal laws also work to combat such material, especially where children are involved:

> Federal law prohibits the production, distribution, reception, and possession of an image of child pornography using or affecting any means or facility of interstate or foreign commerce (*See* 18 U.S.C. § 2251; 18 U.S.C. § 2252; 18 U.S.C. § 2252A). Specifically, Section 2251 makes it illegal to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of that conduct. Any individual who attempts or conspires to commit a child pornography offense is also subject to prosecution under federal law.[1]

3. Combatting "actionable material"

This bill provides a cause of action against any person or entity that "engages in online sex trafficking by making, obtaining, or distributing, including through electronic distribution, actionable material." The bill broadly defines "actionable material" to include images in which a person is naked or that is "sexual in nature" and that either depicts a minor or was "coerced, made, or obtained by trickery or subterfuge, or stolen, made, or distributed without the knowledge or without or beyond the express permission, freely given, of the person in the photograph, or the person whose identifiable likeness appears in the photograph." The bill does not define "sexual in nature."

Conduct that could subject a person or entity to liability includes "any transmission or sharing by electronic means including, but not limited to, transmission, posting for public view, or sharing via an internet website, platform, application, peer-to-peer file sharing, or other online mechanism." A prevailing plaintiff is entitled to seek actual damages, compensatory damages, punitive damages, injunctive relief, attorney's fees and costs, and other appropriate relief.

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[1] *Citizen's Guide to U.S. Federal Law on Child Pornography* (May 28, 2020) United States Department of Justice, https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography. All internet citations are current as of December 30, 2021.

This bill therefore significantly overlaps with the reach of the other civil laws in California discussed above, but given the expansive scope of the "actionable material," it creates liability for a much broader range of conduct.

The California Women's Law Center writes in support:

> SB 435 is the first bill of its kind in the nation to tackle online sex trafficking. It would give victims of any age avenues for recourse in situations where the victim was coerced, tricked, or forced into a sexual act, and where content that is sexual in nature is circulated in any way without permission.

It should be noted that although the bill references the actionable conduct as "online sex trafficking," the broad definition in the bill arguably includes conduct that does not fall within the commonly understood meaning of the phrase.

In addition to the damages indicated above, the bill also provides for statutory damages against a defendant that fails to remove and cease distribution of actionable material within two business days of receiving notice of "claimed infringement." The bill makes explicit that this includes the uploading or publishing or republishing of actionable material with notice of claimed infringement. The intent and effect of these provisions expose online platforms, such as Facebook, to liability for failing to take down such material after it has been reported as actionable.

4. Concerns with the bill

Opponents of the bills have raised concerns with the breadth of the bill. Writing in opposition, the Media Coalition, which represents a coalition of groups, including the Motion Picture Association of America and the Authors Guild, argues the bill goes beyond the stated purpose. It points out that there are no requirements that the person in the image be identifiable in all circumstances, that the person disclosing the image have an improper intent, or that any harm ultimately be suffered. The comparable state laws discussed above do impose a "knew or reasonably should have known" standard and require some showing of harm, before the action will lie.

Concerns have also been raised regarding the provision in the bill that requires a person or entity in possession or control of actionable material involving a minor to immediately remove the material or disable its distribution, and to either destroy or return all copies to the person depicted. The concern is that *sending* child sexual abuse material, even to the person determined to be depicted, would likely violate federal law and that immediate destruction of such material could hinder federal investigations. The author may wish to consider removing the requirement to return the material and a narrow exemption to the destruction requirement to allow for assistance in legitimate law enforcement investigations where permissible or required by state and federal law.

Additional concerns have been raised that the bill may violate the First Amendment to the United States Constitution and Section 230 of the Communications Decency Act, 47 U.S.C. § 230.

a. First Amendment concerns

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."[2] "[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."[3] 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,"[4] "fighting words,"[5] incitement to imminent lawless action,[6] defamation,[7] and obscenity.[8]

Expression on the internet is given the same measure of protection granted to in-person speech or statements published in a physical medium.[9] 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.[10]

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.[11] As a general rule, the government "may not suppress lawful speech as the means to suppress unlawful speech."[12]

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

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[2] U.S. Const., 1st & 14th amends.
[3] *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.
[4] *Snyder v. Phelps* (2011) 562 U.S. 443, 452.
[5] *Cohen v. California* (1971) 403 U.S. 15, 20.
[6] *Virginia v. Black* (2003) 538 U.S. 343, 359.
[7] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 383.
[8] *Ibid.*
[9] *Reno v. ACLU* (1997) 521 U.S. 844, 870.
[10] *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.
[11] *E.g.*, *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735-1736.
[12] *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]).

