

Date of Hearing: April 1, 2025

Fiscal: Yes

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Rebecca Bauer-Kahan, Chair

AB 392 (Dixon) – As Amended March 26, 2025

**SUBJECT:** Pornographic internet websites: consent

**SYNOPSIS**

*In February, this Committee held an informational hearing on “Technology-Facilitated Male Violence against Women and Girls.” During that hearing, nationally recognized experts discussed the pervasiveness of the abuse that women and girls face on the internet. Writer Moira Donegan testified at length about the impact of nonconsensual pornography (more appropriately referred to as image-based sexual abuse) – including realistic deepfakes – on women and girls.*

*This bill, sponsored by Foundation Ra, establishes liability for any pornographic website that fails to take reasonable steps to ensure that no videos uploaded to their website contain children who were under 18 at the time the video was filmed or people who did not consent to both the making of the video and to it being uploaded. In the event that the operator of the website receives a complaint that a video violating these conditions has been uploaded, the operator will have 48 hours to remove the content. The bill also subjects the user who uploads the video to liability. Because this bill is solely focused on verifying the age and the consent of individuals, it does not regulate the ability of consenting adults to continue to create and share sexually explicit content.*

*Currently, the only organization opposing the bill is California Civil Liberties Advocacy. They have an “oppose unless amended” position with respect to the prior version of the bill, arguing that the definition of “sexually explicit content” and “pornographic internet website” are too broad.*

*If passed by this Committee, this bill will next be heard by the Assembly Judiciary Committee.*

**THIS BILL:**

1) Defines the following:

- a) “Depicted individual” is an individual depicted as engaging in sexual acts in sexual explicit content who meets any of the following:
  - i) The individual did not consent to being depicted.
  - ii) The individual was a minor at the time the content was created.
  - iii) The individual did not consent to the uploading of the content to a pornographic internet website.
- b) “Operator” is a person who operates a pornographic internet website.

- c) “Pornographic internet website” is a website on which the owner, for commercial gain, knowingly uploads, or allows others to upload, sexually explicit content that exceeds one-third of the content published on the website annually.
  - d) “Sexually explicit content” is visual imagery, including AI generated imagery, of an individual or individuals engaging in an act of masturbation, sexual intercourse, oral copulation, or other overtly sexual conduct that taken as a whole lacks serious literary, artistic, political, or scientific value.
- 2) Requires an operator to take reasonable steps to ensure that any content uploaded to the operator’s website does not include a depicted individual.
  - 3) Requires a user uploading content to submit all of the following:
    - a) A statement, under penalty of perjury, that any individual depicted meets all of the following criteria:
      - i) Was not a minor at the time the content was created.
      - ii) Consents to the content being uploaded.
      - iii) Consented to being depicted in the content.
    - b) Information sufficient to enable the operator to contact the user.
  - 4) Establishes a presumption that the operator violated 3) if the operator does not obtain the required information.
  - 5) Requires the operator to remove content within 48 hours of receiving information that a depicted individual, a minor or individual who did not consent, was included in the sexually explicit content.
  - 6) Authorizes a depicted individual who is harmed as a result of sexually explicit content being displayed on a pornographic internet website to bring a civil action against the operator of the website and the user who uploaded the content.
  - 7) A prevailing plaintiff is entitled to all of the following:
    - a) Statutory damages up to \$75,000 per violation.
    - b) Punitive damages.
    - c) Attorney’s fees and costs.
    - d) Any other available relief, including injunctive relief.
  - 8) A public prosecutor may bring a civil action to enforce this statute to obtain the following relief:
    - a) A civil penalty of up to \$25,000 per violation.

- b) Injunctive and other equitable relief.
- c) Attorney's fees and costs.
- d) Any other relief the court deems appropriate.

**EXISTING LAW:**

- 1) Establishes the standard for obscenity: "(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." (*Miller v. California* (1973) 414 U.S. 15, 24 [internal quotation marks and citations omitted].)
- 2) Defines various terms for purposes of child pornography statutes, including:
  - a) "Matter" means any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction, or any other article, equipment, machine, or material. "Matter" also means live or recorded telephone messages if transmitted, disseminated, or distributed as part of a commercial transaction.
  - b) "Obscene matter" incorporates the *Miller v. California* standard in 1). (Pen. Code § 311(a), (b).)
- 3) Makes it a crime to do any of the following:
  - a) Knowingly produce, develop, duplicate, distribute, or possess, in various specified formats, obscene matter depicting a minor personally engaging in or simulating sexual conduct, with the intent to provide the obscene matter to others. (Pen. Code § 311.1(a).)
  - b) Engage in conduct under (a) for commercial consideration. (Pen. Code § 311.2(b).)
  - c) Knowingly develop, duplicate, print, or exchange any representation of information, data, or image that depicts a minor engaged in an act of sexual conduct, regardless of whether the minor personally engaged in the sexual conduct or the depiction is obscene. (Pen. Code § 311.3(a).)
  - d) Knowingly employ, use, persuade, induce, or coerce—or in the case of parents or guardians, permit—a minor to engage or assist in posing or modeling in a performance involving sexual conduct, regardless of whether it is obscene, for a commercial purpose (Pen. Code § 311.4(b)) or not for a commercial purpose. (Pen. Code § 311.4(c))
  - e) Knowingly possess or control any matter, representation of information, data, or image, in various specified formats, the production of which involves the use of a person under 18 years of age personally engaging in or simulating sexual conduct. (Pen. Code § 311.11(a).)

