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December 6, 2022

The Honorable Charles E. Schumer
Majority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
1236 Longworth House Office Building
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
2468 Rayburn House Office Building
Washington, D.C. 20515

Re: Kids Online Safety Act (S. 3663)

Dear Majority Leader Schumer, Speaker Pelosi, Leader McConnell, and Leader McCarthy:

We write to express our concerns about the threats to liberty and minors' well-being posed by S. 3663, the Kids Online Safety Act (KOSA). The safety of minors is an undeniably important issue deserving thoughtful consideration. That simply has not happened here. While many hearings have been held about the safety of minors online generally, the text of this particular bill has received less than 20 minutes of discussion—all of it in a single committee meeting: the July 27, 2022 markup. After substantial amendments were accepted at markup, there is not even a current version of the bill available to the public for consideration—forcing us to reconstruct the final text sent to the Senate floor manually.[1] As a result of this opaque process, First Amendment experts were unable to meaningfully raise concerns about the bill before it was approved by the committee.

KOSA would constitute an age verification mandate even more sweeping than those enacted in 1996 and 1998—which both failed in court.[2] That mandate would apply to virtually any

[1] The text of the bill as reported out of committee is available at https://techfreedom.org/wp-content/uploads/2022/12/KOSA-As-Reported-7.27.22.pdf

[2] Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 133 (1996), struck down in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997); Child Online Protection Act (COPA), Pub. L. No. 105-277, div. C, Tit. XIV, 112 Stat. 2681-736 (1998), enjoined in ACLU v. Ashcroft (Ashcroft I), 322 F.3d 240, 243, 247 (3d Cir. 2003), aff'd 542 U.S. 656 (2004). The Supreme Court reviewed and affirmed Ashcroft I in American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 196 (3d Cir. 2008).

Internet-connected service: any "social media service, social network, video game, messaging application, video streaming service, [and] educational service" *plus* any "online platform" that "primarily provides a community forum for user generated content," such as Wikipedia.[3] Across nearly the entire digital realm, the current language of KOSA would violate the First Amendment rights of both minors and adults to access content and communicate anonymously or pseudonymously. KOSA will also be weaponized against content aimed purely at adults. Its duty of care for all minors in general cannot be operationalized in any other way, and its provisions will authorize political opportunism in the states, with protected speech as a casualty.

I. KOSA Effectively Mandates Intrusive and Unconstitutional Age Verification

How KOSA mandates age verification. Several provisions of KOSA work together to ensure that covered platforms *must* verify the identity of *all* users. First, Section 4(a)(1)(A) requires platforms to provide minors a "safeguard" that would limit other individuals, "in particular individuals aged 17 or over," from finding or contacting a minor. Platforms must therefore determine whether *every* user is a minor. Without knowledge of each user's age, it would be impossible for platforms to comply with this requirement.

Second, Section 3 imposes a general duty on covered platforms to "act in the best interests of a minor that uses [their services]"—whether a platform knows that users are minors or not.[4] And because the duty exists regardless of a platform's actual or constructive knowledge of a user's age, platforms will face strong pressure to implement the most stringent available methods for verifying the age of all users.

Third, Section 3(b)(4) requires each platform to "take reasonable measures in its design and operation of products and services to prevent and mitigate … sexual exploitation, including enticement, grooming, [and] sex trafficking." What technical measures courts might accept as "reasonable" is entirely unclear, as we discuss further in Sections II and III. But unless platforms perform robust age verification for every user, there will be no reliable way for them to distinguish between flirtatious conversations between adults and unlawful sexual exploitation of minors. KOSA's vague and uncertain commands will lead platforms to default to age verification as the only means to avoid crushing liability.

Reliable age verification is presently impossible. In practice, no age verification mechanism ever developed would be reliable enough to adequately protect platforms

[3] Kids Online Safety Act, S. 3663, 117th Cong. §§ 2(3) & (6) (2022).

