

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1196

INTRODUCER: Senator Ingoglia

SUBJECT: Harm to Minors

DATE: February 5, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Parker</u>	<u>Stokes</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 1196 creates s. 501.173, F.S., requiring manufacturers of tablets or smartphones to manufacture a device that when activated in this state, automatically enables a filter that prevents the user from accessing or downloading material that is harmful to minors; notifies the user of the device when the filter blocks the device from downloading an application or accessing an Internet website; gives a user with a password the opportunity to unblock a filtered application or website; and reasonably precludes a user other than a user with the password the opportunity to deactivate, modify, or uninstall the filter.

The bill provides civil and criminal penalties and provides that a manufacturer of a device is subject to civil and criminal liability if:

- The device is activated in this state;
- The device does not, upon activation, enable a filter that complies with specified requirements; and
- A minor accesses material that is harmful to minors on the device.

The bill amends s. 787.025, F.S., increasing the criminal penalty, from a first degree misdemeanor to a third degree felony, for adults who intentionally lure or entice, or who attempt to lure or entice, children under the age of 12 into a structure, dwelling, or conveyance for other than a lawful purpose. The bill also increases the criminal penalty from a third degree felony¹ to a second degree felony² for committing a second or subsequent offense. Additionally, the penalty for this offense is increased from a third degree felony to a second degree felony if the offender has previous specified convictions.

¹ A felony of the third degree is punishable by a term of imprisonment of 5 years, as provided in s. 775.082, s. 775.083, or s. 775.083, F.S.

² A second degree felony is punishable by a term of 15 years of imprisonment, as provided in s. 775.082, s. 775.083, or s. 775.083, F.S.

The bill creates s. 827.12, F.S., providing that a person 18 years of age or older may not knowingly engage in any communication that is part of a pattern of communication or behavior that is:

- Designed to maintain an inappropriate relationship with a minor or another person believed by the person to be a minor; or
- Harmful to minors as defined in s. 847.001, F.S.³

A person 18 years of age or older may not knowingly use a computer online service, Internet service, local bulletin board service, or any other means or device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a minor, or another person believed by the person to be a minor, to share an image or a recorded image depicting nudity of the minor for the sexual excitement of either party.

A person who violates this section commits the offense of harmful communication with a minor and commits a third degree felony. If the minor is younger than 12 years of age, the person commits a second degree felony. A person convicted under this section must register as a sexual offender.

The bill provides an exception under this section for medical diagnosis, treatment, or educational conversation by a parent, caregiver, or educator for the purposes of sexual education, and not intended to elicit sexual excitement.

The bill defines the terms “inappropriate relationship,” “harmful to minors,” “sexual conduct,” and “sexual excitement.”

The bill amends s. 921.0022, F.S., by ranking the above described offenses:

- Section 827.12(3)(a), F.S., Harmful communication with a minor who is 12 years of age or older, ranking the third degree felony as a level 3 offense in the offense severity ranking chart.
- Section 827.12(3)(b), F.S., Harmful communication with a minor younger than 12 years of age, ranking the second degree felony as a level 5 offense in the offense severity ranking chart.

This bill may have a positive indeterminate fiscal impact. See Section V. Fiscal Impact Statement.

The bill becomes effective October 1, 2024.

³ Section 847.001(7), F.S., provides that “harmful to minors,” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it: (a) Predominantly appeals to a prurient, shameful, or morbid interest; (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduce for minors; and (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

II. Present Situation:

Content Filtering, Safety Measures, and Parental Controls

Content filtering is a process involving the use of software or hardware to screen and/or restrict access to objectionable email, webpages, executables and other suspicious items. Companies often use content-based filtering, also known as information filtering, as part of their Internet firewalls. A common security measure, content filtering helps companies execute corporate policies on the use of information systems -- for example, the filtering and blocking of employee access to social media platforms. Additionally, parents often use web filtering to screen and/or exclude content their children have access to from a home computer. Filtering software can screen content for anything that is objectionable or criminal, including online porn, hate sites, illegal content and social media. However, one drawback of content filtering programs is that it is easy to unintentionally block access to content that should not be blocked.⁴

Providing children with information on ways to more safely use social media may decrease the harm they experience. Having conversations about social media, its benefits, and its risks, may help promote positive social media usage.⁵ Parental controls may also help protect children from inappropriate content, cyberbullying, and other online safety issues.⁶ Examples of parental controls include blocking websites, filtering content, imposing limits on screen time, allowing parents to monitor online activity, using location tracking, and disabling Wi-Fi.⁷

However, two studies at the University of Central Florida found that parental control apps may actually be counterproductive, harming the trust between a parent and child and reducing the child's ability to respond to online threats. In one of the studies, children believed that the apps were overly restrictive and prevented them from doing everyday tasks, such as homework assignments. Additionally, a researcher stated that "parental involvement and direct supervision were both associated with fewer peer problems and less online victimization for teens, but neither of these factors correlated with the use of parental control apps."⁸

Protection of Children in Online Spaces Act

Section 501.1735, F.S., provides that any online service, product, game, or feature likely to be predominantly accessed by children under 18 years of age may not, except under certain situations:

⁴ Tech Target Network, Loshin, Peter, *What is Content Filtering and how does it work?*, available at, <https://www.techtarget.com/searchsecurity/definition/content-filtering> (last visited on January 29, 2024).

