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# Judiciary Committee

**Wednesday, January 17, 2024  
1:00 PM - 3:00 PM  
404 HOB**

**Meeting Packet**

**Paul Renner  
Speaker**

**Tommy Gregory  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Judiciary Committee

**Start Date and Time:** Wednesday, January 17, 2024 01:00 pm

**End Date and Time:** Wednesday, January 17, 2024 03:00 pm

**Location:** Sumner Hall (404 HOB)

**Duration:** 2.00 hrs

**Consideration of the following bill(s):**

HB 1 Social Media Use for Minors by Sirois, McFarland

CS/HB 3 Online Access to Materials Harmful to Minors by Regulatory Reform & Economic Development  
Subcommittee, Tramont, Overdorf

HB 401 Tracking Devices and Applications by Overdorf

HB 531 Traveling Across County Lines to Commit Criminal Offenses by Snyder

To submit an electronic appearance form, and for information about attending or testifying at a committee meeting, please see the "Visiting the House" tab at [www.myfloridahouse.gov](http://www.myfloridahouse.gov).

**NOTICE FINALIZED on 01/12/2024 4:07PM by Ramirez.Julia**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1 Social Media Use for Minors

**SPONSOR(S):** Sirois and others

**TIED BILLS:** HB 1377 **IDEN./SIM. BILLS:** SB 1788

| REFERENCE   | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|---|-----------|---------|--|
| 1) Regulatory Reform & Economic Development<br>Subcommittee | 13 Y, 1 N | Wright  | Anstead                                  |
| 2) Judiciary Committee                                      |           | Leshko  | Kramer                                   |

### SUMMARY ANALYSIS

In 2023, an estimated 4.9 billion people worldwide used social media. Many experts have tied the increased use of social media in our society to the increase in rates of depression, anxiety, and stress in adolescents. Studies also indicate that social media may trigger an array of negative emotions in users that contribute to or worsen their depression symptoms. Accordingly, bipartisan groups, professional associations, teachers, and parents across the world have recently sounded the alarm about the dangers of social media use by children. The U.S. Surgeon General and the American Psychological Association have issued advisories urging action to protect children online.

HB 1 requires social media platforms to prohibit children under the age of 16 from creating an account and to perform reasonable age-verification methods to verify that the age of a person attempting to create an account is 16 years of age or older. The reasonable age-verification method must be conducted by an independent third-party not affiliated with the social media platform, and any information used to verify age must be deleted after it is verified.

The bill requires a social media platform to do the following related to existing accounts belonging to a minor younger than 16 years of age:

- Terminate any such account that it reasonably knows to be held by a minor younger than 16 years of age.
- Allow such an account holder or the confirmed parent or guardian to terminate the account.
- Permanently delete all personal information held by the social media platform relating to the terminated account, unless there are legal requirements to maintain such information.

If the social media platform allows minors who are 16 or 17 years of age to create an account on the platform, the bill requires the platform to include a link on its Internet homepage or platform login page that contains certain information, including:

- A disclosure of the use of addictive designs, deceptive patterns, and manipulated images.
- Local resources for law enforcement, suicide prevention, and domestic violence prevention services.
- A reporting mechanism related to bullying, harassment, and threats of violence or self-harm.
- Whether the platform collects or sells personal information of minors under the age of 18 and to whom it is sold.

The bill does not apply to certain websites whose predominant function is e-mail, messaging, or texts; streaming services, news, sports or entertainment sites; and online shopping or gaming.

The bill provides that, if a social media platform violates the requirements for minor users under 16 years of age, 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 provides a private cause of action against a social media platform that fails to timely delete an account of a minor under 16 years of age after receiving a request to delete the account.

The bill may have an indeterminate fiscal impact on state government and private entities. See Fiscal Comments.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### **Social Media Platforms**

The term “social media” includes “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, videos, personal messages, and other content.”<sup>1</sup>

In 2005, the year Facebook started, just 5% of American adults used social media platforms. By 2011, that share had risen to half of all Americans, and by 2021, 72% of the public used some type of social media.<sup>2</sup>

Approximately 38% of children between the ages 8 to 12 and 84% of teenagers between the ages of 13 and 18 are using social media.<sup>3</sup> More than one in three teens ages 13 to 17 report that they use social media “almost constantly”.<sup>4</sup> Some social media companies already prohibit kids under 13 from signing up to their platforms to comply with federal requirements, but children may easily get around the bans, regardless of their parents’ consent.<sup>5</sup>

In less than a generation, social media has evolved from a direct electronic information exchange to a virtual gathering place, retail platform, and marketing tool. What began as a desktop or laptop experience shifted to mobile phones and tablets. With the advent of social media apps that could run on smartphones, end users could take their communities with them wherever they went and use social media at any time.<sup>6</sup>

##### **Social Media and Addictive Designs and Deceptive Patterns**

In general, “addictive designs” or “deceptive patterns,” also called “dark patterns,” are deceptive user experiences that take advantage of how people habitually use websites to incentivize people to do something they may not normally do, such as impulse purchasing, giving away personal information, or spending excessive time on a website.<sup>7</sup> Examples include “autoplay,” when a video website

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<sup>1</sup> Meriam-Webster, *Dictionary, Definition, Social Media*, <https://www.merriam-webster.com/dictionary/social%20media> (last visited Jan. 8, 2024).

<sup>2</sup> Pew Research Center, *Social Media Fact Sheet*, (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> (last visited Jan. 8, 2024).

<sup>3</sup> Shiv Sudhakar, *Age 13 and younger is 'too early' for kids to be on social media, surgeon general admits*, Fox News, Feb. 10, 2023, <https://www.foxnews.com/lifestyle/age-13-too-early-kids-social-media-surgeon-general> (last visited Jan. 9, 2024).

<sup>4</sup> The Annie E. Casey Foundation, *Social Media's Concerning Effect on Teen Mental Health*, (Aug. 10, 2023), <https://www.aecf.org/blog/social-medias-concerning-effect-on-teen-mental-health#:~:text=Numerous%20studies%20show%20that%20higher,poor%20body%20image%2C%20eating%20disorder> (last visited January 8, 2024).

<sup>5</sup> Barbara Ortutay, *Car seats and baby formula are regulated. Is social media next?*, The Associated Press, May, 23, 2023, <https://apnews.com/article/surgeon-general-kids-social-media-teens-tiktok-instagram-443530d9baa3f91386bf9fbfb313bbaf> (last visited Jan. 9, 2024).

<sup>6</sup> Maryville University, *The Evolution of Social Media: How Did It Begin, and Where Could It Go Next?*, (May 28, 2020), <https://online.maryville.edu/blog/evolution-social-media/> (last visited Jan. 8, 2024).

<sup>7</sup> Brad Bartlett, *Dark Design Patterns: Teach Kids to Recognise Them*, Kidslox, Feb. 7, 2023, <https://kidslox.com/guide-to/dark-design-patterns> (last visited Jan. 6, 2024).

automatically plays new videos in succession as a default setting;<sup>8</sup> and “infinite scroll,” when a website allows users to scroll endlessly through content, rather than clicking through pages.<sup>9</sup>

In 2022, the Federal Trade Commission (FTC) issued a report outlining the ways that companies are increasingly using dark patterns to manipulate consumers into buying products or forfeiting their privacy.<sup>10</sup> Common dark pattern tactics include:

- Disguising ads by designing advertisements to look like independent, editorial content; claiming to be neutral but really ranking companies based on compensation; and utilizing countdown timers designed to make consumers believe they only have a limited time to purchase a product or service when the offer is not actually time-limited.
- Making it difficult to cancel subscriptions or charges, which involves tricking someone into paying for goods or services without consent.
- Burying key terms and junk fees, which involves hiding or obscuring material information from consumers that consumers do not see before making a purchase.
- Tricking consumers into sharing data, which involves falsely giving consumers choices about privacy settings or sharing data, and instead steering consumers toward the option that gives away the most personal information.<sup>11</sup>

Recently, FTC has filed complaints against several companies for using dark patterns as a deceptive trade practice.<sup>12</sup> For example, FTC has taken action against Twitter (now X), alleging it deceptively used account security information to sell targeted advertisements.<sup>13</sup> Additionally, FTC filed a complaint against Amazon, alleging use of dark patterns to deceive users into subscribing to a premium service.<sup>14</sup> Both cases are still pending.

## Effects of Social Media on Children

Social media has become an important aspect of the digital interactions of minors, who use social media for entertainment and communication purposes.<sup>15</sup> Adolescents are constantly in touch with their peers via social media accounts. However, social media has the potential to have both positive and negative effects on their health.<sup>16</sup>

Children may experience many benefits from using social media, including:<sup>17</sup>

- Enhancing their communication skills;
- Enhancing their social connections;

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<sup>8</sup> Rene Otto, *Autoplay and infinite scroll*, Medium, <https://rene-otto.medium.com/autoplay-and-infinite-scroll-8607abe52bb7#:~:te xt=nobody%20asked%20for%20autoplay%20video.%3A%20stealing%20your%20attention%20back.%E2%80%9D> (last visited Jan. 6, 2024).

<sup>9</sup> Erin Rupp, *The Infinite Scroll: Why It's So Addictive and How to Break Free*, Freedom.to, Feb. 28, 2022, [The Infinite Scroll: Why It's So Addictive and How to Break Free - Freedom Matters](https://www.freedom.to/blog/the-infinite-scroll-why-it-s-so-addictive-and-how-to-break-free-freedom-matters) (last visited Jan. 6, 2024).

<sup>10</sup> Federal Trade Commission, *FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers*, Sep. 15, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers> (last visited Jan. 9, 2024).

<sup>11</sup> *Id.*

<sup>12</sup> Frank Gorman, Benjamin Chapin, Reade Jacob, and Julia May, *FTC Targets “Dark Patterns” in Actions Against Amazon and Publishers Clearing House*, WilmerHale, <https://www.wilmerhale.com/insights/client-alerts/20230814-ftc-targets-dark-patterns-in-actions-against-amazon-and-publishers-clearing-house> (last visited Jan. 6, 2024).

<sup>13</sup> Federal Trade Commission, *FTC Charges Twitter with Deceptively Using Account Security Data to Sell Targeted Ads*, May 25, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads> (last visited Jan. 9, 2024).

<sup>14</sup> Federal Trade Commission, *FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime Without Consent and Sabotaging Their Attempts to Cancel*, Jun. 21, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their> (last visited Jan. 6, 2024).

<sup>15</sup> Andrea Imer & Florian Schmiedek, *Associations between youth's daily social media use and well-being are mediated by upward comparisons*, *Communications Psychology*, (Aug. 22, 2023), <https://www.nature.com/articles/s44271-023-00013-0#citeas> (last visited Jan. 8, 2024).

<sup>16</sup> Maya Dollarhide, *Social Media: Definition, Effects, and List of Top Apps*, Investopedia.com, <https://www.investopedia.com/terms/s/social-media.asp> (last visited Jan. 6, 2024).

<sup>17</sup> *Id.*

- Making new friends and meaningful connections;
- Exchanging ideas and digital photos;
- Developing a new interest, and experimenting with new forms of self-expression;
- Learning basic social and technical skills;
- Feeling more included;
- Interacting across geographic barriers; and
- Enjoying humor.

On the other hand, common risks associated with using social media include:<sup>18</sup>

- Depression;
- Increased stress;
- Social withdrawal;
- Anxiety;
- Poor body image;
- Loneliness;
- Low self-esteem;
- Exposure to harmful or inappropriate content;
- Exposure to dangerous people;
- Cyberbullying;<sup>19</sup>
- Sexting;
- Oversharing personal or private information;
- Exposure to excessive advertisements;
- Being the victim of hacking or identity theft;
- Interference with sleep, exercise, homework, or family activities;
- Drama;
- Social pressure;
- Suicide or suicidal thoughts;
- Negative influence on cognitive ability; and
- Negative school performance.

Children use social media to find community,<sup>20</sup> but their mental health may be negatively affected. Deterioration in mental health is one of the side effects stemming from social media overuse. The link between social-media use, depression, and loneliness has been causally linked or proven by psychologists showing that an increase in use causes a decrease in well-being.

In May 2023, U.S. Surgeon General Dr. Vivek Murthy released an advisory to call attention to the effects of social media on youth mental health. The advisory noted that at crucial periods of adolescent brain development, social media use is predictive of decreases in life satisfaction, as well as additional concerns around body image, sleep issues, and much more.<sup>21</sup> He also concluded that 13 years old is “too early” for children to use social media, despite most social media companies allowing 13-year-olds to use their platforms, because in early adolescence, kids are still “developing their identity, their sense of self.”<sup>22</sup>

<sup>18</sup> Loyola Medicine, *Social Media Safety for Kids and Teens*, <https://www.loyolamedicine.org/about-us/blog/social-media-safety-kids-teens>, (last visited Jan. 6, 2024); *Is social media bad for mental health and wellbeing? Exploring the perspectives of adolescents*.

O'Reilly M, Dogra N, Whiteman N, Hughes J, Eruyar S, Reilly P. *Clin Child Psychol Psychiatry*. 2018; 23:601–613.

<sup>19</sup> Research shows that victims of cyberbullying are more likely to use alcohol and drugs and skip school than other students. They also are more likely to receive poor grades and experience low self esteem and health problems. In extreme situations, cyberbullying has led to suicide. Fisher BW, Gardella JH, Teurbe-Tolon AR, *Peer cybervictimization among adolescents and the associated internalizing and externalizing problems: a meta-analysis.. J Youth Adolesc.*, Jul. 22, 2016, <https://pubmed.ncbi.nlm.nih.gov/27447707/> (last visited Jan. 8, 2024).