[4] Unlike Section 4(a)(2)'s prescription of certain default safeguard settings, Section 3 does not condition the existence of a platform's duty on whether a platform "knows or reasonably believes" a particular user to be a minor.

against liability under KOSA.[5] Only by sidestepping the problem entirely has the Children's Online Privacy Protection Act (COPPA) of 1998 avoided First Amendment challenges.[6] Defending the constitutionality of the Child Online Protection Act (COPA) of 1998, the government argued that websites could avoid liability for providing information deemed "harmful to minors" by requiring users to input credit card information and thereby verify that they were not minors. The Third Circuit rejected this proposition, holding that credit card information does not actually verify a user's identity, thus rendering COPA's affirmative defense "effectively unavailable."[7] More modern identity verification solutions involve providing government-issued documents and/or "selfies" or live video. But there is good reason to doubt that these methods are much more reliable: the Internet is replete with instructions on how to fool such verification measures with free, easy-to-use software.[8]

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[5] *See* Gordon v. Holder, 721 F.3d 638, 642, 657 (D.C. Cir. 2013) (recognizing that "[r]emote purchasing also makes it easier for parties to evade age restrictions … age verification requirements are only partially effective"); American Booksellers Found. For Free Expression v. Sullivan, 799 F. Supp. 2d 1078, 1082 (D. Alaska 2011) ("There are no reasonable technological means that enable a speaker on the Internet to ascertain the actual age of persons who access their communications.").

[6] COPPA requires "verifiable parental consent" for the "collection, use, or disclosure of personal information from children" by services and sites "directed to" children under 13 or when sites have "actual knowledge" that users are under 13. 15 U.S.C. § 6502. Thus, children can access mixed-audience services and sites by lying about their age (often with their parents' consent and/or participation). The Federal Trade Commission has accepted the provision of a credit card by *someone* as a "reasonable" way to "obtain verifiable parental consent," 16 C.F.R. § 312.5(b)(2)(ii), even though this mechanism in no way verifies the parent-child relationship and merely makes it *more* likely (yet far from certain) that *someone* over the age of 18 is involved. U.S. credit card issuers generally do not issue credit cards to anyone under 18, but most will allow primary account holders to add minors *of any age* to their cards as authorized users. Alexandria White, *What's the minimum age to be an authorized user on a credit card?*, CNBC (Apr. 15 2022), https://www.cnbc.com/select/whats-the-minimum-age-to-be-an-authorized-user-on-a-credit-card/. The distinction between primary and secondary card users is not apparent to operators when they verify the credit card information provided will work. In effect, COPPA requires adults to identify themselves only before accessing content aimed at the youngest children—sites with limited interactivity that few, if any, adults would ever use except alongside a very young child. Because COPPA has avoided burdening the rest of the Internet, the law has avoided First Amendment challenge. By applying to minors (up to 16), rather than to children 12 and under, KOSA presents the additional problem that virtually all platforms fall within the bill's requirements, rather than a smaller subsection of the Internet that are directed to children under 13.

[7] American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 196 (3d Cir. 2008) ("We conclude that the District Court correctly found that the affirmative defenses are 'effectively unavailable' because they do not actually verify age.").

[8] The links found on the first page of Google search results for "trick selfie verification" make clear how easy it is to find information on bypassing these verification schemes. *See, e.g.*, *Deepfakes Expose Cracks in Virtual ID Verification*, Gemini Advisory (Jan. 27, 2021), https://geminiadvisory.io/deepfakes-id-verification/; Avi Gopani, *How To Fool Facial Recognition Systems*, Analytics India Magazine (Aug. 4, 2021), https://analyticsindiamag.com/how-to-fool-facial-recognition-systems/; John Kowalski, *Ever wondered how people are passing selfie & ID verification?*, Black Hat World (May 3, 2021), https://www.blackhatworld.com/seo/ever-wondered-how-people-are-passing-selfie-id-verification.1324282/.

Age verification poses serious privacy and security risks. Because KOSA's sponsors have not recognized that the bill is a de facto age verification mandate, it is not surprising that the bill fails entirely to address the risks created by requiring the collection of the sensitive identity information and biometric data that would be needed to age-verify users—especially by companies that are rich targets for malicious actors.[9] Platforms should collect less data about us, not more. Companies have collected and retained data with impunity for decades, failing to take a disciplined approach to protect individual privacy. KOSA's de facto age verification mandate would likely increase the harm of data collection and exploitation, not reduce it. There is as yet no comprehensive federal privacy law to govern such information. While KOSA authorizes FCC rulemaking to enforce several aspects of the bill, the bill does not authorize the FTC to issue rules to govern what kind of information may be collected, what may be retained to prove compliance with KOSA, and how such sensitive information must be secured.