- 4) Provides an enhanced punishment for the crimes specified above, if the minor personally engages or simulates the sexual conduct, when committed on or via government-owned computers or property. (Pen. Code § 311.12(a).)
- 5) Authorizes the forfeiture and destruction of matter or obscene matter depicting a minor personally engaging in or simulating sexual conduct, regardless of whether a conviction is sought or obtained. (Pen. Code § 312.3 (a), (f).)
- 6) Grants a cause of action for a depicted individual 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.
  - 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) Establishes, under Section 230 of the Communications Decency Act, that no 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. (47 U.S.C. § 230(c)(1).)
- 8) Exempts from Section 230 protection violations of federal criminal law, intellectual property law, state law that is consistent with Section 230, communications privacy law, and sex trafficking law. (47 U.S.C. § 230(e).)
- 9) Defines “child pornography” as any visual depiction of sexually explicit conduct, where any of the following is true:
  - a) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.
  - b) The visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.
  - c) The visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. (18 U.S.C. § 2256.)

## COMMENTS:

### 1) **Author’s statement.** According to the author:

AB 392 would require users to verify age and consent when uploading sexually explicit material to adult media sites. With our hyper-technological age, it is easy for individuals to share nonconsensual sexually explicit materials online. We must look for every opportunity to protect all Californians from having their personal images and videos uploaded without their consent. One in 12 people has been a victim of image-based sexual abuse and anyone can become the next victim. AB 392 is a barrier to block abuse from happening in the first place and hold both the websites and the uploaders accountable.

2) **Image-based sexual abuse.** There are several ways to classify the different types of weaponized intimate images based on the various ways that men and boys<sup>1</sup> obtain those images that they use to abuse their victim:

- *Revenge porn.* The most predominant case is the nonconsensual distribution online of images that were originally consensually, but privately, shared with the offender. Often the man is the victim's current or former partner.
- *Up-skirting, down-blousing, or spy cam pornography.* This constitutes the sharing of images that were taken secretly, without the victim's knowledge. Pornhub advertises free "Spy Porn Videos" and xhamster offers "Voyeur Videos and Naughty Peeping Porn."
- *Rape porn.* Sometimes the men will film or photograph a sexual assault on an unconscious, inebriated, or otherwise nonconsenting woman or girl and then share it with friends or upload it online. On Pornhub and other pornography websites, these videos fall into the category of "Force Porn Videos." There are also websites like "RapeLust" and "Rape Porn TV" entirely dedicated these types of videos.
- *Sextortion.* These are nude or lewd images that are obtained coercively or fraudulently from victims through threats or deceit, with the men then going on to either distribute the images or threaten to do so unless money, more images, or sex are provided to them.
- *Deepfake Pornography.* This is an exploding genre of image-based sexual abuse where sexually explicit videos and images are forged using Artificial Intelligence and are often indistinguishable from genuine images.<sup>2</sup> Pornhub offers "deepfake porn videos" and "adultdeepfakes." The AdultDeepFakes.com website advertises the "Best Celebrity DeepFake Porn Videos."

The use of sexual abuse images to harass, humiliate, and harm women and girls predates the internet. What is new is the ease with which the images can be created and that the abuse can spread further and faster. Image-based sexual abuse is a very old form of sexual degradation and violation that has taken on new significance with emerging technologies and the growing move of social and professional life into digital spaces.<sup>3</sup>

In 1953, nude images of Marilyn Monroe were published on the cover of *Playboy* without her consent. The first Black woman to be crowned Miss America, Vanessa Williams, was forced to give up her crown in 1984 when Penthouse published nude photos of her without her consent. Every decade since Marilyn Monroe suffered from image-based abuse, high-profile women have

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<sup>1</sup> According to Sophie Maddocks' review of image-based abuse research, "it has been borne out across the research literature that perpetrators. . .are mostly male." Along with being male, they are usually heterosexual and hold victim-blaming attitudes toward women. So, for purposes of this analysis the offenders will be referred to as men and boys. That does not mean, however, that women and girls do not commit image-based sexual abuse. It is just far less likely. <https://mediawell.ssrc.org/research-reviews/image-based-abuse-a-threat-to-privacy-safety-and-speech/>

<sup>2</sup> Testimony by Moira Donegan before this Committee on February 25, 2025.

<sup>3</sup> *Ibid.*

been victimized.<sup>4</sup> In 1995, actress Pamela Anderson and her husband, Tommy Lee, had a private sex tape stolen from their home by a disgruntled contractor. The private tape was made on their honeymoon and was never intended for public consumption. The VHS tape was copied and sold through underground channels before being widely distributed online. This incident remains in the zeitgeist 30 years later.<sup>5</sup> It marked a shift in how private videos could be exploited for profit on a large scale, foreshadowing the digital age of non-consensual intimate images and videos.