<sup>20</sup> Pew Research Center, *Teens' Social Media Habits and Experiences*, <https://www.pewresearch.org/internet/2018/11/28/teens-social-media-habits-and-experiences/>, (last visited Jan. 6, 2024).

<sup>21</sup> "Social Media and Youth Mental Health," The US Surgeon General's Advisory, May 2023.

<sup>22</sup> Lauraine Langreo, EducationWeek, *Surgeon General: Kids Under 14 Should Not Use Social Media*, Feb. 2, 2023, <https://www.edweek.org/leadership/surgeon-general-kids-under-14-should-not-use-social-media/2023/02> (last visited Jan. 6, 2024).

Other experts, such as David Greenfield, a psychologist, agree and assert the platforms lure users with powerful tactics. One such tactic is “intermittent reinforcement,” which refers to a reward scheme in which the user receives rewards inconsistently and unpredictably. While adults are susceptible, young people are particularly at risk because the brain regions that are involved in resisting temptation and reward are not nearly as developed in children and teenagers as in adults.<sup>23</sup>

Examples of studies and reports that have shown the dangers of social media use by children include the following.

- One study conducted by social media and psychology scholars found a link between social media use and poor mental health, especially among girls. The study demonstrated that girls experience a consistent and substantial association between mental health and social media, and such associations were stronger than links between mental health and binge drinking, sexual assault, obesity, and hard drug use.<sup>24</sup>
  - Dr. Jean Twenge, a generational trends scholar, saw the beginning of a mental health crisis starting in 2012 when reviewing mental health metrics that showed rates of depression, anxiety, and loneliness were rising, which she points out coincides with the fast rise in use of smartphones in 2012 and all the social media that comes along with them.<sup>25</sup>
- Another study found that social media use causes children to be more sensitive to anticipating social risks: While children generally become more attuned to social interactions as they enter adolescence, those who are frequent, early social media users become particularly sensitive to anticipating social risks and rewards from their peers.<sup>26</sup>
  - The researchers found that “habitual” social media users, or those who checked their social feeds 15 times a day or more, responded more quickly and more intensely to perceived good or bad emotions from peers, compared to students who checked once a day or less.<sup>27</sup>
- A recent report by the Wall Street Journal outlined internal Meta<sup>28</sup> research showing that Instagram conducted online surveys, diary studies, focus groups, and large-scale questionnaires, which showed that 32 percent of teenage girls reported that Instagram made them have a worse body image. Of research participants who experienced suicidal thoughts, 13 percent of British teens and 6 percent of American teens directly linked their interest in suicide to Instagram.<sup>29</sup>
- Several studies have also tied the advent of the smartphone, where the majority of children are accessing social media, to increased rates of depression, especially among girls.<sup>30</sup> Since 2019, rates of depression, especially among young girls, has skyrocketed. In 2021, more than 40 percent of high school students reported depressive symptoms, with girls reporting even higher rates of poor mental health and suicidal thoughts, according to data from the U.S. Centers for Disease Control and Prevention (CDC).<sup>31</sup>

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<sup>23</sup> Matt Richtel, New York Times, *Is Social Media Addictive? Here's What the Science Says*. (Oct. 25, 2023), <https://www.nytimes.com/2023/10/25/health/social-media-addiction.html> (last visited Jan. 8, 2024).

<sup>24</sup> Haidt, J., Rausch, Z., & Twenge, J., *Social Media and Mental Health: A Collaborative Review*, New York University, <https://jonathanhaidt.com/reviews/> (last visited Jan. 8, 2024).

<sup>25</sup> Michaelleen Doucleff, *The truth about teens, social media and the mental health crisis*, NPR Health Shots, Apr. 25, 2023, <https://www.npr.org/sections/health-shots/2023/04/25/1171773181/social-media-teens-mental-health> (last visited Jan. 8, 2024).

<sup>26</sup> Sarah D. Sparks, *Preteens' Social Media Habits Could Be Changing Their Brains*, Education Week, Jan. 6, 2023, <https://www.edweek.org/leadership/preteens-social-media-habits-could-be-changing-their-brains/2023/01> (last visited Jan. 6, 2024); Maria T. Maza, BS; Kara A. Fox, MA; Seh-Joo Kwon, BS; et al, *Association of Habitual Checking Behaviors on Social Media With Longitudinal Functional Brain Development*, JAMA Pediatrics, (Jan. 3, 2023), <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2799812> (last visited Jan. 6, 2024).

<sup>27</sup> Maria T. Maza, *supra* note 26.

<sup>28</sup> Meta is the parent company of Facebook, Instagram, WhatsApp, and Messenger.

<sup>29</sup> Taylor Hatmaker, *Facebook knows Instagram harms teens. Now, its plan to open the app to kids looks worse than ever*, TechCrunch.com, <https://techcrunch.com/2021/09/16/facebook-instagram-for-kids-mosseri-wsj-teen-girls/> (last visited Jan. 6, 2024).

<sup>30</sup> Nesi J, Prinstein MJ., *Using social media for social comparison and feedback-seeking: gender and popularity moderate associations with depressive symptoms*. J Abnorm Child Psychol., Nov. 2015, <https://pubmed.ncbi.nlm.nih.gov/25899879/> (last visited Jan. 8, 2024).

<sup>31</sup> Fardouly J, Vartanian LR, *Social media and body image concerns: current research and future directions*, Curr. Opin. Psychol., 2016, <https://www.sciencedirect.com/science/article/abs/pii/S2352250X15002249> (last visited Jan. 8, 2024).



- According to the CDC, nearly one in three high school girls considered suicide in 2021, a 60 percent increase since 2011; teen depression doubled between 2010 and 2019; and emergency room admissions for self-harm among 10 to 14-year-old girls tripled between 2009 and 2015.<sup>32</sup>
- A study on the effects of social media use on mental health during adolescent development indicates that there are two windows of time when children are most sensitive to detrimental effects of social media, and when higher estimated social media use predicts a decrease in life satisfaction ratings a year later. For girls, the windows occur at ages 11 through 13; and for boys, the windows occur at ages 14 through 15.<sup>33</sup>

Based on these studies and other scientific research, many experts have called for the regulation of social media, and specifically, regulation of the use of social media by children. Dr. Mary Alvord, a member of the American Psychological Association social media advisory panel, states that just because social media is here to stay, doesn't "mean we have to accept its dangers. Just as we decide when kids are old enough to drive, and we teach them to be good drivers, we can establish guidelines and teach children to use social media safely."<sup>34</sup>

### Safety Measures and Parental Controls

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.<sup>35</sup> Parental controls may also help protect children from inappropriate content, cyberbullying, and other online safety issues.<sup>36</sup> 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.<sup>37</sup>

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."<sup>38</sup>

### Lawsuits Against Social Media Platforms

Evidence exists that social media platforms have intentionally created algorithms and other functions deliberately designed to hold users' attention as long as possible, tapping into psychological biases and vulnerabilities relating to the human desire for validation and fear of rejection. The platforms continue to do so even though they are aware that too much passive use of social media can be unhealthy.<sup>39</sup>

<sup>32</sup> Centers for Disease Control and Prevention, *U.S. Teen Girls Experiencing Increased Sadness and Violence* (Feb. 13, 2023), <https://www.cdc.gov/media/releases/2023/p0213-yrbs.html> (last visited Jan. 8, 2024)

<sup>33</sup> Kirsten Weir, *Social media brings benefits and risks to teens. Here's how psychology can help identify a path forward*, American Psychological Association (Sep. 1, 2023), <https://www.apa.org/monitor/2023/09/protecting-teens-on-social-media#:~:text=During%20those%20windows%E2%80%94around%2011,164%2C%202022>. (last visited Jan. 8, 2023).

<sup>34</sup> Kirsten Weir, *supra* note 32.

<sup>35</sup> WebMD Editorial Contributors, *How to Talk to Your Kids About Social Media*, WebMD.com, <https://www.webmd.com/parenting/how-to-talk-to-kids-about-social-media> (last visited Jan. 6, 2024).

<sup>36</sup> Internetmatters.org, *Parental Controls*, <https://www.internetmatters.org/parental-controls/> (last visited Jan. 6, 2024).

<sup>37</sup> Caroline Knorr, Commonsensemedia.org, *Parents' Ultimate Guide to Parental Controls*, <https://www.commonsensemedia.org/articles/parents-ultimate-guide-to-parental-controls> (last visited Jan. 6, 2024).

<sup>38</sup> Barbara Abney and Zenaïda Kotala, *Apps to Keep Children Safe Online May be Counterproductive*, UCF Today, Apr. 2, 2018, <https://www.ucf.edu/news/apps-keep-children-safe-online-may-counterproductive/> (last visited Jan. 9, 2024).

<sup>39</sup> Kraut R, Patterson M, Lundmark V, Kiesler S, Mukophadhyay T, Scherlis W., *Internet paradox: a social technology that reduces social involvement and psychological well-being?*, *Am Psychol.*, Sept. 1998, <https://pubmed.ncbi.nlm.nih.gov/9841579/> (last visited Jan. 8, 2024)

On October 24, 2023, a group of 41 states, including Florida, and the District of Columbia, filed suit against Meta,<sup>40</sup> contending that the company knowingly used features on its platforms to cause children to use them compulsively, even as the company said that its social media sites were safe for young people.<sup>41</sup> The complaint alleges that Meta took actions which qualify as a deceptive or unfair trade practice and which violate the federal Children’s Online Privacy Protection Act.<sup>42</sup>

The complaint alleges that “Meta has harnessed powerful and unprecedented technologies to entice, engage and ultimately ensnare youth and teens. Its motive is profit, and in seeking to maximize its financial gains, Meta has repeatedly misled the public about the substantial dangers of its Social Media Platforms” and “has concealed the ways in which these Platforms exploit and manipulate its most vulnerable consumers: teenagers and children.”<sup>43</sup>

Regarding the motivation for the suit, Florida Attorney General Ashley Moody stated that “Meta has gone unchecked for too long, and our children are suffering the consequences of these unlawful practices...I took action to stop Meta from targeting minors with addictive features to keep them online for hours, collecting their data and other unlawful actions that harm teens’ mental health,”<sup>44</sup> and “It’s no surprise to parents that children cannot stay off their phones. This has been shown to be very addictive to children across the United States. It’s caused mental health problems and sleep problems.”<sup>45</sup>

Additionally, New York Attorney General Letitia James stated “Meta has profited from children’s pain by intentionally designing its platforms with manipulative features that make children addicted to their platforms while lowering their self-esteem....Social media companies, including Meta, have contributed to a national youth mental health crisis and they must be held accountable.”<sup>46</sup>

## Florida’s Social Media Laws for Children

### *Requirements for Social Media and Phones in Schools*

Section 1003.42(2)(n), F.S., requires students in grades 6 through 12 to receive instruction on the social, emotional, and physical effects of social media. The instructional materials must be available online, and district school boards must notify parents of the material’s availability.

Sections 1006.07(2)(f) and 1003.32(1)(a), F.S., prohibit students from using wireless communications devices at school during instructional time, except when expressly directed by a teacher solely for educational purposes and requires a teacher to designate an area for wireless communications devices during instructional time.

### *Protection of Children in Online Spaces Act*

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<sup>40</sup> *State of Florida v. Meta Platforms, Inc., Instagram, LLC*, Case No. 8:23-cv-02412 (M.D. Fla.); *State of Arizona, et al. v Meta Platforms, Inc., Instagram LLC, Meta Payments, Inc., et al*, Case No. 4:23-cv-05448 (N.D. Cal.). The cases have merged, and are still pending.

<sup>41</sup> *State of Arizona, et al. v Meta, Id*; Matt Richtel, *Is Social Media Addictive? Here’s What the Science Say*,. New York Times, Oct. 25, 2023, <https://www.nytimes.com/2023/10/25/health/social-media-addiction.html> (last visited Jan. 8, 2024) (sic).

<sup>42</sup> *Id.*

<sup>43</sup> Compl., *State of Arizona, et al. v. Meta Platforms, Inc., et al.*, [https://www.washingtonpost.com/documents/b68f2951-2a4b-4822-b0fb-04238703c039.pdf?itid=lk\\_inline\\_manual\\_5](https://www.washingtonpost.com/documents/b68f2951-2a4b-4822-b0fb-04238703c039.pdf?itid=lk_inline_manual_5) (N.D. Cal. Oct. 24, 2023) (No. 4:23-cv-05448).

<sup>44</sup> Office of Attorney General Ashley, ATTORNEY GENERAL MOODY TAKES LEGAL ACTION AGAINST META TO PROTECT CHILDREN, Oct. 24, 2023, <https://www.myfloridalegal.com/newsrelease/attorney-general-moody-takes-legal-action-against-meta-protect-children> (last visited Jan. 9, 2024).

<sup>45</sup> CBS, *Florida Attorney General Ashley Moody targets Meta over negative impacts on kids*, (Oct. 25, 2023) <https://www.cbsnews.com/miami/news/florida-attorney-general-ashley-moody-targets-meta-negative-impacts-kids/> (last visited Jan. 13, 2024).

<sup>46</sup> New York State Attorney General, *Attorney General James and Multistate Coalition Sue Meta for Harming Youth*, (Oct. 24, 2023) <https://ag.ny.gov/press-release/2023/attorney-general-james-and-multistate-coalition-sue-meta-harming-youth> (last visited Jan. 13, 2024).