Mandating age verification is unconstitutional. Even if a reliable age verification mechanism did exist, KOSA's de facto age verification mandate would still violate the First Amendment rights of adults to anonymously access lawful, constitutionally protected content online. The Third Circuit's analysis of COPA is again instructive: "The Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech, because such restrictions can have an impermissible chilling effect on those would-be recipients."[10] Accordingly, the Third Circuit held COPA likely unconstitutional in part because age verification requirements "will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial."[11] In 2008, striking down COPA again for the final time, the Third Circuit reiterated that age verification "would deter users from visiting implicated Web sites" and therefore "would chill protected speech."[12]

KOSA would be even worse than COPA. As noted, KOSA would apply to virtually *all* Internet services,[13] while COPA generally excluded online services that provided a forum for user-

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[9] Jason Kelley et al., *Victory! ID.me to Drop Facial Recognition Requirement for Government Services*, Electronic Frontier Foundation (Feb. 9, 2022), https://www.eff.org/deeplinks/2022/02/victory-irs-wont-require-facial-recognition-idme.

[10] American Civil Liberties Union v. Ashcroft, 322 F.3d 240, 259 (3d Cir. 2003).

[11] *Id.*

[12] American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 197 (3d Cir. 2008).

[13] See supra note 3 and associated text.

generated content.[14] COPA effectively mandated age verification only for *accessing* content deemed "*harmful to minors*." KOSA would be even broader than COPA in both respects.

First, it would force age verification for accessing a much broader range of content, including information about abortion (which could lead to their prosecution in many states after the *Dobbs* decision), fringe ideologies, drug abuse, gambling, and other topics that adults may have entirely lawful reasons to inform themselves about. As the Fourth Circuit noted when striking down a Virginia analogue to COPA, "the stigma associated with [controversial content] may deter adults from [accessing it] if they cannot do so without the assurance of anonymity. … Such requirements would unduly burden protected speech in violation of the First Amendment."[15]

Second, while COPA focused only on access to content, KOSA would also impose an age verification barrier for communicating, chilling freedom of expression. Today, users can create pseudonymous Twitter accounts by providing nothing more than an email—and use that account to comment publicly and message privately. But under KOSA, Twitter would have to require more—likely a government-issued ID, since courts have already found credit cards ineffective as a means of age-verification.[16] Users could no longer trust their pseudonyms to protect themselves, especially from government actors and powerful figures who would seek to stifle criticism.

KOSA's de facto age verification mandate also violates the First Amendment rights of platforms by imposing substantial economic burden on expression. Age verification costs money and poses "significant costs for Internet speakers who have to segregate harmful and non-harmful material."[17] As discussed below, KOSA would have the same impact: covered

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[14] 47 U.S.C. § 231(b)(4). COPA applied to such platforms so long as they did not "select" or "alter" content in any way inconsistent with Section 230.

[15] Psinet, Inc. v. Chapman, 362 F.3d 227, 236–37 (4th Cir. 2004). *See also* Southeast Booksellers Ass'n v. McMaster 371 F. Supp. 2d 773, 782 (D.S.C. 2005) (age verification creates a "First Amendment problem" because "age verification deters lawful users from accessing speech they are entitled to receive."); American Civil Liberties Union v. Johnson, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (mandatory age verification "violates the First and Fourteenth Amendments of the United States Constitution because it prevents people from communicating and accessing information anonymously.").

[16] *See supra* note 2 and accompanying text; *See also* Southeast Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 783 (D.S.C. 2005) ("Additionally, age verification is problematic because it requires the use of a credit card, which not all adults have … Moreover, to the extent that the State relies on third party verification services in lieu of credit-card based age verification, these systems have similarly been rejected by reviewing courts because of the stigma associated with their use." (citing Reno v. ACLU, 521 U.S. 844, 856 (1997)).

