

Date of Hearing: June 20, 2023

ASSEMBLY COMMITTEE ON JUDICIARY
Brian Maienschein, Chair
SB 646 (Cortese) – As Amended April 27, 2023

As Proposed to be Amended

SENATE VOTE: 39-0

SUBJECT: CIVIL LAW: PERSONAL RIGHTS: ONLINE SEX TRAFFICKING: SEXUAL PHOTOGRAPHS

KEY ISSUE: SHOULD INDIVIDUALS WHO ARE VICTIMS OF CHILD SEXUAL ABUSE MATERIAL BE AUTHORIZED TO BRING A CIVIL ACTION AGAINST A PERSON OR ENTITY WHO DISTRIBUTES THE MATERIAL, INCLUDING DISTRIBUTION THAT IS ONLINE AND ON SOCIAL MEDIA PLATFORMS?

SYNOPSIS

Child sexual abuse material (CSAM) refers to content, including pictures and videos, which capture the sexual abuse of children. CSAM is deplorable and yet tragically prevalent throughout social media. In 2021, the National Center for Missing and Exploited Children (NCMEC) estimated that over 29 million reports of suspected child sexual exploitation were reported by online platforms. Those 29 million reports included nearly 85 million individual images and videos of CSAM.

This bill adds to the chorus of voices calling for accountability in this space, and proposes to address the scourge of CSAM on social media platforms by authorizing a cause of action for a person who is depicted in “actionable material,” as defined, against a person or entity who distributes the material. The author also proposes to amend the bill to remove language referencing the Attorney General’s enforcement authority, discussed in further detail in the COMMENTS section. The amendments are incorporated into the summary, below.

This bill is sponsored by the Soaring Institute, and is supported by the Children’s Advocacy Institute, Child USA, the California Catholic Conferences, and the Consumer Attorneys of California. It is opposed by a coalition of technology industry advocates including TechNet, the California Chamber of Commerce, and Oakland Privacy.

SUMMARY: Imposes civil liability for the distribution of specified forms of child sexual abuse material (CSAM). Specifically, **this bill:**

- 1) Makes various findings and declarations regarding the development of child sexual abuse material (CSAM) online and on social media platforms.
- 2) Defines the following for the purpose of this bill:
 - a) “Actionable material” means a moving or still photograph in any technological form, regardless of whether it has been altered, that is either of the following:

- i) 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.
 - ii) An image or depiction of a person who, when less than 18 years of age, was a victim of a violation of specified sections 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.
- b) “Electronic distribution” means 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.
 - c) “Illicit picture” means 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.
- 3) Authorizes a person who is depicted in actionable material when the person was less than 18 years of age to bring a civil action against a person or entity that distributes, including through electronic distribution, actionable material.
 - 4) Authorizes recovery of actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, and any other appropriate relief, including statutory damages of \$200 and attorney’s fees and costs. Requires this amount to be adjusted, commencing on January 1, 2023, and every five years thereafter, to reflect an increase in the cost of living in California, as indicated by the annual average of the California Consumer Price Index.
 - 5) Authorizes a parent or guardian to bring a civil action pursuant to 3) on behalf of a minor or ward in the actionable material.
 - 6) 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.
 - 7) Requires an action brought pursuant to 3) to be commenced within six 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.
 - 8) Prohibits civil liability or statutory damages if actionable material about which the defendant received notice is removed from electronic distribution, or access to them is disabled, within two business days of having received notice of claimed infringement.
 - 9) Protects a person from liability for distributing the material pursuant to this section 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 internet website that is available in California to list, in a location available to the public via the service or on the internet website, an agent for notification of claimed violation of this bill, and to create a method to

contact the agent listed for the purpose of reporting content that the user believes was erroneously removed as actionable material.

- 11) Makes the provisions of this bill severable.
- 12) Requires a person or entity that operates an online service or internet website that is available in California to destroy an item of actionable material if the operator of that online service or internet website has confirmed that any investigation related to that actionable material has been completed.

