

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 Judiciary

BILL: CS/SB 1792

INTRODUCER: Judiciary Committee and Senators Grall and Garcia

SUBJECT: Online Access to Materials Harmful to Minors

DATE: February 6, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1792 requires commercial entities that knowingly and intentionally publish or distribute material harmful to minors on a website or application to prohibit access to such material by any person younger than 18 years of age, if their website or application contains a substantial portion of material that is harmful to minors.

The bill requires commercial entities 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 nongovernmental, independent third party not affiliated with the commercial entity, and any information used to verify age must be deleted once the age is verified.

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

The bill does not apply to news or news-gathering organizations. It also does not apply to internet service providers, search engines, or cloud service providers that merely provide access to websites or other systems not under their control.

Any violation of the bill's regulations is deemed to be an unfair and deceptive trade practice, actionable only by the Department of Legal Affairs under the Florida Deceptive and Unfair

Trade Practices Act. The bill also provides a private cause of action against commercial entities that fail to prohibit or block a minor from future access to material harmful to minors, after a report of unauthorized or unlawful access.

The bill authorizes the department to adopt rules to implement the bill. It takes effect on July 1, 2024.

II. Present Situation:

Effects of Harmful Content on Children

Internet usage and mobile technology have 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 U.S., 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

Seventy percent of teens accidentally stumble upon pornography online,⁵ with trends showing teens are generally experiencing an increase in unwanted exposure to pornographic content

¹ Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19(1-2) SEXUAL ADDICTION & COMPULSIVITY, J. TREATMENT & PREV. 99, 99-122 (2012), available at <https://www.tandfonline.com/doi/abs/10.1080/10720162.2012.660431>; Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, Pew Research Center, Apr. 9, 2015, <https://www.pewresearch.org/internet/2015/04/09/teens-social-media-technology-2015/>.

² Simone Kühn & Jurgen Gallinat, *Brain Structure and Functional Connectivity Associated With Pornography Consumption: The Brain on Porn*, 71 JAMA PSYCHIATRY 7, 827-34 (Jul. 2014), available at <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1874574>.

³ Barna, *Porn in the Digital Age: New Research Reveals 10 Trends*, Apr. 6, 2016, <https://www.barna.com/research/porn-in-the-digital-age-new-research-reveals-10-trends/>.

⁴ Joel Khalili, *These are the most popular websites right now – and they might just surprise you (October 2023 edition)*, TechRadarPro, Oct. 31, 2023, <https://www.techradar.com/news/porn-sites-attract-more-visitors-than-netflix-and-amazon-youll-never-guess-how-many>.

⁵ The Kaiser Family Foundation, *Generation Rx.com: How Young People Use the Internet for Health Information* (Dec. 2001), at 12, available at <https://www.kff.org/wp-content/uploads/2001/11/3202-genrx-report.pdf>.

online.⁶ A sample of U.S. 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; are more likely to have engaged in certain sexual acts;⁸ and are more likely to display aggression.⁹ Due to the correlational nature of these findings, researchers debate whether these characteristics are precursors to pornography use or a consequence of it; however, pornography use does appear to be a strong exacerbating factor in individuals who have preexisting markers for sexual aggression.¹⁰

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.¹¹ Additionally, studies have shown that problematic or excessive pornography use actually changes the reward circuitry in people's brains, which can lead to a loss of self-control and addiction.¹²

⁶ Kimberly J. Mitchell et al., *Trends in Youth Reports of Sexual Solicitations, Harassment and Unwanted Exposure to Pornography on the Internet*, 40 J. ADOLESCENT HEALTH 2, 116, 124 (2006), available at <https://www.unh.edu/ccrc/sites/default/files/media/2022-03/trends-in-youth-reports-of-unwanted-sexual-solicitations-harassment-and-unwanted-exposure-to-pornography-on-the-internet.pdf>.

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>.

