

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 3 Online Access to Materials Harmful to Minors

SPONSOR(S): Judiciary Committee, Regulatory Reform & Economic Development Subcommittee, Tramont and others

TIED BILLS: HB 1491 **IDEN./SIM. BILLS:** SB 1792

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee	13 Y, 0 N, As CS	Wright	Anstead
2) Judiciary Committee	21 Y, 0 N, As CS	Leshko	Kramer

SUMMARY ANALYSIS

Internet usage and mobile technology have become mainstream, especially among teens and young adults, which has expanded the creation and dissemination of pornography. The majority of Americans, including minors, are exposed to pornography online regularly, and 56 percent of American high school students have viewed pornography in the last year.

Adolescents who view pornography:

- Tend to have sexually permissive views, have more sexual partners in their lifetime, and are more likely to have engaged in certain sexual acts;
- Tend to display more aggression, have more traditional gender role attitudes, and view women as sex objects;
- Report feeling insecure about their ability to perform sexually and the way they look; and
- Tend to reduce their pornography use as their self-confidence increases or their relationships with family and friends improve.

Several states, including Louisiana, Utah, Arkansas, Mississippi, Montana, North Carolina, Texas, and Virginia, have recently passed legislation to require websites that host obscene material or other material harmful to minors to verify the age of a visitor and block access to minors.

The bill requires a commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on a website or application, if the website or application contains a substantial portion of material harmful to minors, to prohibit access to such material by any person younger than 18 years of age.

The bill requires such a commercial entity to perform reasonable age-verification methods to verify that the age of a person attempting to access the material is 18 years of age or older. The reasonable age-verification method must be conducted by a non-governmental, independent third-party not affiliated with the commercial entity, and any information used to verify age must be deleted when the age is verified.

The bill requires a commercial entity to provide an easily accessible link or function on its homepage, landing page, or age-verification page to allow a minor user or the confirmed parent or guardian of the minor user to report unauthorized or unlawful access. The commercial entity must prohibit or block future access by the minor within five days after receiving such a report.

The bill provides that, if a commercial entity violates the requirements for minor users, it is an unfair and deceptive trade practice actionable under the Florida Deceptive and Unfair Trade Practice Act, solely by the Department of Legal Affairs. The bill also allows for a private cause of action against a commercial entity that fails to prohibit or block a minor from future access to material harmful to minors after a report of unauthorized or unlawful access.

The bill may have an indeterminate fiscal impact on state government and commercial entities.

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Effects of Harmful Content on Children

Internet usage and mobile technology has become mainstream, especially among teens and young adults.¹

Because the Internet is not subject to regulations, it has emerged as a vehicle for circulation of pornography. Pornographic images are available for consumption in the privacy of one's home via the Internet rather than in public adult bookstores or movie theaters. Therefore, the accessibility, affordability, and anonymity have attracted a wider audience. Research in the United States has shown that 66% of men and 41% of women consume pornography on a monthly basis. An estimated 50% of all Internet traffic is related to sex. These percentages illustrate that pornography is no longer an issue of minority populations but a mass phenomenon that influences our society.²

Many users come across pornography on the internet who are not seeking it, and others seek it out.³ Adult websites such as Xvideos and Pornhub are among the most visited in the United States, receiving an average of 693.5 million and 639.6 million monthly visitors, respectively. Of the top 20 most visited websites, four are classified as pornographic.⁴

Twenty-seven percent of young adults first view pornography before the onset of puberty and 70 percent of teens accidentally stumble upon pornography online⁵ with trends showing teens are generally experiencing an increase in unwanted exposure to pornographic content online.⁶ A sample of American high school students in 2021 found that 56 percent viewed pornography in 2020.⁷

Research suggests that adolescents who view pornography tend to have more sexually permissive attitudes, have more sexual partners in their lifetime, and are more likely to have engaged in certain sexual acts.⁸ Similarly, adolescents who viewed pornography tended to display more aggression, have

¹ Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19(1-2) SEXUAL ADDICTION & COMPULSIVITY 99, 99-100 (2012); See also PEW RESEARCH CENTER, *Teens, Social Media & Technology Overview 2015: Smartphones Facilitate Shifts in Communication Landscape for Teens*, <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> (last visited Jan. 7, 2024).

² Simone Kuhn, PhD, and Jurgen Gallinat, PhD, *Brain Structure and Functional Connectivity Associated With Pornography Consumption, The Brain on Porn*, JAMA Psychiatry, JAMA Network, (July 2014), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1874574>

³ Josh McDowell Ministry, *THE PORN PHENOMENON: THE IMPACT OF PORNOGRAPHY IN THE DIGITAL AGE* (2016), research summary available at <https://www.barna.com/research/porn-in-the-digital-age-new-research-reveals-10-trends/> (last visited Jan. 7, 2024).

