

BRETT GUTHRIE, KENTUCKY
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED NINETEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-3641
Minority (202) 225-2927

December 22, 2025

Ms. Kate Ruane
Director of the Free Expression Project
Center for Democracy & Technology
1401 K Street NW
Suite 200
Washington DC 20005

Dear Ms. Ruane:

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade hearing on Tuesday, December 2, 2025, to testify at the hearing entitled, "Legislative Solutions to Protect Children and Teens Online."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Monday, January 12, 2026. Your responses should be mailed to Alex Khlopin, Policy Analyst, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to alex.khlopin@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Gus M. Bilirakis
Chairman
Subcommittee on Commerce, Manufacturing, and Trade

cc: The Honorable Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade

Attachment —Additional Questions for the Record

The Honorable Russ Fulcher (R-ID)

1. Ms. Ruane, I often look at these issues through a constitutional lens. You have written about how the Senate KOSA's duty of care raises significant First Amendment issues considering it focuses on constitutionally protected speech. No law blocked by the courts will protect a single child. Can you outline the First Amendment issues associated with the Senate KOSA's "duty of care" and the impact of recent key court decisions?



Hon. Brett Guthrie
Chair
House Committee on Energy and Commerce
2161 Rayburn House Office Building
Washington, DC 20515

Hon. Frank Pallone
Ranking Member
House Energy & Commerce Committee
2107 Rayburn House Office Building
Washington, DC 20515

Hon. Gus Bilirakis
Chair
House Committee on Energy and Commerce,
Subcommittee on Commerce,
Manufacturing and Trade
2306 Rayburn House Office Building
Washington, DC 20515

Hon. Jan Schakowsky
Ranking Member
House Energy and Commerce Committee,
Subcommittee on Commerce,
Manufacturing, and Trade
2408 Rayburn House Office Building
Washington, DC 20515

Dear Chair Guthrie, Chair Bilirakis, Ranking Member Pallone, and Ranking Member Schakowsky,

This letter responds to the question for the record submitted to the Center for Democracy & Technology (CDT) by the Honorable Russ Fulcher (R-ID) following the Subcommittee on Commerce, Manufacturing, & Trade Hearing Entitled “Legislative Solutions to Protect Children and Teens Online.”

The question follows:

Ms. Ruane, I often look at these issues through a constitutional lens. You have written about how the Senate KOSA’s duty of care raises significant First Amendment issues considering it focuses on constitutionally protected speech. No law blocked by the courts will protect a single child. Can you outline the First Amendment issues associated with the Senate KOSA’s "duty of care" and the impact of recent key court decisions?

CDT’s Response:

The Senate version of the Kids Online Safety Act’s (KOSA’s) duty of care provision should be subject to strict constitutional scrutiny for at least three reasons and likely would not survive that standard of review.¹ First, it restricts the constitutionally protected speech minors can access via

¹ Kids Online Safety Act, S. 1748 (119th Cong. 1st Sess.), <https://www.congress.gov/bill/119th-congress/senate-bill/1748>. The question refers to the Senate version of KOSA, but it is worth noting that there also may be lingering constitutional concerns with the duty of care in the pared down version of KOSA currently being considered by the House. Kids Online Safety Act, H.R. ____, (119th Cong. 1st Sess.), https://docs.house.gov/meetings/IF/IF17/20251202/118714/BILLS-119pih-HR____KidsOnlineSafetyAct.pdf. The House version of the duty of care narrows the categories of content to be considered to include content that is illegal or otherwise

covered platforms. Second, it burdens the editorial judgment of covered platforms, forcing them to alter their decisions about what content to publish, what content to recommend, and to whom to recommend it. Third, it burdens adults' access to constitutionally protected speech by incentivizing platforms to verify their age prior to allowing users unfettered access to speech on any covered platform. Each of these issues provides a basis to subject the law to the highest degree of constitutional scrutiny, known as strict scrutiny, which the provision should fail. Recent cases, including *Moody v. NetChoice*² and *Free Speech Coalition v. Paxton*,³ provide significant support for this conclusion.

1. Senate KOSA's duty of care provision burdens minors' access to and ability to engage in constitutionally protected speech.