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:

- 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.

### Social Media Use by Children - Laws in Other States

In March 2023, Utah became the first state to adopt laws regulating kids' access to social media.<sup>47</sup> This legislative action was rapidly followed by several other states, including Arkansas, Louisiana, Ohio, and Texas, with numerous others contemplating similar measures.<sup>48</sup>

According to the Utah law, effective March 1, 2024, a social media company must:<sup>49</sup>

- Verify the age of a Utah resident seeking to maintain or open an account,
- Obtain parental consent before minors under 18 can open or maintain their current account, and
- Deny access to existing users who do not verify their age within 14 days of attempting to access their account.
- Give a minor's parents or guardians access to all posts, messages, and responses.
- Not display advertising to minors.
- Not allow minors to engage in direct messaging to individuals outside their platform friend group.
- Prohibit minors from accessing their accounts between 10:30pm and 6:30am.

The law has recently been challenged on First Amendment grounds.<sup>50</sup> NetChoice, LLC, an Internet trade association whose members include Facebook, Instagram, Twitter, TikTok, Snapchat, Pinterest, and Nextdoor, claims the provisions amount to a "unconditional attempt to regulate both minors' and adults' access to-and ability to engage in-protected expression." The case is still pending.<sup>51</sup>

A case challenging a similar law in Arkansas resulted in the law being preliminarily enjoined, meaning it is not in effect, pending an appeal.<sup>52</sup> The court found that the law placed too high a burden on adults and children attempting to access protected content, and was impermissibly vague as to whom the bill applies.<sup>53</sup>

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<sup>47</sup> Ch. 498, Laws of Utah 2023.

<sup>48</sup> Act No. 441, 2023 La. Acts; Tex. H.B. 18 (2023); 2023 Ark. Acts 689; Ohio House Bill 33 - 135th General Assembly.

<sup>49</sup> Lisa M. Thomas, Snehal Desai, and Kathryn Smith, *The Beehive State Joins the Buzz Around Minors and Social Media*, *The National Law Review*, Dec. 26, 2023, <https://www.natlawreview.com/article/beehive-state-joins-buzz-around-minors-and-social-media> (last visited Jan. 7, 2024).

<sup>50</sup> *NetChoice, LLC v. Reyes*, (D. Utah December 18, 2023) (No. 2:23-cv-00911).

<sup>51</sup> Mack Degeurin, *Tech trade group sues over 'unconstitutional' Utah teen social media curfew law*, *Popular Science*, <https://www.popsoci.com/technology/lawsuit-utah-teen-social-media-curfew/#:~:text=NetChoice%2C%20in%20a%20suit%20filed,age%20verification%20requirement%2C%20which%20NetChoice> (last visited Jan. 8, 2024).

<sup>52</sup> *NetChoice v. Griffin*, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023).

<sup>53</sup> *Id.*

## Child-Focused Online Privacy Laws

### *Federal Children's Online Privacy Protection Act (COPPA)*

COPPA,<sup>54</sup> and its related rules,<sup>55</sup> federally regulate websites' collection and use of children's information. COPPA provides that the operator of a covered entity, a website or online service that is directed at children, or that has actual knowledge that it collects children's personal information, must comply with requirements regarding data collection and use, privacy policy notifications, and data security.

A covered entity may not collect personal information from a child under the age of 13 without the prior, verifiable consent of his or her parent.<sup>56</sup>

COPPA requires covered entities to:<sup>57</sup>

- Give parents direct notice of their privacy policies, including a description of their data collection and sharing practices;
- Post a clear link to their privacy policies on their home page and at each area of their website where they collect personal information from children;
- Institute procedures to protect the personal information that they hold;
- Ensure that any third-party with which they share collected personal information implements the same protection procedures; and
- Delete children's personal information after the purpose for its retention has been fulfilled.

Violations of COPPA are deemed an unfair or deceptive act or practice and may therefore be federally prosecuted by FTC. While there is no criminal prosecution or private right of action under COPPA, it does authorize state attorneys general to enforce violations that affect residents of their states.<sup>58</sup>

In 2019, Google and its subsidiary YouTube agreed to pay a \$170 million settlement for lawsuits from FTC and New York for violations of COPPA for collecting personal information from children without consent. Specifically, it was alleged that YouTube tracked cookies<sup>59</sup> from viewers of child-directed channels, without first notifying parents and obtaining their consent. YouTube earned millions of dollars by using the identifiers to deliver targeted ads to viewers of these channels.<sup>60</sup>

### *California Age-Appropriate Design Code Act*

In 2022, California passed a combination social media and data privacy law that prohibits social media platforms from showing children advertising. California adopted the California Age-Appropriate Design Code Act (CAADCA)<sup>61</sup> legislation modeled on the United Kingdom's Age Appropriate Design Code,<sup>62</sup>

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<sup>54</sup> 15 U.S.C. §6502.

<sup>55</sup> 16 C.F.R. pt. 312.

<sup>56</sup> 15 U.S.C. §§ 6502(a)-(b).

<sup>57</sup> See, Federal Trade Commission, *General Questions About the COPPA Rule: What is the Children's Online Privacy Protection Rule?*, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0> (last visited Jan. 6, 2024).

<sup>58</sup> *Id.*

<sup>59</sup> Cookies are bits of data that are sent to and from a user's browser to identify the user. When the user opens a website, the user's browser sends a piece of data to the web server hosting that website. This data usually appears as strings of numbers and letters in a text file. Every time the user accesses a website, a cookie is created and placed in a temporary folder on the user's device. From here, cookies try to match the user's preferences for what the user wants to read, see, or purchase. Microsoft, *Everything you need to know about Internet cookies*, (April 25, 2023), <https://www.microsoft.com/en-us/edge/learning-center/what-are-cookies?form=MA1312> (last visited Jan. 12, 2024).

<sup>60</sup> Federal Trade Commission, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law*, Sep. 4, 2019, <https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law> (last visited Jan. 9, 2024).

<sup>61</sup> Cal. Civil Code § 1798.99.28-.35.

<sup>62</sup> 5Rights Foundation, *California follows UK lead as child data protection law is passed*, <https://5rightsfoundation.com/in-action/california-follows-uk-lead-as-child-data-protection-law-is-passed.html> (last visited Jan. 7, 2024).

which requires online platforms to adhere to strict default privacy and safety settings that protect the best interest of children.<sup>63</sup> CAADCA covers children under 18 years of age and will be effective July 1, 2024.<sup>64</sup>

More specifically, CAADCA requires certain businesses that provide an online service, product, or feature that is likely to be accessed by children to comply with several new requirements and restrictions, including a:<sup>65</sup>

- Prohibition on using personal information of any child in a way that it knows or has reason to know is materially detrimental to a child's physical or mental health and/or wellbeing; and
- Prohibition on using dark patterns to manipulate children into providing unnecessary personal information.

The law has recently been challenged on several grounds, including on First Amendment and Supremacy Clause grounds, and has been preliminarily enjoined.<sup>66</sup> A similar law has since been adopted in Utah.<sup>67</sup>

### *European Union - Social Media and Data Privacy Laws for Children*

In 2015, the European Union (E.U.) passed a law to require member states to require parental consent for a child to access social media. The E.U. mandates that at a minimum, such parental consent requirements must apply to children 13 years of age or younger, and may apply to children 16 years of age or younger.<sup>68</sup>

Additionally, in 2023, the E.U. passed the Digital Services Act (DSA), which currently applies to 19 of the largest Internet companies, including Meta, Apple, TikTok, and Google. The DSA, in part, requires such companies to prevent harmful content from spreading on their platforms and to share certain internal data with regulators and associated researchers.<sup>69</sup>

The DSA, which became effective January 1, 2024, compels such tech companies to set up new policies and procedures to remove flagged hate speech, terrorist propaganda, and other material defined as illegal by countries within the E.U.<sup>70</sup>

### **Age-Verification Mechanisms**

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

- Alcohol and tobacco;<sup>71</sup>
- Gambling;
- Adult websites; and

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<sup>63</sup> Office of Governor Gavin Newsome, *Governor Newsom Signs First-in-Nation Bill Protecting Children's Online Data and Privacy*, <https://www.gov.ca.gov/2022/09/15/governor-newsom-signs-first-in-nation-bill-protecting-childrens-online-data-and-privacy/> (last visited Jan. 7, 2024).

<sup>64</sup> Cal. Civil Code § 1798.99.28-.35

<sup>65</sup> Briana Kelly, Nelson Mullins Riley & Scarborough LLP, *State of California Passes Bill to Protect Children Online*, Jan. 26, 2023, <https://www.lexology.com/library/detail.aspx?g=e4c49600-b850-4d8f-a68a-117acf89972f> (last visited Jan. 7, 2024).

<sup>66</sup> *NetChoice, LLC v. Bonta*, 2023 WL 6135551 (N.D. Cal. 2023).

<sup>67</sup> Ch. 477, Laws of Utah 2023.

<sup>68</sup> Diana Graber, *Europeans Teach Us a Lesson About Banning Teens From Social Media*, HuffPost, Dec. 21, 2015, [https://www.huffpost.com/entry/europeans-teach-us-a-less\\_b\\_8854802](https://www.huffpost.com/entry/europeans-teach-us-a-less_b_8854802) (last visited Jan. 6, 2024).

<sup>69</sup> Martin Coulter, *Big Tech braces for EU Digital Services Act regulations*, Reuters (Aug. 24, 2023), <https://www.reuters.com/technology/big-tech-braces-roll-out-eus-digital-services-act-2023-08-24/> (last visited Jan. 6, 2024).

<sup>70</sup> Adam Satariano, *E.U. Takes Aim at Social Media's Harms With Landmark New Law*, The New York Times, Apr. 22, 2022, <https://www.nytimes.com/2022/04/22/technology/european-union-social-media-law.html> (last visited Jan. 6, 2024).

<sup>71</sup> 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).



- Firearms.<sup>72</sup>

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 passed laws to require adult websites to use age-verification measures to block adult content from being accessed by minors.<sup>73</sup>

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.<sup>74</sup>

There are several ways that Internet companies verify, or attempt to verify, age. Options include using:<sup>75</sup>

- Government identity documents, which generally require the user to submit a government document to a third-party for the company for 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 require a facial analysis to estimate age.
- Credit cards, which generally require the user to supply credit card information for validation.
- Open banking, which generally require 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 require the user to tick a box or self-enter a birthdate.
- Zero knowledge proofs, which generally enable 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.<sup>76</sup>

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 the information revealed through age-verification processes and combine it with other data for targeted advertisements or sharing that data with third parties.<sup>77</sup>

However, there are numerous minimally invasive verification techniques that do not require sharing any age-verification information at all with social media platforms. For instance, a trusted third-party could

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<sup>72</sup> 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).

<sup>73</sup> 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).

<sup>74</sup> 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).

<sup>75</sup> The Age Verification Providers Association, *How do you check age online?*, <https://avpassociation.com/avmethods/> (last visited Jan. 7, 2024).

<sup>76</sup> 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).

<sup>77</sup> 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).

verify age and provide a QR code or similar device to the age-restricted website, establishing age without the platform even seeing the age-verification documents or even the user's identity.<sup>78</sup> Experts assert that age-verification systems have progressed considerably from a generation ago.<sup>79</sup>

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.<sup>80</sup>

### **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.<sup>81</sup> FDUTPA was modeled after the FTC Act.<sup>82</sup>

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.<sup>83</sup> The SAO may enforce violations of FDUTPA if the violations take place 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.<sup>84</sup> In certain circumstances, consumers may also file suit through private actions.<sup>85</sup>

The DLA and the SAO have powers to investigate FDUTPA claims, which include:<sup>86</sup>

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

The DLA and 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.<sup>87</sup>

FDUTPA may not be applied to certain entities in certain circumstances, including:<sup>88</sup>

- Any person or activity regulated under laws administered by the Office of Insurance Regulation or the Department of Financial Services; or

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<sup>78</sup> 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).

<sup>79</sup> Broadband Breakfast, *Improved Age Verification Allows States to Consider Restricting Social Media*, Nov. 20, 2023, [Improved Age Verification Allows States to Consider Restricting Social Media – Broadband Breakfast](#) (last visited Jan. 9, 2023).

<sup>80</sup> 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).

<sup>81</sup> S. 501.202, F.S.

<sup>82</sup> 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).

<sup>83</sup> Ss. 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 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUTPA and the potential for deterrence of anticompetitive conduct in Florida), available at [http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0.business.Division\\*](http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0.business.Division*) (last visited on Jan. 6, 2024).

<sup>84</sup> S. 501.203(2), F.S.

<sup>85</sup> S. 501.211, F.S.

<sup>86</sup> S. 501.206(1), F.S.

<sup>87</sup> 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.

<sup>88</sup> S. 501.212(4), F.S.

- Banks, credit unions, and savings and loan associations regulated by the Office of Financial Regulation or federal agencies.

### **Effect of Proposed Changes**

The bill provides the following definitions:

- "Account holder" means a resident of this state who has or opens an account or creates a profile or other form of identification to use or access a social media platform.
- "Reasonable age-verification method" means any commercially reasonable method regularly used by government agencies or businesses for the purpose of age and identity verification.
- "Social media platform" means an online forum offered by an entity that has the ability to track the activity of an account holder or user, if the online forum allows the account holder or user to do all of the following:
  - Create or use a profile, account, or other form of identification.
  - Upload content or view the content or activity of other account holders.
  - Interact with or track other account holders or users.