⁸ Debra K. Braun-Corville & Mary Rojas, *Exposure to Sexually Explicit Web Sites and Adolescent Sexual Attitudes and Behaviors*, 45 J. ADOLESCENT HEALTH 2, 156-62 (2009), available at [https://www.jahonline.org/article/S1054-139X\(08\)00658-7/fulltext](https://www.jahonline.org/article/S1054-139X(08)00658-7/fulltext); Jane D. Brown & Kelly L. L'Engle, *X-Rated Sexual Attitudes and Behaviors Associated With U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 36 J. OF GERIATRIC PSYCHIATRY & NEUROLOGY 1 (Feb. 2009), available at https://www.researchgate.net/publication/23654736_X-Rated_Sexual_Attitudes_and_Behaviors_Associated_With_US_Early_Adolescents'_Exposure_to_Sexually_Explicit_Media.

⁹ Eileen M. Alexy et al., *Pornography as a Risk Marker for an Aggressive Pattern of Behavior among Sexually Reactive Children and Adolescents*, 14 J. AM. PSYCHIATR. NURSES ASS'N 6, 442-53 (2009), available at <https://journals.sagepub.com/doi/10.1177/1078390308327137>.

¹⁰ Michele L. Ybarra et al., *X-rated material and perpetration of sexually aggressive behavior among children and adolescents: is there a link?*, 37 AGGRESSIVE BEHAVIOR 1 (Jan./Feb. 2011), available at <https://onlinelibrary.wiley.com/doi/10.1002/ab.20367>; Paul J. Wright, *A MetaAnalysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies*, 66 J. COMM. 1, 183-205 (Feb. 2016), available at <https://academic.oup.com/joc/article-abstract/66/1/183/4082427?redirectedFrom=fulltext>.

¹¹ 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. 6, 568-79 (2010), available at <https://www.tandfonline.com/doi/abs/10.1080/00224490903151374>; Thomas Lickona, *Should We Teach Kids About Porn's Harms? Yes, and Here's How*, Psychology Today, Nov. 18, 2019, <https://www.psychologytoday.com/ca/blog/raising-kind-kids/201911/should-we-teach-kids-about-porns-harms-yes-and-heres-how>; Liang Li et al., *Family Functioning and problematic internet pornography use among adolescents: a moderated mediation model*, Front. Public Health, Jun. 15, 2023, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10307975/>.

¹² Simone Kuhn & Jurgen Gallinat, *Brain Structure and Functional Connectivity Associated with Pornography Consumption*, 71 JAMA PSYCHIATRY 7, 827-34 (Jul. 2014), available at <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1874574>.

Eight states have recently passed laws to require websites with pornography to verify the age of a visitor and block access to minors: Louisiana,¹³ Utah, Arkansas, Mississippi, Montana, North Carolina, Texas, and Virginia.¹⁴

Obscenity

Sexual expression which is indecent, but not obscene, is protected by the First Amendment.¹⁵ Material that is obscene does not enjoy the same constitutional protections.¹⁶ In determining whether sexual expression is obscene and therefore outside the protection of the First Amendment, courts may apply the *Miller*¹⁷ test, which evaluates whether:

- The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
- The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
- The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁸

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.”¹⁹

Material Harmful to Minors

State Definitions

Under state law, “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:

- 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.

¹³ 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>; 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>.

¹⁴ 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/>; 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>.

¹⁵ *Simmons v. State*, 944 So. 2d 317, 323 (Fla. 2006).

¹⁶ *Id.*

¹⁷ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁸ *Id.*; see also 2025 Emery Hwy, *L.L.C. v. Bibb County, Georgia*, 377 F. Supp. 2d 1310, 1332 (M.D. Georgia 2005) (applying the *Miller* test); s. 847.001(12), F.S. (providing that a mother’s breastfeeding of her baby is not under any circumstance obscene).

¹⁹ *Johnson v. State*, 351 So. 2d 10, 11 (Fla. 1977).

- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.²⁰

“Sexual conduct” means 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.²¹

“Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.²²

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

Associated Laws

State law 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.²⁴

Additionally, several federal laws 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 [i]nternet access” to pictures that are obscene, child pornography, and harmful to minors on computers accessed by minors; and
 - Implement an internet safety policy.²⁵
- 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.²⁶
- 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.²⁷

²⁰ Section 847.001(7), F.S.

²¹ Section 847.001(19), F.S. A mother’s breastfeeding of her baby does not under any circumstances constitute “sexual conduct.” *Id.*

²² Section 847.001(20), F.S.

²³ *Simmons*, 944 So. 2d at 323.

²⁴ Section 847.0138, F.S.

²⁵ Federal Communications Commission, *Children’s Internet Protection Act (CIPA)*, <https://www.fcc.gov/consumers/guides/childrens-internet-protection-act> (last visited Jan. 25, 2024).

²⁶ 18 U.S.C. s. 2252B(b). The definition of “harmful to minors” parallels the *Miller* test for obscenity, as applied to minors. *See* 18 U.S.C. s. 2252B(d).

²⁷ 18 U.S.C. s. 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.²⁸

Age Verification

Mechanisms

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

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

Adult websites in the U.S. generally use checkboxes for users to confirm that they are at least 18 years of age. Recently, however, several states and the United Kingdom have enacted laws requiring 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 new accounts, but such information is not always verified. For example, Facebook requires new users to self-report a birthdate to confirm that they are at least 13 years old. Meta is currently testing new ways to verify age, including through the use of biometrics and online interviews.³²

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

- Government identity documents, which generally require users to submit government documents to a third-party company for review.
- Phone records, which generally check users' phones for parental controls.
- Credit score databases, which generally require the user to enter identifying information that is subsequently confirmed through a credit check agency.
- Biometric age estimation, which generally requires a facial analysis to estimate age.
- Credit cards, which generally requires users to supply credit card information for validation.

²⁸ 47 U.S.C. s. 231.

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)* (April 2020), at 7, available at <https://www.fda.gov/media/133880/download>.

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/>.

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>; 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>.

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/>.

³³ The Age Verification Providers Association, *How do you check age online?*, <https://avpassociation.com/avmethods/> (last visited Jan. 18, 2024).

- Open banking, which generally requires users to log into their own online banking system and give approval for date of birth information to be supplied to a bank-approved, third-party age-verification provider.
- Algorithmic profiling, which generally assesses the likely ages of users based on their online behavior.
- Self-declaration, which generally requires users to check a box or enter a birthdate.
- Zero knowledge proofs, which generally enables users to upload identity documents to privacy 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, people 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 information revealed through age-verification processes, and combine it with other data for targeted advertisements or data-sharing with third parties.³⁵

However, there are numerous minimally invasive verification techniques that do not require sharing any age-verification information with social media platforms. For example, a trusted third-party could verify the age of a user, and provide a QR code or similar device, to an age-restricted website, thereby establishing the user’s age without the platform ever seeing the age-verification documents or the user’s identity.³⁶ Experts assert that age-verification systems have progressed considerably from a generation ago, when the U.S. 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 U.S. consumed 11.73 percent of all alcoholic drinks sold in the U.S. market in 2016, and 49.8 percent of tobacco and vape shops in California failed to check the identification of underage decoys in 2018.³⁸

³⁴ Bessie Liu, *Aleo blockchain adds zPass, a ZK protocol for verifying identities*, Blockworks, Oct. 26, 2023, <https://blockworks.co/news/zkdecentralized-identity-verification>.

³⁵ John Reynolds, *Don’t risk identity fraud just to play that video game – do this instead*, Aleo, Dec. 28, 2023, <https://aleo.org/post/dont-risk-identity-fraud-to-play-that-video-game/>.

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>.

³⁷ Broadband Breakfast, *Improved Age Verification Allows States to Consider Restricting Social Media*, Nov. 20, 2023, <https://broadbandbreakfast.com/2023/11/improved-age-verification-allows-states-to-consider-restricting-social-media/>.

