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March 17, 2023

The Honorable Jesse Gabriel
Chair, Assembly Privacy and Consumer Protection Committee
Honorable Committee Members
Legislative Office Building
1020 N Street, Room 162
Sacramento, CA 95814

The Honorable Brian Maienschein
Chair, Assembly Judiciary Committee
Honorable Committee Members
1020 N Street, Room 104
Sacramento, CA 95814

Re: SUPPORT AND CO-SPONSORSHIP OF AB 1394 (WICKS)

Dear Chairs Gabriel and Maienschein and Honorable Committee Members:

The Children's Advocacy Institute at the University of San Diego School of Law, which for 30 years has worked to improve the well-being of children in California through regulatory, legislative, and judicial advocacy, is pleased to co-sponsor AB 1394. As the basis of its co-sponsorship with Common Sense Media, the Institute endorses these observations of the President and CEO National Center for Missing & Exploited Children, presented to Congress this past February:

It is no longer feasible to rely solely on online platforms to adopt voluntary measures, especially given their near complete immunity for activity on their sites, or to hope that they will design their platforms to avoid precipitating dangers to children from sexual exploitation, enticement, and revictimization. ... *If the United States is going to commit to protecting children online, legislation is our only path forward to update current laws, regulate the design of online platforms to*

*require child safety measures, create meaningful transparency in efforts to combat online child sexual exploitation, and provide new remedies for survivors.*¹

CHILD SEXUAL EXPLOITATION: A WINDOW INTO ANOTHER, HORRIFYING WORLD WHERE OUR MOST VULNERABLE CHILDREN ARE TARGETED

The average age of child sex trafficking victims is 13–14.² These are not children passing for being 18-plus years of age. To our collective shame, in the U.S., 60% of domestic child trafficking victims have a history in the child welfare system.³

Keeping these children away from their exploiters is a life-and-death matter for them as *“the average life expectancy of an exploited child is a shockingly short time: seven years.* Homicide and HIV/AIDS account for a majority of the deaths.”⁴

Girls of color are especially at-risk. “According to the FBI, 57.5% of all juvenile prostitution arrests are Black children” And, “[c]ompared to their racial counterparts, Black girls are more likely to be trafficked at a younger age.”⁵ The data are shocking:

The hyper-sexuality of young women of color has also deeply affected the way the law responds to crimes against their bodies. A 2017 study by Georgetown Law’s Center on Poverty and Inequality found that adults view Black girls as less innocent and more adult-like than their white peers. Black girls are also viewed as in need of less nurturing, less protection, less comfort and are more independent and know more about adult topics like sex. **These attitudes and stereotypes make them more vulnerable to trafficking and less likely to be identified or seen as victims.** Data can be found across the country of a large majority of “solicitation” arrests are of young women of color where they only make a small demographic of the entire population. According to Right4Girls, “Black children account for 57% of all juvenile prostitution arrests — more than any other racial group.”⁶

So, too, are our queer youth uniquely at-risk. “Nearly 1 in 3 LGBTQ+ minors (32%) reported an online sexual encounter with someone they believed to be over 18, ten percentage points higher than their non-LGBTQ+ peers (22%).”⁷

Child sexual abuse (including trafficking) takes a terrible toll on a child’s overall health, increasing the risk not only for the expected depression, anxiety, substance abuse, post-traumatic stress disorder, and suicidal ideation but also for enduring diseases like high blood pressure and other chronic illness.⁸

¹ [https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20\(2-14-23\)%20\(final\).pdf](https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20(2-14-23)%20(final).pdf), at pp. 1–2 (emphasis added).

² *Facts & Figures, YOUTH UNDERGROUND*, <https://youth-underground.com/facts-figures/> (last visited Nov. 19, 2022).

³ *Child Sex Trafficking, CHILDREN’S RIGHTS*, <https://www.childrensrights.org/newsroom/fact-sheets/child-sex-trafficking/#:~:text=The%20average%20age%20of%20child%20sex%20trafficking%20victims%20is%2015,were%20sexually%20abused%20as%20children> (last visited March 17, 2022).

⁴ Kate Walker, *Ending The Commercial Sexual Exploitation of Children: A Call For Multi-System Collaboration in California*, CALIFORNIA CHILD WELFARE COUNCIL (2013) at 15, <https://www.chhs.ca.gov/wp-content/uploads/2017/06/Committees/California-Child-Welfare-Council/Council-Information-Reports/Ending-CSEC-A-Call-for-Multi-System-Collaboration-in-CA-February-2013.pdf>.

⁵ <https://www.cbefinc.org/wp-content/uploads/2020/05/SexTraffickingReport3.pdf>.