The bill requires a social media platform to prohibit a minor who is younger than 16 years of age from creating a new account on the social media platform.

The bill requires a social media platform to use a reasonable age-verification method to verify the age of each account holder on the social media platform at the time a new account is created. If an account holder fails to verify his or her age, the account must be denied. Such reasonable age-verification method must be conducted by an independent, third-party which is not affiliated with the social media platform.

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

- Retained by the third-party or social media platform once the age has been verified.
- Used for any other purpose.

The bill requires a social media platform to do the following related to existing accounts belonging to a minor younger than 16 years of age:

- Terminate any such account that is reasonably known by the social media platform to be held by a minor younger than 16 years of age.
  - The social media platform must provide a minimum of 90 days for an account holder to dispute such termination by verifying age.
- Allow such an account holder to request to terminate the account.
  - Such termination must be effective within 5 business days after such request.
- Allow the confirmed parent or guardian of such an account holder to request that the minor's account be terminated.
  - Such termination must be effective within 10 business days after such request.
- Permanently delete all personal information held by the social media platform relating to the terminated account, unless there are legal requirements to maintain such information.

If the social media platform allows minors of 16 or 17 years of age to create an account on the platform, the bill requires the platform to include a clearly labeled, conspicuous, and readily accessible link on its Internet homepage or platform login page that:

- Discloses the following social media platform policies in a manner that is clearly, concisely, prominently, and understandably written using language suited to the age of users who are younger than 18 years of age likely to routinely access the platform without unrelated, confusing, or contradictory materials:
  - The content moderation policies of the social media platform.
  - Whether the social media platform uses or allows the use of addictive design or deceptive pattern features, including autoplay or infinite scroll.
  - Whether the social media platform allows manipulated photographs or digital images to be shared on the platform.



- Whether the social media platform considers the best interests of platform users who are under 18 years of age when designing, developing, and providing services.
- The methodology the social media platform uses to consider the best interests of platform users who are under 18 years of age.
- The policies and protections the social media platform uses to protect platform users who are under 18 years of age against harmful behaviors, such as bullying, harassment, and threats of violence or self-harm.
- Whether the social media platform collects or sells personal information of platform users who are under 18 years of age. If such personal information is collected, the platform must disclose the type of personal information collected and the purpose of such collection. If such personal information is sold, the platform must disclose to whom the information is sold.
- Provides clear access to the following:
  - Zip code-based references to local resources for law enforcement, suicide prevention, and domestic violence prevention services.
  - Reporting mechanisms related to harmful behaviors, such as bullying, harassment, and threats of violence or self-harm.
- At the time of log in, and before obtaining access to the platform, requires platform users who are 16 or 17 years of age to read and accept a disclaimer which must be in substantially the following form:

This application may be harmful to your mental health and may use design features that have addictive qualities or present unverified information or that may be manipulated by [insert platform name] or others for your viewing. This application may also collect your personal data to further manipulate your viewable content and may share your personal data with others.

The bill does not apply to online services, websites, or applications where the predominant or exclusive function is:

- Electronic mail.
- Direct messaging consisting of text, photos, or videos that are sent between devices by electronic means where messages are shared between the sender and the recipient only, visible to the sender and the recipient, and are not posted publicly.
- A streaming service that provides only licensed media in a continuous flow from the service, website, or application to the end user and does not obtain a license to the media from a user or account holder by agreement to its terms of service.
- News, sports, entertainment, or other content that is preselected by the provider and not user generated, and any chat, comment, or interactive functionality that is provided incidental to, directly related to, or dependent upon provision of the content.
- Online shopping or e-commerce, if the interaction with other users or account holders is generally limited to the ability to upload a post and comment on reviews or display lists or collections of goods for sale or wish lists, or other functions that are focused on online shopping or e-commerce rather than interaction between users or account holders.
- Interactive gaming, virtual gaming, or an online service, that allows the creation and uploading of content for the purpose of interactive gaming, edutainment, or associated entertainment, and the communication related to that content.
- Photo editing that has an associated photo hosting service, if the interaction with other users or account holders is generally limited to liking or commenting.
- A professional creative network for showcasing and discovering artistic content, if the content is required to be non-pornographic.
- Single-purpose community groups for public safety if the interaction with other users or account holders is generally limited to that single purpose and the community group has guidelines or policies against illegal content.
- To provide career development opportunities, including professional networking, job skills, learning certifications, and job posting and application services.
- Business to business software.

- A teleconferencing or videoconferencing service that allows reception and transmission of audio and video signals for real time communication.
- Shared document collaboration.
- Cloud computing services, which may include cloud storage and shared document collaboration.
- To provide access to or interacting with data visualization platforms, libraries, or hubs.
- To permit comments on a digital news website, if the news content is posted only by the provider of the digital news website.
- To provide or obtain technical support for a platform, product, or service.
- Academic, scholarly, or genealogical research where the majority of the content that is posted or created is posted or created by the provider of the online service, website, or application and the ability to chat, comment, or interact with other users is directly related to the provider's content.
- A classified ad service that only permits the sale of goods and prohibits the solicitation of personal services or that is used by and under the direction of an educational entity, including:
  - A learning management system;
  - A student engagement program; and
  - A subject or skill-specific program.

The bill provides that, if a social media platform violates the requirements for minor users under 16 years of age, it is an unfair and deceptive trade practice actionable under FDUTPA solely by DLA.<sup>89</sup> In addition to other FDUTPA remedies, DLA may collect a civil penalty of up to \$50,000 per violation.

The bill allows a private cause of action against a social media platform that fails to terminate an existing account within the required time after being notified to do so by the minor account holder under 16 years of age or a confirmed parent or guardian. The social media platform 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 social media platforms.

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. 501.1736, F.S.; provides requirements for social media platforms that allow access and creation of accounts by minors; provides causes of action and penalties.
- Section 2: Provides an effective date.

## 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.

<sup>89</sup> Unlike under general FDUTPA actions, DLA is not prohibited from bringing an action against a social media platform that is also a:

- Person or activity regulated under laws administered by OIR or DFS; and
- Bank, credit union, and savings and loan association regulated by OFR or federal agencies.

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 companies operating social media platforms due to the resources necessary to implement new procedures for age-verification, including using third-party verification services and creating certain disclosures.

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 social media platforms and their users to utilize age-verification 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.”<sup>90</sup> Generally, “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>91</sup> The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.<sup>92</sup>

In most circumstances these protections “are no less applicable when government seeks to control the flow of information to minors”<sup>93</sup> as states do not possess “a free-floating power to restrict the ideas to which children may be exposed.”<sup>94</sup>

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

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<sup>90</sup> U.S. Const., amend. I.

<sup>91</sup> *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>92</sup> U.S. Const. amend. XIV. *See also* Art. I, Fla. Const.

<sup>93</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>94</sup> *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 794 (2011).

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.<sup>95</sup>

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.<sup>96</sup>

The U.S. Supreme Court regards content-based laws, which limit communication because of the message it conveys, as presumptively unconstitutional.<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup>

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.<sup>100</sup>

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 and were too burdensome for law-abiding adults.<sup>101</sup> Currently, there are numerous minimally invasive verification techniques that do not require sharing any age-verification information at all with social media platforms.<sup>102</sup>

Additionally, in determining whether laws requiring age-verification to access social media platforms unconstitutionally restrict free speech, courts have found that even if "the state has the power to enforce parental prohibitions it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent."<sup>103</sup> Moreover,

age-verification requirements are more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies. "Filters impose selective restrictions on speech at the receiving end, not

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<sup>95</sup> 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).

<sup>96</sup> *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).

<sup>97</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

<sup>98</sup> *Sable Comm's v. F.C.C.*, 492 U.S. 115 (1989).

<sup>99</sup> *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 \(mtsu.edu\)](#) (last visited Jan. 7, 2024).

<sup>100</sup> *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*).

<sup>101</sup> Broadband Breakfast, *Improved Age Verification Allows States to Consider Restricting Social Media*, Nov. 20, 2023, [Improved Age Verification Allows States to Consider Restricting Social Media – Broadband Breakfast](#) (last visited Jan. 9, 2023); *Reno v. Am. C. L. Union*, 521 U.S. 844, 886 (1997); *Ashcroft*, 542 U.S. 656.

<sup>102</sup> 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).

<sup>103</sup> *NetChoice, LLC v. Yost*, 2024 WL 104336 (S.D. Ohio Jan. 9, 2024).

universal restrictions at the source.” And “[u]nder a filtering regime, adults ... may gain access to speech they have a right to see without having to identify themselves[.]” Similarly, the State could always “act to encourage the use of filters ... by parents” to protect minors.<sup>104</sup>

### *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.”<sup>105</sup>

### *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.”<sup>106</sup> 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.<sup>107</sup>

### *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.<sup>108</sup>

Section 230 of the federal Communications Decency Act (CDA),<sup>109</sup> 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”<sup>110</sup> and specifically prohibits all inconsistent causes of action and liability imposed under any State or local law.<sup>111</sup>

#### 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**

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<sup>104</sup> *NetChoice, LLC v. Griffin*, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023).

<sup>105</sup> *Woodstone Ltd. Partn. v. City of Saint Paul, Minnesota*, 2023 WL 3586077 (D. Minnesota May 22, 2023).

<sup>106</sup> *Sable Commc’s of California, Inc. vs. F.C.C.*, 492 U.S. 115, 126 (1989).

<sup>107</sup> *Ashcroft*, 542 U.S. 656; *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.)

<sup>108</sup> Cornell Law School, Legal Information Institute, *Supremacy Clause*, [https://www.law.cornell.edu/wex/supremacy\\_clause](https://www.law.cornell.edu/wex/supremacy_clause) (last visited Feb. 23, 2021).

<sup>109</sup> *Force*, 934 F.3d at 63 (quoting *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

<sup>110</sup> 47 U.S.C. § 230(c)(1).

<sup>111</sup> 47 U.S.C. § 230(e).



26        (a) "Account holder" means a resident of this state who  
 27 has or opens an account or creates a profile or other form of  
 28 identification to use or access a social media platform.

29        (b) "Department" means the Department of Legal Affairs.

30        (c) "Reasonable age verification method" means any  
 31 commercially reasonable method regularly used by government  
 32 agencies or businesses for the purpose of age and identity  
 33 verification.

34        (d) "Social media platform:"

35        1. Means an online forum offered by an entity that has the  
 36 ability to track the activity of an account holder or user, if  
 37 the online forum allows the account holder or user to do all of  
 38 the following:

39            a. Create or use a profile, account, or other form of  
 40 identification.

41            b. Upload content or view the content or activity of other  
 42 account holders.

43            c. Interact with or track other account holders or users.

44        2. Does not include an online service, website, or  
 45 application where the predominant or exclusive function is:

46            a. Electronic mail.

47            b. Direct messaging consisting of text, photos, or videos  
 48 that are sent between devices by electronic means where messages  
 49 are shared between the sender and the recipient only, visible to  
 50 the sender and the recipient, and are not posted publicly.

51 c. A streaming service that provides only licensed media  
52 in a continuous flow from the service, website, or application  
53 to the end user and does not obtain a license to the media from  
54 a user or account holder by agreement to its terms of service.

55 d. News, sports, entertainment, or other content that is  
56 preselected by the provider and not user generated, and any  
57 chat, comment, or interactive functionality that is provided  
58 incidental to, directly related to, or dependent upon provision  
59 of the content.

60 e. Online shopping or e-commerce, if the interaction with  
61 other users or account holders is generally limited to the  
62 ability to upload a post and comment on reviews or display lists  
63 or collections of goods for sale or wish lists, or other  
64 functions that are focused on online shopping or e-commerce  
65 rather than interaction between users or account holders.

66 f. Interactive gaming, virtual gaming, or an online  
67 service, that allows the creation and uploading of content for  
68 the purpose of interactive gaming, edutainment, or associated  
69 entertainment, and the communication related to that content.

70 g. Photo editing that has an associated photo hosting  
71 service, if the interaction with other users or account holders  
72 is generally limited to liking or commenting.

73 h. A professional creative network for showcasing and  
74 discovering artistic content, if the content is required to be  
75 non-pornographic.



76 i. Single-purpose community groups for public safety if  
77 the interaction with other users or account holders is generally  
78 limited to that single purpose and the community group has  
79 guidelines or policies against illegal content.

80 j. To provide career development opportunities, including  
81 professional networking, job skills, learning certifications,  
82 and job posting and application services.

83 k. Business to business software.

84 l. A teleconferencing or videoconferencing service that  
85 allows reception and transmission of audio and video signals for  
86 real time communication.

87 m. Shared document collaboration.

88 n. Cloud computing services, which may include cloud  
89 storage and shared document collaboration.

90 o. To provide access to or interacting with data  
91 visualization platforms, libraries, or hubs.

92 p. To permit comments on a digital news website, if the  
93 news content is posted only by the provider of the digital news  
94 website.

95 q. To provide or obtain technical support for a platform,  
96 product, or service.

97 r. Academic, scholarly, or genealogical research where the  
98 majority of the content that is posted or created is posted or  
99 created by the provider of the online service, website, or  
100 application and the ability to chat, comment, or interact with

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101 other users is directly related to the provider's content.

