

July 26, 2023

The Honorable Maria Cantwell Chair, Senate Commerce Committee United States Senate 511 Hart Senate Office Building Washington, D.C. 20510 The Honorable Ted Cruz
Ranking Member, Senate Commerce
Committee
United States Senate
167 Russell Senate Office Building
Washington, D.C. 20510

Re: Kids Online Safety Act (S. 1409)

Dear Chair Cantwell, Ranking Member Cruz, and Members of the Committee:

We write to reiterate our concerns about the Kids Online Safety Act (KOSA). Last year, joined by leading Internet law and First Amendment scholars, we wrote to explain that KOSA would impose a de facto age-verification mandate and an unworkable duty of care, both of which violate the First Amendment and undermine the well-being of minors. A copy of that letter is enclosed for your reference. Unfortunately, subsequent revisions to KOSA have not resolved these concerns. KOSA still poses a grave threat to First Amendment rights to anonymous expression; ultimately, the bill would harm, rather than help, minors.

I. KOSA Will Still Force Platforms to Age-Verify Users

As we wrote last year, KOSA's original language would have effectively required covered platforms to verify the age and thus the identity of every user. KOSA's revised text attempts to avoid this First Amendment problem³ by requiring covered platforms to protect only those users that it has "actual knowledge or knowledge fairly implied on the basis of

¹ Letter from TechFreedom to Majority Leader Schumer, Speaker Pelosi, Leader McConnell, and Leader McCarthy (Dec. 6, 2022), https://techfreedom.org/wp-content/uploads/2022/12/Kosa-Letter-December-6-2022.pdf.

 $^{^2}$ This letter is based on the text of Senator Blackburn's substitute amendment for the July 27, 2023 committee markup.

³ See TechFreedom supra note 1, at 4–5 (explaining that COPA was struck down in part because its affirmative defense for age-verifying users had an impermissible chilling effect on the First Amendment right to receive information and noting that KOSA would present the additional First Amendment harm of requiring speakers to identify themselves before being permitted to communicate online).

objective circumstances" are minors. Furthermore, new rules of construction say that the bill does not require platforms to collect age-related data or perform age verification. While doubtless well-intentioned, these changes merely trade a clear, explicit mandate for a vague, implicit one; the unconstitutional effect on anonymous expression will be the same.

It is entirely unclear what constitutes "knowledge fairly implied" that a particular user is a minor. In an enforcement action, the Federal Trade Commission must consider the "totality of the circumstances," which includes, but is not limited to, "whether the operator, using available technology, exercised reasonable care." Vague as this provision is, it apparently does not apply to civil suits brought by state attorneys general, 7 which could give them even more unpredictable discretion.

Thus, one can only speculate as to how this key term would be interpreted. This uncertainty alone makes age verification the most risk-averse, "reasonable" course of action for platforms—especially with respect to end-to-end-encrypted services. Both the FTC and state attorneys general will likely draw interpretive cues from COPPA, which requires parental consent for the "collection, use, or disclosure of personal information from children" when a service has *actual knowledge* that a user is under 13 years old *or* when the service is "directed to" children under 13—effectively, the service has constructive knowledge that its users are highly likely to be minors.

To date, COPPA has had negligible effects on adults because services directed to children under 13 are unlikely to be used by anyone *other* than children due to their limited functionality, effectively mandated by COPPA.⁹ But extending COPPA's framework to sites

⁴ See, e.g., Kids Online Safety Act, S. 1409, 118th Cong. §§ 2(6) (2023) (defining "know" or "knows"), (3)(a) ("duty of care"), (4)(a)(1) ("safeguards for minors").

⁵ Id. § 14(c).

⁶ *Id.* § 14(b).

⁷ *Id.* § 10(c), 14(b).

⁸ *Cf.* Letter from TechFreedom to Senators Richard Durbin and Lindsey Graham (May 2, 2023), https://techfreedom.org/wp-content/uploads/2023/05/TechFreedom-Letter-EARN-IT-Act-of-2023.pdf (explaining that allowing a service's use of encryption to be considered as evidence under broad and uncertain liability would effectively force online services to abandon encryption as a precautionary measure).

