

July 27, 2023

**RE: Vote “No” on the Kids Online Safety Act, S. 1409**

Honorable Maria Cantwell  
Chair, Senate Commerce Committee  
511 Hart Senate Office Building  
Washington, D.C. 20510

Honorable Ted Cruz  
Ranking Member, Senate Commerce Committee  
167 Russell Senate Office Building  
Washington, DC 20510

Dear Chair Cantwell, Ranking Member Cruz, and members of the Senate Commerce Committee:

The Kids Online Safety Act presents serious constitutional concerns because it intrudes on the free speech rights of minors and adults. While the bill’s purported goal of addressing child safety online is laudable, its means — singling out particular topics for censorship by social media companies — will silence important conversations, limit minors’ access to potentially vital resources, and violate the First Amendment by imposing a government-mandated content moderation rule. KOSA’s purported intent to regulate certain harms would disfavor content related to “anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors” and could chill any speech tied to youth stress — from discussions about how conversion therapy has harmed LGBTQ+ youth to young people’s worries about climate change to concerns about school shootings.<sup>1</sup>

We have both publicly and privately expressed our concern that KOSA will chill access to resources for those experiencing eating disorders, depression, and anxiety, and would enable government officials to target protected speech.<sup>2</sup> We are writing to elaborate on KOSA’s



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<sup>1</sup> Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health (2022), [here](#) (showing higher rates of attempted suicide among LGBTQ youth who experienced discrimination or were subjected to or threatened with conversion therapy); Elizabeth Marks et al., *Young People’s Voices on Climate Anxiety, Government Betrayal and Moral Injury: A Global Phenomenon*, *The Lancet* (2021), [here](#) (60 percent of young survey respondents said they felt “very” or “extremely” worried about climate change); American Psychological Association, *Stress in America: Generation Z* (2018), [here](#) (75 percent of respondents in Generation Z reported mass shootings were a “significant source of stress”).

<sup>2</sup> Coalition Letter On Privacy and Free Expression Threats in Kids Online Safety Act (Nov. 28, 2022), [here](#).

constitutional implications — namely, that KOSA is an impermissible, content-based regulation of speech:<sup>3</sup>

- **KOSA is a content-based regulation of constitutionally protected speech.** A law is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”<sup>4</sup> Content-based discrimination may be “subtle, defining regulated speech by its function or purpose,” but is nonetheless still “presumptively unconstitutional.”<sup>5</sup> Moreover, content-based regulations cannot be justified by an effort to regulate the harms or the “primary’ effect of the speech — i.e., its persuasive (or repellant) force.”<sup>6</sup> When the “only reason why such expressive conduct” is subject to a regulation is because it “conveys a particularly odious message,” it is content-based.<sup>7</sup> This is true if the “chain of causation” of a particular harm “necessarily’ run[s] through the persuasive effect of the expressive component” of the regulated speech.<sup>8</sup> “The emotive impact of speech on its audience is not a ‘secondary effect’ unrelated to the content of the expression itself.”<sup>9</sup>



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<sup>3</sup> In addition, KOSA may incentivize age gating, impose liability on platforms for content about which they had no knowledge, or create impermissibly vague obligations. Those aspects raise additional constitutional concerns. *Reno v. Am. C.L. Union*, 521 U.S. 844, 882 (1997) (age verification would impermissibly burden “noncommercial speech”); *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 668 (2004) (age verification not narrowly tailored); *Smith v. California*, 361 U.S. 147, 154 (1959) (requiring knowledge to impose liability on intermediaries); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (“[W]e believe any statute that chills the exercise of First Amendment rights must contain a knowledge element.”); *Reno*, 521 U.S. at 870-71 (“Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the [law]? This uncertainty undermines the likelihood that the [law] has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.”).

<sup>4</sup> *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

<sup>5</sup> *Id.* at 163-64.

<sup>6</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 n.7 (1992).

<sup>7</sup> *R.A.V.*, 505 U.S. at 394 n.7.