102 s. A classified ad service that only permits the sale of  
103 goods and prohibits the solicitation of personal services or  
104 that is used by and under the direction of an educational  
105 entity, including:

106 (I) A learning management system;

107 (II) A student engagement program; and

108 (III) A subject or skill-specific program.

109 (2) A social media platform shall do all of the following:

110 (a) Prohibit a minor who is younger than 16 years of age  
111 from creating a new account on the social media platform.

112 (b)1. Use reasonable age verification methods to verify  
113 the age of each account holder on the social media platform at  
114 the time a new account is created. If an account holder fails to  
115 verify his or her age, the social media platform must deny the  
116 account. The reasonable age verification method must be  
117 conducted by an independent, third-party not affiliated with the  
118 social media platform.

119 2. Personal identifying information used to verify age may  
120 not be retained once the age of an account holder or a person  
121 seeking an account has been verified. Any personal identifying  
122 information collected to verify age may not be used for any  
123 other purpose.

124 (c) For existing accounts:

125 1. Terminate any account that is reasonably known by the

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126 social media platform to be held by a minor younger than 16  
127 years of age and provide a minimum of 90 days for an account  
128 holder to dispute such termination by verifying his or her age.

129 2. Allow an account holder younger than 16 years of age to  
130 request to terminate the account. Termination must be effective  
131 within 5 business days after such request.

132 3. Allow the confirmed parent or guardian of an account  
133 holder younger than 16 years of age to request the minor's  
134 account be terminated. Termination must be effective within 10  
135 business days after such request.

136 4. Permanently delete all personal information held by the  
137 social media platform relating to the terminated account, unless  
138 there are legal requirements to maintain such information.

139 (d) If the social media platform allows minors younger  
140 than 18 years of age to create an account on the platform, the  
141 platform must include a clearly labeled, conspicuous, and  
142 readily accessible link on its Internet homepage or platform  
143 login page that:

144 1. Discloses the following social media platform policies  
145 in a manner that is clearly, concisely, prominently, and  
146 understandably written using language suited to the age of users  
147 who are younger than 18 years of age likely to routinely access  
148 the platform without unrelated, confusing, or contradictory  
149 materials:

150 a. The content moderation policies the social media

151 platform uses for content on the platform.

152 b. Whether the social media platform uses or allows the  
153 use of addictive design or deceptive pattern features, including  
154 autoplay or infinite scroll.

155 c. Whether the social media platform allows manipulated  
156 photographs or digital images to be shared on the platform.

157 d. Whether the social media platform considers the best  
158 interests of platform users who are younger than 18 years of age  
159 when designing, developing, and providing services.

160 e. The methodology the social media platform uses to  
161 consider the best interests of platform users who are younger  
162 than 18 years of age when designing, developing, and providing  
163 services.

164 f. The policies and protections the social media platform  
165 uses to protect platform users who are younger than 18 years of  
166 age against harmful behaviors, such as bullying, harassment, and  
167 threats of violence or self-harm.

168 g. Whether the social media platform collects or sells  
169 personal information of platform users who are younger than 18  
170 years of age, including personal identifiers, biometrics, and  
171 geolocation data. If such personal information is collected, the  
172 platform must disclose the type of personal information  
173 collected and the purpose of such collection. If such personal  
174 information is sold, the platform must disclose to whom the  
175 information is sold.

176 2. Provides clear access to the following:

177 a. Zip code-based references to local resources for law  
178 enforcement, suicide prevention, and domestic violence  
179 prevention services.

180 b. Reporting mechanisms related to harmful behaviors, such  
181 as bullying, harassment, and threats of violence or self-harm.

182 3. At the time of log in, and before obtaining access to  
183 the platform, requires platform users who are younger than 18  
184 years of age to read and accept a disclaimer which must be in  
185 substantially the following form:

186  
187 This application may be harmful to your mental health  
188 and may use design features that have addictive  
189 qualities or present unverified information or that  
190 may be manipulated by [insert platform name] or others  
191 for your viewing. This application may also collect  
192 your personal data to further manipulate your viewable  
193 content and may share your personal data with others.

194  
195 (3) Any violation of subsection (2) is an unfair and  
196 deceptive trade practice actionable under part II of this  
197 chapter solely by the department against a social media  
198 platform. If the department has reason to believe that a social  
199 media platform is in violation of subsection (2), the  
200 department, as the enforcing authority, may bring an action

201 against such platform for an unfair or deceptive act or  
202 practice. For the purpose of bringing an action pursuant to this  
203 section, ss. 501.211 and 501.212 do not apply. In addition to  
204 other remedies under part II of this chapter, the department may  
205 collect a civil penalty of up to \$50,000 per violation.

206 (4) (a) A social media platform that violates subparagraph  
207 (2) (c) 2. or subparagraph (2) (c) 3. for failing to terminate an  
208 account within the required time after being notified to do so  
209 by the minor account holder or a confirmed parent or guardian is  
210 liable to such Florida minor for such access, including court  
211 costs and reasonable attorney fees as ordered by the court.  
212 Claimants may be awarded up to \$10,000 in damages.

213 (b) A civil action for a claim under this subsection must  
214 be brought within 1 year after the violation.

215 (5) Any action brought under subsection (3) or subsection  
216 (4) may only be brought on behalf of a Florida minor.

217 (6) For purposes of bringing an action in accordance with  
218 subsections (3) and (4), a social media platform that allows a  
219 Florida minor younger than 16 years of age to create an account  
220 on such platform is considered to be both engaged in substantial  
221 and not isolated activities within this state and operating,  
222 conducting, engaging in, or carrying on a business, and doing  
223 business in this state and is therefore subject to the  
224 jurisdiction of the courts of this state.

225 (7) This section does not preclude any other available

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226 | remedy at law or equity.

227 |       (8) The department may adopt rules to implement this  
228 | section.

229 |       Section 2. This act shall take effect July 1, 2024.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

|                       |               |       |
|-----------------------|---------------|-------|
| ADOPTED               | <u>      </u> | (Y/N) |
| ADOPTED AS AMENDED    | <u>      </u> | (Y/N) |
| ADOPTED W/O OBJECTION | <u>      </u> | (Y/N) |
| FAILED TO ADOPT       | <u>      </u> | (Y/N) |
| WITHDRAWN             | <u>      </u> | (Y/N) |
| OTHER                 | <u>      </u> |       |

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1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Sirois offered the following:

3

4

**Amendment**

5

Remove line 117 and insert:

6

conducted by a non-governmental, independent, third-party not

7

affiliated with the





## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

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

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

| REFERENCE  | ACTION           | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|------------------|---------|--|
| 1) Regulatory Reform & Economic Development Subcommittee | 13 Y, 0 N, As CS | Wright  | Anstead                                  |
| 2) Judiciary Committee                                   |                  | 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 an 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. See Fiscal Comments.

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

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives .**

**STORAGE NAME:** h0003b.JDC

**DATE:** 1/14/2024

# 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.<sup>1</sup>

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.<sup>2</sup>

Many users come across pornography on the internet who are not seeking it, and others seek it out.<sup>3</sup> 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.<sup>4</sup>

Twenty-seven percent of young adults first view pornography before the onset of puberty and 70 percent of teens accidentally stumble upon pornography online<sup>5</sup> with trends showing teens are generally experiencing an increase in unwanted exposure to pornographic content online.<sup>6</sup> A sample of American high school students in 2021 found that 56 percent viewed pornography in 2020.<sup>7</sup>

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.<sup>8</sup> Similarly, adolescents who viewed pornography tended to display more aggression, have

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<sup>1</sup> 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).

<sup>2</sup> 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>

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 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>

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> 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.<sup>9</sup> 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;<sup>10</sup> however, they were able to identify pornography use as a strong exacerbating factor in individuals who have preexisting markers for sexual aggression.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

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

## Obscenity

"Sexual expression which is indecent but not obscene is protected by the First Amendment."<sup>16</sup> However, material that is obscene does not enjoy the same constitutional protections.<sup>17</sup> In determining whether sexual expression is obscene and thus outside the protection of the First Amendment, a court may apply the *Miller*<sup>18</sup> 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 . .

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

<sup>9</sup> 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).

<sup>10</sup> Owens, *Supra* note 1, at 107.

<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> 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](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).

<sup>14</sup> 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).

<sup>15</sup> 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%9C20th%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).

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

<sup>17</sup> *Id.*

<sup>18</sup> *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.<sup>19,20</sup>

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.”<sup>21</sup>

### 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.<sup>22</sup>

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.<sup>23</sup>

### 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.<sup>24</sup>
- 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.<sup>25</sup>
- It 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.<sup>26</sup>

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

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

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

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

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

<sup>24</sup> Federal Communications Commission, *Children’s Internet Protection Act (CIPA)*,

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

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

<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

## Age Verification

### *Age Verification Mechanisms*

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

- Alcohol and tobacco,<sup>29</sup>
- Gambling, and
- Firearms.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup>

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

- 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.

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<sup>27</sup> 47 U.S.C. § 231.

<sup>28</sup> S. 847.0138, F.S.

<sup>29</sup> 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).

<sup>30</sup> 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).

<sup>31</sup> 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).

<sup>32</sup> 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).

<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup>

However, there are numerous minimally invasive verification techniques that do not require sharing any age verification information at all with social media platforms.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup>

### *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.<sup>39</sup>

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.<sup>40</sup>

Some of these state laws have recently been challenged on First Amendment grounds.<sup>41</sup> 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.

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<sup>34</sup> 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).

<sup>35</sup> 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).

<sup>36</sup> 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).

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

<sup>38</sup> 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).

<sup>39</sup> Sashchuk, *supra* note 15; Los Angeles Blade, *supra* note 15.

<sup>40</sup> Utah Code Annotated § 78B-3-1002.

<sup>41</sup> See *Free Speech Coalition Inc. v. LeBlanc*, No. 2:23-cv-2123 (E.D. La.); <sup>41</sup> *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.<sup>42</sup> 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.<sup>43</sup>

### *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.<sup>44</sup>

In 1997, in *Reno v. American Civil Liberties Union*,<sup>45</sup> the U.S. Supreme Court held that the provision of the CDA prohibiting the transmission of indecent messages<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>

### **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.<sup>49</sup> FDUTPA was modeled after the Federal Trade Commission (FTC) Act.<sup>50</sup>

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.<sup>51</sup> The SAO may enforce violations of FDUTPA if the violations take place

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<sup>42</sup> 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).

<sup>43</sup> 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).

<sup>44</sup> 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 \(1997\) - The Free Speech Center \(mtsu.edu\)](https://www.free-speech-center.org/reno-v-american-civil-liberties-union-1997) (last visited Jan. 7, 2024).

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

<sup>46</sup> 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).

<sup>47</sup> *Reno*, 521 U.S. 844; Ronald Kahn, *supra* note 28.

<sup>48</sup> *Id.*

<sup>49</sup> Ch. 73-124, L.O.F.; s. 501.202, F.S.

<sup>50</sup> 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).

<sup>51</sup> 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.<sup>52</sup> In certain circumstances, consumers may also file suit through private actions.<sup>53</sup>

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

- Administering oaths and affirmations;
- Subpoenaing witnesses or matter; and
- Collecting evidence.<sup>54</sup>

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.<sup>55</sup>

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.<sup>56</sup>

### **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;<sup>57</sup> 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.

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

<sup>52</sup> S. 501.203(2), F.S.

<sup>53</sup> S. 501.211, F.S.

<sup>54</sup> S. 501.206(1), F.S.

<sup>55</sup> 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.

<sup>56</sup> S. 501.212(4), F.S.

<sup>57</sup> 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 an 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.<sup>58</sup> 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.

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<sup>58</sup> 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.”<sup>59</sup> Generally, “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>60</sup> The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.<sup>61</sup>

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

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<sup>59</sup> U.S. Const., amend. I.

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

<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup>

The U.S. Supreme Court regards content-based laws, which limit communication because of the message it conveys, as presumptively unconstitutional.<sup>64</sup> 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.<sup>65</sup>

As discussed above, "sexual expression which is indecent but not obscene is protected by the First Amendment."<sup>66</sup> However, material that is obscene does not enjoy the same constitutional protections.<sup>67</sup> In determining whether sexual expression is obscene and thus outside the protection of the First Amendment, a court may apply the *Miller*<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup>

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.<sup>71</sup>

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,<sup>72</sup> 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

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<sup>62</sup> 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).

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

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

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

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

<sup>67</sup> *Id.*

<sup>68</sup> *Miller v. California*, 413 U.S. 15, 23 (1973).

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

<sup>70</sup> *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 \(mtsu.edu\)](#) (last visited Jan. 7, 2024).

<sup>71</sup> *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*).

<sup>72</sup> 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.<sup>73</sup>

### *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.<sup>74</sup>

Section 230 of the federal Communications Decency Act (CDA),<sup>75</sup> 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"<sup>76</sup> and specifically prohibits all inconsistent causes of action and liability imposed under any State or local law.<sup>77</sup>

### *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."<sup>78</sup> 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.<sup>79</sup>

### *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."<sup>80</sup>

## 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.

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<sup>73</sup> *Colmenero*, 2023 WL 5655712 at 10-13.

<sup>74</sup> Cornell Law School, Legal Information Institute, *Supremacy Clause*, [https://www.law.cornell.edu/wex/supremacy\\_clause](https://www.law.cornell.edu/wex/supremacy_clause) (last visited Jan. 13, 2024).

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

<sup>76</sup> 47 U.S.C. § 230(c)(1).

<sup>77</sup> 47 U.S.C. § 230(e).

