

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 646 (Cortese)
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SUBJECT

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

DIGEST

This bill 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.

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.” Given their heinous nature, a more robust set of laws address such materials when children are involved. Relevant here, “Masha’s law” provides civil remedies for personal injuries caused by the sexual exploitation of children, namely the creating, distributing, downloading, and possessing of child sexual abuse material (CSAM). The statute laws out a series of federal criminal laws that serve as predicate offenses and provides actual or liquidated damages, as well as costs and attorney’s fees.

This bill authorizes a state cause of action against a person or entity that distributes “actionable material.” That term includes material that would serve as a predicate offense under Masha’s law and “illicit pictures” of minors, as defined. The bill also requires a person or entity distributing actionable material to remove it or disables its distribution, subject to a civil action for statutory damages for failure to do so within two business days of notice of claimed infringement. This bill is sponsored by Liberty Law. The bill is supported by the California Catholic Conference and opposed by various industry groups, including TechNet.

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.S.C. § 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, including for true threats and incitement to imminent violence. (E.g., *Virginia v. Black* (2003) 538 U.S. 343, 359.)

Existing law:

- 1) 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).)

- 2) 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).)
- 3) 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).)
- 4) 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).)
- 5) 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).)
- 6) 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.)
- 7) 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).)
- 8) 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).)
- 9) 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.)

This bill:

- 1) Authorizes a person to bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, and any other appropriate relief, including statutory damages and attorney’s fees and costs, against a person or entity that distributes, including through electronic distribution, actionable material. A parent or guardian may bring a civil action pursuant to this section on behalf of a minor or ward in the actionable material.
- 2) Makes injunctive relief available to block or interrupt the distribution, including electronic distribution, of actionable material.
- 3) Requires the Attorney General to commence an action to enforce this law against a person or entity that engages in repeated violations, and, among other actions, to levy fines commensurate with the statutory damages provided for therein, payable to the person in the actionable material.

- 4) Defines “actionable material” to mean a moving or still photograph in any technological form, regardless of whether it has been altered, that is either of the following:
 - a) an “illicit” picture of a person who was less than 18 years of age at the time the photograph was created, or their identifiable likeness; or
 - b) an image or depiction of a person who, when less than 18 years of age, was a victim of a violation of Section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of Title 18 of the United States Code, and would have a cause of action available to them under Section 2255 of Title 18 of the United States Code due, in whole or in part, to that image or depiction.
- 5) Defines “illicit picture” to mean an image of the intimate body part or parts of an 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.
- 6) Defines “electronic distribution” to mean a 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.
- 7) Requires a person or entity distributing actionable material, upon receipt of notice from the person in the actionable material, to immediately remove the material or disable its distribution. In addition to any other damages awarded, statutory damages in the amount of \$200,000, as specified, shall be awarded to the prevailing plaintiff to be paid by the defendant for failing to cease distribution of the material within two business days after notice of claimed infringement of this section was received by the defendant. If the material is removed or access is disabled within that time frame, no liability shall attach.
- 8) Provides that an action brought pursuant thereto shall be commenced within 6 years of discovery of infringement, or within 10 years of the person in the actionable material having reached 18 years of age, whichever is longer.
- 9) Provides that a person shall not be liable for distributing the material if the distribution is made in the course of reporting unlawful activity or is necessary to comply with a court order or other law.
- 10) Requires a person or entity that operates an online service or website that is available in California to do the following:

- a) list, in a location available to the public via the service or on the website, an agent for notification of claimed violation of this section;
 - b) create a method to contact the agent for the purpose of reporting content that the user believes was erroneously removed as actionable material; and
 - c) destroy an item of actionable material if the operator has confirmed that any investigation related to that actionable material has been completed.
- 11) Provides that its provisions are severable and cumulative to any other rights, duties, obligations, penalties, or crimes imposed under any other law.

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 massive center of the problem. 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 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

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 April 17, 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.

⁵ *Ibid.*

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.