<sup>8</sup> *R.A.V.*, 505 U.S. at 394 n.7 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991) (Souter, J., concurring in judgment)) (emphasis and omission in original).

<sup>9</sup> *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)) (internal quotation mark omitted); *accord Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 1219, 179 L. Ed. 2d 172 (2011) (“insulting, and even outrageous, speech” is protected); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52-57 (1988) (no recovery for “severe emotional distress,” even for “outrageous” speech); *accord Boos*, 485 U.S. at 321 (risk of offending foreign officials did not justify suppressing speech).



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KOSA would be such a content-based regulation of speech. It would impose a “duty of care” on social media platforms to prevent or mitigate depression, eating disorders, substance use disorders, and suicidal behaviors for minors. In effect, this would pressure platforms to silence certain viewpoints and even cut off discussion of entire topics. The duty to mitigate anxiety, for example, could easily cause platforms to prohibit conversations about anything that causes young people stress, from central political issues like school shootings and climate change to the details of their daily lives like final exams and soccer tryouts. Moreover, this would impact the speech available not only to young people, but also to adults, who would be reduced to what the platforms deem sufficiently safe for minors.

- **The speech that KOSA targets is protected.** The few categories of unprotected speech, including true threats, incitement, and defamation, are “well-defined and narrowly limited,”<sup>10</sup> and speech burdened by KOSA does not fit within them. Although the Supreme Court has permitted some limitations for speech that is “harmful” to children, that is limited to certain types of constitutional “obscenity,” meaning “only depictions of sexual conduct”<sup>11</sup> — which is not the focus of KOSA’s provisions. Speech may not be proscribed based on “an ad hoc balancing of relative social costs and benefits.”<sup>12</sup> Thus, “insulting, and even outrageous, speech” is protected.<sup>13</sup> Creation of “a wholly new category of content-based regulation that is permissible only for speech directed at children” would be “unprecedented and mistaken.”<sup>14</sup> The Supreme Court has been emphatic on this point: “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.”<sup>15</sup> KOSA does not fit within those narrow exceptions to the protection of speech.

KOSA’s content-based regulation of speech would impermissibly burden the speech of both adults and minors. For adults, speech would be subject to the vague bounds of KOSA’s content-moderation rule, and to whatever measures platforms take to “reasonably . . . know”

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<sup>10</sup> *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (listing constitutional obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).

<sup>11</sup> *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 793 (2011).

<sup>12</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“As a free-floating test for First Amendment coverage, that [balancing test] is startling and dangerous.”).

<sup>13</sup> *Snyder*, 562 U.S. at 458.

<sup>14</sup> *Brown*, 564 U.S. at 794.

<sup>15</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

who is a minor. Such broad content prohibitions, backed by untested age assurance measures have been found — repeatedly — to be unconstitutional.<sup>16</sup> Similarly, prohibiting speech from being provided to an internet forum “open to all comers” where the provider has “knowledge” that a “specific person” is under 18 impermissibly provides a “heckler’s veto” over adult speech.<sup>17</sup> As the Supreme Court observed, “A statute that ‘effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.’”<sup>18</sup>

For minors, the burdens on speech would be just as impermissible. Minors, like adults, “are entitled to a significant measure of First Amendment protection,” and “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”<sup>19</sup> As described above, none of KOSA’s provisions fit within bounds of unprotected speech, even for minors.

A law, like KOSA, that violates those bounds must satisfy strict scrutiny, based on a showing that “it is justified by a compelling government interest and is narrowly drawn to serve that interest.” Under this standard, “the curtailment of free speech must be actually necessary to the solution.”<sup>20</sup> KOSA cannot meet that standard. As in previous attempts to regulate speech, KOSA is not premised on “a direct causal link,” but instead “is based on correlation, not evidence of causation.”<sup>21</sup> As several authorities have noted, the relationship between social media and mental health is complex, and “findings suggesting causal associations are rare.”<sup>22</sup>

Moreover, strict scrutiny requires a statute to be neither under- nor overinclusive.<sup>23</sup> KOSA is both. It is underinclusive in failing to address



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<sup>16</sup> *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 668 (2004); *Reno v. Am. C.L. Union*, 521 U.S. 844, 882 (1997) (“Given that the risk of criminal sanctions ‘hovers over each content provider, like the proverbial sword of Damocles,’ the District Court correctly refused to rely on unproven future technology to save the statute.”).