EXISTING STATE 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. (Penal Code Section 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. (Civil Code Section 1708.85 (a). Unless otherwise specified all future references are to the Civil Code.)
- 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. (Section 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. (Section 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. (Section 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. (Section 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. (Section 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. (Section 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. (Section 1708.86.)

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. Section 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. Section 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. Section 2255.)
- 4) Provides a right to free speech and expression. (U.S. Const., 1st amend; Cal. Const., art 1, Section 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.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Child sexual abuse material (CSAM) refers to content, including pictures and videos, which capture the sexual abuse of children. CSAM is deplorable and yet tragically prevalent throughout social media. In 2021, the National Center for Missing and Exploited Children (NCMEC) estimated that over 29 million reports of suspected child sexual exploitation were reported by online platforms. Those 29 million reports included nearly 85 million individual images and videos of CSAM. (*What is Child Sexual Abuse Material (CSAM)*, (Rape, Abuse & Incest National Network (RAINN)) (August 25, 2022) available at: <https://www.rainn.org/news/what-child-sexual-abuse-material-csam>.)

A spring 2022 report by Forbes detailed how the exploitation manifests on the platform TikTok in particular. The review explored “how viewers regularly use the comments to urge young girls to perform acts that appear to toe the line of child pornography – rewarding those who oblige with TikTok gifts, which can be redeemed for money, or off-platform payments to Venmo, PayPal or CashApp accounts that users list in their TikTok profiles.” (*How TikTok Live Became ‘A Strip Club Filled With 15-Year-Olds’*, Alexandra S. Levine (Forbes) April 27, 2022 available at: <https://www.forbes.com/sites/alexandralevine/2022/04/27/how-tiktok-live-became-a-strip-club-filled-with-15-year-olds/?sh=734b448162d7>.) Further, the article describes:

The transactions are happening in a public online forum open to viewers almost anywhere on the planet. Some of the demands are explicit – like asking girls to kiss each other, spread their legs or flash the camera – and some harder to detect, masked with euphemisms. Commenters say ‘outfit check’ to get a complete look at a girl’s body; ‘pedicure check’ to see their feet; ‘there’s a spider on your wall’ to get girls to turn around and show their rears; and ‘play rock-paper-scissors to encourage girls to flirt-fight or wrestle with each other. Phrases like ‘put your arms up’ or ‘touch the ceiling’ are often directed at girls in crop tops

so viewers can see their breasts and stomachs. And many simply coax girls to show their tongues and belly buttons or do handstands and splits. In return, the girls are showered with virtual gifts, like flowers, hearts, ice cream cones and lollipops, that can be converted to cash. (*Ibid.*)

Congress has also engaged in efforts to curb the prevalence of CSAM on social media platforms during the last three years, including this past month with the reintroduction of the Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act. The EARN IT Act would remove immunity for companies that “knowingly facilitate or profit” from sexually explicit images of children on their platforms. (*BREAKING: Congress Introduces Bill Compelling Big Tech to Address Growing Threat of Online Child Sexual Exploitation*, (RAINN) April 20, 2023 available at: <https://www.rainn.org/news/breaking-congress-introduces-bill-compelling-big-tech-address-growing-threat-online-child>.) Previous efforts to move this legislation have ultimately failed due to concerns that the bill would negatively impact the protections intended to be provided by Section 230 of the federal Communications Decency Act. (*Congress Re-Introduces Bill to Protect Kids From Online Sexual Abuse. Here’s What to Know*, Solcyre Burga (TIME) April 23, 2023 available at: <https://time.com/6273895/congress-re-introduces-bill-to-protect-kids-from-online-sexual-abuse/>.)

This bill proposes to address the scourge of CSAM on social media platforms by authorizing a cause of action by a person who is depicted in “actionable material,” as defined, against a person or entity that distributes the material. In addition to allowing for recovery of actual damages, compensatory damages, punitive damages, and attorney’s fees and costs, the bill would require a court to grant a prevailing plaintiff \$200,000 in statutory damages if the person or entity who distributes the material fails to remove the content within two days of receiving notice.