Senate KOSA's duty of care provision would require covered online services to exercise reasonable care in the creation and implementation of any design feature to prevent and mitigate enumerated harms such as "depressive disorders and anxiety disorders" in minors under the age of 17.⁴ That would effectively require covered platforms to restrict access to a wide range of constitutionally protected content on various subjects that might be linked to "depressive disorders and anxiety disorders" in minors, including but not limited to content related to climate change, weight loss, violence in schools, ongoing international conflicts, and any number of other topics that an individual

unprotected by the constitution. This is beneficial from a practical perspective in that it narrows the amount of speech platforms would be incentivized to censor under the legislation, but it may not fully cure the constitutional concerns, because determining whether particular speech falls outside the ambit of the constitution's protections is a fact-specific endeavor. See *Counterman*, 600 U.S. at 73 (recounting tests for unprotected speech); *Central Hudson*, 447 U.S. at 563 (describing false commercial speech as unprotected). When applying restrictions on the distribution of content, even illegal content, courts have been wary of the chilling effects the application of liability to distributors of speech might have. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963). Even the pared down version of the duty of care currently before the House requires covered services to make speculative judgments about what content should be covered by its policies, often based upon imperfect information and potentially no information regarding the original speaker's intent. Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation at Scale Is Impossible To Do Well*, TechDirt (Nov. 20, 2019) ("[T]o make good decisions you often need a tremendous amount of context, and there's simply no way to adequately provide that at scale in a manner that actually works."). This uncertainty in a legal requirement to remove or reduce the distribution of speech receives close constitutional scrutiny even when the targeted speech is not constitutionally protected because of the chilling effect it visits upon protected speech.

² *Moody v. NetChoice, LLC*, 603 U.S. 707, 144 S. Ct. 2383 (2024).

³ *Free Speech Coalition v. Paxton*, 606 U.S. 461, 478 (2025) (hereinafter "FSC").

⁴ Kids Online Safety Act, S. 1748 (119th Cong. 1st Sess.), <https://www.congress.gov/bill/119th-congress/senate-bill/1748>. See danah boyd, *KOSA Isn't Designed to Help Kids*, Substack (Jan. 31, 2024), <https://zephoria.substack.com/p/kosa-isnt-designed-to-help-kids>.

might find distressing. Moreover, *different kinds of content* might qualify as harmful depending on the age category of a particular minor.⁵ What triggers anxiety in 8-12 year olds might be quite different from what does so for 15-17 year olds. Triggering content is also likely different based upon individual minors, who are far from monolithic.

KOSA's duty of care essentially would force covered platforms to make speculative judgments about which content and design features may contribute to these outcomes and then "mitigate" those harmful impacts. Mitigation strategies will include actions to reduce the publication and recommendation of content within the categories identified as potentially harmful. This tactic will undoubtedly sweep beneficial and educational content into the censorship dragnet. Content filtering technology that will be used to comply with KOSA's duty of care is unable to parse intent or nuance and is trained on keywords or associations between text to detect content and take action at scale. If a content filter is trained to detect and prevent recommendation of content with the hashtag #thinspo or #skinnygirlhacks to reduce content that relates to eating disorders, it is likely to remove not only content that uses those hashtags to promote an eating disorder, but also content that condemns, provides education about, or seeks to help people find pathways to treat and recover from eating disorders.⁶ As such, KOSA's duty of care could prevent users from accessing important content they need, undermining its very purpose of protecting minors from harm.

Those content restrictions are not saved by their application to minors rather than to adults. A long line of precedent establishes that children have First Amendment rights and "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."⁷ For example, in *Brown v. Entertainment Merchants Association*, the Supreme Court struck down a California statute restricting the sale of violent video games to minors. In that decision,

⁵ Michal Luria & Aliya Bhatia, *The Kids Are Online: Research-Driven Insights on Child Safety Policy*, at 17, Ctr. for Democracy & Tech. (Feb. 2025), <https://cdt.org/wp-content/uploads/2025/02/2025-02-14-Child-Safety-Symposium-Summary-report-final.pdf>.

⁶ 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/>.

⁷ *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975)).

the Court noted, “No doubt a State possesses legitimate power to protect children from harm, [...], but that does not include a free-floating power to restrict the ideas to which children may be exposed.”⁸ The Seventh Circuit, reviewing a similar ban on minors’ access to violent video games, explained, “[minors] must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise.”⁹ The court reasoned that “[t]o shield children right up to the age of 18 from exposure to [disfavored or harmful ideas] would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”¹⁰