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.

This bill seeks to address this problem by imposing civil liability for the distribution of "actionable material" involving children.

2. Liability for actionable material

"Actionable material" is defined as a moving or still photograph in any technological form, regardless of whether it has been altered, that is one of two things. First, it includes an "illicit picture" of a child, which is an image of the intimate body part or parts of an 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.

The second type of actionable material is an image or depiction of a person who, when less than 18 years of age, was a victim of a violation of 18 U.S.C. Sections 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, and would have a cause of action available to them under Masha's law, 18 U.S.C. Section 2255 due, in whole or in part, to that image or depiction. Those predicate offenses involve children victimized through forced labor, sex trafficking, sexual abuse, or sexual exploitation, as well as certain activities relating to child pornography or sexual exploitation and the transportation of persons for illegal sexual activity and crimes.

The bill authorizes a person, or their parent or guardian, to bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, and any other appropriate relief, including statutory damages and attorney's fees and costs, against a person or entity that distributes, including through electronic distribution, actionable material. The language of the bill is slightly unclear about who has standing to bring this claim. The author has agreed to an amendment that clarifies his intent for this cause of action to be brought by those depicted as minors in the actionable material:

Amendment

Amend Section 52.9(b)(1) as follows:

A person **who is depicted in actionable material when the person was less than 18 years of age** may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, and any other appropriate relief, including statutory damages and attorney's fees and costs, against a person or entity that distributes, including through electronic distribution, actionable material.

A person or entity, including a social media platform, is required to remove or disable the distribution of actionable material within two days of receipt of notice from the person depicted therein. In addition to any other damages, \$200,000 in statutory damages can be awarded to a prevailing plaintiff for failure to so remove or disable.

However, the bill provides a complete defense to any liability under the bill if the defendant removes actionable material about which they received notice within two days of that notice.

An operator of an online service or website available in California is required to list an agent for notification of claimed violations and for notice that material was erroneously removed as actionable material.

In addition to the above, the Attorney General can also enforce the law against repeat offenders and levy fines payable to the person depicted in the actionable material. The bill also makes available a civil injunction to block or interrupt the distribution, including electronic distribution, of actionable material.

According to the author:

Child sex abuse material (CSAM) is rampant on social media. Too often, victims have no legal recourse for the online distribution of content depicting their abuse. These sexually exploited children are re-victimized every time a predator watches CSAM content. Often times, predators

produce material where the victim is smiling. This leads to survivors worrying that people may think they are enjoying their abuse. Victims have testified that the worst part of the re-victimization process is knowing that the content may be used to normalize the abuse and groom future victims.

SB 646 gives victims standing in state court by codifying a federal statute that enables legal advocates to bring cases against social media companies that profit or benefit from the distribution of CSAM. In 2017, Congress passed the Fight Online Sex Trafficking Act that closed a loophole in law that gave platforms protection from liability when they facilitated CSAM distribution. Victim Advocates use Masha's Law (2006) to seek restitution and hold platforms accountable for their culpability. Through this statute, victims are able to sue their abusers and their enablers, in federal court.

This bill seeks to provide victims the same standing in state court. Any person or entity who transmits CSAM is liable to be sued for damages under SB 646. SB 646 also requires that platforms list an agent who will be responsible for fielding requests to remove content. If the platform does not act within two business days, they will be liable to the civil remedies listed in Masha's law. The platform must also create a method for contacting that agent. Platforms already are using hash values to locate and remove such content.

Any action taken must commence within 6 years of discovery or within 10 years of the victim turning 18, whichever is longer. In addition to any other damages awarded, statutory damages in the amount of two hundred thousand dollars (\$200,000) shall be awarded to the prevailing plaintiff and will be paid by the defendant for failing to cease distribution of the material within two business days after notice. This amount will be adjusted for inflation in 2028 and every five years after that.

