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NetChoice
Defending Free Speech and Free Enterprise Online

Request for Veto: AB 1394 on Commercial Sexual Exploitation

VETO REQUEST

September 20, 2023

Dear Governor Newsom:

We respectfully urge you to **veto** AB 1394 relating to commercial sexual exploitation and child sexual abuse material. In its desire to remove obscene material from the internet, the legislature passed a bill that would impose strict liability on social media platforms that "facilitate, aid, or abet" the distribution of child sexual abuse material (CSAM). Despite the legislature's laudable goal, this bill is constitutionally deficient under the First Amendment because it imposes strict liability for the social media platforms. The Supreme Court has clearly stated that liability for the dissemination of obscene material can only attach under *at least* a "knowing" standard. To impose liability under a less rigorous standard would sweep too broadly and chill constitutionally protected speech. Because the bill falls short of what the First Amendment requires, it will not advance the government's interest in protecting minors nor will it result in the removal of obscene material from social media websites.

In sum, AB 1394:

1. Violates the First Amendment's by imposing a liability standard below that set by the Supreme Court;
2. Chills constitutionally protected speech; and
3. Will not advance the government's interest in combating sexual exploitation online.

The First Amendment Demands a "Knowing" Standard to Impose Liability for the Dissemination of Obscene Material

The First Amendment prohibits the government from punishing the dissemination of lawful speech.[1] And as the Supreme Court recently reiterated, the First Amendment's protection for online speech is coextensive with its protection of traditional media.[2]

If a regulation touches on speech, even indirectly, it must be "narrowly drawn" to restrict an unlawful activity without chilling lawful expression.[3] The State does not have a free pass to regulate merely because it wants to combat some evil.[4] Such a law "cannot be sustained merely because [it was] enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."[5]

Indeed, the Court has held that this requirement of narrow tailoring applies even when the state is regulating *unprotected speech* such as true threats,[6] incitement,[7] and obscenity.[8] To safeguard protected expression, the Court has found that laws regulating the dissemination of unprotected expression must include a scienter requirement in order to impose liability.[9]

To punish the distribution of obscene material like that targeted by AB 1394, the Court has said that a *knowing* standard is sufficient.[10] By establishing a *knowing* standard as constitutionally sufficient, the Court held that the state need not show *more* than knowledge to impose liability, but it cannot impose liability under a lesser standard. The Court has been consistent on this point.[11] Indeed, there is

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[1] *Smith v. California*, 361 U.S. 147 (1959).
[2] *303 Creative v. Elenis*, 143 S.Ct. 2298, 2312 (2023) quoting *Kaplan v. California*, 413 U.S. 115, 119-120 (1973).
[3] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
[4] *Id*. at 307.
[5] *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).
[6] *Counterman v. Colorado*, 143 S.Ct. 2106 (2023).
[7] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[8] *Smith v. California*, 361 U.S. 147 (1959).
[9] *Id*.
[10] *Hamling v. United States*, 418 U.S. 87, 123 (1974).
[11] See *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a conviction for knowingly selling obscene material to a minor); *Miller v. California*, 413 U.S. 15 (1973) (affirming the conviction for knowingly distributing obscene material); *New York v. Ferber*, 548 U.S. 747 (1982) (upholding the criminalization of knowingly distributing child pornography).

no ambiguity here. The federal circuits have faithfully applied this standard.[12] In other words, "knowing" is *the standard* for imposing liability on those who disseminate obscene content.

The Supreme Court has provided two interrelated reasons for why obscenity regulations must include a knowing standard. First, the nature of obscenity does not lend itself to a static application. The Court's definition contemplates that what is considered "obscene" will change over time and across communities.[13] Because obscene material may vary across time and communities, it is necessary to only punish the knowing distribution of obscenity to avoid chilling questionable, but ultimately constitutional, speech.[14] Second, when dealing with the distribution of obscene material, imposing anything less than a knowing requirement will make distributors overly cautious and will "tend to restrict the [materials] he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."[15]

Indeed, the concern over a bookseller's trepidation to distribute only content which he has specifically reviewed is amplified in the case of social media companies.[16] These companies distribute content on a scale previously undreamed of by any bookseller.[17] Accordingly, if a lesser standard of liability were imposed, the risk of chilling speech would be even greater than for bookstores.

AB 1394 Fails to Include the Appropriate "Knowing" Standard for Dissemination of Obscene Material

AB 1394 deals with child sexual abuse material (CSAM) and the dissemination of such obscenity online. Unfortunately, in the legislature's desire to decrease CSAM online it passed a bill that imposes liability in a manner inconsistent with the First Amendment. Indeed, while AB 1394 claims to adhere to the Supreme Court's "knowing" standard, it would impose strict liability in all but name. The Supreme Court rejected strict liability for disseminating obscene material because it would chill the dissemination of lawful speech.[18]

Specifically, AB 1394 says that a social media platform will be deemed to have knowledge of the

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[12] E.g., *Does 1-6 v. Reddit Inc.*, 2022 WL 13743458 (9th Cir. Oct. 24, 2022) (Because the plaintiff's did not allege that Reddit knowingly participated in or benefited from a sex trafficking venture, the plaintiff failed to state a viable claim).
[13] *Hamling*, at 129.
[14] See generally *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating provisions of the Child Pornography Prevention Act as overbroad).
[15] *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963) citing *Smith v. California*, 361 U.S. 147 (1959).
[16] *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790 (2011) (the First Amendment's commands do not change with the advent of new technologies).
[17] *Twitter v. Taamneh*, 143 S.Ct. 1203, 1216 (2023).
[18] *Hamling v. United States*, 418 U.S. 87, 121-123 (discussing the importance of imposing a knowing standard).

material if 1) the material was both reported to the platform and is CSAM, 2) the reported CSAM depicts the reporting user or the reporting user's minor child, and 3) the reported CSAM was on the platform's site. Under these requirements, no mental state is *actually* required. This leaves the platforms in no better position than the bookseller from *Smith*.

Mental states rarely—if ever—need elaboration.[19] Courts understand what a legislature means when it includes a standard mental state like "knowing." And when the Supreme Court has clearly stated the appropriate mental state to apply when dealing with speech restrictions. Any statute—whether by name or definition—that imposes a standard for liability that is inconsistent with the Supreme Court's requirements for protecting free speech is unconstitutional. By defining "knowledge" as strict liability, AB 1394 plainly violates the First Amendment.

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In conclusion, NetChoice shares lawmakers' desire to protect minors from exploitation online and to ensure that peddlers of such obscenity are prosecuted to the fullest extent of the law. But because AB 1394 would be struck down in court, it will do nothing to advance these laudable and important interests. Because AB 1394 suffers from clear constitutional deficiencies, we ask you to **veto** this bill and adopt measures capable of achieving both outcomes without violating the Constitution.

As always, we offer ourselves as a resource to discuss these issues in further detail. We appreciate your attention to this matter.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.

[19] See e.g., 18 U.S.C. 2252(A) (penalizing the knowing dissemination of CSAM); 18 U.S.C. 2258 (definitions for the section and neither "knowing" nor "knowledge" are defined).