⁶ <https://www.endslaverynow.org/blog/articles/intersections-of-human-trafficking> (emphasis supplied).

⁷ https://info.thom.org/hubs/Research/Responding%20to%20Online%20Threats_2021-Full-Report.pdf at p. 11.

⁸ See CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION,

Part of the reason for the endurance of their trauma is that for survivors, the abuse never really ends because, “[o]nce an image [of their abuse] is on the Internet, they are irretrievable and can continue to circulate forever.” The child is re-victimized as the images are viewed again and again.⁹

This is made worse because criminals often purposefully produce material where children are seen smiling, leading survivors to worry that others will assume their enjoyment or implicate them in the abuse. Survivors report that perhaps the most difficult part of their re-victimization is a victims’ knowledge that their images may be used to groom future victims as a way to normalize the abusive behavior.¹⁰

It is challenging in a public document to describe how horrifying these videos and images can be.

Most members of the public will never see [child sexual abuse material] ... The images and videos that are reported are not merely sexually suggestive or older teenagers who “look young.” **This content depicts crime scene activity. Children — including those who are too young to call for help — are raped, abused, and exploited in this imagery.** The abuse is documented in images and videos and distributed repeatedly through thousands of search engines; social media; photo-sharing, file-sharing, and email services; and gaming and messenger apps. Children are physically and sexually abused each time an image or video is made. They are revictimized every time a sexually abusive image or video in which they are depicted is traded online and a new predator takes personal gratification in their anguish or uses the imagery to entice another child into sexual abuse.¹¹

THE PROBLEM OF SEXUAL EXPLOITATION OF CHILDREN IS A CALIFORNIA PROBLEM

California is a big part of the problem. According to the Los Angeles County Department of Public Health, “[Commercial sexual exploitation of minors, abbreviated CSEC] is a rampant and fast-growing problem: Three of the nation’s 13 high-intensity child prostitution areas as identified by the FBI are located in California: Los Angeles, San Francisco and San Diego metropolitan areas.”¹² Unfortunately, the actual rate at which children are trafficked is underreported, so the full extent

PREVENTING SEXUAL VIOLENCE (last reviewed by the CDC on Jan. 17, 2020), available at <https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html>

CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html. The paradigm shift from tangible to digital CSAM has exacerbated these effects. Von Weiler, J., Haardt-Becker, A., & Schulte, S. Care and treatment of child victims of child pornographic exploitation (CPE) in Germany, 16 J. OF SEXUAL AGGRESSION 211, 216 (2010).⁹ <https://www.justice.gov/criminal-ceos/child-pornography> Sadly, these feelings usually persist and even intensify over time over time. U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION AND PREVENTION AND INTERDICTION, 11 at D-12 (2010), available at <http://www.justice.gov/psc/docs/natstrategyreport.pdf> (finding that almost ninety-five percent of CSAM victims suffer lifelong psychological damage and may never overcome the harm, even after lifelong therapy). The problem has taken on a new dimension as CSAM involves increasingly younger victims and is becoming more violent and graphic over time.

¹⁰ PALMER, T. & STACEY, L., JUST ONE CLICK: SEXUAL ABUSE OF CHILDREN AND YOUNG PEOPLE THROUGH THE INTERNET AND MOBILE PHONE TECHNOLOGY (Barkingside, UK: Barnardo’s, 2013); *United States v. Williams* (11th Cir.2006) 444 F.3d 1286, 1290 (“Our concern is not confined to the immediate abuse of the children depicted in these images but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children.”).

¹¹ [https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20\(2-14-23\)%20\(final\).pdf](https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20(2-14-23)%20(final).pdf), at pp. 2–3 (emphasis added).

¹² *Commercial Sexual Exploitation of Children and Youth Fact Sheet*, L.A. CNTY. DEP’T OF MENTAL HEALTH (2014), http://file.lacounty.gov/SDSInter/dmh/211312_2014_DMH_CSEC_Fact_Sheet_FINAL.pdf

to which California's and the nation's children are under threat of this emotional trauma and physical violation is unknown.

The National Human Trafficking Resource Center Hotline received the highest number of reports on cases or victims of human trafficking from California.¹³

SOCIAL MEDIA PLATFORMS FACILITATE UNLAWFUL SEXUAL EXPLOITATION OF CHILDREN — AND THEY KNOW IT

“So, where is child sex trafficking happening? You might suspect a dark alley, the local swimming pool, or even a shopping mall parking lot. The most alarming news is a child can be trafficked right in the comfort of their own home.