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

<sup>79</sup> *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.)

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

This analysis is drafted to the committee substitute as passed by the Regulatory Reform & Economic Development Subcommittee.



26 501.1737 Age verification for online access to materials  
 27 harmful to minors.—

28 (1) As used in this section, the term:

29 (a) "Commercial entity" includes a corporation, limited  
 30 liability company, partnership, limited partnership, sole  
 31 proprietorship, and any other legally recognized entity.

32 (b) "Department" means the Department of Legal Affairs.

33 (c) "Distribute" means to issue, sell, give, provide,  
 34 deliver, transfer, transmit, circulate, or disseminate by any  
 35 means.

36 (d) "Material harmful to minors" means any material that:

37 1. The average person applying contemporary community  
 38 standards would find, taken as a whole, appeals to the prurient  
 39 interest;

40 2. Depicts or describes, in a patently offensive way,  
 41 sexual conduct as specifically defined in s. 847.001(19); and

42 3. When taken as a whole, lacks serious literary,  
 43 artistic, political, or scientific value for minors.

44 (e) "News-gathering organization" means any of the  
 45 following:

46 1. A newspaper, news publication, or news source, printed  
 47 or published online or on a mobile platform, engaged in  
 48 reporting current news and matters of public interest, and an  
 49 employee thereof who can provide documentation of such  
 50 employment.



51        2. A radio broadcast station, television broadcast  
52 station, cable television operator, or wire service, and an  
53 employee thereof who can provide documentation of such  
54 employment.

55        (f) "Publish" means to communicate or make information  
56 available to another person or entity on a publicly available  
57 website or application.

58        (g) "Reasonable age verification methods" means any  
59 commercially reasonable method regularly used by government  
60 agencies or businesses for the purpose of age and identity  
61 verification.

62        (h) "Substantial portion" means more than 33.3 percent of  
63 total material on a website or application.

64        (2) A commercial entity that knowingly and intentionally  
65 publishes or distributes material harmful to minors on a website  
66 or application, if the website or application contains a  
67 substantial portion of material harmful to minors, must:

68        (a) Perform reasonable age verification methods to verify  
69 the age of a person attempting to access the material is 18  
70 years of age or older and prevent access to the material by a  
71 person younger than 18 years of age. The reasonable age  
72 verification method must be conducted by an independent third-  
73 party not affiliated with the commercial entity.

74        (b) Provide an easily accessible link or function on its  
75 homepage, landing page, or age verification page to allow a

76 minor user or the confirmed parent or guardian of a minor user  
77 to report unauthorized or unlawful access. Within 5 days after  
78 such report, the commercial entity must prohibit or block future  
79 access by such minor.

80 (3) A commercial entity or third party that performs  
81 reasonable age verification methods may not retain any personal  
82 identifying information of the person seeking online access to  
83 material harmful to minors any longer than is reasonably  
84 necessary to verify the age of the person. Any personal  
85 identifying information collected for age verification may not  
86 be used for any other purpose.

87 (4) (a) This section does not apply to any bona fide news  
88 or public interest broadcast, website video, report, or event  
89 and does not affect the rights of a news-gathering organization.

90 (b) An Internet service provider or its affiliates or  
91 subsidiaries, a search engine, or a cloud service provider does  
92 not violate this section solely for providing access or  
93 connection to or from a website or other information or content  
94 on the Internet or a facility, system, or network not under the  
95 provider's control, including transmission, downloading,  
96 intermediate storage, or access software, to the extent the  
97 provider is not responsible for the creation of the content of  
98 the communication which constitutes material harmful to minors.

99 (5) (a) Any violation of subsection (2) or subsection (3)  
100 is an unfair and deceptive trade practice actionable under part

101 II of this chapter solely by the department on behalf of a  
102 Florida minor against a commercial entity. If the department has  
103 reason to believe that a commercial entity is in violation of  
104 subsection (2) or subsection (3), the department, as the  
105 enforcing authority, may bring an action against the commercial  
106 entity for an unfair or deceptive act or practice. For the  
107 purpose of bringing an action pursuant to this section, ss.  
108 501.211 and 501.212 do not apply. In addition to any other  
109 remedy under part II of this chapter, the department may collect  
110 a civil penalty of up to \$50,000 per violation of this section.

111 (b) A commercial entity that violates subsection (2) for  
112 failing to prohibit or block a minor from future access to  
113 material harmful to minors after a report of unauthorized or  
114 unlawful access is liable to the minor for such access,  
115 including court costs and reasonable attorney fees as ordered by  
116 the court. Claimants may be awarded up to \$10,000 in damages. A  
117 civil action for a claim under this paragraph must be brought  
118 within 1 year after the violation.

119 (c) Any action under this subsection may only be brought  
120 on behalf of or by a Florida minor.

121 (6) For purposes of bringing an action under subsection  
122 (5), a commercial entity that publishes or distributes material  
123 harmful to minors on a website or application, if the website or  
124 application contains a substantial portion of material harmful  
125 to minors and such website or application is available to be

126 accessed in Florida, is considered to be both engaged in  
127 substantial and not isolated activities within this state and  
128 operating, conducting, engaging in, or carrying on a business  
129 and doing business in this state, and is therefore subject to  
130 the jurisdiction of the courts of this state.

131 (7) This section does not preclude any other available  
132 remedy at law or equity.

133 (8) The department may adopt rules to implement this  
134 section.

135 Section 2. This act shall take effect July 1, 2024.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

|                       |               |       |
|-----------------------|---------------|-------|
| ADOPTED               | <u>      </u> | (Y/N) |
| ADOPTED AS AMENDED    | <u>      </u> | (Y/N) |
| ADOPTED W/O OBJECTION | <u>      </u> | (Y/N) |
| FAILED TO ADOPT       | <u>      </u> | (Y/N) |
| WITHDRAWN             | <u>      </u> | (Y/N) |
| OTHER                 | <u>      </u> |       |

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1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Tramont offered the following:

3

4

**Amendment**

5

Remove line 72 and insert:

6

verification method must be conducted by a non-governmental,

7

independent, third-



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 401 Tracking Devices and Applications

**SPONSOR(S):** Overdorf

**TIED BILLS:**           **IDEN./SIM. BILLS:**

| REFERENCE                              | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| 1) Criminal Justice Subcommittee       | 18 Y, 0 N | Butcher | Hall                                     |
| 2) Justice Appropriations Subcommittee | 13 Y, 0 N | Smith   | Keith                                    |
| 3) Judiciary Committee                 |           | Butcher | Kramer                                   |

### SUMMARY ANALYSIS

A consumer tracking device is intended to help track missing items when attached to belongings such as a user's purse, keys, wallet, or luggage. As availability and use of affordable consumer tracking devices has increased, so too have concerns about the potential for nefarious uses of such technology. In recent years, there have been numerous reports of tracking devices having been planted into clothing and purses or attached to the vehicle of another person without their knowledge. In addition to tracking devices, tracking applications that are downloadable to mobile devices can also be used to follow the location or movement of another person, potentially without that person's knowledge or consent.

Unless exempted, s. 934.425, F.S., prohibits a person from knowingly installing a tracking device or tracking application on another person's property without the other person's consent. A violation of the prohibition is punishable as a second degree misdemeanor. Current law does not specifically prohibit the *placement*, as it does the installation of a tracking device or application on another person's property without his or her consent; or prohibit the unconsented *use* of a tracking device or tracking application by a person other than the one responsible for installing the device or application.

HB 401 amends s. 934.425, F.S., to prohibit a person from knowingly:

- *Placing*, in addition to installing, a tracking device or tracking application on another person's property without that person's consent; or
- Using a tracking device or tracking application to determine the location or movement of another person or another person's property without that person's consent.

The bill expands the scope of prohibited conduct to capture those persons who do not install or place a tracking device or tracking application on another person's property themselves, but who nonetheless access and use such a device or application to determine the location or movement of another person or another person's property without that person's consent.

The bill increases the penalty for a violation of s. 934.425, F.S., from a second degree misdemeanor to a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine.

The bill may have a positive indeterminate impact on jail and prison beds by expanding the scope of prohibited conduct under s. 934.425, F.S., and increasing the penalty for a violation from a second degree misdemeanor to a third degree felony, which may result in longer jail sentences and new prison admissions.

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





## Abuse of Location Tracking Technology

A consumer tracking device is intended to help users track missing items when attached to belongings such as a user's purse, keys, wallet, or luggage. In the case of a missing item, the device sends its current location back to the user, and in some cases, provides the user with directions to the device's location.<sup>6</sup> These popular devices sell from around twenty five to thirty five dollars for one unit to around one hundred dollars for a four-pack of units.<sup>7</sup>

As availability and use of affordable consumer tracking devices has increased, so too have concerns about the potential for nefarious uses of such tracking technology. In recent years, there have been numerous reports of consumer trackers being discovered having been planted into clothing and purses or attached to the vehicle of another person without their knowledge.<sup>8</sup> In response, the manufacturers of some tracking devices have made efforts to curb their misuse and make consumers aware if a device has gone out of range or if a device is away from its owner and nearby another networked device for an extended period of time.<sup>9</sup>

Additionally, some companies have developed applications that can be used by consumers to scan for nearby tracking devices.<sup>10</sup> Other companies have specifically employed anti-stalking measures in the functionality of the tracking device itself, such as requiring a user to register using multi-factor authentication, provide government identification, and acknowledge that personal information can and will be shared with law enforcement at the company's discretion to aid in the investigation and prosecution of suspected stalking.<sup>11</sup>

In addition to tracking devices, tracking applications can also be used to follow the location or movement of another person, potentially without that person's knowledge or consent. Some applications, such as Find My iPhone and other applications developed to help parents keep tabs on minor children, have legitimate uses but may be accessed by third parties without the consent of the user. Other applications are developed and marketed as surveillance applications, commonly targeting potential customers interested in the using the technology to track the movements and communications of a romantic partner.<sup>12</sup> Some tech platforms have responded to the proliferation of these applications by banning companies from advertising applications on their platforms with the express purpose of tracking and monitoring another person or their activities without their authorization.<sup>13</sup>

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<sup>6</sup> Samantha Cole, *Police Records Show Women Are Being Stalked With Apple AirTags Across the Country*, Motherboard Tech by VICE, (Apr. 6, 2022) <https://www.vice.com/en/article/y3vj3y/apple-airtags-police-reports-stalking-harassment> (last visited Jan. 11, 2024).

<sup>7</sup> Kevin Webb and Annabelle Williams, *Apple's AirTag is designed to compete with Tile's family of Bluetooth trackers - here's how they stack up*, Business Insider, (Aug. 24, 2022) <https://www.businessinsider.com/guides/tech/apple-airtags-vs-tile-tracker-bluetooth> (last visited Jan. 11, 2024).

<sup>8</sup> Emily J. Hanson and Kristin Finklea, *Stalking Concerns Raised by Bluetooth Tracking Technologies: In Brief*, Congressional Research Service, (Feb. 15, 2022), <https://crsreports.congress.gov/product/pdf/R/R47035/2> (last visited Jan. 11, 2024); Lisa Zobel, Mark Muldofsky, Nicole Mastrangelo, Deborah Kim, Anneke Ball, Rachel Wenzlaff, and Ivan Pereira, *Apple AirTags causing major security concerns over reports of stalking*, ABC News, (Jan. 20, 2023) <https://abcnews.go.com/US/apple-airtags-causing-major-security-concerns-reports-stalking/story?id=96531871> (last visited Jan. 11, 2024).

<sup>9</sup> For example, iPhone owners should receive a push alert whenever an unknown AirTag is nearby for an extended period of time and away from its owner. Reece Rogers, *Are you Being Tracked by an AirTag? Here's How to Check*, Wired, (Aug. 11, 2023) <https://www.wired.com/story/how-to-find-airtags/> (last visited Jan. 11, 2024).

<sup>10</sup> *Id.*  
<sup>11</sup> Sarah Perez, *Tile takes extreme steps to limit stalkers and thieves from using its Bluetooth trackers*, TechCrunch (Feb. 16, 2023), <https://techcrunch.com/2023/02/16/tile-takes-extreme-steps-to-limit-stalkers-and-thieves-from-using-its-bluetooth-trackers/> (last visited Jan. 11, 2024).

<sup>12</sup> Jennifer Valentino-DeVries, *Hundreds of Apps Can Empower Stalkers to Track Their Victims*, The New York Times, (May 19, 2018) <https://www.nytimes.com/2018/05/19/technology/phone-apps-stalking.html> (last visited Jan. 11, 2024).

<sup>13</sup> Zack Whittaker, *'Stalkerware' phone spying apps have escaped Google's ad ban*, TechCrunch, (Aug. 11, 2023) <https://techcrunch.com/2020/08/11/stalkerware-apps-google-ads/> (last visited Jan. 11, 2024).

## *Unlawful Installation of a Tracking Device or Application*

Unless exempted, s. 934.425, F.S., prohibits a person from knowingly installing a tracking device<sup>14</sup> or tracking application<sup>15</sup> on another person's property without the other person's consent.