⁵ WebMD Editorial Contributors, April 9, 2023, *How to Talk to Your Kids About Social Media*, available at, <https://www.webmd.com/parenting/how-to-talk-to-kids-about-social-media> (last visited on January 29, 2024).

⁶ Internetmatters.org, *Parental Controls*, available at, <https://www.internetmatters.org/parental-controls/> (last visited on January 29, 2024).

⁷ Commonsensemedia.org, Knorr, Caroline, March 9, 2021, *Parents' Ultimate Guide to Parental Controls*, available at, <https://www.commonsensemedia.org/articles/parents-ultimate-guide-to-parental-controls> (last visited on January 29, 2024).

⁸ UCF Today, Abney, Barbara and Kotola, Zenaida, April 2, 2018, *Apps to Keep Children Safe Online May be Counterproductive*, available at, <https://www.ucf.edu/news/apps-keep-children-safe-online-may-counterproductive/> (last visited on January 29, 2024).

- Process the personal information of any child if the platform has actual knowledge or willfully disregards that the processing may result in substantial harm or privacy risk to children.
- Profile a child.
- Collect, sell, share, or retain any personal information that is not necessary to provide an online service, product, or feature with which a child is actively and knowingly engaged.
- Use a child’s personal information for any unstated reason.
- Collect, sell, or share any precise geolocation of data of children.
- Use dark patterns to lead or encourage children to provide personal information beyond what personal information would otherwise be reasonably expected to be provided for that online service, product, game or feature; to forego privacy protections; or to take any action that the online platform has actual knowledge of or willfully disregards that may result in substantial harm or privacy risk to children.
- Use collected information to estimate age or age range for any other purpose or retain that personal information longer than necessary to estimate age.

Freedom of Speech and the Protection of Minors

Background

Freedom of speech is guaranteed to citizens in the United States Constitution and the State Constitution.⁹ As a foundational principle, this prohibits the government from dictating what people “see or read or speak or hear.”¹⁰ However, there are limits to the freedom of speech; it is not absolute. Categories of speech that do not enjoy complete protection include defamation, incitement, obscenity, and pornography involving real children.¹¹

Courts have held, as a bedrock principle of the First Amendment, that a government may not prohibit or suppress the expression of an idea simply because an audience finds the idea offensive or disagreeable.¹² When evaluating what constitutes the free speech rights of adults, the U.S. Supreme Court held, “[W]e have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’”¹³ Stated slightly differently, this means that some forms of pornography are protected under the Constitution, but obscenity is not.

The Miller Test

In 1973, the U.S. Supreme Court developed a three-prong test in *Miller v. California*,¹⁴ to define whether speech is obscene. According to the Miller test, speech is determined to be obscene if:

- The average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

⁹The United States Constitution states, “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST. amend. I. The State Constitution similarly states “No law shall be passed to restrain or abridge the liberty of speech or of the press.” Fla. Const. art. I, s. 4.

¹⁰ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

¹¹ *Id.*

¹² *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

¹³ *Ashcroft*, 245, quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

¹⁴ *Miller v. California*, 413 U.S. 15 (1973).

- The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁵

The *Miller* test is incorporated into the definition of what is “harmful to minors” in s. 847.001(6), F.S., and “obscenity” in s. 847.001(12), F.S.

Further, courts have found 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.’ 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. No similar tailoring is required when the material is obscene material, which is not protected by the First Amendment.”¹⁶

Current Florida law

Transmission of Material Harmful to Minors

Section 847.0138, F.S., provides that:

- Any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, as defined in s. 847.001, F.S., to a specific individual known by the defendant to be a minor commits a third degree felony.¹⁷
- Any person in any jurisdiction other than this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, as defined in s. 847.001, F.S., to a specific individual known by the defendant to be a minor commits a third degree felony.¹⁸

Section 847.001(7), F.S., defines “harmful to minors” as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement¹⁹ 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.

Prohibited Computer Usage

A person commits a third degree felony²⁰ if he or she knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

¹⁵ *Id.* at 24.