[17] McMaster, 371 F. Supp. 2d at 783; *See also* American Booksellers Foundation v. Dean, 202 F. Supp. 2d 300, 318 (D. Vt. 2002) ("Given the financial and practical difficulties associated with [age verification] most noncommercial—as well as some commercial—Web publishers face a heavy, if not impossible, compliance burden.").

platforms would effectively be forced to segregate material relating to certain topics to prevent minors from accessing it. Courts have noted that this burden is particularly problematic when applied to noncommercial platforms that offer content for free.[18] KOSA suffers from this same problem in its entirety: not only does it effectively require covered platforms to age-verify all of their users (to deter communications between adults and minors), but it defines "covered platform" broadly to mean any public-facing website or service that primarily provides a forum for user-generated content. Thus, a small message board hosted as a hobby faces the same duty of care, and the same necessity to age-verify users, as the biggest social media platform. Noncommercial places of online gathering, especially small ones, can bear neither the risk of liability, nor the costs of implementing age verification. As a result, they will likely be forced to shut down. Like the Communications Decency Act of 1996, KOSA "threatens to torch a large segment of the Internet community."[19]

KOSA's age verification regime, like others before it, "effectively tax[es] the distributors of protected speech [and] runs counter to a notion so engrained in First Amendment jurisprudence that the difficulties with this proposal are so obvious as to not require explanation."[20]

II. The Duty of Care Is Unworkable and Will Harm Minors

Even if platforms could somehow reliably verify the age of their users, and even if requiring such verification did not violate the First Amendment, the duty imposed on platforms by KOSA is exceedingly broad and hopelessly vague.

The duty of care is untethered from the First Amendment. The drafters of COPA understood at least partially that they had to be mindful of the First Amendment. When defining content that is "harmful to minors," they incorporated the Supreme Court's obscenity test in an (unsuccessful) attempt to account for the First Amendment and impact only speech *outside* its protection. In contrast, KOSA invents new and undefined categories of harm that encompass content definitively protected by the First Amendment, and it imposes a vague duty on platforms to prevent and mitigate those harms.

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[18] Reno v. ACLU, 521 U.S. 844, 881 (1997) ("it is not economically feasible for most noncommercial speakers to employ such verification."); ACLU v. Ashcroft, 534 F.3d at 196–97 (upholding the district court's ruling that age verification "place[s] substantial economic burdens on the exercise of protected speech because [it] involve[s] significant cost and the loss of Web site visitors, especially to those plaintiffs who provide their content for free.").

[19] Reno, 521 U.S. at 882.

[20] McMaster, 371 F. Supp. 2d at 784 (holding South Carolina's COPA analogue unconstitutional) (internal quotation marks and citations omitted).

Imposing a duty of care to mitigate harms caused by constitutionally protected expression raises substantial First Amendment concerns. For decades, broadcast media, book and magazine publishers, and game publishers have been frequent targets of lawsuits alleging that their actions have impacted minors negatively. But courts have steadfastly refused to impose a duty of care on publishers and broadcasters to broadly protect minors from harm. As one court noted, such a duty "would provide no recognizable standard for the … industry to follow" and would "act as a restraint on … first amendment rights."[21] Instead, courts have ruled that liability may only be imposed where some *unprotected* expression—typically incitement—is alleged and proven.[22] KOSA provides no such First Amendment limitation, opting instead to impose the kind of broad, vague liability that courts have consistently found unconstitutional.

The duty of care is undefined and unmeetable. As a threshold matter, it is unclear whether KOSA imposes a duty to each minor *as an individual*, or to minors *as a group*.[23] It would certainly not be reasonable to expect a platform to tailor its design and operations to each individual minor that uses its services.[24] But imposing a duty of care broadly to minors in general is also unworkable in that it treats minors as a monolith, when in reality, each minor experiences, interacts with, and is impacted by content differently. "Such a burden would quickly have the effect of reducing and limiting … expression to only the broadest taste and acceptance and the lowest level of offense, provocation, and controversy."[25]

It is also unclear how a platform could "prevent and mitigate" the harms listed, or what constitutes "reasonable measures in the design or operation" of services. There is no one-

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[21] Zamora v. Columbia Broadcasting System, 480 F. Supp. 199, 202, 203 (S.D. Fla. 1979).