The only exception to the general rule that minors’ First Amendment rights cannot be restricted simply because they are minors (outside of the public school context) is for speech that is obscene for minors, a narrow category of sexually explicit content.¹¹ In *Free Speech Coalition v. Paxton*, the Court reiterated that content that is obscene as to minors includes only “works that (a) taken as a whole, and under contemporary community standards, appeal to the prurient interest of minors; (b) depict or describe specifically defined sexual conduct in a way that is patently offensive for minors, and (c) taken as a whole, lack serious literary, artistic, political, or scientific value for minors.”¹² As to what kind of content that might entail, the Court in *Ginsberg v. New York* had found that “girlie magazines,” like *Playboy*, could be considered to fall in this category.¹³ The FSC Court in a footnote gave additional guidance illustrating how limited this category of speech is, explaining that it “cannot conceivably be read to cover, say, a PG-13 or R Rated movie.”¹⁴ Senate KOSA’s duty of care sweeps in content far beyond that which is obscene as to minors – which is limited to content such as adult magazines like *Playboy* or websites like Pornhub or OnlyFans – leaving no doubt that it applies to speech that minors have the constitutional right to access and should be subject to strict scrutiny.

⁸ *Id.* at 794.

⁹ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

¹⁰ *Id.*

¹¹ *Ginsberg v. New York*, 390 U.S. 629, 634 (1968).

¹² *FSC*, 606 U.S. at 472.

¹³ *Ginsberg*, 390 U.S. at 634.

¹⁴ *FSC*, 606 U.S. at 481 n.7.

2. Senate KOSA’s Duty of Care burdens the editorial judgment of covered platforms.

Implementation of Senate KOSA’s duty of care requires changes to covered platforms’ content moderation rules and processes. Under the bill, platforms would have to decide what kinds of content might lead to enumerated harmful outcomes for minors, change their content policies to reflect this assessment, alter what content they recommend to their users, and make changes to the ways in which that content is presented and to which users that content may be presented or recommended. In other words, KOSA’s duty of care is a regulation of covered platforms’ editorial judgment.

Burdens on editorial judgment are treated skeptically by courts and rightfully so.¹⁵ Speech intermediaries are tremendously important to freedom of expression.¹⁶ They represent the most efficient way for ideas and speech to reach broader audiences. This is particularly so when the speech intermediary is a social media platform, where anyone from a head of state to a preschool teacher can reach audiences far beyond those they would have without the platform.¹⁷ In the recent case, *Moody v. NetChoice*, the Supreme Court made clear that laws that regulate social media platforms’ decisions regarding which content to display and how to display it burden their editorial judgment and are subject to the highest degree of scrutiny a court can apply.¹⁸ Because Senate KOSA would require covered platforms to change which content to display, to whom they display it, and how, under *Moody* it would be subject to strict scrutiny.

¹⁵ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (“The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).

¹⁶ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (invalidating a scheme of government notice to booksellers that certain books may be obscene because it provided insufficient safeguards for First Amendment protections and aimed to suppress speech rather than aid publishers with legal compliance).

¹⁷ *Packingham v. North Carolina*, 582 U.S. 98, 105–06 (2017) (describing social media as containing democratic forums with the “vast potential to alter how we think, express ourselves, and define who we want to be”).

¹⁸ *Moody*, 603 U.S. at 743.

3. Senate KOSA’s duty of care burdens adults’ access to constitutionally protected speech by incentivizing covered services to verify users’ ages prior to allowing unfettered access to speech on the platform.

Finally, Senate KOSA’s duty of care burdens adults’ access to constitutionally protected speech by subjecting them to age verification. While the Supreme Court in *FSC v. Paxton* recently upheld an age verification requirement for access to adult web sites under intermediate scrutiny, the Court was very clear in its reasoning that it was upholding the state statute at issue because it barred minors’ access to content they do not have the constitutional right to view, and the burden it placed on the speech of adults was tailored to service the goal of restricting access to that narrow category of content by minors.¹⁹ That is simply not the case for KOSA, which would erect age verification barriers to access all sorts of content beyond that which might be obscene for minors, and clearly targets fully protected speech. Strict scrutiny is “the standard for reviewing the direct targeting of fully protected speech.”²⁰ Therefore, Senate KOSA’s duty of care is subject to strict scrutiny, as previous laws that have required age verification to access or communicate constitutionally protected have been.²¹

While Senate KOSA contains language purportedly not requiring platforms to verify age to comply, that language is functionally meaningless.²² To comply with the law, covered platforms need to know to at least some degree which of their users are under the age of 18 and to do so means verifying all of their users’ ages in some way. That means that all users, including adult users, would need to undergo an age verification process to access their social media accounts, erecting a high barrier to accessing services the Supreme Court has termed “the modern public square”²³ and an insurmountable barrier to those who would prefer not to share additional data with covered services or who do not

¹⁹ *FSC*, 606 U.S. at 499.