⁴ Joel Khalil, *These are the most popular websites right now - and they might just surprise you* (October 2023 edition), TechRadar, <https://www.techradar.com/news/porn-sites-attract-more-visitors-than-netflix-and-amazon-youll-never-guess-how-many> (last visited Jan. 8, 2024).

⁵ KAISER FAMILY FOUNDATION, *Generation Rx.com: How Young People Use the Internet for Health Information*, December 2001, at 12, available at <https://kaiserfamilyfoundation.files.wordpress.com/2001/11/3202-genrx-report.pdf>.

⁶ Kimberly J. Mitchell et al., *Trends in Youth Reports of Sexual Solicitations, Harassment and Unwanted Exposure to Pornography on the Internet*, 40 JOURNAL OF ADOLESCENT HEALTH 116, 124 (2007), available at: <http://unh.edu/ccrc/pdf/CV135.pdf> (last visited Jan. 7, 2023).

⁷ Amanda Giordano, *What to Know About Adolescent Pornography Exposure*, Psychology Today (Feb. 27, 2022), <https://www.psychologytoday.com/us/blog/understanding-addiction/202202/what-know-about-adolescent-pornography-exposure> (last visited Jan. 7, 2024).

⁸ Debra K. Braun-Corville & Mary Rojas, *Exposure to Sexually Explicit Web Sites and Adolescent Sexual Attitudes and Behaviors*, 45(2) J ADOLESCENT HEALTH 153, 156-162 (2009). See also Jane D. Brown & Kelly L. L'Engles, *X-Rated: Sexual Attitudes and Behaviors Associated with U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 36 COMM. RSCH. 129-151 (2009). Contra. Marie-Therese Luder et al., *Associations between Online Pornography and Sexual Behavior among Adolescents: Myth or Reality?*,

more traditional gender role attitudes, and view women as sex objects.⁹ Due to the correlational nature of these findings, researchers were unable to determine if these characteristics were precursors to pornography use or a consequence of it;¹⁰ however, they were able to identify pornography use as a strong exacerbating factor in individuals who have preexisting markers for sexual aggression.¹¹

Adolescents who view pornography report feeling insecure about their ability to perform sexually and how they look, and tend to decrease their pornography use as their self-confidence increases or they develop positive relationships with friends and family.¹²

Additionally, studies have shown that problematic or excessive pornography use actually changes the reward circuitry in people's brains leading to a loss of self-control, which can lead to addiction.¹³

Eight states have recently passed laws to require websites with pornography to verify the age of a visitor and block access to minors.¹⁴ Those states include Louisiana,¹⁵ Utah, Arkansas, Mississippi, Montana, North Carolina, Texas, and Virginia.

Obscenity

"Sexual expression which is indecent but not obscene is protected by the First Amendment."¹⁶ However, material that is obscene does not enjoy the same constitutional protections.¹⁷ In determining whether sexual expression is obscene and thus outside the protection of the First Amendment, a court may apply the *Miller*¹⁸ test, which considers whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests and that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by . .

40(5) ARCHIVES OF SEXUAL BEHAVIOR 1027-1035 (2011) (finding that pornography use had no association with early sexual imitation or risky sexual behaviors).

⁹ Eileen M. Alexy et al., *Pornography as a Risk Marker for an Aggressive Pattern of Behavior among Sexually Reactive Children and Adolescents*, 14(6) J AM. PSYCHIATRIC NURSES ASS'N 442, 450 (2009). See also Elisabet Haggstrom-Nordin et al., *Experiences of and Attitudes towards Pornography among a Group of Swedish High School Students*, 14 EURO. J CONTRACEPTION AND REPRODUCTIVE HEALTH CARE 277, 277-284 (2009).

¹⁰ Owens, *Supra* note 1, at 107.

¹¹ Michelle L. Ybarra & Kimberly J. Mitchell, *X-Rated Material and Perpetration of Sexually Aggressive Behavior Among Children and Adolescents: Is There a Link?*, 8 CyberPsychology and Behavior 473, 473-486 (2011). See generally, Paul J. Wright, *A Meta-Analysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies*, 66(1) J COMM 183-205 (2016).

¹² Lotta Lofgren-Martenson & Sven-Axel Mason, *Lust, Love, and Life: A Qualitative Study of Swedish Adolescents' Perceptions and Experiences with Pornography* 47 J SEX RSCH. 568, 575 (2010).