[22] *See* Wilson v. Midway Games, 198 F. Supp. 2d 167, 182 (D. Conn. 2002) (holding that even if defendant's video game caused violence and physical harm, "the First Amendment precludes [plaintiff's] action for damages unless Mortal Kombat's images or messages are 'directed to inciting or producing imminent lawless action and likely to incite to incite or produce such action'"); Watters v. TSR, Inc., 904 F.2d 378, 382 (6th Cir. 1990) ("[W]ithout actual incitement' First Amendment considerations argue against the liability of a publisher for … a reader's reactions to a publication." (internal citations and quotation marks omitted); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 494–95 (1981) ("[T]he effect of the imposition of liability could reduce the U.S. adult population to viewing only what is fit for children. Incitement is the proper test here.") (internal citation omitted).

[23] The text points in both directions. Section 3(a) requires covered platforms to "act in the best interests of a minor that uses [their services] … as described in subsection (b)." Section 3(b), in contrast, requires platforms to take reasonable measures when acting "in the best interests of minors."

[24] *See* Watters v. TSR, Inc., 904 at 381 ("The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring the game could never reach a 'mentally fragile' individual would be to refrain from selling it at all.").

[25] Davidson v. Time Warner, Civ. A. No. V-94-006, 1997 U.S. Dist. LEXIS 21559 at *37–38 (S.D. Tex. Mar. 31, 1997) (quoting McCollum v. Columbia Broadcasting Sys., Inc., 202 Cal. App. 3d 989, 1005–06 (1988)).

size-fits-all "best interests of minors," let alone a consensus on how those interests are best protected. Outsourcing to platforms this impossible objective under threat of broad, vague liability ignores critical context and nuance—and threatens to harm minors rather than protecting them.

Attempts to satisfy the duty of care will be disastrous for minors. The easiest and most risk-averse solution from a platform's perspective would be to simply ban minors from the service entirely. This would have a devastating effect on our digital economy, on the minors cut off from a wealth of online knowledge and connectivity with the world, and on American society, which would raise generations of digitally illiterate youth unprepared to participate in our increasingly online world.

The second-best option is no better: Platforms might attempt to block minors from accessing any content that could conceivably relate to the harms listed in Section 3(b). But even this extreme measure could hardly be said to safeguard the best interests of minors.

Consider Section 3(b)(1), which requires platforms to prevent and mitigate "mental health disorders or associated behavior, including the promotion or exacerbation of self-harm, suicide, eating disorders, and substance use disorders." Setting aside the fact that the DSM-V lists nearly 300 mental disorders, each with their own diagnostic criteria, one need look only to the harms listed in this section to understand why KOSA's approach is deeply flawed.

Even broad keyword and hashtag blocking has been proven ineffective at meaningfully reducing users' ability to find content related to, for example, eating disorders.[26] Platforms already attempt to moderate such content and provide intervention, but the challenges associated with these moderation efforts are well known. Multiple studies have documented the ease with which users evade such efforts by introducing alternative spellings or entirely new codewords and hashtags.[27]

More fundamentally, there is no way to accurately identify what content might exacerbate self-harm, suicide, eating disorders, or substance use disorders. A picture of a thin fashion model might be entirely harmless to one person, and trigger body image issues in another.[28]

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[26] Louise Matsakis, *How Pro-Eating Disorder Posts Evade Filters on Social Media*, Wired (June 13, 2018), https://www.wired.com/story/how-pro-eating-disorder-posts-evade-social-media-filters/.

[27] Copia Institute, *Content Moderation Case Studies: The Challenges In Moderating Information Regarding Eating Disorders (2012)*, Techdirt (Mar. 10, 2021), https://www.techdirt.com/2021/03/10/content-moderation-case-studies-challenges-moderating-information-regarding-eating-disorders-2012/.

[28] National Eating Disorders Association spokeswoman Chelsea Kronengold acknowledged this difficulty, telling the New York Times, "There are certain posts and certain content that may trigger one person and not another person. From the social media platform's perspective, how do you moderate that gray area content?"