“I think the biggest risk is through social media,” said Michael Syrax, FBI Special Agent, Violent Crimes Against Children Division.

‘Some of these children are recruited through Facebook, Instagram, and other social media outlets, much in the same way that a person would interact with them in real life,’ Syrax said.¹⁴

Data supports the opinion of FBI Agent Syrax. During the time that, for example, Instagram went from one million users to one billion, there has been **“a 9,000% jump in abuse images** online, according to the U.S. National Center for Missing and Exploited Children, a nonprofit, and COVID-19 lockdowns saw a surge in reports about online child sexual abuse.”¹⁵

Fully one-quarter of 9-to 17-year-olds report having had an online sexually explicit interaction with someone they believed to be an adult.¹⁶

Facebook has known about traffickers using its products since at least 2018, leaked documents show. It got so bad that in 2019, Apple threatened to pull Facebook and Instagram's access to the App Store, a platform the social media giant relies on to reach hundreds of millions of users yearly.¹⁷ A CNN report stated that: **“A report distributed internally [within Facebook] in January 2020 found that ‘our platform enables all three stages of the human exploitation lifecycle (recruitment, facilitation, exploitation) via complex real-world networks[.]’”**¹⁸

Similarly, multiple investigative reports have documented how TikTok permits users to urge children to commit sexual or sexualized acts. For example, in 2022:

¹³ <https://htcourts.org/california/>.

¹⁴ <https://www.wtnh.com/news/child-sex-trafficking-reality/children-of-color-at-a-higher-risk-of-child-sex-trafficking/> (emphasis added).

¹⁵ <https://www.reuters.com/legal/litigation/can-an-eu-law-save-children-harmful-content-online-2022-07-12/>.

¹⁶ *Responding to Online Threats: Minors' Perspectives on Disclosing, Reporting, and Blocking*, THORN (May 2021), https://info.thorn.org/hubs/Research/Responding%20to%20Online%20Threats_2021-Full-Report.pdf, at 18.

¹⁷ Clare Duffy, *Facebook Has Known It Has a Human Trafficking Problem For Years. It Still Hasn't Fully Fixed It*, CNN (Oct. 25, 2021), <https://www.cnn.com/2021/10/25/tech/facebook-instagram-app-store-ban-human-trafficking#:~:text=A%20report%20distributed%20internally%20in,accounts%20to%20help%20with%20detection>.

¹⁸ *Id.* (emphasis added).

A *Forbes* review of hundreds of recent TikTok livestreams reveals how viewers regularly use the comments to urge young girls to perform acts that appear to toe the line of child pornography — rewarding those who oblige with TikTok gifts, which can be redeemed for money, or off-platform payments to Venmo, PayPal or Cash App accounts that users list in their TikTok profiles.

It’s “the digital equivalent of going down the street to a strip club filled with 15-year-olds,” says Leah Plunkett, an assistant dean at Harvard Law School and faculty associate at Harvard’s Berkman Klein Center for Internet & Society, focused on youth and media. Imagine a local joint putting a bunch of minors on a stage before a live adult audience that is actively giving them money to perform whatever G, PG or PG-13 activities they request, she said. “That is sexual exploitation. But that’s exactly what TikTok is doing here.”¹⁹

“Clearly, what once was improbable [about sex trafficking of children] has been made possible through social media.”²⁰

An astonishing 65% of underage sex trafficking victims recruited online in active criminal sex trafficking cases in 2020 were recruited through Facebook, while 14% were recruited through Instagram, and 8% were recruited through Snapchat. ²¹ Since 2000, traffickers have recruited 55% of sex trafficking victims online, usually through social media platforms.²²

SOCIAL MEDIA PLATFORMS MAKE IT DIFFICULT FOR SURVIVORS TO REMOVE UNLAWFUL IMAGES AND VIDEOS OF THEIR EXPLOITATION

A 2020 report by the Canadian Centre for Child Protection revealed that social media companies design their products in a way that makes reporting and removing images and videos portraying their exploitation difficult, if not impossible, for survivors. As one survivor told the Center, “I spend hours every day searching for my own content, reporting thousands of accounts and posts sharing CSAM. When platforms don’t actively look for or prevent this content from being uploaded, the burden falls on me to have these images removed.” ²³

AB 1394 (WICKS)

It is self-evident that unless social media platforms devote far more of their resources to the morally compelled but unprofitable task of preventing their spaces from being used by those seeking to exploit children sexually, we will never successfully reduce the sexual exploitation of children. This need to establish legal minimum requirements is especially true and urgent during a time when the largest platform is laying off tens of thousands of workers to increase its profits. ²⁴

¹⁹ Alexandra S. Levine, *How TikTok Live Became ‘A Strip Club Filled With 15-Year-Olds’*, FORBES, (Apr. 27, 2022), at <https://www.forbes.com/sites/alexandralevine/2022/04/27/how-tiktok-live-became-a-strip-club-filled-with-15-year-olds/?sh=75efad7b62d7>.