¹⁶ *Simmons v. State*, 944 So. 2d 317 (Fla. 2006). *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244-45 (2002).

¹⁷ Section 847.0138(2), F.S.

¹⁸ Section 847.0138(3), F.S.

¹⁹ 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.

²⁰ Section 847.0135(3)(b), F.S.

- Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or
- Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in any sexual conduct.

Prohibited Acts in Connection with Obscene Materials

Under s. 847.0133, F.S., a person commits a third-degree felony if he or she knowingly sells, rents, loans, gives away, distributes, transmits, or shows any obscene material to a minor.²¹

“Obscene material” means any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose.²²

Other States with Device Level Content Filter Mandates

In 2021, Utah passed into law its “Children Device Protection Act” requiring cellphone manufacturers to turn on every available content filter blocking material that is harmful to minors.²³ The Utah bill contained the following core requirements:

- That all tablets or smartphones sold or activated within the state contain a content filter that prevents the user of that device from accessing “material that is harmful to minors”;
- That these filters are turned on by default upon activating the device but can also be disabled via a passcode provided to the purchaser; and
- That a legal right of action—usually a private right of civil action—is allowed against manufacturers for each violation of the above.²⁴

III. Effect of Proposed Changes:

The bill creates s. 501.173, F.S., requiring manufacturers of tablets or smartphones to manufacture a device that when activated in this state, automatically enables a filter that prevents the user from accessing or downloading material that is harmful to minors; notifies the user of the device when the filter blocks the device from downloading an application or accessing an

²¹ This offense is unranked on the OSRC, and as such, defaults to the statutorily assigned level as described in s. 921.0023, F.S. Accordingly, because the offense is punishable as a third-degree felony it will be ranked as a level 1 offense on the OSRC.

²² Section 847.0133(1), F.S.

²³ State of Utah, H.B. 72 Device Filter Amendments (2021).

²⁴ Withrow, Josh, *Device-Level Content Filter Mandates Defy Common Sense and the Constitution*, R Street, June 1, 2023, available at, <https://www.rstreet.org/commentary/device-level-content-filter-mandates-defy-common-sense-and-the-constitution/> (last visited on January 29, 2024).

Internet website; gives a user with a password the opportunity to unblock a filtered application or website; and reasonably precludes a user other than a user with the password the opportunity to deactivate, modify, or uninstall the filter.

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The bill becomes effective October 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The First Amendment of the U.S. Constitution prevents the government from creating laws that restrict the speech of citizens.²⁸ “Congress shall make no law ... abridging the freedom of speech.” The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.²⁹

The state has a compelling interest in protecting the physical and psychological well-being of children. Courts have recognized that speech used to further the sexual

²⁸ U.S. Const., amend I.

²⁹ U.S. Const. amend XIV. *See also* Art. I, Fla. Const.

exploitation of children does not enjoy constitutional protection.³⁰ The state also has a compelling interest in protecting minors from being seduced to perform sexual actions, and no legitimate commerce is burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them.³¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Florida Department of Law Enforcement (FDLE) estimates that there will be an increase in the number of people required to register as sexual offenders in Florida, which increases the volume of in-person registration at sheriffs' offices and address verifications required of law enforcement around Florida and will have an indeterminate financial impact.³²

There may be indeterminate costs incurred by the FDLE for the sexual offender/predator registry to review approximately 250 records to determine if persons with out of state convictions who were previously determined not to qualify would now qualify for sexual offender registration based on this new provision.³³

The FDLE estimates an anticipated technology fiscal impact, reporting an estimated time to complete the necessary programmatic changes to fulfill the needs of this legislation is an estimated 1 week to complete utilizing existing staff resources. The estimated total cost is \$4,000.³⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

³⁰ *Cashatt v. State*, 873 So.3d 430, (1st DCA 2004).

³¹ *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

³² FDLE, *2024 Legislative Bill Analysis*, (January 12, 2024), p. 3 (on file with the Senate Committee on Criminal Justice).

³³ *Id.*

³⁴ *Id.* at p. 4.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes:

501.173, 787.025, 827.12, 921.0022, 943.0435, 944.606, 944.607, 61.13, 68.07, 92.55, 98.0751, 394.9125, 397.487, 435.07, 775.0862, 900.05, 903.046, 903.133, 907.043, 921.1425, 934.255, 938.10, 943.0584, 943.0595, 947.1405, 948.013, 948.05, 948.06, 948.30, 985.4815, 1012.467, 944.608, 320.02, 322.141, 322.19, 775.13, 775.21, 775.261, 948.063, 775.24, 775.25, 943.0436, 948.31, and 985.04.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