Similarly, a post about one's experience with an eating disorder might have profoundly different effects on various individuals. Indeed, some people—including many mental health and medical professionals—post about topics like eating disorders for the purpose of steering others *away* from unhealthy behaviors and encouraging them to seek help. By using the same keywords and hashtags as those who regrettably promote unhealthy behaviors, they "infiltrate" such content to provide a healthier perspective. Others post about their own struggles to seek out a community who can help them. As National Eating Disorders Association CEO Claire Mysko noted, "It's very, very difficult to tease out what would fit under the category of toxic, pro-eating disorder content. … You don't want to set it up as this is good and bad, demonizing the users who are posting this content."[29]

Yet KOSA does exactly that by reducing the entire complex question to a vague and unmanageable duty of care that will likely be discharged by blocking as much related content as possible. Minors will still inevitably seek out information related to eating disorders, self-harm, and suicide. But they will be forced to do so on websites that KOSA does not reach—websites that are far more likely to offer harmful information without pushback or intervention from outside parties.

Other provisions in Section 3 similarly threaten to cut minors off from legitimate and useful information or expression. Section 3(b)(5) requires platforms to prevent and mitigate "promotion … of narcotic drugs … tobacco products, gambling, and alcohol." What constitutes "promotion" is entirely unclear. Would articles advocating drug policy reform constitute "promotion" of narcotic drugs? Could a platform be held liable for allowing minors to view or post popular music that references these topics in a positive light?

Blocking all such content is once again the most risk-averse, "reasonable" measure. In addition to restricting minors' access to much artistic and political expression, it would also prevent minors from accessing resources intended to *prevent* harms, including anti-tobacco/nicotine campaigns such as the Truth Initiative.[30] Minors are constantly exposed to the temptation of such substances and products offline. But under KOSA, they will be far less likely to encounter online content that steers them away from these harms.

The duty of care impacts purely informational content. KOSA's restrictions encompass far more than just social media platforms, messaging applications, or video games. KOSA imposes its duty of care on "any public-facing website … that primarily provides a

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Kate Conger et al., *Eating Disorders and Social Media Prove Difficult to Untangle*, New York Times (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/technology/social-media-eating-disorders.html.

[29] Matsakis, *supra* note 26.

[30] Truth Initiative, https://truthinitiative.org/ (last visited Dec. 1, 2022).

community forum for user-generated content" that is used or is likely to be used even by just *one* minor—effectively every such website or service. KOSA would sweep within its ambit community-edited repositories such as Wikipedia and Wiktionary—which by definition exist *solely* for sharing user-generated content. Such websites, often noncommercial and without the resources to bear large compliance costs, may face no choice but to ensure that minors cannot access factual, educational material. That KOSA could result in the censorship of an online *encyclopedia* should, in itself, demonstrate its staggering and harmful overbreadth.

The duty of care threatens adult expression as well. Finally, KOSA's vagueness could result in censorship of content that is never even presented to minors. Section 3(a) requires a covered platform to act "in the best interest of a *minor that uses the platform's products or services.*"[31] But nothing in KOSA apparently limits the duty of care to harms resulting *from* the minor's usage. Rather, Section 3(b) seems to be triggered simply by a minor being on the same platform as the content in question.

Consider the vile and radicalizing racist speech that is all too common on social media. Today, such content is typically allowed as "lawful but awful." If a minor who uses a platform were harmed in an attack committed by someone else on that platform, would the platform face liability under KOSA for failure to prevent "physical violence"? KOSA's language is vague enough to indicate that liability might attach. But the law should not countenance guilt by association, whether physically or just by IP address. Nor can the possibility that a minor user may somehow be harmed by a person who saw certain content justify forcing platforms by law to remove constitutionally protected speech.

III. KOSA Will Be Abused

KOSA will enable politically motivated actors to purge the Internet of speech that they dislike under the guise of "protecting minors." Section 11(b) permits state attorneys general to bring enforcement actions whenever they believe that a resident of their state has been adversely affected by an alleged violation of KOSA.