³⁸ Persona, *Age verification system: How to add it into your business*, <https://withpersona.com/blog/incorporate-age-verification-intobusiness> (last visited Jan. 18, 2024).

Laws

As noted earlier, Louisiana, Utah, Arkansas, Mississippi, Montana, North Carolina, Texas, and Virginia have all recently passed legislation to require websites that host obscene material or other material harmful to minors to verify the ages of visitors 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 that violates this provision is liable 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. 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.⁴¹

Unlike past legislative efforts to curb online pornography by declaring the websites a danger to public health, the recent laws have had a demonstrable effect against such websites. Pornhub, a large pornography website, has 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.⁴³

Constitutionality of Age Verification

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

³⁹ 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/>; 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>.

⁴⁰ UTAH CODE s. 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, Oct. 5, 2023, <https://news.bloomberglaw.com/privacy-and-data-security/porn-industry-group-loses-challenge-to-louisiana-age-check-law>.

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>.

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

⁴⁴ Ronald Kahn, *Reno v. American Civil Liberties Union (1997)*, Free Speech Center at Middle Tennessee State University, Dec. 15, 2023, <https://firstamendment.mtsu.edu/article/reno-v-american-civil-liberties-union/>.

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 court also held that requiring adults to prove their age to access certain content was an unconstitutional limit on free speech because 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)

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

The Department of Legal Affairs or the state attorney's office 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 state attorney's office may enforce violations of FDUTPA if the violations take place within its jurisdiction. The department has enforcement authority when: the violation is multi-jurisdictional; the state attorney defers to the department 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 department and the state attorney's office have powers to investigate FDUTPA claims, which include:⁵⁴

- Administering oaths and affirmations.
- Subpoenaing witnesses or matter.

⁴⁵ 521 U.S. 844 (1997).

⁴⁶ It is still illegal to transmit obscene messages to minors. U.S. Department of Justice, Criminal Division, *Obscenity*, <https://www.justice.gov/criminal/criminal-ceos/obscenity> (last visited Jan. 25, 2024).

⁴⁷ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666-68 (2004); Ronald Kahn, *Reno v. American Civil Liberties Union (1997)*, Free Speech Center at Middle Tennessee State University, Dec. 15, 2023, <https://firstamendment.mtsu.edu/article/reno-v-american-civil-liberties-union/>.

⁴⁸ *Reno*, 521 U.S. at 886-91 (O'Connor concurring in part and dissenting in part). The court also considered overbreadth and vagueness arguments, and determined that the Communications Decency Act of 1996 was too broad and vague. *Id.* at 883-84.

⁴⁹ Section 501.202, F.S.

⁵⁰ See 15 U.S.C. s. 45; see also 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 Sections 501.203(2) and 501.207(1)(c) and (2), F.S.; see also David J. Federbush, *FDUTPA for Civil Antitrust Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLA. BAR J. 52 (Dec. 2002), available at <https://www.floridabar.org/the-florida-bar-journal/fdutpa-for-civil-antitrust-additional-conduct-party-and-geographic-coverage-state-actions-for-consumer-restitution/> (analyzing the merits of FDUTPA and the potential for deterrence of anticompetitive conduct in Florida).

⁵² Section 501.203(2), F.S.

⁵³ Section 501.211, F.S.

⁵⁴ Section 501.206(1), F.S.

- Collecting evidence.

The department and the state attorney's office may seek the following remedies:⁵⁵

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

FDUTPA may not be applied to certain entities in certain circumstances, including:⁵⁶

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

III. Effect of Proposed Changes:

The bill creates s. 501.1737, F.S., entitled "Age verification for online access to materials harmful to minors."

Definitions

The bill defines the following terms as used in the bill:

- "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, and any other legally recognized entity.
- "Department" means the Department of Legal Affairs.
- "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 as specifically defined in state law;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.

⁵⁵ Sections 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. Section 501.2105, F.S.

⁵⁶ Section 501.212(4), F.S.