The California Catholic Conference writes in support:

Online sexual exploitation is a growing concern, especially on emerging social media such as Instagram, TikTok and OnlyFans. Pornhub, the largest pornographic site in the world had to remove over 10 million pornographic videos in December 2020 because they did not verify users, could not confirm consent was obtained, and had numerous cases of reuploads of the real sexual abuse, rape, nonconsensual content, and sex trafficking of children, teenagers and adults.

This bill will help to deter traffickers and other bad actors from sharing sexually exploitive material of children and will empower survivors with

the tools to have their images removed – helping them to recover their dignity and rebuild their lives.

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.”⁶ “[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.”⁷ 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,”⁸ “fighting words,”⁹ incitement to imminent lawless action,¹⁰ defamation,¹¹ and obscenity.¹²

Expression on the internet is given the same measure of protection granted to in-person speech or statements published in a physical medium.¹³ 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.¹⁴

The United States Supreme Court has held that posting on social networking and/or social media sites constitutes communicative activity protected by the First

⁶ U.S. Const., 1st & 14th amends.

⁷ *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.

⁸ *Snyder v. Phelps* (2011) 562 U.S. 443, 452.

⁹ *Cohen v. California* (1971) 403 U.S. 15, 20.

¹⁰ *Virginia v. Black* (2003) 538 U.S. 343, 359.

¹¹ *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 383.

¹² *Ibid.*

¹³ *Reno v. ACLU* (1997) 521 U.S. 844, 870.

¹⁴ *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.

Amendment.¹⁵ As a general rule, the government “may not suppress lawful speech as the means to suppress unlawful speech.”¹⁶

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.”¹⁷ 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.”¹⁸

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.’ ”¹⁹ 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.’ ”²⁰

If a restriction on speech is determined to be content based, it will be subject to strict scrutiny.²¹ 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.”²² Content-based restrictions subject to strict scrutiny are “presumptively unconstitutional.”²³ A restriction can survive strict scrutiny only if it uses the least-restrictive means available to achieve a compelling government purpose.²⁴

Although this bill is a content-based regulation, as it requires examination of whether the content is “actionable material,” it arguably falls within a clear 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.

¹⁵ E.g., *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735-1736.

¹⁶ *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]).

¹⁷ *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

¹⁸ *FCC v. League of Women Voters* (1984) 468 U.S. 364, 383.

¹⁹ *Packingham*, *supra*, 137 S.Ct. at p. 1736.

²⁰ *McCullen v. Coakley* (2014) 573 U.S. 464, 486 (*McCullen*).

²¹ *Id.* at p. 478.

²² *Id.* at p. 479.

²³ *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2226 (*Reed*).

²⁴ *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

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.²⁵

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:

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.

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

²⁵ *New York v. Ferber* (1982) 458 U.S. 747, 756.

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.²⁶

Here the material at issue is one of two things. The first is a visual depiction of a child's intimate "body part or parts" or of the child "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." This material arguably meets the *Ferber* standard and falls outside of First Amendment protection. The second category of actionable material requires content that already serves as the basis for criminal and civil penalties under Federal law, specifically that the images or depictions of the child are the basis, at least in part, of a predicate offense found in Masha's law. Even those predicate offenses that do not require the actual existence of CSAM, have been upheld despite constitutional challenge.²⁷

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. However, the bill here is distinct in that all forms of "actionable material" involve the depiction of an actual minor.

While the bill's prohibitions, especially on distribution, "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy," there is a strong case that its restrictions will be found to meet constitutional muster in the likely litigation to follow any implementation of the law.

A coalition of business and technology groups, including the Computer and Communications Industry Association, believe the bill's provisions that hold platforms liable for distributing illicit pictures of minors and other actionable material violates the First Amendment:

SB 646 will have a significant chilling effect on lawful speech and violates established First Amendment principles

As noted above, SB 646 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

²⁶ *Id.* at 764-65.

²⁷ *United States v. Williams* (2008) 553 U.S. 285, 307 (upholding 18 U.S.C. § 2252A).

