



August 30, 2023

The Honorable Anthony Portantino  
Chair, Senate Appropriations Committee  
State Capitol, Room 412  
Sacramento, CA 95814

**Re: A.B. 1394– OPPOSE (as amended 7/13/2023)**

Dear Senator Portantino:

I write today on behalf of the Electronic Frontier Foundation, a San Francisco-based, non-profit organization that works to protect civil liberties in the digital age. EFF represents more than 35,000 active donors and members, including thousands of supporters in California. We write to respectfully oppose A.B. 1394, authored by Assemblymember Buffy Wicks. We have great respect for Assemblymember Wicks and her goal of protecting children online. We must, however, oppose this proposal, as it runs into direct conflict with the First Amendment and triggers federal preemption. While Asm. Wicks continues to make substantial amendments to the bill, including to address compliance for companies, these issues remain for everyday internet users.

47 USC Sec. 230(c)—often referred to as Section 230—“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.”<sup>1</sup> *See Barnes v. Yahoo, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). A.B. 1394 runs into issues at each of these points and is therefore clearly preempted by federal law. It targets online services that fall under this shield of immunity. It also treats the platforms, under new causes of action, as the publisher of offensive content provided by its users.

Under this bill, California would be imposing civil liability for hosting user-generated content and giving anyone that reported it the right to sue in federal court. That is directly in conflict with 230’s immunity, which makes clear that “no 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).

### **First Amendment Concerns**

In addition to the clear conflict with federal law, A.B. 1394 also raises considerable First Amendment issues. It establishes a notice-based liability regime that puts steep penalties on any service that does not promptly take material down or does not comply with the timelines. While child sexual abuse material (CSAM) is abhorrent, the bill as written

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<sup>1</sup> *Barnes v. Yahoo, Inc.*, No. 05-36189 (9th Cir. 2009)  
<https://law.justia.com/cases/federal/appellate-courts/ca9/05-36189/05-36189-2011-02-25.html>

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creates liability based merely on a notice or claim of CSAM—not on actual knowledge that the material is CSAM. This sets up a system that makes it very easy to remove lawful speech merely because a user flags it as CSAM. And, because the bill's cause of action accrues to the person who reports CSAM material, rather than to a victim who appears in such material, it incentivizes organizations and individuals to report aggressively—perhaps reporting *any* material that they dislike as CSAM. Unlike other notice-and-takedown systems, such as the Digital Millennium Copyright Act, there is no mechanism for someone to appeal a decision, nor is there a safe harbor for providers to protect them while they investigate.

We also believe that this bill could incentivize companies to censor protected speech to avoid liability. We have seen this happen with similarly well-intentioned laws. The federal Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) ostensibly sought to criminalize sex trafficking, but swept up Internet speech about sex, sex workers, and sexual freedom, including harm reduction information and speech advocating decriminalization of prostitution.<sup>2</sup>

A.B. 1394 could follow a similar path, in which companies fearing the consequences of the law cast an overbroad net and remove information on how to prevent commercial sexual exploitation of minors or support groups for victims. Failing to comply with a notice could be construed as negligence under this bill as written.

We appreciate Asm. Wicks' dedication to privacy and the concerns that this bill is trying to address but believe that AB 1394 improperly attempts to solve a terrible problem by focusing on social media platforms and their internal operations. In doing so, it raises conflicts with federal law and the potential for grave, unintended consequences that limit free speech. For these reasons, we respectfully urge your no vote. Thank you.

Sincerely,



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cc: The Honorable Buffy Wicks; Honorable Members and Committee Staff, Senate Appropriations Committee.

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<sup>2</sup> Electronic Frontier Foundation, "Victory! Lawsuit Challenging FOSTA Reinstated by Court" (Jan 2020).

<https://www.eff.org/press/releases/victory-lawsuit-challenging-fosta-reinstated-court>