⁵⁷ Section 847.001(19), F.S.

- “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.

Regulations

The bill requires any 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:

- Perform reasonable age verification methods to verify the age of a person attempting to access the material is 18 years of age or older, and prevent access to the material by a person younger than 18 years of age. The reasonable age verification method must be conducted by a nongovernmental, independent, third party not affiliated with the commercial entity.
- 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 a minor user to report unauthorized or unlawful access. Within 5 days after such report, the commercial entity must prohibit or block future access by such minor.

The bill provides that a commercial entity or third party that performs reasonable age verification methods may not retain any personal identifying information of the person seeking online access to material harmful to minors any longer than is reasonably necessary to verify the age of the person. Any personal identifying information collected for age verification may not be used for any other purpose.

The bill does not apply to any bona fide news or public interest broadcast, website video, report, or event, and does not affect the rights of news-gathering organizations. Additionally, an internet service provider or its affiliates or subsidiaries, a search engine, or a cloud service provider does not violate the bill solely for providing 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. This includes transmission, downloading, intermediate storage, or access software, to the extent the provider is not responsible for the creation of the content of the communication which constitutes material harmful to minors.

Enforcement

The bill provides that any violation of the bill’s regulations is an unfair and deceptive trade practice actionable under the Florida Deceptive and Unfair Trade Practices Act, solely by the Department of Legal Affairs on behalf of a Florida minor against a commercial entity. If the department has reason to believe that a commercial entity is in violation of any of the regulations described in the bill, the department, as the enforcing authority, may bring an action against the commercial entity for an unfair or deceptive act or practice. For the purpose of bringing an action

pursuant to the bill, the sections of the Act providing for individual remedies under the Act,⁵⁸ and for application of the Act,⁵⁹ do not apply. In addition to other remedies under the Act, the department may collect a civil penalty of up to \$50,000 per violation.

The bill also provides that any commercial entity that violates the bill by failing to prohibit or block a minor from future access to material harmful to minors, after a report of unauthorized or unlawful access,⁶⁰ is liable to the minor for such access, including court costs and reasonable attorney fees as ordered by the court. Claimants may be awarded up to \$10,000 in damages. A civil action for a claim under this paragraph must be brought within one year after the violation.

Any action under the bill may only be brought on behalf of, or by, a Florida minor. Additionally, for purposes of bringing an action in accordance with the previous paragraph, a commercial entity that 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 and such website or application is available to be accessed in Florida, is considered to be both engaged in substantial and not isolated activities within this state and operating, conducting, engaging in, or carrying on a business and doing business in this state, and is therefore subject to the jurisdiction of the courts of this state.

Other Available Remedies at Law or Equity

The bill does not preclude any other available remedy at law or equity.

Authorization to Adopt Rules

The department may adopt rules to implement the bill.

Effective Date

The bill takes effect on July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁵⁸ Section 501.211, F.S.

⁵⁹ Section 501.212, F.S.

⁶⁰ See proposed s. 501.1737(2)(b), F.S. (providing that the commercial entity must prohibit or block, within five days after receiving a report from the minor or his or her confirmed parent or guardian, future access by the minor having unauthorized or unlawful access).

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Requiring commercial entities and their users to use 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.”⁶¹ Generally, “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁶² The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.⁶³

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 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.
- Availability of less speech-restrictive alternatives.⁶⁴

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.⁶⁵

The U.S. Supreme Court regards content-based laws, which limit communication because of the message it conveys, as presumptively unconstitutional.⁶⁶ Such a law may be justified only if the government shows that the law is required to promote a compelling

⁶¹ U.S. CONST. amend. I.

⁶² *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁶³ U.S. CONST. amend. XIV; *see also* FLA. CONST., art. I.

⁶⁴ Eric N. Holmes, Congressional Research Service, *Online Age Verification (Part III): Select Constitutional Issues* (CRS Report No. LSB11022, August 17, 2023), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB11022>.

⁶⁵ *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).