As currently written, the notice requirement contemplated by the bill appears to intend to function as a potential safe harbor to avoid the additional statutory penalties. Subdivision (e)(2) of the bill states that if the actionable material is removed by the person or entity within two days of receiving the notice, a potential defendant may avoid both civil liability as well as liability for statutory damages. However, it is not clear at which point in the process the plaintiff is obligated to provide the notice, what form it should take, or whether it is intended to also provide safe harbor from the statutory damages alone, or for any of the other recovery available in the bill as well. *Should this bill be approved by this Committee, the author may wish to make amendments clarifying the notice provisions of the bill.*

First Amendment Concerns. A coalition of technology industry businesses oppose this bill and claim the following:

SB 646 raises several constitutional concerns and its overbreadth creates a significant chilling effect on lawful speech. 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-intended, this bill will result in more lawful speech being removed and fewer online spaces for teens to communicate and share ideas with one another.

In addition to the tech coalition, Oakland Privacy raises further concerns regarding the impact of the two-day response window provided for by the bill. They posit that by “using such an abbreviated timeline, the bill seeks to create a rebuttable presumption that *any* content that is

reported must be taken down with no questions asked and no meaningful evaluation, including that of whether or not the reporting individual is or is not the minor depicted in the content or their parent or guardian.”

The First Amendment of the United States Constitution provides that, “*Congress* shall make no law abridging the freedom of speech, or of the press.” [Emphasis added.] As applied to the states through the Fourteenth Amendment, and as interpreted by the courts, the First Amendment prohibits any law or policy, at any level of government, from abridging freedom of speech. Legislation seeking to regulate speech can generally be distinguished as either content-based or content-neutral. Content-based laws, or laws that target a particular type of speech, must meet a strict scrutiny standard and must therefore be the least restrictive means to achieve a compelling government purpose in order to withstand legal challenge. Content neutral laws, on the other hand, or laws which serve a purpose unrelated to the speech itself, need only pass intermediate scrutiny. Under this standard, the law “need not be the least restrictive or least intrusive means of” serving the government’s interests,” but “ may not regulate expression in a manner that a substantial portion of the burden on speech does not serve to advance its goals.”

Supreme Court jurisprudence has identified various categories of speech and determined how much each is protected by the First Amendment. These categories can first be broken down into two primary categories – protected or unprotected. Protected speech benefits from the full shield of the First Amendment and cannot be regulated by the government. Unprotected speech is speech that has been found to be “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,” and thus may be subject to government regulation. (*R.A.V. v. St. Paul* (1992) 505 U.S. 377, 383.) Unprotected speech can be broken down further into various categories including: true threats; obscenity; defamation; and incitement to imminent lawless action. Obscenity is defined through the following three-pronged test referred to as the *Miller* test. (*Miller v. California*, 413 U.S. 15 (1972).)

The Supreme Court has long upheld the premise that what is now identified as CSAM but is colloquially understood to be child pornography is obscene and therefore generally not protected by the First Amendment. (*New York v. Ferber*, 458 U.S. 747 (1982).) The opponents therefore argue that it is actually the subsequent necessary implications of this bill that raise First Amendment concerns. In sum, that the economic risk of failing to address every instance of CSAM is so great, that social media platforms will overcorrect and in so doing result in a silencing of minors and other content on the platform. Because this bill would only obligate the platforms to remove content that is not subject to First Amendment protection, there is a strong argument that the bill does not run afoul of the First Amendment.

It is worthwhile to note, however, that any legislation imposing requirements on a company to make determinations on whether to remove user’s content or speech risks a chilling effect, regardless of whether or not it passes constitutional muster. Various factors may heighten this risk. Arguably, social media platforms already have the technology to quickly identify and remove certain types of content – that is why most users are not regularly exposed to pornographic images when casually searching for unrelated content. Therefore, it is possible that platforms may be able to modify their existing tools to face the requirement posed by this bill without unduly burdening non-actionable material. However, to the extent that platforms with immense numbers of users may be inundated by reports of actionable material, valid or otherwise, there may exist a risk that platforms will react in such a way so as to avoid liability to

the greatest extent possible. One factor in increasing or decreasing the likelihood of this reaction may very well be the amount of time platforms have to respond to these reports, with a shorter time period leading to an increased risk of over-removal. While there is no question that any distribution of CSAM is detrimental to the child depicted, reasonable minds may differ on the most acceptable balance between preventing harm caused by CSAM and harming other users through the censorship of non-actionable material.