With the mainstream adoption of the internet, the circulation of stolen and leaked intimate content became easier. Mass file-sharing made it almost impossible for victims to regain control over their private images once they were online. During this period, websites dedicated to leaked celebrity content began appearing, often profiting off stolen or hacked material. As video-sharing sites like YouTube (2005), and later Pornhub (2007), became dominant, uploading and accessing explicit content became more accessible than ever.

One of the most infamous examples of websites facilitating the posting and sharing of revenge pornography was the website “Is Anyone Up?” (2010-2012), which specialized in revenge pornography. The website encouraged users to submit explicit photos of their ex-partners, often including their full names, social media handles, and locations. The owner of the site, Hunter Moore, became known as one of the first internet trolls, as his website was developed explicitly to humiliate people, primarily women.<sup>6</sup> In 2014, an iCloud hack, that became known as “The Fappening,” saw hundreds of private nude photos of female celebrities—such as Jennifer Lawrence, Kate Upton, and Rihanna—leaked online after hackers accessed their cloud storage accounts. This brought the nonconsensual distribution of private images into the evening news headlines. Almost 500 photos were published, showing mostly women, mostly naked, none of which were intended for the public’s eyes. Three years later, in 2017, it happened again. Images of Amanda Seyfried, Rosario Dawson and Miley Cyrus were posted on a number of websites, including 4chan and Reddit.

By the late 2010s, deepfake pornography emerged as a new threat impacting women with public profiles and middle school girls alike. Using generative artificial intelligence (GenAI), deepfake creators can superimpose a woman’s face onto an explicit video, making it appear as though they had actually engaged in the depicted acts. While high-profile celebrities were most often targeted when this technology was first developed, open-source GenAI models have been exploited to make this technology more accessible and affordable.<sup>7</sup> This has led to a proliferation of websites and phone-based apps that offer user-friendly interfaces for uploading clothed images of real

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<sup>4</sup> Maddocks, Sophie. *Image-Based Abuse: A Threat to Privacy, Safety, and Speech*. Social Science Research Council, MediaWell. (Mar. 15, 2023) <https://mediawell.ssrc.org/research-reviews/image-based-abuse-a-threat-to-privacy-safety-and-speech/>.

<sup>5</sup> Lucy Cocoran, “The True Story Behind Pamela And Tommy’s Leaked Sex Tape Is Almost Too Crazy To Believe,” *Elle* magazine (May 17, 2021) accessed at <https://www.elle.com.au/culture/news/true-story-behind-pamela-anderson-and-tommy-lee-leaked-sex-tape-25256/>

<sup>6</sup> “Operator of ‘Revenge Porn’ Website Sentenced to 2½ Years in Federal Prison in Email Hacking Scheme to Obtain Nude Photos,” United States Attorney’s Office, Central District of California (Dec.. 2, 2015) accessed at <https://www.justice.gov/usao-cdca/pr/operator-revenge-porn-website-sentenced-2-years-federal-prison-email-hacking-scheme>.

<sup>7</sup> Brian Contreras, “Tougher AI Policies Could Protect Taylor Swift—And Everyone Else—From Deepfakes,” *Scientific American* (Feb. 8, 2024) accessed at [www.scientificamerican.com/article/tougher-ai-policies-could-protect-taylor-swift-and-everyone-else-from-deepfakes/](https://www.scientificamerican.com/article/tougher-ai-policies-could-protect-taylor-swift-and-everyone-else-from-deepfakes/).

people to generate photorealistic nude images of not only adults, but also children. According to a recent *New York Times* article:

Boys in several states have used widely available “nudification” apps to pervert real, identifiable photos of their clothed female classmates, shown attending events like school proms, into graphic, convincing-looking images of the girls with exposed A.I.-generated breasts and genitalia. In some cases, boys shared the faked images in the school lunchroom, on the school bus or through group chats on platforms like Snapchat and Instagram, according to school and police reports.<sup>8</sup>

In 2018, fewer than 2,000 deepfake pornography videos had been uploaded to the best-known deepfake streaming site; by 2022, that number had grown to over 13,000 with 16 million views every month.<sup>9</sup> By 2023, researchers had determined that in the previous seven years at least 244,625 deepfake image-based sexual abuse videos had been uploaded to the top 35 websites that had been set up to either exclusively or at least partially host deepfake pornography videos. In addition, over the first nine months of 2023, 113,000 videos were uploaded to these websites.<sup>10</sup>

In February 2024, deepfake nude images of 16 eighth-grade students were circulated among students at a California middle school.<sup>11</sup> Similar reports of abuses, almost always against girls, have been reported across the country and show no sign of abating.<sup>12</sup> In the first six months of 2024, these sites had been visited over 200 million times.<sup>13</sup> Meanwhile, a 2024 study from Center on Democracy and Technology reports that 40% of students were aware of deepfakes being shared at school, 15% of which depicted an individual in a sexually explicit or intimate manner. In over 60% of these cases, the images were distributed via social media.<sup>14</sup> This provides a potent means of amplifying deepfake nonconsensual pornography, extending the

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<sup>8</sup> Natasha Singer, “Teen Girls Confront an Epidemic of Deepfake Nudes in Schools,” *New York Times* (Apr. 8, 2024) <https://www.nytimes.com/2024/04/08/technology/deepfake-ai-nudes-westfield-high-school.html>.