²⁰ *How Sex Traffickers Use Social Media to Contact, Recruit, and Sell Children*, FIGHT THE NEW DRUG (Aug. 11, 2021), <https://fightthenewdrug.org/how-sex-traffickers-use-social-media-to-contact-recruit-and-sell-children-for-sex/>.

²¹ *Id.*

²² <https://traffickinginstitute.org/wp-content/uploads/2022/09/2021-Federal-Human-Trafficking-Report-WEB-1.pdf>, at p. 4.

²³ Canadian Centre for Child Protection, *Reviewing Child Sexual Abuse Material Reporting Functions on Popular Platforms*, https://protectchildren.ca/pdfs/C3P_ReviewingCSAMMaterialReporting_en.pdf.

²⁴ <https://techcrunch.com/2023/03/14/meta-to-cut-another-10000-jobs-zuckerberg-says/>.

To that end, AB 1394 has two parts.

Part One:

Part one amends current law (Civil Code section 3345.1) that already permits survivors of child sexual exploitation to sue in civil court those who have exploited or trafficked them. It adds provisions allowing survivors to sue a platform if the platform “knowingly, recklessly, or negligently facilitated, aided, or abetted” the sexual exploitation.

According to the bill, this means platforms being “directly involved” in, or “actively participating” in, the development, deployment, or enforcement of a system, design, feature, or affordance that the social media platform knows, or should know, foreseeably causes child users to be victims of commercial sexual exploitation.²⁵ If a platform does not act in ways that facilitate the sexual exploitation of children, they are not liable under the bill.

Penalties range from \$1,000,000 for each act of exploitation to a maximum of \$5 million, appropriate for vast corporations that actively or directly facilitate the sexual exploitation of children.

This part of the bill aims to offer survivors a pathway to obtaining the money needed to pay for their ongoing treatment and their suffering. It is also a harm prevention measure that seeks to impose a downside financial consequence for a platform that is directly involved in or actively participating in the sexual exploitation of children.²⁶

The phrases “directly involved” and “actively participate” are not accidental. They are lifted verbatim from Ninth Circuit cases ruling that Section 230 of the Communications Decency Act to be inapplicable, clearing the way for liability for suchs acts of platforms.²⁷

Part Two:

Where part one of the bill is about ensuring certain vast corporations have a financial reason aggressively to prevent their platforms from being used to facilitate sexual exploitation of children, the second part of the bill is about helping survivors deal with the consequences of their exploitation.

Thus, the second part of the bill requires platforms, when notified by a survivor, to render images or videos of children who have been sexually exploited permanently invisible²⁸, helping survivors

²⁵ Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *E.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

²⁶ For example, to give an idea of the cost involved, in 2020, Facebook announced a \$100 million investment over three years to support organizations fighting online child exploitation and abuse. Sounds like a lot ... until you do the math. \$100 million over 3 years is \$33 million per year. as of 2021, Facebook's annual revenue was approximately \$86 billion. To calculate the exact percentage, we can divide \$33 million by \$86 billion and multiply by 100: \$33 million / \$86 billion is approximately 0.038% of its annual revenue devoted to addressing children that are being sexually exploited by their own products. **That is the same as someone earning \$100,000 a year spending \$38; not a hearty investment.**

²⁷ See, for example, *Fair Hous. Council of San Fernando Valley v. Roomates.com*, 521 F.3d 1157, 1172 (9th Cir. 2008) which held that when a platform is “directly involved with developing and enforcing” an unlawful scheme, Section 230 of the Communications Decency Act does not bar such a claim. Being an “active participant” in unlawful content is likewise excluded websites from Section 230 immunity. See, *Jane Does, No. 1-6 v. Reddit*, Slip Op., at p. 655 (9th Cir. 2022), at <https://cdn.ca9.uscourts.gov/datastore/opinions/2022/10/24/21-56293.pdf>.