⁹ Because "collection" includes allowing "[e]nabling a child to make personal information publicly available in identifiable form," 16 C.F.R. § 312.2 (2013), child-directed sites generally offer very limited functionality, preventing users from communicating with each other except in pre-set messaging options. Few adults would use such sites. Moreover, in determining whether a service is "directed to" children, the COPPA rule directs the FTC to consider the subject matter, visual content, presence of child celebrities or celebrities who appeal to children, language, and other indicia. *Id.*

"directed to" older teens would significantly burden the speech of adults because the social media services and games that older teens use are largely the same ones used by adults.

The FTC recently began to effectively extend COPPA to cover teens. Whether or not the FTC Act gives the Commission such authority, this example illustrates what the FTC—and state attorneys general—might do with the broad language of KOSA. In a 2022 enforcement action, the FTC alleged that Epic Games had committed an unfair trade practice by allowing users of its popular Fortnite game to chat with other users, despite knowing that "a third of Fortnite players, based on social media data, are teens aged 13-17." While the complaint focused on Epic Games' use of its audience composition for marketing purposes, its logic could establish "knowledge fairly implied" under KOSA. This complaint was remarkable not only for extending COPPA to teens but also because the FTC had effectively declared a threshold above which it would consider a site "directed to" them—something the FTC had never done for sites "directed to" minors under COPPA.¹¹

KOSA purports not to require "a covered platform to implement an age gating or age verification functionality." ¹² Clearly, failure to age-gate or age-verify cannot be per se a violation of the bill. ¹³ But it is not difficult to see how the FTC or state attorneys general will plead around this provision. Their suits would not seek to impose liability for a failure to age-gate or age-verify. After all, neither would be effective enough anyway; both can all too easily be circumvented. ¹⁴ Instead, they would argue that if too many (say, a third) of a site's users are teens, the site is, in effect, directed to teens—and this could be a key part of the "circumstances" that show that the site had "knowledge fairly implied" that users of its site were minors for purposes of enforcing KOSA's duty of care (§ 3), safeguards for minors (§ 4), and other requirements. To avoid liability, an operator's safest course would be either to determine which users are minors with reasonably high accuracy, or try to drive down the

¹⁰ Complaint, United States v. Epic Games, Inc., No. 5:22-CV-00518 ¶ 3 (Dec. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesComplaint.pdf.

¹¹ The COPPA rule permits the FTC to "consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience" in assessing whether a service is directed to children. 16 C.F.R. Part 312.2 (2013).

¹² KOSA § 14(c)(2).

¹³ Courts *should* interpret this provision to mean that failure to age-gate or age-verify cannot be cited even as evidence than an operator had not "exercised reasonable care" by failing to use such "available technology." Id. § 10(b). But it is far from clear that they will. Plaintiffs will doubtless argue that Section 10(b) does not prevent failure to use such technology from being considered as part of the "totality of the circumstances."

 $^{^{14}}$ See TechFreedom, supra note 1, at 2–3 (explaining why reliable age verification is presently impossible and the effect of this impossibility on First Amendment analysis).

percentage of users on the site who are minors. The only way to accomplish either is to ageverify all users. In this sense, KOSA will still coerce both without "requiring" either.

Alternatively, a site might try to blind itself to the age of its users, making it impossible for sites to apply any special protections for minor users at all, whether under KOSA or under preexisting youth safety features. Presumably, sites with high percentages of minor users might avoid this strategy as too risky, because they could be held to have "knowledge fairly implied" that significant numbers of their users are minors anyway. But sites with lower percentages might well take this approach, arguing that safeguarding user privacy by avoiding collecting any data that could provide inferences of age is itself an exercise of "reasonable care." Perversely, KOSA could push such sites to make minors *less* safe.

The FTC must, within 18 months, issue guidance on the meaning of "knowledge fairly implied." Whatever the FTC says, it will be just that—guidance. It will not bind the agency. Nor, apparently, will it have any effect on how attorneys general may interpret the bill. The impact of KOSA remains unchanged from its original language: adults' First Amendment right to access content and speak anonymously will be undermined by a de facto ageverification requirement.