<sup>9</sup> Moira Donegan, “Demand for deepfake pornography is exploding. We aren’t ready for this assault on consent,” *The Guardian* (Mar. 13, 2023).

<sup>10</sup> Matt Burges, “Deepfake Porn is Out of Control,” *Wired* (Oct. 16, 2023) <https://www.wired.com/story/deepfake-porn-is-out-of-control/>.

<sup>11</sup> Mackenzie Tatananni, “‘Inappropriate images’ circulate at yet another California high school, as officials grapple with how to protect teens from AI porn created by classmates,” *Daily Mail* (Apr. 11, 2024) <https://www.dailymail.co.uk/news/article-13295475/Inappropriate-images-California-Fairfax-High-School-AI-deepfake.html>.

<sup>12</sup> Tim McNicholas, “New Jersey high school students accused of making AI-generated pornographic images of classmates,” CBS News (Nov. 2, 2023) <https://www.cbsnews.com/newyork/news/westfield-high-school-ai-pornographic-images-students/>; Lauraine Langreo, “Students Are Sharing Sexually Explicit ‘Deepfakes.’ Are Schools Prepared?” *Ed Week* (Sept. 26, 2024) <https://www.edweek.org/leadership/studentsare-sharing-sexually-explicit-deepfakes-are-schools-prepared/2024/09>; Gabrielle Hunt and Daryl Higgins “AI nudes of Victorian students were allegedly shared online. How can schools and parents respond to deepfake porn?,” *The Guardian* (June, 12, 2024) <https://www.theguardian.com/australia-news/article/2024/jun/12/ai-nudes-of-victorian-students-were-allegedly-shared-online-how-can-schools-and-parents-respond-to-deepfake-porn>.

<sup>13</sup> *People of the State of California v. Sol Ecom, Inc., et al.* (2024) Case No. CGC-24-617237, p. 2, [https://www.sfcityattorney.org/wp-content/uploads/2024/08/2024-08-16-First-Amended-Complaint\\_Redacted.pdf](https://www.sfcityattorney.org/wp-content/uploads/2024/08/2024-08-16-First-Amended-Complaint_Redacted.pdf)

<sup>14</sup> Elizabeth Laird, Maddy Dwyer and Kristin Woelfel, “In Deep Trouble: Surfacing Tech-Powered Sexual Harassment in K-12 Schools,” Center for Democracy & Technology (Sept. 26, 2024) <https://cdt.org/wp-content/uploads/2024/09/FINAL-UPDATED-CDT-2024-NCII-Polling-Slide-Deck.Pdf>.

content's reach by, in effect, and crowdsourcing abuse, potentially reaching thousands or even millions of viewers.

Women who have been victims of the non-consensual sharing of their intimate images have often been blamed for consenting to the creation of the private photos and videos. Young women and girls are regularly cautioned to not take and share nude pictures. But, what are women to do about the creation of deepfaked images and videos? How can women protect themselves from AI-enabled revenge pornography and the damage it will inevitably do to their lives? This can inflict profound psychological trauma.

In a recent *Guardian* article, gender equity expert and journalist Luba Kassova argues that “nonconsensual deepfake pornography has become a growing human rights crisis.” She asks readers to:

Imagine finding that someone has taken a picture of you from the internet and superimposed it on a sexually explicit image available online. Or that a video appears showing you having sex with someone you have never met.

Imagine worrying that your children, partner, parents or colleagues might see this and believe it is really you. And that your frantic attempts to take it off social media keep failing, and the fake “you” keeps reappearing and multiplying. Imagine realising that these images could remain online forever and discovering that no laws exist to prosecute the people who created it.<sup>15</sup>

Image-based abuse has become a general risk faced by millions of women and girls and there is very little they can reasonably do to prevent their own victimization.

**3) The impact of sexual abuse imagery on women and girls.** Regardless of the form the image-based sexual abuse takes, the weaponizing of these images and videos can destroy the lives of women and girls. Maintaining a “good” online identity has become essential in contemporary society. Applying for college or a job, online dating, even ordering an Uber or food delivery depend on a person’s ability to create a good online identity.<sup>16</sup> Beyond the damage to their future, women and girls often face deep emotional and psychological harm. Thirty years after the theft of her intimate video with her husband, Pamela Anderson, a rape survivor, equates the theft and release of the tape to being raped again.<sup>17</sup>

Other women who have experienced image-based sexual abuse, whether deepfakes or otherwise, also compare the experience to being sexually assaulted. Women have reported feeling so much shame about their body because of deepfake images that they couldn’t look in a mirror. One woman reported that she could not shower for days after she discovered deepfaked images of her online because she felt “so gross” and “didn’t want to see her body.” The first time she

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<sup>15</sup> Kassova, Luba. “Tech bros need to realise deepfake porn ruins lives – and the law has to catch up,” *The Guardian* (Mar. 1, 2024) <https://www.theguardian.com/global-development/2024/mar/01/tech-bros-nonconsensual-sexual-deepfakes-videos-porn-law-taylor-swift>.