Section 230 of the Federal Communications Decency Act. The federal Communications Decency Act (CDA) 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,” and affords broad protection from civil liability for the good faith content moderation decisions of interactive computer services. (47 U.S.C. Sec. 230(c)(1) and (2).) Though Section 230 was originally passed in response to judicial inconsistency with respect to the liability of internet service providers under statutes pertaining to “publishers” of content created by others, it has since been interpreted to confer operators of social media platforms and other online services with broad immunity from liability for content posted on their platforms by others.

Section 230 also indicates that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section,” but further provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (47 U.S.C. Sec. 230(e)(3).) The latter provision has generally been interpreted to expressly preempt any state law that has the effect of treating a social media or other online platform as the publisher of information posted by other users, including prescriptive requirements relating to content moderation. This is consistent with the law’s original intent, which was to ensure that internet platforms facilitating the sharing of content can do so without considerable risk of liability in the event that content is not meticulously policed.

Since the development of social media platforms, the extent of Section 230’s immunity shield has been heavily litigated. Questions have arisen regarding what elements of a user’s experience and therefore of a social media platform’s business model, benefit from section 230, and which fall outside its scope. In *Fair Housing Council v. Roommates.com, LLC*, Roommates.com was sued by a coalition of fair housing councils in California for allegedly violating the federal Fair Housing Act and state housing discrimination laws. (*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (2007).) The claim was based largely on the website’s search function which appeared to prefer certain profiles over others, seemingly on the basis of elements of the user’s identity, including their gender and sexual orientation, which were collected by Roommate.com through a mandatory questionnaire developed by the website. The District Court ruled in favor of Roommates.com, holding that the website was protected by Section 230. The councils subsequently appealed to the Ninth Circuit, which held that the website’s use of the information they required users to submit in order to utilize the website rendered Roommate.com outside the protection of Section 230. In its analysis, the court reasoned that a “website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.” (*Roommates.com, LLC*, 521 F.3d at p. 1163 (2007).) With regard to Roommate.com’s own role in developing the users’ profiles, the court argued, “Roommate is ‘responsible’ at least ‘in part’ for each subscriber’s

profile page, because ever such page is a collaborative effort between Roommate and the subscriber.” (*Id.* at p. 1167)

Just two years later in *Barnes v. Yahoo! Inc.*, the Ninth Circuit established a three-part test for determining whether a website benefits from the liability shield of Section 230. According to *Barnes*, Section 230 “only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” (*Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1100 - 1101 (2009).)

Most recently, the Court issued a decision in a pair of cases addressing the same practice – *Twitter v. Taamneh* and *Google v. Gonzalez*. In November 2015, the Islamic State (ISIS) took responsibility for a series of coordinated terrorist attacks in Paris. Among the at least 130 people killed was 23-year-old American Nohemi Gonzalez. Shortly after Nohemi’s death, her father filed suit against Google, Twitter, and Facebook, arguing that the platforms were liable for aiding and abetting international terrorism by failing to appropriately respond to, or address, terrorist organizations’ use of their services. (*Gonzalez v. Google LLC*, (Oyez) available at: <https://www.oyez.org/cases/2022/21-1333>.) They additionally argued that Google was not immune under Section 230 because their algorithm recommended ISIS videos to their users who ultimately conducted the acts of terrorism. The petitioners lost in both district court and on appeal to the Ninth Circuit, and subsequently appealed to the United States Supreme Court. Earlier this month, the Court issued its decision in both matters, holding that “the failure to allege that the platforms here do more than transmit information by billions of people – most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas – is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted ISIS’ acts. A contrary conclusion would effectively hold any sort of communications provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” (*Twitter, Inc. v. Taamneh*, (2023) 143 S. Ct. 1206, 1213.)