⁶⁶ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

state interest and that the least restrictive means have been chosen to further that articulated interest.⁶⁷

As discussed above, sexual expression which is indecent, but not obscene, is protected by the First Amendment.⁶⁸ Material that is obscene does not enjoy the same constitutional protections.⁶⁹ In determining whether sexual expression is obscene and therefore outside the protection of the First Amendment, courts may apply the *Miller*⁷⁰ test, which evaluates whether:

- The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
- The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
- The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷¹

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.⁷²

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.⁷³

Additionally, in determining whether laws 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,⁷⁴ 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 is not obscene for adults. [As such, a]ny prurient material risks being regulated, because it will likely be

⁶⁷ *Sable Communications of California, Inc. vs. F.C.C.*, 492 U.S. 115, 126 (1989).

⁶⁸ *Simmons*, 944 So. 2d at 323.

⁶⁹ *Id.*

⁷⁰ *Miller*, 413 U.S. at 24.

⁷¹ *Id.*; see also *2025 Emery Hwy, L.L.C.*, 377 F. Supp. 2d at 1332 (applying the *Miller* test); s. 847.001(12), F.S. (providing that a mother's breastfeeding of her baby is not under any circumstance obscene).

⁷² *Reno*, 521 U.S. at 874 (1997); *Ashcroft*, 542 U.S. at 666-68; Ronald Kahn, *Reno v. American Civil Liberties Union* (1997), Free Speech Center at Middle Tennessee State University, Dec. 15, 2023, <https://firstamendment.mtsu.edu/article/reno-v-american-civil-liberties-union/>.

⁷³ *Reno*, 521 U.S. at 886-91 (O'Connor concurring in part and dissenting in part). The court also considered overbreadth and vagueness arguments, and determined that the Communications Decency Act of 1996 was too broad and vague. *Id.* at 883-84.

⁷⁴ To be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct." *Miller*, 413 U.S. at 27.

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.⁷⁵

Supremacy Clause

Article VI, Paragraph 2 of the U.S. 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.⁷⁶

Section 230 of the federal Communications Decency Act, 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”⁷⁷ and specifically prohibits all inconsistent causes of action and liability imposed under any state or local law.⁷⁸

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.”⁷⁹ 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.⁸⁰

Contracts Clause

Article I, Section 10 of the U.S. 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.”⁸¹

⁷⁵ *Free Speech Coalition, Inc.*, 2023 WL 5655712 at *10-*13 (W. D. Texas 2023).

⁷⁶ Cornell Law School, Legal Information Institute, *Supremacy Clause*, https://www.law.cornell.edu/wex/supremacy_clause (last visited Jan. 17, 2024).

⁷⁷ 47 U.S.C. s. 230(c)(1).

⁷⁸ 47 U.S.C. s. 230(e)(3).

⁷⁹ *Sable Communications of California, Inc.*, 492 U.S. at 126.

⁸⁰ *Ashcroft*, 542 U.S. at 666; *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004); *but see Erznoznik*, 422 U.S. at 213 (determining that the city’s regulation was overly broad).

⁸¹ *Woodstone Ltd. Partn. v. City of Saint Paul, Minnesota*, 2023 WL 3586077, *6 (D. Minnesota May 22, 2023).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill will result in increased costs for commercial entities operating websites or applications containing a substantial portion of material that is harmful to minors. Such entities will now be required to implement new procedures for age verification, including the use of third-party verification services.

C. Government Sector Impact:

The bill may result in an increase in civil penalties collected by the Department of Legal Affairs. It may also result in an increase of regulatory costs to the department, which has been tasked with enforcing the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the section 501.1737 of the Florida Statutes.

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

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

CS by Judiciary on February 5, 2024:

The committee substitute requires the age verification method to be performed by a nongovernmental entity. This requirement is in addition to the requirements in the underlying bill that the age verification be performed by an independent third party not affiliated with the commercial entity. The committee substitute also incorporates several minor wording changes not affecting the substance of the bill.

B. Amendments:

None.