"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."[13] 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."[14]

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.' "[15] 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.' "[16]

If a restriction on speech is determined to be content based, it will be subject to strict scrutiny.[17] 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."[18] Content-based restrictions subject to strict scrutiny are "presumptively unconstitutional."[19] A restriction can survive strict scrutiny only if it uses the least-restrictive means available to achieve a compelling government purpose.[20]

The Media Coalition asserts that the law is an impermissible content-based regulation of speech in violation of the First Amendment:

> The bill cannot clear the high hurdles the First Amendment imposes on attempts to regulate or punish speech. It is a content-based regulation on speech that does not fall into a historic exception to the First Amendment and, therefore, is subject to strict scrutiny review. The bill fails strict scrutiny analysis because there is no clear compelling state interest, and even if one could be articulated, the bill is not narrowly tailored to address it. It also lacks the requisite knowledge standard for the elements of the tort; and it is unconstitutionally vague because it lacks adequate definitions of key terms and the text is convoluted and internally inconsistent.

Recent amendments have limited the scope of liability, exempting otherwise liable persons that capture or distribute actionable material under the following circumstances:

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[13] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.
[14] *FCC v. League of Women Voters* (1984) 468 U.S. 364, 383.
[15] *Packingham*, *supra*, 137 S.Ct. at p. 1736.
[16] *McCullen v. Coakley* (2014) 573 U.S. 464, 486 (*McCullen*).
[17] *Id.* at p. 478.
[18] *Id.* at p. 479.
[19] *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2226 (*Reed*).
[20] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

- the distributed image was created in agreement or with the understanding that it was created for public use or distribution;
- the person possessing or viewing the distributed image has permission to publish it by any means from the person depicted;
- the person depicted in the image had no reasonable expectation of privacy in the distributed image based on the manner or location it was captured or by previously making it accessible to the general public; or,
- the distributed image is related to a matter of public concern

These narrowing amendments quell some of the concerns that the bill may run afoul of the First Amendment by, for example, punishing the distribution of newsworthy material. However, given the broad and ambiguous definitions, and the notice and takedown requirements, the bill may be found to impose a chilling effect on otherwise lawful speech. For instance, fear of liability could likely prompt the takedown of wide swaths of legally protected speech. This could occur with content providers themselves (including average users, newspapers, or other entities), but this would particularly be relevant on social media where platforms would have to investigate every notice of claimed infringement, which involves at the very least: verifying the identity of the person claiming infringement; determining that the person is depicted in the content; that the content is "actionable material" (which may include a determination of whether content was distributed "beyond the express permission" of the individual); and ensuring that none of the exceptions apply. This would all need to be accomplished within two days of every notice. Given the amount of resources necessary to avoid liability, platforms will likely err on the side of caution and automatically remove any reported content, regardless of the credibility of the claimed infringement. This could be found to "'burden substantially more speech than is necessary to further the government's legitimate interests.'"[21]

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).[22] In response, two federal legislators

[21] *Packingham*, *supra*, 137 S.Ct. at p. 1736.
[22] *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

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 statements might be false, defamatory, or otherwise actionable.[23] 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.[24]

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.[25] 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."[26] 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."[27] 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.

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."[28] Since its passage, Congress has created one exemption to Section 230 to allow online platforms (including social media platforms) to be held liable if it was aware that the platform was being used to traffic children for sex.[29]

Congress has also altered the liability 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.[30]

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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.)

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

[24] *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.)

[25] 47 U.S.C. § 230(a) & (b).

[26] *Id.*, § 230(c)(1).

[27] *Id.*, § 230(c)(1) & (2).

[28] *Id.*, § 230(e)(1) & (3).

[29] *Id.*, § 230(e)(5). 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. (*See* P.L. 115-164, 113 Stat. 1253.)

[30] *See* 17 U.S.C. § 512, the Digital Millennium Copyright Act (DCMA).

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."[31] 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.[32]

The bill provides for the potential liability of platforms if they do not take down content posted by users within two days of notice of claimed infringement. While SESTA/FOSTA creates a narrow exception to Section 230's protective ambit and allows a social media platform to be held liable if it is aware that child sex trafficking is being conducted on the platform,[33] this bill provides for much broader platform liability that is arguably inconsistent with Section 230 and therefore likely preempted.

The author may wish to consider refining the targeted conduct the bill seeks to combat; addressing the above constitutional concerns, including through clearer definitions and appropriate exceptions; and narrowing the application of the bill in order to address outstanding Section 230 issues.

5. Additional stakeholder input

The Silicon Valley Democratic Club, the Feminist Majority, and numerous other organizations write in support: "This bill will first and foremost prevent abuse while also helping survivors of human trafficking rebuild their lives." They highlight a recent article by Nicholas Kristof, Opinion Columnist for The New York Times, that profiled victims of sexual abuse "who were monetized and exploited through porn sites such as 'Pornhub.'" They assert that "Pornhub alone is estimated to attract more than 3.5 billion visits each year and receives almost 3 billion advertisement impressions each day. Other pornography sites with similar content are not far behind, with ad impressions totaling in the hundreds of millions each day."