Section 934.425, F.S., specifies that the prohibition does not apply to:

- A law enforcement officer as defined in s. 943.10, F.S., or any local, state, federal, or military law enforcement agency, that lawfully installs a tracking device or tracking application on another person's property as part of a criminal investigation;
- A parent or legal guardian of a minor child who installs a tracking device or tracking application on the minor child's property if:
  - The parents or legal guardians are lawfully married to each other and are not separated or otherwise living apart, and either parent or legal guardian consents to the installation of the tracking device or tracking application;
  - The parent or legal guardian is the sole surviving parent or legal guardian of the minor child;
  - The parent or legal guardian has sole custody of the minor child; or
  - The parents or legal guardians are divorced, separated, or otherwise living apart and both consent to the installation of the tracking device or tracking application;
- A caregiver of an elderly person or disabled adult, as those terms are defined in s. 825.101, F.S., if the elderly person or disabled adult's treating physician certifies that the installation of a tracking device or tracking application onto the elderly person or disabled adult's property is necessary to ensure the safety of the elderly person or disabled adult;
- A person acting in good faith on behalf of a business entity for a legitimate business purpose, except for persons engaged in private investigation, as defined in s. 493.6101, F.S.;<sup>16</sup> or
- An owner or lessee of a motor vehicle that installs, or directs the installation of, a tracking device or tracking application on such vehicle during the period of ownership or lease, provided that:
  - The tracking device or tracking application is removed before the vehicle's title is transferred or the vehicle's lease expires;
  - The new owner or lessor of the vehicle consents in writing for the tracking device or tracking application to remain installed; or
  - The owner of the vehicle at the time of the installation of the tracking device or tracking application was the original manufacturer of the vehicle.<sup>17</sup>

Additionally, s. 934.425, F.S., specifies that a person's consent to be tracked is presumed to be revoked if:

- The consenting person and the person to whom consent was given are lawfully married and one person files a petition for dissolution of marriage from the other; or
- The consenting person or the person to whom consent was given files an injunction for protection against the other person pursuant to s. 741.30, F.S., relating to domestic violence, s. 741.315, F.S., relating to foreign protection orders, s. 784.046, F.S., relating to repeat violence, sexual violence, or dating violence, or s. 784.0485, F.S., relating to stalking.<sup>18</sup>

A violation of the prohibition is punishable as a second degree misdemeanor.<sup>19</sup>

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<sup>14</sup> A "tracking device" means any device whose primary purpose is to track or identify the location or movement of an individual. S. 934.425(1)(c), F.S.

<sup>15</sup> A "tracking application" means any software program whose primary purpose is to track or identify the location or movement of an individual. S. 934.425(1)(b), F.S.

<sup>16</sup> "Private investigation" means the investigation by a person or persons for the purpose of obtaining information with reference to any of the following matters: crime or wrong done or threatened against the United States or any state or territory of the United States, when operating under express written authority of the governmental official responsible for such investigation; to identify habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or groups of persons; the credibility of witnesses or other persons; the whereabouts of missing persons, owners of unclaimed property or escheated property, or heirs to estates; the location or recovery of lost or stolen property; the causes and origin of, or responsibility for, fires, libels, slanders, losses, accidents, damage, or injuries to real or personal property; or the business of securing evidence to be used before investigating committees or boards of award or arbitration or in the trial of civil or criminal cases and the preparation thereof. S. 493.6101(17), F.S.

<sup>17</sup> S. 934.425(4)(a-e), F.S.

<sup>18</sup> S. 934.425(3)(a-b), F.S.

<sup>19</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

Current law does not specifically prohibit the *placement*, rather than the installation, of a tracking device or application on another person's property without his or her consent or prohibit the unconsented to use of a tracking device or tracking application by a person other than the one responsible for installing the device or application.

### Grounds for Issuance of a Search Warrant

Under s. 933.02, F.S., a search warrant may be issued upon the following grounds:

- When the property shall have been stolen or embezzled in violation of law:
- When any property shall have been used:
  - As a means to commit any crime;
  - In connection with gambling, gambling implements and appliances; or
  - In violation of s. 847.011, F.S., or other laws in reference to obscene prints and literature.
- When any property constitutes evidence relevant to proving that a felony has been committed:
- When property is being held or possessed:
  - In violation of any of the laws prohibiting the manufacture, sale, and transportation of intoxicating liquors;
  - In violation of the fish and game laws;
  - In violation of the laws relative to food and drug; or
  - In violation of the laws relative to citrus disease pursuant to s. 581.184, F.S.
- When the laws in relation to cruelty to animals, as provided in ch. 828, F.S., have been or are violated in any particular building or place.<sup>20</sup>

Summarizing the distinction between misdemeanor and felony crimes in relation to obtaining property via a search warrant, the Fourth District Court of Appeal has said, "property used to commit any crime—whether felony or misdemeanor—may be seized under a warrant; while property merely constituting relevant evidence of a crime may be seized only if the suspected crime is a felony."<sup>21</sup> Regarding a misdemeanor crime, "property seized can be retained only if it constitutes property actually used to commit the misdemeanors alleged as the basis for the warrant."<sup>22</sup>

Under current law, because a violation of s. 934.425, F.S., for the unlawful installation of a tracking device or application is a second degree misdemeanor, evidence such as subscriber information or application, location, or download data may fall outside the scope of property for which a law enforcement officer may obtain a search warrant and thus is unavailable to aide in a criminal investigation.

### Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code<sup>23</sup> are listed in a single offense severity ranking chart (OSRC),<sup>24</sup> which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.<sup>25,26</sup> A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense.<sup>27,28</sup> The final score

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<sup>20</sup> S. 933.02, F.S.

<sup>21</sup> *Bordo, Inc. v. State*, 627 So. 2d 561, 563 (Fla. 4th DCA 1993).

<sup>22</sup> *Id.* at 564.

<sup>23</sup> All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

<sup>24</sup> S. 921.0022, F.S.

<sup>25</sup> S. 921.0022(2), F.S.

<sup>26</sup> Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third-degree felony defaults to a level 1; an unlisted second-degree felony defaults to a level 4; an unlisted first-degree felony defaults to a level 7; an unlisted first-degree felony punishable by life defaults to a level 9; and an unlisted life felony defaults to a level 10. S. 921.0023, F.S.

<sup>27</sup> Ss. 921.0022 and 921.0024, F.S.

<sup>28</sup> A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(1), F.S.

calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.<sup>29</sup>

## Effect of Proposed Changes

HB 401 amends s. 934.425, F.S., to prohibit a person from knowingly:

- *Placing*, in addition to installing, a tracking device or tracking application on another person's property without that person's consent; or
- Using a tracking device or tracking application to determine the location or movement of another person or another person's property without that person's consent.

The bill expands the scope of prohibited conduct by capturing the unlawful *placement* of a tracking device or tracking application on another person's property, rather than just the installation of a tracking device or tracking application on another person's property. The change may clarify that in order to commit a violation a person need not be required to affix a tracking device or application to a piece of property, but also commits a violation by simply dropping such a device into another person's property, such as a purse or coat pocket.

The bill also expands the scope of prohibited conduct by also capturing those persons who do not install or place a tracking device or tracking application on another person's property themselves, but who nonetheless access and use such a device or application to determine the location or movement of another person or another person's property without that person's consent.

The bill increases the penalty for a violation of s. 934.425, F.S., from a second degree misdemeanor to a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine. However, the bill does not rank the offense on the OSRC, and as such, under s. 921.0023, F.S., the offense defaults to a level 1 offense.

Additionally, because the bill increases the penalty for a violation from a second degree misdemeanor to a third degree felony, a law enforcement officer may be able to obtain a search warrant under s. 933.02, F.S., for property constituting evidence relevant to proving that a felony has been committed. As such, law enforcement may be able to obtain a search warrant to access evidence such as subscriber information and application, location, and download data from a tracking device, which may be essential to properly investigating unlawful tracking violations.

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

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 934.425, F.S., relating to installation of tracking devices or tracking applications; exceptions; penalties.

**Section 2:** Provides an effective date of October 1, 2024.

---

<sup>29</sup> If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a non-prison sanction, such as a county jail sentence, probation, or community control. S. 921.0024(2), F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

The bill may have a positive indeterminate impact on jail and prison beds by expanding the scope of prohibited conduct under s. 934.425, F.S., and increasing the penalty for a violation from a second degree misdemeanor to a third degree felony, which may result in longer jail sentences and new prison admissions.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

1                                   A bill to be entitled  
 2           An act relating to tracking devices and applications;  
 3           amending s. 934.425, F.S.; prohibiting the placement  
 4           or use of a tracking device or tracking application to  
 5           determine the location or movement of another person  
 6           or another person's property without that person's  
 7           consent; providing criminal penalties; providing an  
 8           effective date.

9  
 10 Be It Enacted by the Legislature of the State of Florida:

11  
 12           Section 1. Section 934.425, Florida Statutes, is amended  
 13 to read:

14           934.425 Installation or use of tracking devices or  
 15 tracking applications; exceptions; penalties.—

16           (1) As used in this section, the term:

17           (a) "Business entity" means any form of corporation,  
 18 partnership, association, cooperative, joint venture, business  
 19 trust, or sole proprietorship that conducts business in this  
 20 state.

21           (b) "Tracking application" means any software program  
 22 whose primary purpose is to track or identify the location or  
 23 movement of an individual.

24           (c) "Tracking device" means any device whose primary  
 25 purpose is to reveal its location or movement by the

26 | transmission of electronic signals.

27 | (d) "Person" means an individual but does not include a  
28 | business entity.

29 | (2) Except as provided in subsection (4), a person may not  
30 | knowingly:

31 | (a) Install or place a tracking device or tracking  
32 | application on another person's property without that ~~the other~~  
33 | person's consent; or

34 | (b) Use a tracking device or tracking application to  
35 | determine the location or movement of another person or another  
36 | person's property without that person's consent.

37 | (3) For purposes of this section, a person's consent is  
38 | presumed to be revoked if:

39 | (a) The consenting person and the person to whom consent  
40 | was given are lawfully married and one person files a petition  
41 | for dissolution of marriage from the other; or

42 | (b) The consenting person or the person to whom consent  
43 | was given files an injunction for protection against the other  
44 | person pursuant to s. 741.30, s. 741.315, s. 784.046, or s.  
45 | 784.0485.

46 | (4) This section does not apply to:

47 | (a) A law enforcement officer as defined in s. 943.10, or  
48 | any local, state, federal, or military law enforcement agency,  
49 | that lawfully installs or places a tracking device or tracking  
50 | application on another person's property as part of a criminal

51 investigation.

52 (b) A parent or legal guardian of a minor child who  
53 installs or places a tracking device or tracking application on  
54 the minor child's property if:

55 1. The parents or legal guardians are lawfully married to  
56 each other and are not separated or otherwise living apart, and  
57 either parent or legal guardian consents to the installation or  
58 placement of the tracking device or tracking application;

59 2. The parent or legal guardian is the sole surviving  
60 parent or legal guardian of the minor child;

61 3. The parent or legal guardian has sole custody of the  
62 minor child; or

63 4. The parents or legal guardians are divorced, separated,  
64 or otherwise living apart and both consent to the installation  
65 or placement of the tracking device or tracking application.

66 (c) A caregiver of an elderly person or disabled adult, as  
67 those terms are defined in s. 825.101, if the elderly person's  
68 or disabled adult's treating physician certifies that the  
69 installation or placement of a tracking device or tracking  
70 application onto the elderly person's or disabled adult's  
71 property is necessary to ensure the safety of the elderly person  
72 or disabled adult.

73 (d) A person acting in good faith on behalf of a business  
74 entity for a legitimate business purpose. This paragraph does  
75 not apply to a person engaged in private investigation, as



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76 defined in s. 493.6101, on behalf of another person unless such  
77 activities would otherwise be exempt under this subsection if  
78 performed by the person engaging the private investigator.

79 (e) An owner or lessee of a motor vehicle that installs or  
80 places, or directs the installation or placement of, a tracking  
81 device or tracking application on such vehicle during the period  
82 of ownership or lease, provided that:

83 1. The tracking device or tracking application is removed  
84 before the vehicle's title is transferred or the vehicle's lease  
85 expires;

86 2. The new owner of the vehicle, in the case of a sale, or  
87 the lessor of the vehicle, in the case of an expired lease,  
88 consents in writing to the nonremoval of the tracking device or  
89 tracking application; or

90 3. The owner of the vehicle at the time of the  
91 installation or placement of the tracking device or tracking  
92 application was the original manufacturer of the vehicle.

93 (5) A person who violates this section commits a felony  
94 ~~misdemeanor~~ of the third ~~second~~ degree, punishable as provided  
95 in s. 775.082, ~~or~~ s. 775.083, or s. 775.084.

96 Section 2. This act shall take effect October 1, 2024.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

|                       |               |       |
|-----------------------|---------------|-------|
| ADOPTED               | <u>      </u> | (Y/N) |
| ADOPTED AS AMENDED    | <u>      </u> | (Y/N) |
| ADOPTED W/O OBJECTION | <u>      </u> | (Y/N) |
| FAILED TO ADOPT       | <u>      </u> | (Y/N) |
| WITHDRAWN             | <u>      </u> | (Y/N) |
| OTHER                 | <u>      </u> |       |

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1 Committee/Subcommittee hearing bill: Criminal Justice  
 2 Subcommittee

3 Representative Overdorf offered the following:

4

5 **Amendment (with title amendment)**

6 Remove lines 49-95 and insert:

7 that lawfully installs, places, or uses a tracking device or  
 8 tracking application on another person's property as part of a  
 9 criminal investigation.