<sup>16</sup> Sophie Maddocks, *Image-Based Abuse: A Threat to Privacy, Safety, and Speech*, MediaWell (Mar. 15, 2023) <https://mediawell.ssrc.org/research-reviews/image-based-abuse-a-threat-to-privacy-safety-and-speech/>.

<sup>17</sup> *PAMELA a love story*, 2023, available on Netflix.



showered, “[when] she took her clothes off, and she walked past the mirror in the bathroom she just sobbed.”<sup>18</sup>

Post-traumatic stress disorder is common among victims who often “can’t reach a place of psychological safety because their images are never fully deleted.”<sup>19</sup> Studies of victims indicate that these women and girls suffer other severe mental health affects as well, including anxiety, depression, suicidal ideation, and difficulty trusting loved ones. They are at increased risk of substance abuse, eating disorders, and self-harm. They are more likely to leave their jobs and they are more likely to experience major disruptions in their education.<sup>20</sup> The vulnerability of women and girls and their inability to protect themselves from the threat of image-based sexual abuse stops them from being able to fully and equally participate in public life, chilling their fundamental rights of association and free speech.

**4) Why do men and boys commit this type of abuse.** Moira Donegan, Writer in Residence at the Michelle R. Clayman Institute for Gender Research at Stanford University, testified in February at an informational hearing held by this Committee on technology-facilitated male violence against women and girls:

One investigation by a researcher at Michigan State University found that perpetrators cite three types of motivation: to show off; to bully; and to seek revenge. . . Nonconsensual pornography aims to punish women for a perceived grievance men have against them, or to discipline a perceived transgression on the women’s part. It is wielded against women and girls who break up with men in whom they were no longer romantically interested, enforcing a punishment for defying men’s wishes. It is wielded against women who speak or behave in ways that men disagree with, enforcing a punishment for defying men’s standards.

In all cases, the message sent by nonconsensual pornography is one of men’s social domination over women. The message is that women and men are not equals, but that women must defer to men and that those who do not will be humiliated and made to suffer. And the infliction of this suffering is very much deliberate.<sup>21</sup>

For many perpetrators, causing women and girls trauma and humiliating them is the point.

**5) Pornhub.** Aylo (formerly MindGeek), the multinational pornographic conglomerate was launched in 2004 and purchased by Ethical Capital Partners, a privately held equity firm, in 2023. The company owns Pornhub, RedTube, and YouPorn, among other platforms. In addition to platforms, the company owns a number of pornography studios including Brazzers, Digital Playground, Men.com, Reality Kings, Sean Cody, and WhyNotBi.com.<sup>22</sup> In January 2024, Pornhub saw over three billion visits to its website in the United States alone. In November 2024, Pornhub was the seventh most popular website in the world with 5.25 billion visits.<sup>23</sup>

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<sup>18</sup> Jess Davies. “I investigated deepfake technology and found *hundreds* of men using it to create non-consensual porn,” *Glamour UK* (Feb. 6, 2024) <https://www.glamourmagazine.co.uk/article/deepfake-porn-twitch-scandal>

<sup>19</sup> Sophie Maddocks (2023)

<sup>20</sup> Testimony by Moira Donegan before this Committee on February 25, 2025.

<sup>21</sup> Testimony taken from an automatically generated transcript of Ms. Donegan’s testimony.

<https://calmatters.digitaldemocracy.org/hearings/258546>.

<sup>22</sup> Wikipedia. <https://en.wikipedia.org/wiki/Aylo>.

<sup>23</sup> <https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/>.

The platform offers a revenue sharing for its users who upload videos. Its “Tiers Monetization Program” allows individuals in the model program to receive a portion of the advertising revenue based upon the number of videos they upload. In order to be eligible to revenue sharing, a user must appear in the videos. “Consistently uploading new, high-quality videos that are 7 minutes or longer will help you reach higher Tiers and a higher payout.”<sup>24</sup> In addition to sharing the advertising revenue, Pornhub offers monthly and annual cash rewards between \$50 and \$2,500 for the videos that are viewed the most.<sup>25</sup> Users in the United States who are participating in the revenue sharing programs are able to receive payment through direct deposit, a paper check, or crypto currency.<sup>26</sup>