To the extent that the decision in *Google* left room for argument that social media platforms may still be held liable for the distribution of CSAM due to the exemption found at (e)(1) of the code, it is likely that a recent denial of a petition for certiorari foreclosed that argument. Section 230 includes an exemption to immunity for enforcement of sex trafficking laws, including the sexual exploitation of children. (47 U.S.C. Sect. 230(1)(e).) In *Does v. Reddit*, 51 F.4th 1137 (2022), a group of parents brought a claim against Reddit after discovering explicit images or videos of their children posted to various subreddit groups. The parents claimed that, despite contacting the platform with the information countless times, Reddit did little if anything to remove the content or prevent it from being shared due to the profit it provides the platform. (*Reddit*, 51 F.4th 1137, 1139.) Based on this allegation, the parents argued that Reddit reaped financial benefit from openly hosting child pornography and sought recovery under federal law 18 U.S.C. Section 1495, claiming that Reddit is liable as a beneficiary of child sex trafficking, among other causes of action. (*Id.* at 1140). The district court held that in order to trigger the exemption to immunity provided by Section 230, plaintiffs seeking to hold a platform liable must plead that Reddit’s own conduct violated the criminal sex trafficking statute, a requirement which the plaintiffs failed to meet. (*Ibid.*)

The parents appealed to the Ninth Circuit, which held that “the plain text of FOSTA and precedent interpreting a similar immunity exception establishes that a website can only be held

liable if its own conduct – not a third party’s – violates 18 U.S.C. §1591.” (*Id.* at 1141.) The court further reasoned: “In a sex trafficking beneficiary suit *against a defendant-website*, the most important component is the *defendant-website’s* own conduct – its ‘participation in the venture.’ [...] A complaint against a website that merely alleges trafficking by the website’s users – without the participation of the website – would not survive. Proof that a user committed criminal trafficking may ‘entitle a plaintiff to relief’ in a case against the *user*, but not against the website.” (*Id.* at 1142.) On May 30, the Supreme Court declined to grant the parents’ petition for writ of certiorari, leaving the Ninth Circuit decision untouched. (*Doe v. Reddit, Inc.*, 2023 U.S. LEXIS 2249.)

It is possible that the current measure—at least as applied to social media platforms themselves—may be vulnerable to the same reasoning. The bill authorizes a cause of action by an individual who is depicted in CSAM *against a person or entity that distributes CSAM*. A claim brought under this bill’s provisions against an individual user of a social media platform may result in recovery for a plaintiff. However, a claim against a social media platform (or entity) that hosts CSAM would mimic the facts of *Reddit*. Ultimately, were this bill to be signed into law, a successful defense against a preemption challenge would likely hinge on whether the platform’s participation, knowledge, or benefit from the distribution of CSAM was sufficient to establish a “participation in the venture.” Nevertheless, the bill could provide compensation to victims of CSAM as it is applied to those individuals and entities who either create or upload the content to the platform, offering an important avenue for victims to hold such producers and distributors responsible for their wrongdoing to the extent.

The Soaring Center, the sponsor of the measure, contends that the measure is safe from a preemption challenge:

It is worth noting that CSAM is wholly 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). Any arguments to the contrary are without merit and made in bad faith.

The child pornography facilitated, created, and distributed by any online platform is “without the protection of the First Amendment” and without the protection of Section 230. “Given the importance of the State’s interest in protecting the victims of child pornography,” federal and state regulation is necessary to “stamp out this vice at all levels in the distribution chain.” *Osborne v. Ohio*, 495 U.S. 103, 110- 11 (1990).

As currently drafted this bill will likely face significant legal challenges as it would apply to social media platforms. Nonetheless, the author has undoubtedly identified a significant social woe desperately in need of a thoughtful solution.