¹³ Simone Kuhn & Jurgen Gallinat, *Brain Structure and Functional Connectivity Associated with Pornography Consumption*, 71(7) JAMA PSYCHIATRY 827, 827-834, available at

https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1874574?utm_source=Silverchair%20Information%20Systems&utm_medium=email&utm_campaign=JAMAPsychiatry:OnlineFirst05/28/2014#Discussion (last visited Jan. 7, 2024).

¹⁴ Dmytro Sashchuk, *Age verification regulations in the United States of America*, Veriff, (Nov. 15, 2023),

<https://www.veriff.com/fraud/learn/age-verification-legalization-in-the-united-states-of-america> (last visited Jan. 7, 2024); Los Angeles Blade, *Pornhub blocks access as new age verification laws take effect*, Jan. 7, 2024,

<https://www.losangelesblade.com/2024/01/07/pornhub-blocks-access-as-new-age-verification-laws-take-effect/> (last visited Jan. 7, 2024).

¹⁵ The personal story of pop-singer Billie Eilish inspired the law in Louisiana which blocks access to pornography for minors. Eilish reported that she watched a lot of porn when she was about 11 years old. Eilish believes that the pornography had a drastic effect on her brain and feels "incredibly devastated that I was exposed to so much porn." The author of the bill, a sex addiction therapist, said "I just thought how courageous it was. ... It just sort of re-emphasized to me what a problem this is, especially for our children." The Guardian, *Billie Eilish says watching porn as a child 'destroyed my brain'*, (Dec. 14, 2021)

<https://www.theguardian.com/music/2021/dec/15/billie-eilish-says-watching-porn-gave-her-nightmares-and-destroyed-my-brain#:~:text=%E2%80%9C9CI%20think%20it%20really%20destroyed,was%20so%20violent%20and%20abusive> (last visited Jan. 13, 2024); Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat.*, Politico Magazine (Aug. 8, 2024), <https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148> (last visited Jan. 8, 2024).

¹⁶ *Simmons v. State*, 944 So. 2d 317, 323 (Fla. 2006).

¹⁷ *Id.*

¹⁸ *Miller v. California*, 413 U.S. 15, 23 (1973).

. applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.^{19,20}

The Florida Supreme Court has determined that the applicable community standard to be used in determining obscenity is the local county standard, explaining that such a standard “permits maximum protection of materials acceptable in cosmopolitan areas while not forcing more conservative areas to accept public depiction of conduct they find obscene.”²¹

Florida Definition of Material Harmful to Minors

Section 847.001(7), F.S., defines as “harmful to minors” any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Section 847.001(19), F.S., defines “sexual conduct” as any actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.²²

Section 847.001(20), F.S., defines “sexual excitement” as the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

The Florida Supreme Court has found that images in the aid of legitimate scientific or educational purposes, such as a depiction of Michelangelo’s David transmitted for an art history class, and an illustration of human genitalia intended for a sex education or biology class, are not materials harmful to minors.²³

Laws Related to Material Harmful to Minors

There are several federal laws that prohibit access or distribution of harmful or obscene material to a minor:

- Schools and libraries that receive discounts for Internet access or internal connections through an E-rate program must:
 - “Certify that they block or filter Internet access” to pictures that are (a) obscene, (b) child pornography, and (c) harmful to minors on computers accessed by minors; and
 - Implement an Internet safety policy.²⁴
- It is a crime to knowingly use a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors.²⁵
- It is a crime to knowingly embed words or digital images into the source code of a website with the intent to deceive a minor into viewing material that is harmful to minors.²⁶

¹⁹ 2025 *Emery Hwy, L.L.C. v. Bibb County, Georgia*, 377 F. Supp. 2d 1310 (M.D. Georgia 2005).

²⁰ S. 847.001(12), F.S. (A mother’s breastfeeding of her baby is not under any circumstance “obscene”).

²¹ *Johnson v. State*, 351 So. 2d 10, 11 (Fla. 1977).

²² A mother’s breastfeeding of her baby does not under any circumstances constitute “sexual conduct.”

²³ *Simmons v. State*, 944 So. 2d 317, 329 (Fla. 2006).

²⁴ Federal Communications Commission, *Children’s Internet Protection Act (CIPA)*,

<https://www.fcc.gov/consumers/guides/childrens-Internet-protection-act> (last visited Jan. 7, 2024).

²⁵ The definition of “harmful to minors” parallels the *Miller* test for obscenity, as applied to minors. 18 U.S.C. § 2252B.

²⁶ 18 U.S.C. § 2252C.