²⁰ *Id.* at 484.

²¹ *NetChoice v. Bonta I*, 113 F.4th 1101,1121 (9th Cir. 2024) (upholding a preliminary injunction against the enforcement of a requirement for covered services to assess what content might harm children and take action to address that content because it regulated constitutionally protected speech and did not survive strict scrutiny).

²² Kids Online Safety Act, S. 1748 (119th Cong. 1st Sess.), <https://www.congress.gov/bill/119th-congress/senate-bill/1748>.

²³ *Packingham*, 582 U.S. at 99.

have the needed documentation to verify their ages. Strict scrutiny, therefore, should apply to the duty of care because of the burden the provision would place on adults' access to protected speech.

4. KOSA's Duty Of Care Provision Likely Would Not Survive Strict Scrutiny.

Strict scrutiny "requires a restriction to be the least restrictive means of achieving a compelling governmental interest,"²⁴ and Senate KOSA's duty of care fails that test. Although courts have recognized that protecting children is a compelling interest, to survive strict scrutiny, the government must demonstrate that the requirement at issue would achieve that compelling interest.²⁵ It is questionable at best whether the government could make such a demonstration with respect to Senate KOSA's duty of care. When California attempted to require parental consent for minors to purchase violent video games, the Court noted that the state could not show that violent video games caused violence in minors.²⁶ California had put forth studies demonstrating a link between playing violent video games and violent behavior, but the Court rejected these studies as insufficient because they did not show that playing violent video games *caused* violent action.²⁷ The state was not permitted to rely on the judgment of the legislature that the evidence was sufficient to justify the restriction because the law was subject to strict rather than intermediate scrutiny and strict scrutiny requires a causal connection.

The result should be the same for Senate KOSA. While some studies have linked social media use to certain risks of harm for minors, no study has shown that social media was its cause. Moreover, research on the effects of social media on minors is mixed. Many studies show that social media has benefits for minor users who are able to find communities they cannot find offline and information they otherwise might not have learned.²⁸ It further shows that social media's impacts are different for

²⁴ *FSC*, 606 U.S. at 484 (cleaned up).

²⁵ *See Brown*, 564 U.S. at 799 ("The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution" (internal citations omitted)).

²⁶ *Id.* at 799-800.

²⁷ *Id.*

²⁸ Berger, Matthew N., Melody Taba, Jennifer L. Marino, Megan S. C. Lim, and S. Rachel Skinner. "Social Media Use and Health and Well-Being of Lesbian, Gay, Bisexual, Transgender, and Queer Youth: Systematic Review." *Journal of Medical Internet Research* 24, no. 9 (September 21, 2022): e38449. <https://doi.org/10.2196/38449>; Duplaga M, Szulc K. The Association of Internet Use with Wellbeing, Mental Health and Health Behaviours of Persons with Disabilities. *Int J Environ Res Public Health*. 2019 Sep 4;16(18):3252. [doi: 10.3390/ijerph16183252](https://doi.org/10.3390/ijerph16183252).

minors depending on their age.²⁹ It is unlikely that the government could demonstrate sufficiently that social media use causes any particular harm to minors or that any of the potential actions covered services might take to comply would mitigate the harms enumerated in Senate KOSA. Under the Supreme Court’s reasoning in *Brown* that would doom the provision.

Even if a reviewing court were to find the evidence of social media’s harmful impacts sufficient to demonstrate that the duty of care would achieve the government’s goals of reducing harm, Senate KOSA’s duty of care likely would still fail strict scrutiny because it is not the least restrictive means for achieving the government’s legitimate ends. Rather than restricting the publication of poorly scoped categories of content, the government could pursue less intrusive regulations, including supporting user controls, protecting users’ privacy by requiring data minimization and use restrictions, or supporting the creation of more child-friendly spaces on the internet. Each of these alternatives would restrict less constitutionally protected speech than Senate KOSA’s duty of care, demonstrating that the provision is not the least restrictive means of achieving the government’s legitimate goals.

For those reasons, a reviewing court would likely find Senate KOSA’s duty of care to be unconstitutional under the First Amendment.

²⁹ Orben, Amy. “Teenagers, Screens and Social Media: A Narrative Review of Reviews and Key Studies.” *Social Psychiatry and Psychiatric Epidemiology* 55, no. 4 (April 1, 2020): 407–14. <https://doi.org/10.1007/s00127-019-01825-4>.