<sup>17</sup> *Reno*, 521 U.S. at 880.

<sup>18</sup> *Ashcroft*, 542 U.S. at 665 (quoting *Reno*, 521 U.S. at 874).

<sup>19</sup> *Erznoznik*, 422 U.S. at 213

<sup>20</sup> *Brown*, 564 U.S. at 799.

<sup>21</sup> *Brown*, 564 U.S. at 799-800.

<sup>22</sup> American Psychological Association, Health Advisory on Social Media Use in Adolescence 3 (2023), [here](#) (“In other words, the effects of social media likely depend on what teens can do and see online, teens’ pre-existing strengths or vulnerabilities, and the contexts in which they grow up.”); accord U.S. Surgeon General, Social Media and Youth Mental Health 11 (2023), [here](#).

<sup>23</sup> *Brown*, 564 U.S. 803-04.



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harms to youths' wellbeing beyond the platforms it attempts to regulate, as it leaves news media, books, magazines, music and music videos, and entire industries such as fitness supplements and beauty products entirely unaddressed. "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."<sup>24</sup>

KOSA's reach is also overinclusive — KOSA requires platforms to mitigate specific harms, and in turn, certain kinds of speech. Although the bill purports to exempt "resources for the prevention or mitigation" of harms, content moderation is notoriously inexact, and implementing KOSA's provisions at scale will inevitably sweep up the good as well as the bad. For example, one study found that the vast majority — 92 percent — of parental control apps block LGBTQ+ and sex-education resources online, including suicide-prevention and mental health resources.<sup>25</sup> Similarly, while one recent federal law nominally targeted sex trafficking, its net result has been the takedown of unrelated speech, disproportionately affecting Black and women creators.<sup>26</sup> The net effect is that a government mandate about what harms must be addressed will result in overbroad take-downs of protected speech. The bill appears to depend on private entities to perfect content moderation technology to mitigate KOSA's sweep, but as the Supreme Court has stated, Congress may not "rely on unproven future technology to save the statute."<sup>27</sup> Moreover, KOSA's prohibition on content that causes anxiety and depression would sweep up discourse on matters of public importance as well as private conversations, conflicting with the tenets "[a]t the heart of the First Amendment."<sup>28</sup>

KOSA cannot show it is narrowly drawn to justify its intrusion on protected speech. This analysis does not address *whether* Congress should undertake legislation regarding minors' wellbeing, online safety, digital literacy, or — as we have advocated — consumer privacy, but *how*. As the Supreme Court has concluded, "Even where

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<sup>24</sup> *Brown*, 564 U.S. at 802.

<sup>25</sup> Jamie Wareham, *92% Of Top Parental Control Apps Wrongly Block LGBTQ And Sex-Ed Sites*, *Forbes* (Jan. 19, 2022), [here](#).

<sup>26</sup> Amelia Gallay, *Sex Sells, But Not Online: Tracing the Consequences of FOSTA-SESTA*, *Berkeley Journal of Criminal Law* (Dec. 4, 2021), [here](#).

<sup>27</sup> *Reno*, 521 U.S. at 882.

<sup>28</sup> *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" (internal citation omitted)); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("Freedoms of expression require 'breathing space.'" (internal citation omitted)).

the protection of children is the object, the constitutional limits on governmental action apply.”<sup>29</sup> KOSA runs afoul of those protections.

Please feel free to contact me with any questions at [cvenzke@aclu.org](mailto:cvenzke@aclu.org).

Sincerely,

Cody Venzke  
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American Civil Liberties Union



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<sup>29</sup> *Brown*, 564 U.S. at 804-05.