- It is a crime to knowingly make any Internet communication for commercial purposes that is available to any minor and that includes any material harmful to minors.²⁷

Additionally, s. 847.0138, F.S., prohibits a person from knowingly transmitting or believing that he or she was transmitting an image, information, or data that is harmful to minors via an electronic mail to a specific individual known by the defendant to be a minor.²⁸

Age Verification

Age Verification Mechanisms

Many industries are currently required to use online age-verification methods, including:

- Alcohol and tobacco,²⁹
- Gambling, and
- Firearms.³⁰

Adult websites in the United States generally use a checkbox for a user to confirm they are at least 18 years of age. Recently, however, several states and the United Kingdom have passed laws to require adult websites to use age-verification measures to block adult content from being accessed by minors.³¹

Additionally, some social media platforms ask for age identifying information to create an account, but such information is not always verified. For example, Facebook requires new users to self-report a birthdate to confirm age of at least 13 years old. Meta is currently testing new ways to age verify, including through the use of biometrics and online interviews.³²

There are several ways that Internet companies verify, or attempt to verify, age. Options include using:³³

- Government identity documents, which generally require the user to submit a government document to a third party for the company to review.
- Phone records, which generally check the user's phone for parental controls.
- Credit score databases, which generally require the user to enter identifying information, which is then confirmed through a credit check agency.
- Biometric age estimation, which generally requires a facial analysis to estimate age.
- Credit cards, which generally require the user to supply credit card information for validation.
- Open banking, which generally requires the user to log into their own online banking system, and give approval for date of birth data to be supplied to a bank-approved third-party age verification provider.
- Algorithmic profiling, which generally assesses the likely age of a user based on their online behavior.
- Self-declaration, which generally requires the user to tick a box or self-enter a birthdate.

²⁷ 47 U.S.C. § 231.

²⁸ S. 847.0138, F.S.

²⁹ The U.S. Food and Drug Administration (FDA) recommends using independent, third-party age- and identity-verification services that compare customer information against third-party data sources for online sellers of tobacco. FDA, *Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised)*, p. 7, (April 2020), <https://www.fda.gov/media/133880/download> (last visited Jan. 9, 2024).

³⁰ Jan Stepnov, *What Is an Age Verification System and Why Incorporate It Into Your Business*, Regula (Apr. 21, 2023), <https://regulaforensics.com/blog/age-verification-system/> (last visited Jan. 12, 2024).

³¹ Masha Borak, UK introduces Online Safety Bill mandating age verification, Oct. 27, 2023, <https://www.biometricupdate.com/202310/uk-introduces-online-safety-bill-mandating-age-verification#:~:text=The%20United%20Kingdom%20has%20finally,checking%20measures%2C%20including%20biometric%20technology>. (last visited Jan. 9, 2024); Dmytro Sashchuk, *Age verification regulations in the United States of America*, Veriff, (Nov. 15, 2023), <https://www.veriff.com/fraud/learn/age-verification-legalization-in-the-united-states-of-america> (last visited Jan. 7, 2024).

³² Meta, *Introducing New Ways to Verify Age on Instagram*, Jun. 23, 2022, <https://about.fb.com/news/2022/06/new-ways-to-verify-age-on-instagram/> (last visited Jan. 9, 2024).

³³ The Age Verification Providers Association, *How do you check age online?*, <https://avpassociation.com/avmethods/> (last visited Jan. 7, 2024).

- Zero knowledge proofs, which generally enable users to upload identity documents to private servers and securely share encrypted, anonymous “proofs” of age to a company, through a process called hashing, without actually transmitting the identity documents to the company.³⁴

When verifying age online, users usually share personal information, including:

- Full name and location.
- Email or phone number (when using two-factor authorization).
- Home address.

Identity theft is a potential risk when users reveal this information, and websites can collect the information revealed through age verification processes and combine it with other data for targeted advertisements or sharing that data with third parties.³⁵

However, there are numerous minimally invasive verification techniques that do not require sharing any age verification information at all with social media platforms.³⁶ Age verification systems have progressed considerably from a generation ago, when the Supreme Court held that age-verification methods often failed at that task and were too burdensome for law abiding adults.³⁷

Age fabrication is also a widespread issue. For example, underage customers in the United States consumed 11.73% of all alcoholic drinks sold in the U.S. market in 2016, and 49.8% of tobacco and vape shops in California failed to check the ID of underage decoys in 2018.³⁸

Age Verification Laws

Several states, including Louisiana, Utah, Arkansas, Mississippi, Montana, North Carolina, Texas, and Virginia, have recently passed legislation to require websites that host obscene material or other material harmful to minors to verify the age of a visitor and block access to minors.³⁹

For example, Utah requires a commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on the Internet through a website that contains a substantial portion of such material to perform reasonable age-verification methods to verify the age of an individual attempting to access the material. A commercial entity who violates this provision is liable to an individual for damages resulting from a minor's accessing the material, including court costs and reasonable attorney fees.⁴⁰

Some of these state laws have recently been challenged on First Amendment grounds.⁴¹ The law in Texas has been preliminarily enjoined, although the litigation is ongoing; but the suits challenging the laws in Utah and Louisiana have been dismissed for lack of jurisdiction, as the laws rely on private enforcement, not state enforcement.

