

May 14, 2021

Senate Judiciary Committee
State Capitol, R Room 2187
Sacramento, CA 95814

Re: SB 435 — Civil law: personal rights: online sex trafficking: sexual photographs (Cortese) – Oppose

To members of the Senate Judiciary Committee:

We are writing with concern about SB-435, introduced by Senator Cortese, in anticipation before your committee.

While well-intentioned, SB-435 is drafted without a clear understanding of the internet, and has significant problems practically and constitutionally which need to be addressed before the bill can be allowed to move forward.

We agree with Senator Cortese that the distribution of non-consensual intimate imagery (NCII), and particularly child sex abuse material (CSAM) is a major issue, not just in California, but globally. Those who create and distribute offensive, immoral and illegal content should be fully prosecuted. However, the bill as written has serious unintended consequences for both free speech and a free internet.

Section 230 Conflict

First, and most importantly, SB-435 violates the protections of Section 230 of the Communications Decency Act, which holds that an interactive computer service can not be held liable for content posted by a third party. It is one of the central tenets of both free speech and a free internet. As written, SB-435 would thus be in clear conflict with federal law, and would result in intense and costly litigation, with no current path to implementation.

Potential Privacy Violations

Though a release from Senator Cortese's office has stated that he is specifically targeting uploads of illegal user-generated content (UGC) on adult sites such as Pornhub, the bill's text reaches much further, and would necessarily impact any platforms that incorporates UGC content, including search engines like Google, social media sites like Facebook and Twitter, non-profit resources like Wikipedia, and small start-up companies of all sizes.

Under SB-435, any platform or service that allows the 'digital transmission' of images would be subject to the penalties in the bill, as would services like Gmail, Skype, Dropbox, Tinder and phone and messaging services. While we should work to stop transmission of revenge porn and CSAM, this bill would require these companies to access and monitor even private communication exchanges, or face potentially devastating fines. Even if these companies were able to bypass end-to-end encryption — legally and technically — the potential privacy violations are enormous.

Most CSAM and NCII is shared privately, in private messages and groups. Often, victims become aware that an explicit image is being shared on a platform or via a messaging device, but lack detailed information as to where or on which accounts or to what extent. Under SB-435, the penalties begin being assessed almost as soon as their complaint is filed, even if there is no reasonable way to find or remove any or all of it.

Unreasonable Burden on Smaller Platforms

User-generated content has already fueled a generation of internet start-ups, and almost every new platform incorporates UGC in some way. Should SB-435 pass, no reasonable start-up would ever allow a user to upload or share an image, even privately.

While there is a tremendous liability for nearly all websites and apps, the bill creates a prohibitive burden for smaller California start-ups and other businesses who cannot staff the around-the-clock reporting centers needed to respond to and remove such content.

False or Malicious Reporting

The provisions in SB-435 make it extremely vulnerable to abuse. Despite instituting strict removal standards and significant penalties for failing to remove NCII and CSAM content, this bill provides no guidance or process for evaluating such reports. There are no penalties for false reporting, and no provision for dismissal of fines for companies who fail to remove reported-but-legal content. The timeline and penalty are based only on the receipt of a report, not its veracity.

The system requires no verification that the image is illegal, or even that the person reporting the image is actually in it, and is ripe for abuse. Sex-related content of all types, including art photography, LGBTQ content, educational material, and legal adult content is regularly flagged on social media by those who are offended or wish its removal. We would likely see the same overreach here. There are no provisions in the bill that would prevent malicious use of the system to silence legal content.

Likewise, there isn't anything in the bill that would prevent someone from exploiting the system in an attempt to collect the statutory damages. Under the law, someone could report the existence of an image, without identifying the image or its location — a common issue for platforms. Alternatively, a person could upload and report a picture of themselves in hopes of profiting if a platform or service does not find and remove the image within the time frame.

Censorship of the Marginalized

Finally, we fear that, rather than narrowly targeting CSAM and NCII, SB-435 will result in the widespread censorship of legal sex-related content by platforms who would rather be overcautious than potentially liable. Once platforms are made liable for third-party content, it's much easier, economically and legally, to broadly block even legal content related to sex and sexuality.

Not only would this be deleterious to free expression generally, it would likely result in the widespread deplatforming of marginalized communities, including LGBTQ+ creators and sex workers, who already face aggressive online patrolling and harassment on social media.

This bill seeks to fight sex trafficking, but its overbroad provisions actually work to push the most vulnerable further to the margins, where they can be exploited. It will push sex-related content — and consumers — off of established platforms and into spaces where there are few restrictions.

Like Senator Cortese, we are committed to the fight against NCII and CSAM. But, even beyond its clear legal conflict with Section 230, the unintended consequences of this bill on all aspects of internet communication are vast and frightening.

We ask that those on the committee vote no on this bill until these issues are addressed.

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