Author’s amendments. The current version of the bill would require the Attorney General to enforce its provisions against a person or entity that engages in repeated violations, and further directs the AG to “levy fines commensurate” with the damages provided for in the bill, payable to the person in the actionable material. The California Constitution entrusts the Attorney General with the power to enforce the laws of the state. (California Constitution, Article V, Section 13.) As it is tasked with enforcement of every law on the books, it is arguably not in the interest of public policy to require the AG to enforce them in any specific way. Moreover, the AG’s enforcement authority need not be specifically identified in new statutes. In order to

provide the AG with the latitude to determine the best method of enforcing this bill, the author proposes to strike subdivision (i) in its entirety.

Additionally, the author proposes one minor clarifying amendment to subdivision (b)(1).

ARGUMENTS IN SUPPORT: This bill is sponsored by The Soaring Center, and is supported by the Children’s Advocacy Institute, Child USA, the California Catholic Conference, and the Consumer Attorneys of California. In support of the measure the Consumer Attorneys of California write:

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. 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.

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).

The CSAM facilitated, created, and distributed by any online platform is "without the protection of the First Amendment" and without the protection of Section 230. "Given the importance of the State's interest in protecting the victims of child pornography," federal and state regulation is necessary to "stamp out this vice at all levels in the distribution chain." *Osborne v. Ohio*, 495 U.S. 103, 110- 11 (1990).

ARGUMENTS IN OPPOSITION: This bill is opposed by a coalition of technology industry organizations including NetChoice, the Internet Coalition, Oakland Privacy, and the California Chamber of Commerce. Oakland Privacy writes the following regarding their concerns:

While there is no question that the problem SB 646 is trying to solve is significant, the bill as currently written is overbroad and problematic. The Legislature is responsible for developing legislation that is workable and fair to all parties and SB 646 falls considerably short of that mark.

[...]

Our first area of concern is the bill’s definition of “illicit pictures”. The bill uses the definition of “*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*”.

While we don’t want to engage in pointless what-aboutism, there are several categories of images that contain intimate body parts that may not be what is generally considered CSAM or child sexual abuse materials. These can include educational materials about sex and sexuality, topless protests engaged in by adolescent women, some explicit artworks, nudist groups, or material exchanged by teens themselves or even parental nude images of infants

and toddlers. (You may think the last one silly, but the author of this letter has a parade of toddler in bath nude images in an album kept to this day by my mom, and if this had happened in the era of Facebook, would inevitably have been shared online). In short, the definition lacks precision and targets both CSAM and non-CSAM images.

[...]

We are also concerned that inter-family disputes may play out in the use of this law, including parents in negative relationships with their adolescent children including those who may be LGBTQ/trans or who are in relationships that lack parental approval.

Pending related legislation. AB 1394 (Wicks, 2023) would require social media platforms to provide a mechanism for users to report child sexual abuse material in which they are depicted and grants victims of commercial sexual exploitation a cause of action against social media platforms for features that were a substantial factor in causing their exploitation. This bill is pending before the Senate Judiciary Committee

AB 1282 (Lowenthal, 2023) would require the state Mental Health Services Oversight and Accountability Commission to report to the Legislature a statewide strategy to understand, communicate, and mitigate mental health risks associated with the use of social media by children and youth. The bill is currently pending before the Senate Health Committee.

SB 680 (Skinner, 2023) would prohibit a social media platform from using a design, algorithm, practice, affordance, or feature that the platform knows or should have known causes child users to experience specified harms, including receiving content that facilitates purchase of a controlled substance and developing an eating disorder. The bill is currently pending before this Committee.

SB 278 (Skinner, 2023) would prohibit a social media platform from using a design, algorithm, practice, affordance, or feature that the platform knows or should have known causes child users to experience specified harms, including receiving content that facilitates purchase of a controlled substance and developing an eating disorder. The bill is currently on the Senate Inactive File.

REGISTERED SUPPORT / OPPOSITION:

Support

The Soaring Center (sponsor)
California Catholic Conference
Child USA
Childrens Advocacy Institute
Consumer Attorneys of California

Opposition

Cal Chamber
Civil Justice Association of California
Computer and Communications Industry Association
Internet Coalition

Netchoice
Oakland Privacy
Technet

Analysis Prepared by: Manuela Boucher-de la Cadena / JUD. / (916) 319-2334