³⁴ Bessie Liu, *Aleo blockchain adds zPass, a ZK protocol for verifying identities*, Blockworks, <https://blockworks.co/news/zk-decentralized-identity-verification> (last visited Jan. 6, 2024).

³⁵ John Reynolds, *Don't risk identity fraud just to play that video game — do this instead*, Aleo, <https://aleo.org/post/dont-risk-identity-fraud-to-play-that-video-game/#:~:text=The%20risks%20of%20today's%20age,public%20records%2C%20or%20ID%20scans>) (last visited Jan. 7, 2024).

³⁶ The Federalist Society, *Age Verification for Social Media: A Constitutional and Reasonable Regulation* (Aug. 7, 2023), <https://fedsoc.org/commentary/fedsoc-blog/age-verification-for-social-media-a-constitutional-and-reasonable-regulation> (last visited Jan. 8, 2024).

³⁷ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

³⁸ Persona, *Age verification system: How to add it into your business*, <https://withpersona.com/blog/incorporate-age-verification-into-business> (last visited Jan. 9, 2024).

³⁹ Sashchuk, *supra* note 15; Los Angeles Blade, *supra* note 15.

⁴⁰ Utah Code Annotated § 78B-3-1002.

⁴¹ See *Free Speech Coalition Inc. v. LeBlanc*, No. 2:23-cv-2123 (E.D. La.); ⁴¹ *Free Speech Coalition, Inc. v. Anderson*, 2023 WL 4899509 (D. Utah 2023); *Free Speech Coalition, Inc. v. Colmenero*, 2023 WL 5655712 (W.D. Texas 2023); Christopher Brown, *Porn Industry Group Loses Challenge to Louisiana Age-Check Law*, Bloomberg Law, <https://news.bloomberglaw.com/privacy-and-data-security/porn-industry-group-loses-challenge-to-louisiana-age-check-law> (last visited Jan. 7, 2024).

Unlike past legislative efforts to curb online pornography by declaring the websites a danger to public health, the recent laws have had a demonstrated effect against such websites. Pornhub, a large pornography website, gets more global users than Amazon or Netflix. In 2019, the last year Pornhub released its data, the site was visited 42 billion times, or 115 million times each day.⁴² In response to these bills, Pornhub has prohibited access to all users, including both minors and adults, in Montana, North Carolina, Utah, Arkansas, Mississippi, and Virginia, via geoblocking.⁴³

Constitutionality of Age Verification

The 1996 the Communications Decency Act (CDA) was designed “to protect minors from ‘indecent’ and ‘patently offensive’ communications on the Internet” by prohibiting “the knowing transmission of obscene or indecent messages,” and allowed websites to defend themselves by either making good faith efforts to restrict such communications to adults, or implementing age-verification measures.⁴⁴

In 1997, in *Reno v. American Civil Liberties Union*,⁴⁵ the U.S. Supreme Court held that the provision of the CDA prohibiting the transmission of indecent messages⁴⁶ was an unconstitutional, content-based restriction of First Amendment free speech rights. The U.S. Supreme Court also held that requiring adults to prove their age to access certain content was an unconstitutional limit on free speech, when there were less restrictive means to curb access to minors, such as filters and parental controls.⁴⁷

In Justice O’Connor’s partial dissent, she found that since technology was insufficient for ensuring that minors could be excluded while still providing adults full access to protected content, the CDA was unconstitutional. However, she contemplated the possibility that future technological advances may allow for a constitutionally sound age-verification law.⁴⁸

Florida Deceptive and Unfair Trade Practices Act

FDUTPA is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable, deceptive, or unfair acts or practices in the conduct of trade or commerce.⁴⁹ FDUTPA was modeled after the Federal Trade Commission (FTC) Act.⁵⁰

The Department of Legal Affairs (DLA) or state attorney’s office (SAO) in the judicial circuit affected or where the violation occurs may bring actions on behalf of consumers or governmental entities when it serves the public interest.⁵¹ The SAO may enforce violations of FDUTPA if the violations take place

⁴² Marc Novicoff, *A Simple Law Is Doing the Impossible. It’s Making the Online Porn Industry Retreat.*, Politico Magazine, Aug. 8, 2024, <https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148> (last visited Jan. 8, 2024).