²⁸ Current law offers consumers the right to have information about them, including images and videos, deleted (Civil Code section 1798.105) but not made invisible. If information is deleted the platform can't detect its re-posting. That deletion is different than the requirement to make unlawful content invisible is affirmed by the fact that Legislative Counsel did not key this bill as an amendment to the CPRA which enacted section 1798.105.

to reduce their lifelong fear of repeated exploitation. The bill requires the platforms to honor the survivor's request within a month's time — remember, these images and videos depict crimes against children — or face civil penalties of up to \$250,000 per violation. The reason for this part of the bill is documented by the 2020 Canadian Centre for Child Protection report already cited above and heartbreaking personal stories such as this one:

Graphic sexually abusive images and videos depicting two female children from ages 5–12 years old and 16–17 years old being abused by 2 adult offenders have been identified in content seized by law enforcement from over 8,000 offenders. This abuse originally occurred 21–24 years ago. The younger child has been approached in public by strangers who recognized her from the sexually abusive material, which predators have posted to the dark web with the child's real name and photos of the child as an adult.²⁹

Moreover, platforms “are not required to engage in efforts to combat revictimization, and currently there is no civil recourse for survivors when [platforms] refuse to engage in these efforts.”³⁰

Just as part one of the bill amends a current law in part using operative words lifted verbatim from Ninth Circuit case law, this part of the bill is grounded in longstanding law, too: state laws.

When it comes to images or videos *uploaded by the child user*, the bill is grounded in contract law, namely, the current legal ability for minors to disaffirm contracts they enter into. (Cal. Fam. Code section 6710). Once the contract with the social media platform is disaffirmed, the platform no longer has the legal authority to display any images uploaded by the child user.

When it comes to *images or videos uploaded by others*, the bill is grounded in the state's longstanding “Right of Publicity” statute. (Cal.Civ. Code section 3344). This is the statute that vests everyone with a right to prevent their images or names from being used by others for profit. “[U]nder California law, the statutory right of publicity exists for celebrity and non-celebrity plaintiffs alike.”³¹ Once a platform receives a request from a survivor to make content invisible, the platform no longer has the authorization required under Civil Code section 3344 to use the child's image for commercial gain, and there can be no reason for the platform to continue to make it visible except for a commercial reason. And, under the case of *Fralely v. Facebook* (N.D.Cal. 2011) 830 F. Supp. 2d 785, under certain circumstances, Right of Publicity cases are not blocked by Section 230.

AB 1394's Penalties:

Beginning in February of next year, a platform that fails to remove unlawful content in the European Union can face a maximum fine of up to 6% of its annual gross income.³² By this measure, the penalties in AB 1349 imposed on a platform if it “knowingly, recklessly, or

²⁹ [https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20\(2-14-23\)%20\(final\).pdf](https://www.missingkids.org/content/dam/missingkids/pdfs/Senate%20Judiciary%20Hearing%20-%20NCMEC%20Written%20Testimony%20(2-14-23)%20(final).pdf), at p. 14.

³⁰ *Id.* at p. 3.

³¹ *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362, 373 n.12 (2000).

³² <https://www.reuters.com/legal/litigation/can-an-eu-law-save-children-harmful-content-online-2022-07-12/>.

negligently” facilitates, aids or abets the crime of commercial sexual exploitation of a mere child are modest and needed to compel such giant corporations to comply.

How needed? *When the FTC fined Facebook a record \$5 billion, its stock rose the next day and the fine was described as a “joke.”*³³ Likewise with the penalties proposed for a platform’s failure to remove horrifying images and videos upon a survivor’s request: \$250,000 for each failure to heed the survivor’s plea.

Such fines are precedented in far less compelling circumstances. For example, Business & Professions Code section 5116.2 permits the Board of Accountancy, which also in part regulates vast corporations (the “Big Four” Accounting firms), to assess a penalty of up \$1 million for a first violation and not more than \$5 million for subsequent violations.³⁴ Surely, motivating compliance to prevent children from being sexually exploited and prevent them, if exploited, from being re-victimized is not less worthy.

CONCLUSION

Social media platforms are currently central to the sexual exploitation of children. Unless platforms are required to devote far more time and resources to preventing and fixing the child sexual exploitation they are facilitating in the first place, children will continue to be sexually exploited in ever-increasing numbers. AB 1394 is a measured, incentive-based, and common-sense approach to prompting the platforms to act to prevent and remediate terrible harm befalling our children when they are in significant part responsible for causing that harm.

Please support these children and survivors by supporting AB 1394.

Sincerely,



Ed Howard
Senior Counsel, Children’s Advocacy Institute

CC: Hon. Buffy Wicks

³³ <https://www.theverge.com/2019/7/12/20692524/facebook-five-billion-ftc-fine-embarrassing-joke>.

³⁴ Likewise, Business & Professions Code section 16755 imposes a maximum penalty of \$1 million for corporations that conspire against free trade. Other examples of fines up to \$1 million are found in the Labor, Financial, and Health & Safety Codes, to name a few.