The Adult Industry Laborers and Artists Association writes in opposition:

> While this bill's intent is to stop non-consensual content online it does not do that. Instead it punishes consensual adult-aged workers, and websites rather than perpetrators responsible for horrible acts. This bill will mostly

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[31] 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.

[32] *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.

[33] Kosseff, *supra*, fn. 13, at pp. 269-270.

harm adult industry workers who sell consensual content they create on marketplace websites that SB-435 will force to shut down.

SUPPORT

California Women's Law Center (sponsor)
Audrie Pott Foundation
Change for Justice
CHILD USA
CHILD USAdvocacy
Coalition Against Trafficking in Women
Democratic Activist for Women Now Dawn
Enough Is Enough Voter Project
Equality Now
Feminist Majority
San Diego County District Attorney's Office
Santa Clara County Democratic Party
Santa Clara County Supervisor Susan Ellenberg
Silicon Valley Democratic Club
Women's March San Jose

OPPOSITION

Adult Industry Laborers and Artists Association
Authors Guild
California News Publishers Association
Free Speech Coalition
TechNet
The Media Coalition
Motion Picture Association of America

RELATED LEGISLATION

Pending Legislation:

SB 388 (Stern, 2021) requires 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 is pending before the Senate Judiciary Committee.

SB 746 (Skinner, 2021) requires businesses to disclose whether they use the personal information of consumers for political purposes, as defined, to consumers, upon

request, and annually to the Attorney General or the California Privacy Protection Agency. This bill is currently on the Senate Floor.

AB 35 (Chau, 2021) requires a person that operates a social media platform to disclose whether or not the platform has a policy or mechanism in place to address the spread of misinformation. AB 35 is pending before the Senate Judiciary Committee.

AB 587 (Gabriel, 2021) requires social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis. AB 587 is pending before the Senate Judiciary Committee.

AB 1114 (Gallagher, 2021) requires 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 is pending before the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

AB 613 (Cristina Garcia, 2021) requires social media platforms, as defined, or users or advertisers posting on a social media platform, to place text or marking within or adjacent to retouched images that have been posted on the platform for promotional or commercial purposes, and specify how that retouched image was altered. AB 613 is pending before the Assembly Privacy and Consumer Protection Committee.

Prior Legislation:

SB 890 (Pan, 2020) would have required social media companies to remove images and videos depicting crimes, as specified, and imposed civil penalties for failing to do so. SB 890 died in the Senate Judiciary Committee.

AB 2391 (Gallagher, 2020) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 2931 died in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Media.

AB 2442 (Chau, 2020) was substantially similar to this bill and would have required social media companies to disclose the existence, or lack thereof, of a misinformation policy, and imposed civil penalties for failing to do so. AB 2442 died in the Senate Judiciary Committee due to the COVID-19 pandemic.

AB 288 (Cunningham, 2019) would have required a social networking service, at the request of a user, to permanently remove personally identifiable information and not

sell the information to third parties, within a commercially reasonable time of the request. AB 288 died in the Assembly Committee on Privacy and Consumer Protection.

AB 602 (Berman, Ch. 491, Stats. 2019) provides a cause of action for the nonconsensual disclosure of sexually explicit material depicting individuals in realistic digitized performances. The bill provides specified remedies and allows for the plaintiff in such cases to proceed using a pseudonym.

AB 1316 (Gallagher, 2019) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 1316 was held on the floor of the Assembly and was re-introduced as AB 2931 (2020).

SB 1424 (Pan, 2018) would have established a privately funded advisory group to study the problem of the spread of false information through Internet-based social media platforms, and draft a model strategic plan for Internet-based social media platforms to use to mitigate this problem. SB 1424 was vetoed by Governor Brown, whose veto message stated that, as evidenced by the numerous studies by academic and policy groups on the spread of false information, the creation of a statutory advisory group to examine this issue is not necessary.

AB 3169 (Gallagher, 2018) would have prohibited social media sites from removing content on the basis of the political affiliation or viewpoint of the content, and prohibited internet search engines from removing or manipulating content from search results on the basis of the political affiliation or viewpoint of the content. AB 3169 died in the Assembly Committee on Privacy and Protection.

AB 2643 (Wieckowski, Ch. 859, Stats. 2014) created a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, as defined, or shows the other person engaged in specified sexual acts, without the other person's consent, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met.

SB 255 (Cannella, Ch. 466, Stats. 2013) made it unlawful in California for any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, to subsequently distribute the image taken, if there was intent to cause serious emotional distress and the depicted person suffers serious emotional distress. A person who commits this crime is guilty of a disorderly conduct misdemeanor.

SB 1361 (Corbett, 2010) would have prohibited social networking websites from displaying, to the public or other registered users, the home address or telephone number of a registered user of that site who is under 18 years of age, and imposed a civil penalty of up to $10,000 for each willful and knowing violation of this prohibition. SB 1361 died in the Assembly Committee on Entertainment, Sports, Tourism, and Internet Media.

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