⁴³ Wes Davis, *Pornhub blocks North Carolina and Montana as porn regulation spreads*, The Verge, <https://www.theverge.com/2024/1/2/24022539/pornhub-blocked-montana-north-carolina-age-verification-law-protest> (last visited Jan. 8, 2024).

⁴⁴ Ronald Kahn, *Reno v. American Civil Liberties Union* (1997), Free Speech Center at Middle Tennessee State University (Dec. 15, 2023), [Reno v. American Civil Liberties Union](https://www.freespeechcenter.org/renov-american-civil-liberties-union-1997) (1997) - The Free Speech Center (mtsu.edu) (last visited Jan. 7, 2024).

⁴⁵ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁴⁶ It is still illegal to transmit obscene messages to minors. United States Department of Justice, *Obscenity*, <https://www.justice.gov/criminal/criminal-ceos/obscenity#:~:text=Federal%20law%20strictly%20prohibits%20the,is%20punishable%20under%20federal%20law> (last visited Jan. 9, 2024).

⁴⁷ *Reno*, 521 U.S. 844; Ronald Kahn, *supra* note 28.

⁴⁸ *Id.*

⁴⁹ Ch. 73-124, L.O.F.; s. 501.202, F.S.

⁵⁰ D. Matthew Allen, et. al., *The Federal Character of Florida’s Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083, (Summer 2011).

⁵¹ S. 501.207(1)(c) and (2), F.S.; see s. 501.203(2), F.S. (defining “enforcing authority” and referring to the office of the state attorney if a violation occurs in or affects the judicial circuit under the office’s jurisdiction; or the Department of Legal Affairs if the violation occurs in more than one circuit; or if the office of the state attorney defers to the department in writing; or fails to act within a specified period); see also David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUTPA and the potential for deterrence of anticompetitive conduct in Florida), available at

within its jurisdiction. The DLA has enforcement authority when the violation is multi-jurisdictional, the state attorney defers to the DLA in writing, or the state attorney fails to act within 90 days after a written complaint is filed.⁵² In certain circumstances, consumers may also file suit through private actions.⁵³

The DLA and the SAO have powers to investigate FDUTPA claims, which include:

- Administering oaths and affirmations;
- Subpoenaing witnesses or matter; and
- Collecting evidence.⁵⁴

The DLA and the SAO may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;
- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.⁵⁵

FDUTPA may not be applied to certain entities in certain circumstances, including:

- Any person or activity regulated under laws administered by the Office of Insurance Regulation or the Department of Financial Services; or
- Banks, credit unions, and savings and loan associations regulated by the Office of Financial Regulation or federal agencies.⁵⁶

Effect of the Bill

The bill provides the following definitions:

- "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, and any other legally recognized entity.
- "Distribute" means to issue, sell, give, provide, deliver, transfer, transmit, circulate, or disseminate by any means.
- "Material harmful to minors" means any material that:
 - The average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest;
 - Depicts or describes, in a patently offensive way, sexual conduct;⁵⁷ and
 - When taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.
- "News-gathering organization" means any of the following:
 - A newspaper, news publication, or news source, printed or published online or on a mobile platform, engaged in reporting current news and matters of public interest, and an employee thereof who can provide documentation of such employment.
 - A radio broadcast station, television broadcast station, cable television operator, or wire service, and an employee thereof who can provide documentation of such employment.
- "Publish" means to communicate or make information available to another person or entity on a publicly available website or application.
- "Reasonable age verification methods" means any commercially reasonable method regularly used by government agencies or businesses for the purpose of age and identity verification.
- "Substantial portion" means more than 33.3 percent of total material on a website or application.

http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!Opendocument&Highlight=0.business.Division* (last visited on Jan. 6, 2024).

⁵² S. 501.203(2), F.S.

⁵³ S. 501.211, F.S.

⁵⁴ S. 501.206(1), F.S.

⁵⁵ Ss. 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. S. 501.2105, F.S.

⁵⁶ S. 501.212(4), F.S.

⁵⁷ As defined in s. 847.001(19), F.S.

The bill requires a commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on a website or application, if the website or application contains a substantial portion of material harmful to minors, to prohibit access to such material by any person younger than 18 years of age.

The bill requires such a commercial entity to perform reasonable age-verification methods to verify that the age of a person attempting to access the material is 18 years of age or older. The reasonable age-verification method must be conducted by a non-governmental, independent third-party not affiliated with the commercial entity.