II. KOSA's Duty of Care Is Incurably Flawed—Practically and Legally

Central to KOSA is its duty of care, which requires platforms to "take reasonable measures in . . . design and operation of any product, service, or features . . . used by minors to prevent and mitigate" various negative externalities, including "anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors." ¹⁶

This duty of care directly requires platforms to protect against the harmful effects of *speech*, the overwhelming majority of which is constitutionally protected. As we explained in last year's letter, courts have held that imposing a duty to protect against harms caused by speech violates the First Amendment.¹⁷

The unconstitutionality of KOSA's duty of care is highlighted by its vague and unmeetable nature. Platforms cannot "prevent and mitigate" the complex psychological issues that arise from circumstances across an individual's entire life, which may manifest in their online

¹⁵ Id. § 10(c).

¹⁶ *Id*. § 3(a).

¹⁷ See TechFreedom, supra note 1, at 6–7 and accompanying footnotes (noting that courts assessing claims that would require imposing a duty to protect against harmful effects of speech only permit liability when unprotected expression, such as incitement, is at issue). See also Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 804 (S.D. Tex. 1983) ("Courts have found that First Amendment considerations . . . argue against the liability of a publisher for a reader's reaction to a publication, absent incitement.").

activity. These circumstances mean that material harmful to one minor may be helpful or even lifesaving to another, particularly when it concerns eating disorders, self-harm, drug use, and bullying. Minors are individuals, with differing needs, emotions, and predispositions. Yet KOSA would require platforms to undertake an unworkable one-size-fits-all approach to deeply personal issues, thus ultimately serving the best interests of *no* minors.

Again, courts have routinely refused to impose such vague, expansive, and inherently unmeetable duties of care on disseminators of expression, holding that doing so would unacceptably chill First Amendment activity. ¹⁸ Indeed, because platforms cannot reasonably anticipate or individually account for the different ways each minor will experience, interact with, or be impacted by content, KOSA's duty of care "provide[s] no recognizable standard . . . to follow." ¹⁹ Placing a duty on speakers to anticipate how listeners may react to expression imposes "overly burdensome and impractical obligations . . . that would interfere with [First Amendment values]." ²⁰ But this is precisely what KOSA requires.

The current language of KOSA adds a limitation to the duty of care, permitting platforms to allow minors to "deliberately and independently search[] for, or specifically request[] content." ²¹ Even if this provision is intended to cabin the duty of care to "unrequested" content, it remains unconstitutional.

The Supreme Court has upheld the FCC's authority to regulate indecency on broadcast media, reasoning that children have easy access to broadcasts, and the nature of the medium

¹⁸ See, e.g., Davidson v. Time Warner, Civ. A. No. V-94-007, 1997 U.S. Dist. LEXIS 21559 at *38 (S.D. Tex. Mar. 31. 1997) ("To create a duty requiring Defendants to police their recordings would be enormously expensive and would result in the sale of only the most bland, least controversial music."); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 494 (1981) ("But the chilling effect of [imposing a duty of care on] a television broadcast is obvious . . . networks would become significantly more inhibited in the selection of controversial materials [].").

¹⁹ Zamora v. Columbia Broadcasting System, 480 F. Supp. 199, 202, 203 (S.D. Fla. 1979) (holding that imposing a duty of care on a television broadcaster to protect against a minor's "addiction" to television violence that allegedly caused him to commit identical acts of violence "has no valid basis and would be against public policy").

²⁰ Sanders v. Acclaim Entertainment, Inc., 188 F. Supp. 2d 1264, 1274–75 (D. Colo. 2002). *See also* Watters v. TSR, Inc., 904 F.3d 378, 381 (6th Cir. 1990) ("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."); McCollum v. Columbia Broadcasting Sys., Inc., 202 Cal. App. 3d 989, 1005–06 (1988) ("[I]t is simply not acceptable to a free and democratic society to impose a duty . . . to avoid the dissemination of ideas . . . which may adversely affect emotionally troubled individuals.); Zamora, 480 F. Supp. at 206 ("Indeed, it is implicit in the plaintiffs' demand . . . that such a claim should exist for an untoward reaction on the part of any 'susceptible' person. The imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court in any event.").

²¹ KOSA § 3(b)(1).

makes it impossible to "completely protect... from unexpected program content." ²² But even so, the courts have consistently held that imposing a duty of care on *broadcasters* to protect minors would violate the First Amendment. ²³ There can be no doubt that imposing a duty of care against online platforms, over which the government has far *less* regulatory authority, ²⁴ is still *more* obviously unconstitutional.