In a 2020 *New York Times* opinion piece, Nicholas Kristof exposed an uglier side of the platform whose parent company prides itself on providing world-class adult entertainment on some of the internet’s safest platforms.<sup>27</sup> “It is infested with rape videos. It monetizes child rapes, revenge pornography, spy cam videos of women showering, racist and misogynist content, and footage of women being asphyxiated in plastic bags.”<sup>28</sup> Kristoff interviewed a number of young women who had been trafficked when they were young and sexually abusive videos of them had shown up on Pornhub. He mentions one 15 year old girl who went missing in Florida and her mother found her on Pornhub “in 58 sex videos.” In another interview, a young woman said that “Pornhub became [her] trafficker.” Her adoptive family had forced her to appear in pornographic videos beginning when she was nine years old. “Some videos of her being abused ended up on Pornhub and regularly reappear there,” she said. The young woman is now 23.<sup>29</sup> Just days after that article was published, Visa and Mastercard announced that they would no longer allow cardholders to use their cards on Pornhub. In December 2023, the company that operates Pornhub, acknowledged in federal court that it had profited for years from pornographic content that depicted sex trafficking victims.<sup>30</sup>

Soon after the *Times* article, Pornhub announced a series of changes to its platform. Users now need to be verified in order to upload videos making it easier for users to be held accountable for the content they upload. According to the site’s trust and safety statement, verified users must maintain proof of identification, age, and consent for all performers in uploaded content. Additionally, along with human moderators the platform employs automated tools and artificial intelligence to search for illegal content.<sup>31</sup> Finally, Pornhub started publishing regular transparency reports. According to their most recent report, in September 2024 they began requiring that users provide the platform with evidence that they are maintaining the required consent documents and the required identity documentation.<sup>32</sup> They also reported a total of 1.27 million pieces of content were uploaded to the platform in the second half of 2024. Of those,

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<sup>24</sup> <https://help.pornhub.com/hc/en-us/articles/26163424150035-How-Do-Tiers-Work>.

<sup>25</sup> <https://help.pornhub.com/hc/en-us/articles/4419900622355-Contests-and-Awards>.

<sup>26</sup> <https://help.pornhub.com/hc/en-us/articles/4419872101139-Earnings-and-Payments>.

<sup>27</sup> <https://aylo.com/>

<sup>28</sup> Nicholas Kristof. “The Children of Pornhub” *New York Times* (Dec. 4, 2020)

<https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>.

<sup>29</sup> *Ibid.*

<sup>30</sup> Erin Nolan. “Pornhub’s Parent Company Admits to Profiting From Sex Trafficking,” *New York Times* (Dec. 21, 2023) <https://www.nytimes.com/2023/12/21/nyregion/pornhub-aylo-profits-sex-trafficking.html?searchResultPosition=2>

<sup>31</sup> <https://help.pornhub.com/hc/en-us/categories/4419836212499>

<sup>32</sup> 2024 Transparency Report (Second Half). <https://help.pornhub.com/hc/en-us/articles/38743689517715-2024-Transparency-Report-Second-Half>.

92,792 were blocked or removed for violating the terms of service. An additional 114,684 pieces of content that had been uploaded before July 2024 were also removed and labeled as terms of service violations during the second half of 2024.<sup>33</sup>

6) **What this bill would do.** This bill is intended to hold those profiting off of the uploading of image-based sexual abuse of women and girls liable for the distribution and sharing of those images. Specifically, this bill:

- Requires the operator of a pornography platform to take “reasonable steps” to make sure that uploaded content does not include anyone who was under 18 at the time the video was made or contain anyone who did not consent to the making and the uploading of the video.
- Requires a user to submit a statement attesting to the fact that content meets the requirements, similar to Pornhub’s current policies, and provide information that allows the platform to contact the user if necessary.
- Requires the platform to remove illegal content within 48 hours of receiving information that someone in the content did not consent or was under age.
- Establishes a private right of action against both the platform and the user for an individual who suffers harm as a result of a violation of the provisions described above. Enables depicted individuals to obtain up to \$75,000 in statutory damages per violation, as well as punitive damages, attorney’s fees, and any other available relief.
- Public prosecutors may also bring actions and obtain the same remedies, although the civil penalty in those cases is capped at \$25,000 per violation.

Nothing in this bill restricts the uploading of pornography that is made by consenting adults.

7) **Constitutional considerations.** By imposing liability for the posting of nonconsensual sexually explicit content on users of pornographic websites and the websites themselves, this bill implicates the First Amendment and federal preemption under Section 230 of the federal Communications Decency Act of 1996.

*First Amendment.* The United States and California Constitutions prohibit abridging, among other fundamental rights, freedom of speech.<sup>34</sup> Sexual expression that is indecent but not obscene is protected by the First Amendment.<sup>35</sup> The test for obscenity was set forth in *Miller v.*

*California*: “(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.”<sup>36</sup> This bill, like several statutes outlawing nonconsensual pornography, incorporates the subjective criteria from (c) into the definition of “sexually explicit content.”

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<sup>33</sup> *Ibid.*

<sup>34</sup> U.S. Const., 1st and 14th Amends; Cal. Const. art. I, § 2.

<sup>35</sup> *Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126.

<sup>36</sup> (1973) 414 U.S. 15, 24.

Moreover, the bill incorporates objective criteria into the material it covers by applying only to sexually explicit content depicting a person who did not, or could not, consent to its creation or distribution – namely child, rape, revenge, or deepfake pornography. Such materials – depicting crimes – have not historically received First Amendment protection.<sup>37</sup> Nonetheless, to avoid chilling the posting of consensual sexual materials, the author may wish to work with stakeholders to continue to refine the bill’s liability provisions in the Assembly Judiciary Committee, which awaits the bill.