Any personal identifying information used to verify age may not be:

- Retained by a commercial entity or other third-party once the age has been verified.
- Used for any other purpose.

The bill requires a commercial entity to provide an easily accessible link or function on its homepage, landing page, or age-verification page to allow a minor user or the confirmed parent or guardian of the minor user to report unauthorized or unlawful access. The commercial entity must prohibit or block future access by the minor within five days after receiving such a report.

The bill does not apply to:

- A bona fide news or public interest broadcast, website video, report, or event and does not affect the rights of a news-gathering organization.
- An Internet service provider or its affiliates or subsidiaries, a search engine, or a cloud service provider that provides access or connection to or from a website or other information or content on the Internet or a facility, system, or network not under the provider's control, including transmission, downloading, intermediate storage, or access software, to the extent the provider is not responsible for the creation of the material harmful to minors.

The bill provides that, if a commercial entity violates the requirements for minor users, it is an unfair and deceptive trade practice actionable under FDUTPA solely by DLA.⁵⁸ In addition to other FDUTPA remedies, DLA may collect a civil penalty of up to \$50,000 per violation.

The bill also allows for a private cause of action against a commercial entity that fails to prohibit or block a minor from future access to material harmful to minors after a report of unauthorized or unlawful access has been made. The commercial entity is liable to such Florida minor for such access, including up to \$10,000 in damages, court costs, and reasonable attorney fees. Such an action must be brought within one year after the violation.

The bill requires that any action brought pursuant to the bill may only be brought on behalf of a Florida minor, and does not preclude any other available remedy at law or equity against such commercial entity.

The bill allows DLA to adopt rules to implement the bill.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

- Section 1: Creates s. 501.1737, F.S.; requiring certain commercial entities who have materials harmful to minors on their website to verify the age of users and block access by minors under 18; providing remedies.
- Section 2: Provides an effective date.

⁵⁸ DLA is not prohibited from bringing an action against:

- Any person or activity regulated under laws administered by OIR or DFS; and
- Banks, credit unions, and savings and loan associations regulated by OFR or federal agencies.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may result in an increase in civil penalties collected by DLA.

2. Expenditures:

The bill may increase regulatory costs to DLA due to the resources necessary to enforce the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may result in increased costs for certain commercial entities who are required to implement new procedures for age-verification, including using third-party verification services.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Requiring commercial entities and their users to utilize age verification to view certain harmful content presents a complex issue that raises several constitutional concerns. The language in the bill may implicate consideration of a number of constitutional protections.

First Amendment Right to Freedom of Speech

The First Amendment to the U.S. Constitution guarantees that "Congress shall make no law ... abridging the freedom of speech."⁵⁹ Generally, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁶⁰ The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.⁶¹

Many of the questions regarding the constitutionality of age-verification laws may concern whether such laws are sufficiently narrow to avoid inhibiting more speech than necessary. The degree of

⁵⁹ U.S. Const., amend. I.

⁶⁰ *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁶¹ U.S. Const. amend. XIV. *See also* Art. I, Fla. Const.

tailoring required may vary depending on whether a given law is content-based or content-neutral. In both circumstances a law's constitutionality depends on several factors, including the:

- Strength of the government's interest,
- Amount of protected speech that the law directly or indirectly restricts, and
- Availability of less speech-restrictive alternatives.⁶²

Content-neutral regulations on free speech are legitimate if they advance important governmental interests that are not related to suppression of free speech, do so in a way that is substantially related to those interests, and do not substantially burden more speech than necessary to further those interests.⁶³

The U.S. Supreme Court regards content-based laws, which limit communication because of the message it conveys, as presumptively unconstitutional.⁶⁴ Such a law may be justified only if the government shows that the law is required to promote a compelling state interest and that the least restrictive means have been chosen to further that articulated interest.⁶⁵

As discussed above, "sexual expression which is indecent but not obscene is protected by the First Amendment."⁶⁶ However, material that is obscene does not enjoy the same constitutional protections.⁶⁷ In determining whether sexual expression is obscene and thus outside the protection of the First Amendment, a court may apply the *Miller*⁶⁸ test, which considers whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests and that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by . . . applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶⁹

In general, the U.S. Supreme Court has held that requiring adults to prove their age to access certain content is an unconstitutional, content-based limit on free speech, when there are less restrictive means to curb access to minors, such as filters and parental controls.⁷⁰

According to Justice O'Connor's *Reno* dissent, because technology was insufficient for ensuring that minors could be excluded while still providing adults full access to protected content, the age verification provision was viewed as ultimately unconstitutional; however, she contemplated the possibility that future technological advances may allow for a constitutionally sound age-verification law.⁷¹