It is easy to see how this provision will be weaponized. Consider the two states that have already passed laws to control how social media platforms moderate content. Florida Governor Ron DeSantis signed into law HB 1557 (colloquially known as the "Don't Say Gay" bill), prohibiting "classroom instruction" on "sexual orientation or gender identity" for students in third grade or below, or above if not "age-appropriate… in accordance with state standards." DeSantis spokeswoman Christina Pushaw stated that the bill "would be more

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[31] S. 3663, 117th Cong. § 3(a) (2022) (emphasis added).

accurately described as an Anti-Grooming Bill."[32] In Texas, Attorney General Ken Paxton issued an opinion equating gender-affirming procedures for transgender youth with "child abuse," prompting Governor Greg Abbott to direct state investigations against parents who obtain gender-affirming care for their children.[33] And politicians across the country have begun labeling drag performances as "grooming" and "sexual abuse."[34]

Under KOSA, like-minded state attorneys general will undoubtedly sue—likely in a state court with sympathetic judges—claiming that platforms have violated their duty of care under KOSA Section 3(b)(4) by allowing minors to access content, even Wikipedia articles, related to sexual orientation and gender identity. And while being transgender is no longer considered a mental disorder in DSM-V, many right-wing activists claim that exposure to gender identity content leads to increased depression and suicidality—yet another attack vector under Section 3(b)(1). Still worse, they may seek to prevent even adults, including mental health and medical professionals, from discussing gender identity among themselves. As explained above, it may suffice under KOSA that a minor who uses the platform was harmed, regardless of whether they were actually exposed to or involved with the allegedly harmful content. An ambitious, politically motivated state attorney general will demand that platforms censor even online support groups for parents of transgender children in order to "protect" any children who happen to also use the platform.

Perhaps KOSA supporters presume that the FTC could prevent such abuse by intervening in cases brought by politically motivated state attorneys general.[35] But depending on the administration, the FTC may be run by those who *support* the suit brought by the state attorney general (and as a result, the FTC could *itself* bring such an action). Moreover, a state attorney general need not even file a lawsuit to harass platforms for hosting legitimate and valuable content. They need only to initiate a burdensome investigation to pressure platforms to purge disfavored content.[36]

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[32] Christina Pushaw (@ChristinaPushaw), Twitter (Mar. 4, 2022, 6:16 PM), https://twitter.com/ChristinaPushaw/status/1499886619259777029.

[33] Letter from Ken Paxton, Attorney General of Texas, to Representative Matt Krause, Chair of House Committee on General Investigating (Feb. 18, 2022), https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf.

[34] Jeff McMillan, *Analysis: Political rhetoric, false claims obscure the history of drag performance*, PBS (Oct. 30, 2022), https://www.pbs.org/newshour/politics/political-rhetoric-false-claims-obscure-the-history-of-drag-performance.

[35] Section 11(b) grants the FTC the right to intervene in any action brought under KOSA by a state attorney general, and to file an appeal in such cases. S. 3663, 117th Cong. § 11(b) (2022).

[36] "For purposes of bringing any civil action under paragraph (1), nothing in this Act shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the

These concerns are not hypothetical. Some have already called for KOSA to be used to prevent "Big Tech" from "turning kids trans" by broadly protecting "against the harms of sexual and transgender content."[37] Handing a loaded weapon to those who in no uncertain terms will use it to rid the Internet of content they disagree with would be grossly irresponsible.

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The goal of protecting minors from harm is laudable and important. But how to do that is a question Congress has struggled with for a quarter century *because* of its exceptional complexity. As written, KOSA does not account for that complexity and fails to serve anyone's best interests. The bill repeats—indeed worsens—the First Amendment mistakes of Congress's previous attempts to require age verification. KOSA threatens to make the Internet a less useful and safe place for minors and adults alike.

We urge more discussion of the text of this bill, including input from experts and civil society. We stand ready to assist you in ensuring that both minors and the First Amendment receive the protection they deserve.

Sincerely,

Ari Cohn
Free Speech Counsel, TechFreedom

Berin Szóka
President, TechFreedom

Eric Goldman
Associate Dean of Research & Professor of Law
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laws of that State to … conduct investigations … or compel the attendance of witnesses or the production of documentary and other evidence." S. 3663, 117th Cong. § 11(b)(3) (2022).

[37] Jared Eckert & Mary McCloskey, *How Big Tech Turns Kids Trans*, The Heritage Foundation (Sept. 15, 2022), https://www.heritage.org/gender/commentary/how-big-tech-turns-kids-trans.

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