*Federal preemption.* Section 230(c)(1) of the federal Communications Decency Act of 1996 shields online platforms from liability for third-party content: “No 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.”<sup>38</sup> This provision has been hailed as the law that created the modern internet, fostering free expression online and allowing an array of innovative services and spaces to flourish, from search engines to social media.<sup>39</sup> It has also come with a destructive side, absolving platforms of responsibility for virtually all third-party harms arising from the use of their services – “a protection not available to print material or television broadcasts.”<sup>40</sup>

Section 230 was intended to promote investment in online companies and encourage “‘Good Samaritan’ blocking and screening of offensive material”<sup>41</sup> without fear of liability for defamation.<sup>42</sup> Courts soon adopted an expansive interpretation – a key early decision construed “publisher” immunity as encompassing “traditional editorial functions” such as deciding whether to publish, remove, or even alter content.<sup>43</sup> Consequently, the plaintiff, a victim of online defamation by an anonymous user, had no recourse against the platform despite its failure to timely remove the content, which would have resulted in liability in the offline world. Following this logic, courts have extended Section 230 well beyond the defamation context, routinely concluding that online intermediaries are not liable for harms related to third-party illicit content.<sup>44</sup> “The common thread weaving through these cases is that the courts have sapped §230’s Good Samaritan concept of its meaning.”<sup>45</sup>

This sweeping grant of immunity has been the subject of widespread criticism and calls for reform.<sup>46</sup> Senators Lindsey Graham and Dick Durbin are planning to introduce a bill that would

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<sup>37</sup> See this Committee’s recent analysis of AB 621 (Bauer-Kahan), quoting First Amendment scholar and professor of constitutional law Erwin Chemerinsky.

<sup>38</sup> 42 U.S.C. § 230(c)(1). Section 230 also (1) provides a safe harbor for good faith content moderation, (2) preempts contrary state laws, and (3) enumerates exemptions for enforcement of federal criminal statutes, intellectual property laws, communications privacy laws, and sex trafficking.

<sup>39</sup> See e.g., Kosseff, *The Twenty-Six Words that Created the Internet* (2019).

<sup>40</sup> Quinta Jurecic, “The politics of Section 230 reform: Learning from FOSTA’s mistakes” *Brookings* (Mar. 1, 2022), <https://www.brookings.edu/articles/the-politics-of-section-230-reform-learning-from-fostas-mistakes>.

<sup>41</sup> § 230(c).

<sup>42</sup> *Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1163.

<sup>43</sup> *Zeran v. Am. Online, Inc* (4th Cir. 1997) 129 F.3d 327.

<sup>44</sup> Michael Rustad & Thomas Koenig, “The Case for a CDA Section 230 Notice-and-Takedown Duty” (2023) 23 Nev.L.J. 533, 561-574.

<sup>45</sup> Danielle Keats Citron, “How to Fix Section 230” (2023) 103 B.U.L. Rev. 713, 727.

<sup>46</sup> E.g., John Lucas, “AG Moody Joins with Other Attorneys General to Urge Congress to Stop Protecting Illegal Activity on the Net,” *Capitolist* (May 23, 2019), <https://thecapitolist.com/ag-moody-joins-with-other-attorneys-general-to-urge-congress-to-stop-protecting-illegal-activity-on-the-net>.

sunset Section 230.<sup>47</sup> Justice Clarence Thomas has called for the Supreme Court to review the scope of Section 230.<sup>48</sup> Ninth Circuit Judge Ryan Nelson recently stated that courts have “stretch[ed] the statute’s plain meaning beyond recognition,” leading to “perverse effects.”<sup>49</sup> The Ninth Circuit “should revisit our precedent,” he urged, particularly in light of “artificial intelligence raising the specter of lawless and limitless protections.”<sup>50</sup>

Courts have emphasized, however, that Section 230 immunity is not limitless.<sup>51</sup> Section 230 is not “an all-purpose get-out-of-jail-free card”<sup>52</sup> that “create[s] a lawless no-man’s-land on the internet.”<sup>53</sup> The Ninth Circuit has “consistently eschewed an expansive reading of the statute that would render unlawful conduct ‘magically . . . lawful when [conducted] online,’ and therefore ‘giv[ing] online businesses an unfair advantage over their real-world counterparts.’”<sup>54</sup>

Under Ninth Circuit precedent, Section 230(c)(1) immunity exists for “(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>55</sup> With respect to the third prong, Section 230 protection extends only to claims that “derive[] from the defendant’s status or conduct as a publisher or speaker.”<sup>56</sup> If, instead, the claim “springs from something separate from the defendant’s status as a publisher, such as from . . . obligations the defendant has in a different capacity,” Section 230 immunity does not apply.<sup>57</sup> Examples of such cases include:

- Yahoo’s promise and subsequent failure to remove revenge pornography and defamatory content, as the asserted liability derived from contract principles.<sup>58</sup>
- A networking website owner’s unlawful failure to warn a woman who was raped by two users of the website who posed as talent scouts to lure her to a fake audition, where it was alleged that an outside source had informed the owner about the predatory scheme.<sup>59</sup>
- A city ordinance that required short-term home rental websites to refrain from completing booking transactions for properties not registered with the city, and to refrain from collecting or receiving a fee for “facilitating or providing services ancillary to a vacation rental or unregistered home-share.”<sup>60</sup>

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<sup>47</sup> Lauren Feiner, “Lawmakers are trying to repeal section 230 again” *The Verge* (Mar. 21, 2025), <https://www.msn.com/en-us/politics/government/lawmakers-are-trying-to-repeal-section-230-again/ar-AA1BptAI?ocid=BingNewsVerp>.

<sup>48</sup> *Doe ex rel. Roe v. Snap, Inc.* (2024) 144 S. Ct. 2493 (Thomas, J., dissenting from denial of certiorari).

<sup>49</sup> *Calise v. Meta Platforms, Inc.* (9th Cir. 2024) 103 F.4th 732, 747 (Nelson, J. concurring) (*Calise*).

<sup>50</sup> *Ibid.*

<sup>51</sup> *Calise, supra*, 103 F.4th at p. 739, citing cases.

<sup>52</sup> *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 853.

<sup>53</sup> *HomeAway.com v. City of Santa Monica* (9th Cir. 2018) 918 F.3d 676, 683.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1109.

<sup>56</sup> *Id.* at p. 1102.

<sup>57</sup> *Calise, supra*, 103 F.4th at p. 742.

<sup>58</sup> *Barnes, supra*, 570 F.3d at p. 1109.

<sup>59</sup> *Doe v. Internet Brands, Inc., supra*, pp. 852-853.

<sup>60</sup> *HomeAway.com, Inc. v. City of Santa Monica* (9th Cir. 2019) 918 F.3d 676, 682 (*HomeAway*).

- Snap’s allegedly defectively-designed app, which promoted content that encouraged two teen boys who died in a high-speed car accident to drive at dangerous speeds.<sup>61</sup>
- The claim that Google aided and abetted terrorism by sharing advertising revenue with ISIS.<sup>62</sup>
- Platforms that processed payments for unlawful purchases of virtual chips for illegal casino apps.<sup>63</sup>

While these cases are highly fact-specific, taken together they establish that Section 230 does not shield conduct, including sharing revenue or otherwise facilitating illegality, that can be characterized as the platform’s own unlawful act.<sup>64</sup> Here, a persuasive argument can be made that liability for commercial pornographic websites that share revenue or facilitate creators and distributors of child, rape, revenge, or deepfake pornography “springs from something separate from the defendant’s status as a publisher, such as from . . . obligations the defendant has in a different capacity.” Thus, such claims may survive a Section 230 defense.

8) **Related legislation.** This Committee passed AB 621 (Bauer-Kahan), a bill that updates an existing law that provides a civil cause of action against creators and distributors of sexually explicit deepfakes by expressly incorporating “nudification” websites and those that knowingly or recklessly facilitate violations of the law, including by providing essential services to nudification websites. Taken together, both bills arguably could significantly reduce the creation and distribution of image-based sexual abuse.

**ARGUMENTS IN OPPOSITION:** In opposition to the prior version of the bill, California Civil Liberties Advocacy argues:

[A]s currently drafted, AB 392 is overly broad in scope and risks suppressing protected forms of expression beyond its intended purpose. Specifically, we are concerned about the following provisions:

The definition of “sexually explicit content” encompasses “masturbation, sexual intercourse, oral sex, or other overt sexual conduct lacking serious literary, artistic, political, or scientific value.” This language mirrors elements of the *Miller v. California* obscenity test but fails to provide objective criteria for determining value, creating ambiguity and raising First Amendment concerns. Courts have long held that content should not be restricted simply based on its sexual nature unless it meets the full constitutional standard for obscenity.

The definition of “pornographic internet website” as a site where “one-third or more of its content consists of sexually explicit material” is arbitrary and vague. Many mainstream platforms host adult content, but this threshold could inadvertently categorize legitimate platforms—including artistic, educational, or sex-positive health websites—as pornographic, exposing them to regulatory burdens and legal liability.

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<sup>61</sup> *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, 1092.

<sup>62</sup> *Gonzalez v. Google LLC* (9th Cir. 2021) 2 F.4th 871, 890 (*Gonzalez*). This case was eventually resolved on the grounds that the plaintiffs did not allege facts sufficient to show a violation of anti-terrorism laws.

<sup>63</sup> *In re Apple Inc. Litig.* (N.D.Cal. 2022) 625 F. Supp. 3d 971, 994.

<sup>64</sup> *See ibid.*

We believe AB 392 in its current form could lead to unintended consequences, including suppressing lawful content and disproportionately impacting platforms that serve educational, artistic, and advocacy purposes related to sexuality and human rights.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

None on file.

**Opposition**

None on file.

**Oppose Unless Amended**

California Civil Liberties Advocacy

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