Additionally, in determining whether a law requiring age-verification to access materials harmful to minors online unconstitutionally prohibits free speech, one federal court has noted that while it

is uncontested that pornography is generally inappropriate for children,⁷² and [that] the state may regulate a minor's access to pornography, . . . [any] material that is sexual will likely satisfy the *Miller* test, because it is inappropriate for minors, even though it

⁶² Holmes, Eric N. (2023, August 17), *Online Age Verification (Part III): Select Constitutional Issues* (CRS Report No. LSB11022), <https://crsreports.congress.gov/product/pdf/LSB/LSB11022> (last visited Jan. 9, 2024).

⁶³ *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).

⁶⁴ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

⁶⁵ *Sable Comm's v. F.C.C.*, 492 U.S. 115 (1989).

⁶⁶ *Simmons v. State*, 944 So. 2d 317, 323 (Fla. 2006).

⁶⁷ *Id.*

⁶⁸ *Miller v. California*, 413 U.S. 15, 23 (1973).

⁶⁹ *2025 Emery Hwy, L.L.C. v. Bibb County, Georgia*, 377 F. Supp. 2d 1310 (M.D. Georgia 2005).

⁷⁰ *Reno v. Am. C. L. Union*, 521 U.S. 844, 886 (1997); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); Ronald Kahn, *Reno v. American Civil Liberties Union* (1997), Free Speech Center at Middle Tennessee State University, Dec. 15, 2023, [Reno v. Am. C. L. Union \(1997\) - The Free Speech Center \(mtsu.edu\)](https://www.mtsu.edu/~free_speech/amlc/amlc.htm) (last visited Jan. 7, 2024).

⁷¹ *Reno*, 521 U.S. 844, at 886 (*O'Connor concurring in part and dissenting in part*); (*The court also considered overbreadth and vagueness arguments, and determined that the CDA was too broad and vague*).

⁷² To be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct." *Miller v. California*, 413 U.S. 15, 27 (1973).

is not obscene for adults. [As such, a]ny prurient material risks being regulated, because it will likely be offensive to minors and lack artistic or scientific value to them. Although this may be permissible when someone knowingly sells material to a minor [] it is constitutionally problematic applied to online speech, where the speech is necessarily broadcast widely.⁷³

Supremacy Clause

Article VI, Paragraph 2 of the United States Constitution, commonly referred to as the Supremacy Clause, establishes that the federal constitution, and federal law generally, take precedence over state laws and constitutions. The Supremacy Clause also prohibits states from interfering with the federal government's exercise of its constitutional powers and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect.⁷⁴

Section 230 of the federal Communications Decency Act (CDA),⁷⁵ in part, specifies that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"⁷⁶ and specifically prohibits all inconsistent causes of action and liability imposed under any State or local law.⁷⁷

State Authority to Regulate to Protect Minors

The U.S. Supreme Court has determined that the state has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards."⁷⁸ In doing so, however, the means must be narrowly tailored to achieve that end so as not to unnecessarily deny adults access to material which is constitutionally protected indecent material.⁷⁹

Contracts Clause

Article I, Section 10 of the United States Constitution prohibits a state from passing any law impairing the obligation of contracts. Article I, Section 10 of the Florida Constitution also prohibits the passage of laws impairing the obligation of contracts. However, the reach of these protections is "limited to preexisting contracts, unlike due process, which extends to future contracts as well."⁸⁰

B. RULE-MAKING AUTHORITY:

The bill provides DLA with rulemaking authority to promulgate rules to enforce the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 11, 2024, the Regulatory Reform & Economic Development Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute corrected a misspelled word and a grammatical error.

⁷³ *Colmenero*, 2023 WL 5655712 at 10-13.

⁷⁴ Cornell Law School, Legal Information Institute, *Supremacy Clause*, https://www.law.cornell.edu/wex/supremacy_clause (last visited Jan. 13, 2024).

⁷⁵ *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019).

⁷⁶ 47 U.S.C. § 230(c)(1).

⁷⁷ 47 U.S.C. § 230(e).

⁷⁸ *Sable Commc's of California, Inc. vs. F.C.C.*, 492 U.S. 115, 126 (1989).

⁷⁹ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). But see, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (Determining regulation overly broad.)

⁸⁰ *Woodstone Ltd. Partn. v. City of Saint Paul, Minnesota*, 2023 WL 3586077 (D. Minnesota May 22, 2023).

On January 17, 2024, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment required that any third-party used by a commercial entity to conduct age-verification under the bill's requirements must be a non-governmental entity.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.