In any event, permitting minor users to search for content is of little help to platforms if they will still face liability for failing to prevent harms arising from those users *seeing* the requested material. Accordingly, to protect against the risk of liability (or burdensome investigations and enforcement actions) under this vague and unmanageable duty, platforms will *still* be forced to simply block minors from accessing any content that could conceivably relate to the harms listed in Section 3.²⁵ KOSA's ultimate effect again remains unchanged: far from protecting minors, this bill ensures that they will be cut off from a vast array of legitimate, useful, and informative content that they have a constitutional right to receive.²⁶

III. KOSA Remains a Ready-Made Censorship Tool

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. The inevitable abuse is entirely predictable. Consider two possibilities.

First, in the aftermath of the May 14, 2022 mass shooting in Buffalo, New York Attorney General Letitia James issued a report blaming social media platforms for hosting the hateful

²² Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978).

²³ See, e.g., Zamora v. Columbia Broadcasting System, 480 F. Supp. 199; Olivia N., 126 Cal. App. 3d 488 (1981); McCollum v. Columbia Broadcasting Sys., Inc., 202 Cal. App. 3d 989; DeFilippo v. National Broadcasting Co., Inc., 446 A.2d 1036 (R.I. 1982).

²⁴ Reno v. American Civil Liberties Union, 521 U.S. 844, 868–69 (1997) ("[Our] cases have recognized special justifications for regulation of the broadcast media . . . Those factors are not present in cyberspace."). *See also* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) (content-based regulations of cable operators must satisfy strict scrutiny).

²⁵ See TechFreedom, supra note 1, at 8-9.

²⁶ See Brown v. Entertainment Merchants Association, 564 U.S. 786, 794–95 (2011) ("[0]nly in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors] . . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.") (internal quotation marks and citations omitted).

speech that radicalized the shooter and calling for increased civil liability.²⁷ Under KOSA's duty of care, James could file suit alleging failure to mitigate or prevent "physical violence" that might affect a minor user²⁸ to pressure platforms into removing any speech deemed "hateful."

Second, some have already admitted that KOSA will be used to censor LGBTQ content, especially that which relates to gender-affirming care. ²⁹ Armed with cherry-picked and selectively interpreted studies associating trans content with "anxiety, depression . . . and suicidal behavior," an ambitious attorney general will claim that "evidence-informed medical information" ³⁰ requires that platforms prohibit minors from viewing such content under KOSA's duty of care.

A state attorney general need not win a lawsuit—or even file one at all—to effectuate censorship. They need only initiate a burdensome investigation to pressure platforms to take down or restrict access to disfavored content.³¹

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We appreciate and support the Committee's concern for the safety and well-being of minors. But KOSA is a fundamentally flawed approach that at best achieves little protection for minors, and at worst threatens to actively undermine their best interests—while simultaneously intruding on the fundamental civil liberties of all Americans. We urge careful

²⁷ OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL LETITIA JAMES, INVESTIGATIVE REPORT ON THE ROLE OF ONLINE PLATFORMS IN THE TRAGIC MASS SHOOTING IN BUFFALO ON MAY 14, 2022 (2022), https://www.documentcloud.org/documents/23167059-buffaloshooting-onlineplatformsreport?responsive=1&title=1.

²⁸ KOSA's duty of care is not limited to harm resulting from the minor's own use of a platform. *See* TechFreedom, *supra* note 1, at 10.

²⁹ Mike Masnick, *Heritage Foundation Says That Of Course GOP Will Use KOSA To Censor LGBTQ Content*, TECHDIRT (May 24, 2023), https://www.techdirt.com/2023/05/24/heritage-foundation-says-that-of-course-gop-will-use-kosa-to-censor-lgbtq-content/; Jared Eckert & Mary McCloskey, *How Big Tech Turns Kids Trans*, THE HERITAGE FOUNDATION (Sept. 15, 2022), https://www.heritage.org/gender/commentary/how-big-techturns-kids-trans.

³⁰ KOSA § 3(a)(1).

 $^{^{31}}$ "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 laws of that State to ... conduct investigations ... or compel the attendance of witnesses or the production of documentary and other evidence." KOSA § 11(b)(3).

consideration	of these	concerns,	and w	e stand	ready	to a	issist	you in	ensuring	that	both
minors and the First Amendment receive the protection they deserve.											

Sincerely,

Ari Cohn

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Encl.