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 air on the side of caution and remove it due to the significant liability exposure. They will have no choice but to do this even if the content does not violate their policies because the risk is too high. Though well-intentioned, this bill will result in more lawful speech being removed and fewer online spaces for people to communicate and share ideas with one another.

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).²⁸ 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 statements might be false, defamatory, or otherwise actionable.²⁹ 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.³⁰

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.³¹ 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

²⁸ 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.)

²⁹ Kosseff, *The Twenty-Six Words That Created The Internet* (2019) pp. 57-65.

³⁰ *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.)

³¹ 47 U.S.C. § 230(a) & (b).

provider.”³² 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.”³³ 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.”³⁴

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.”³⁵ 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.³⁶

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.³⁷ 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.³⁸ 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.³⁹

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

³² *Id.*, § 230(c)(1).

³³ *Id.*, § 230(c)(1) & (2).

³⁴ *Id.*, § 230(e)(1) & (3).

³⁵ Koseff, *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.

³⁶ 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.

³⁷ *Id.*, § 230(e)(5).

³⁸ See P.L. 115-164, 113 Stat. 1253.

³⁹ GAO Report to Congressional Committees, *Sex Trafficking: Online Platforms and Federal Prosecutions*, No. 21-385 (June 2021), pp. 20-25, <https://www.gao.gov/assets/gao-21-385.pdf>.

the platform blocks access to alleged infringing material upon receiving a notice of infringement.⁴⁰

This bill imposes liability on an online platform if it fails to cease distribution of or fails to disable access to, actionable material within two business days of claimed infringement. This clearly places liability on platforms for the content of their users.

The Ninth Circuit has recently analyzed the scope of the SESTA-FOSTA exception:

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 (TVPR), 18 U.S.C. § 1589 et seq. First, section 1595 of the TVPR 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. §1591.⁴¹

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.”⁴²

⁴⁰ See 17 U.S.C. § 512, the Digital Millennium Copyright Act (DCMA).

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

⁴² *Id.* at 1145.

Based on this standard, the notice of claimed infringement, and the waiting period allowed for investigation, will have to be considered sufficient to put the operator of a website on notice of its distribution of actionable material in order to meet this threshold for liability to attach. A coalition of industry groups, including TechNet, does not believe it will fall within any exemption to Section 230:

SB 646 is preempted by Federal Law

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 SB 646 that would conflict with this protection. This bill creates liability for platforms based on third party content. It would also impose liability for failure to remove content, which the Ninth Circuit has held falls squarely within the preemption of Section 230.1 Therefore, by imposing liability on platforms for their moderation decisions SB 646 conflicts with Section 230 and is likely preempted.

Micha Liberty of Liberty Law, the sponsor of this bill, argues the bill falls within the exception to Section 230:

Child pornography (or more appropriately named Child Sexual Abuse Material) is excluded from immunization otherwise provided by Section 230. 47 U.S.C. § 230(e)(1). Further, section 230 unambiguously proclaims that “it is the policy of the United States--to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” 47 U.S.C. § 230(5).

Moreover, the United States Supreme Court has repeatedly recognized that the marketplace for child sex abuse material must be broadly targeted and eliminated finding repeatedly that “[c]hild pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet.” *United States v. Williams*, 553 U.S. 285, 307 (2008). “[E]veryone who reproduces, distributes, or possesses the images of the victim's abuse... plays a part in sustaining and aggravating this tragedy.” *Paroline v. United States*, 572 U.S. 434, 457 (2014).

SUPPORT

Liberty Law (sponsor)
California Catholic Conference
Child USA
The Soaring Center

OPPOSITION

California Chamber of Commerce
Civil Justice Association of California
Computer & Communications Industry Association
Internet Coalition
NetChoice
TechNet

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. The bill provides a safe harbor where certain auditing practices are carried out. SB 287 is currently pending in the Senate Appropriations 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) would make 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. This bill died in the Senate Judiciary Committee.