10 (b) A parent or legal guardian of a minor child who  
 11 installs, places, or uses a tracking device or tracking  
 12 application on the minor child's property if:

13 1. The parents or legal guardians are lawfully married to  
 14 each other and are not separated or otherwise living apart, and  
 15 either parent or legal guardian consents to the installation,

Amendment No. 1

16 placement, or use of the tracking device or tracking  
17 application;

18 2. The parent or legal guardian is the sole surviving  
19 parent or legal guardian of the minor child;

20 3. The parent or legal guardian has sole custody of the  
21 minor child; or

22 4. The parents or legal guardians are divorced, separated,  
23 or otherwise living apart and both consent to the installation,  
24 placement, or use of the tracking device or tracking  
25 application.

26 (c) A caregiver of an elderly person or disabled adult, as  
27 those terms are defined in s. 825.101, if the elderly person's  
28 or disabled adult's treating physician certifies that the  
29 installation or placement of a tracking device or tracking  
30 application onto the elderly person's or disabled adult's  
31 property or the use of a tracking device or tracking application  
32 to determine the location or movement of the elderly person or  
33 disabled person or his or her property is necessary to ensure  
34 the safety of the elderly person or disabled adult.

35 (d) A person acting in good faith on behalf of a business  
36 entity for a legitimate business purpose. This paragraph does  
37 not apply to a person engaged in private investigation, as  
38 defined in s. 493.6101, on behalf of another person unless such  
39 activities would otherwise be exempt under this subsection if  
40 performed by the person engaging the private investigator.

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## Amendment No. 1

41 (e) An owner or lessee of a motor vehicle that installs,  
42 places, or uses, or directs the installation, placement, or use  
43 of, a tracking device or tracking application on such vehicle  
44 during the period of ownership or lease, provided that:

45 1. The tracking device or tracking application is removed  
46 before the vehicle's title is transferred or the vehicle's lease  
47 expires;

48 2. The new owner of the vehicle, in the case of a sale, or  
49 the lessor of the vehicle, in the case of an expired lease,  
50 consents in writing to the nonremoval of the tracking device or  
51 tracking application; or

52 3. The owner of the vehicle at the time of the  
53 installation or placement of the tracking device or tracking  
54 application was the original manufacturer of the vehicle.

55 (5) A person who violates this section commits a felony  
56 ~~misdemeanor~~ of the third ~~second~~ degree, punishable as provided  
57 in s. 775.082, ~~or~~ s. 775.083, or s. 775.084.

58 Section 2. Paragraph (y) of subsection (1) of section  
59 493.6118, Florida Statutes, is amended to read:

60 493.6118 Grounds for disciplinary action.—

61 (1) The following constitute grounds for which  
62 disciplinary action specified in subsection (2) may be taken by  
63 the department against any licensee, agency, or applicant  
64 regulated by this chapter, or any unlicensed person engaged in  
65 activities regulated under this chapter:

Amendment No. 1

66 (y) Installation, placement, or use of a tracking device  
67 or tracking application in violation of s. 934.425.

68

69 -----

70

**T I T L E A M E N D M E N T**

71

Remove line 7 and insert:

72

consent; providing criminal penalties, amending s. 493.6118,

73

F.S.; conforming a provision to changes made by the act;

74

providing an



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 531 Traveling Across County Lines to Commit Criminal Offenses

**SPONSOR(S):** Snyder

**TIED BILLS:** IDEN./SIM. BILLS: SB 538

| REFERENCE                              | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| 1) Criminal Justice Subcommittee       | 14 Y, 2 N | Leshko  | Hall                                     |
| 2) Justice Appropriations Subcommittee | 10 Y, 4 N | Smith   | Keith                                    |
| 3) Judiciary Committee                 |           | Leshko  | Kramer                                   |

### SUMMARY ANALYSIS

Under s. 812.014, F.S., a person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either: temporarily or permanently deprive the other person of a right to the property or a benefit from the property; or appropriate the property to his or her own use or to the use of any person not entitled to the use of such property. Theft offense levels are generally categorized based on the value of the property stolen. If the property is valued at:

- \$100,000 or more, the offender commits grand theft in the first degree, a first-degree felony.
- \$20,000 or more, but less than \$100,000, the offender commits grand theft in the second degree, a second-degree felony.
- \$750 or more, but less than \$20,000, the offender commits grand theft of the third degree, a third-degree felony.
- \$100 or more, but less than \$750, and is taken from a dwelling or unclosed curtilage of a dwelling, the offender commits grand theft of the third degree, a third-degree felony.

Forcible felonies, as defined in s. 776.08, F.S., include treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

Under s. 843.22, F.S., a burglary offense may be reclassified one degree higher and re-ranked one level above the ranking specified in the offense severity ranking chart (OSRC) when the person committing the burglary travels any distance with the intent to commit the burglary in a county that is not his or her county of residence. A person who is arrested for a burglary offense that is subject to reclassification under s. 843.22, F.S., cannot be released on bail until he or she appears for a first appearance hearing and a court determines bond.

HB 531 amends s. 843.22, F.S., to reclassify the penalty for all forcible felonies and grand theft offenses when the offense is committed by an offender who travels any distance with the intent to commit the forcible felony or grand theft in a county other than his or her county of residence. The bill also specifies that a forcible felony or grand theft that is reclassified under the bill is ranked one level above the ranking normally specified in the OSRC for the offense committed. Additionally, the bill prohibits a person who is arrested for a forcible felony or grand theft offense that is subject to reclassification under s. 843.22, F.S., from being released on bail until he or she appears for a first appearance hearing and a court determines bond.

The bill may have a positive indeterminate impact on jail and prison beds by expanding the offenses eligible for reclassification under s. 843.22, F.S., which may result in more jail and prison admissions and more offenders being held in jail prior to first appearance.

The bill provides an effective date of upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Grand Theft

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to the property or a benefit from the property<sup>1</sup>; or
- Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.<sup>2</sup>

Section 812.014, F.S., defines theft offenses and generally categorizes the offense level based on the value of the property stolen. Whether a theft is a misdemeanor or a felony may also depend on the offender's prior history of theft convictions or the type of property stolen. The offense levels for theft crimes based on property value thresholds are classified as follows:

|             | Property Value   | Offense Level                          |
|-------------|--|--|
| Grand Theft | ≥ \$100,000  | First-degree felony <sup>3</sup>       |
|             | ≥ \$20,000, but < \$100,000  | Second-degree felony <sup>4</sup>      |
|             | ≥ \$10,000, but < \$20,000   | Third-degree felony <sup>5</sup>       |
|             | ≥ \$5,000, but < \$10,000  | Third-degree felony                    |
|             | ≥ \$750, but < \$5,000   | Third-degree felony                    |
|             | ≥ \$100, but < \$750 if taken from a dwelling or unenclosed curtilage <sup>6</sup> of a dwelling | Third-degree felony                    |
| Petit Theft | ≥ \$100, but < \$750   | First-degree misdemeanor <sup>7</sup>  |
|             | < \$100  | Second-degree misdemeanor <sup>8</sup> |

Additionally, s. 812.014, F.S., increases the severity of a petit theft offense if a person has one or more prior theft convictions. Petit theft committed by a person with a previous theft conviction is a first-degree misdemeanor.<sup>9</sup> Petit theft committed by a person with two or more previous theft convictions is a third-degree felony.<sup>10</sup>

##### Forcible Felonies

Under s. 776.08, F.S., forcible felonies include:

<sup>1</sup> S. 812.014(1)(a), F.S.

<sup>2</sup> S. 812.014(1)(b), F.S.

<sup>3</sup> A first-degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, and 775.084, F.S.

<sup>4</sup> A second-degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, and 775.084, F.S.

<sup>5</sup> A third-degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, and 775.084, F.S.

<sup>6</sup> "Unenclosed curtilage of a dwelling" means the unenclosed land or grounds, or any outbuildings, directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling. S. 810.09(1)(b), F.S.

<sup>7</sup> A first-degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>8</sup> A second-degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

<sup>9</sup> S. 812.014(3)(b), F.S.

<sup>10</sup> S. 812.014(3)(c), F.S.



- Treason (a first-degree felony);<sup>11</sup>
- Murder (ranges from a second-degree felony to a capital felony);<sup>12</sup>
- Manslaughter (a second or first-degree felony);<sup>13</sup>
- Sexual battery (ranges from a second-degree felony to a capital felony);<sup>14</sup>
- Carjacking (a first-degree felony);<sup>15</sup>
- Home-invasion robbery (a first-degree felony);<sup>16</sup>
- Robbery (a second or first-degree felony);<sup>17</sup>
- Burglary (ranges from a third-degree felony to a first-degree felony);<sup>18</sup>
- Arson (a second or first-degree felony);<sup>19</sup>
- Kidnapping (a first-degree or life felony);<sup>20</sup>
- Aggravated assault (a third-degree felony);<sup>21</sup>
- Aggravated battery (a second-degree felony);<sup>22</sup>
- Aggravated stalking (a third-degree felony);<sup>23</sup>
- Aircraft piracy (a first-degree felony);<sup>24</sup>
- Unlawful throwing, placing, or discharging of a destructive device or bomb (ranges from a third-degree felony to a capital felony);<sup>25</sup> and
- Any other felony which involves the use or threat of physical force or violence against any individual.<sup>26</sup>

### Traveling Across County Lines with Intent to Commit a Burglary

Under s. 843.22, F.S., a burglary offense is reclassified one degree higher and re-ranked one level above the ranking specified in the offense severity ranking chart when the offender committing the burglary travels any distance with the intent to commit the burglary in a county that is not his or her county of residence as follows:<sup>27</sup>

- A felony of the third-degree is reclassified to a felony of the second-degree.
- A felony of the second-degree is reclassified to a felony of the first-degree.
- A felony of the first-degree is reclassified to a life felony.<sup>28</sup>

A person commits burglary by:<sup>29</sup>

- Entering a dwelling, structure, or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the person's entry is licensed or invited; or
- Remaining in a dwelling, structure, or conveyance:
  - Surreptitiously, with the intent to commit an offense therein;
  - After permission to remain is withdrawn, with the intent to commit an offense therein; or
  - To commit or attempt to commit a forcible felony.<sup>30</sup>

---

<sup>11</sup> S. 876.32, F.S.

<sup>12</sup> Ss. 782.04, 782.065, and 782.09, F.S.

<sup>13</sup> S. 782.07, F.S.

<sup>14</sup> S. 794.011, F.S.

<sup>15</sup> S. 812.133, F.S.

<sup>16</sup> S. 812.135, F.S.

<sup>17</sup> S. 812.13, F.S.

<sup>18</sup> S. 810.02, F.S.

<sup>19</sup> S. 806.01, F.S.

<sup>20</sup> S. 787.01, F.S.

<sup>21</sup> S. 784.021, F.S.

<sup>22</sup> S. 784.045, F.S.

<sup>23</sup> S. 784.048, F.S.

<sup>24</sup> S. 860.16, F.S.

<sup>25</sup> Ss. 790.161 and 790.1615, F.S.

<sup>26</sup> S. 776.08, F.S.

<sup>27</sup> S. 843.22(2), F.S.

<sup>28</sup> A capital felony cannot be reclassified. See *Miller v. State*, 438 So. 2d 83 (4th DCA 1983).

<sup>29</sup> S. 810.02, F.S.

<sup>30</sup> S. 810.02(1)(b), F.S.

While a burglary offense is always classified as a felony, the felony offense level may change according to the offense's specific circumstances.<sup>31</sup>

Under s. 843.22, F.S., a person's "county of residence" means the county in which he or she resides within Florida, and evidence of a person's county of residence may include, but is not limited to:

- The address on a person's driver license or state identification card;
- Records of real property or mobile home ownership;
- Records of a lease agreement for residential property;
- The county in which a person's motor vehicle is registered;
- The county in which a person is enrolled in an educational institution; and
- The county in which a person is employed.<sup>32</sup>

A person who is arrested for a burglary offense that is subject to reclassification under s. 843.22, F.S., cannot be released on bail until he or she appears for a first appearance hearing and a court determines bond.<sup>33</sup>

The Florida Department of Law Enforcement's Computerized Criminal History (CCH) data indicates that from January 1, 2014, through August 2023, 44 arrests for a violation of s. 843.22, F.S., were made, two prosecutions were pending, and one person has been convicted for a burglary offense enhanced under s. 843.22, F.S., statewide.<sup>34, 35</sup>

### Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code<sup>36</sup> are listed in a single offense severity ranking chart (OSRC),<sup>37</sup> which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.<sup>38, 39</sup> A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense.<sup>40, 41</sup> The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.<sup>42</sup>

### **Effect of Proposed Changes**

HB 531 amends s. 843.22, F.S., to reclassify the penalty for all forcible felonies and grand theft offenses when the offense is committed by an offender who travels any distance with the intent to commit the forcible felony or grand theft in a county other than his or her county of residence. The bill

---

<sup>31</sup> S. 810.02(2)-(4), F.S.

<sup>32</sup> S. 843.22(1)(a), F.S.

<sup>33</sup> S. 903.046(2)(l), F.S.

<sup>34</sup> However, Florida Statute is an optional field in the arrest data; as such, 12.7% of arrests in the CCH data for the time period reported do not include a statutory reference. Florida Department of Law Enforcement, *CCH Data for Section 843.22, Florida Statutes* (on file with the House Criminal Justice Subcommittee).

<sup>35</sup> While an offender may be charged with a particular offense or enhancement by a law enforcement officer at the time of his or her arrest, the prosecutor has the discretion to determine which offenses or enhancements with which to formally charge a person, based on his or her assessment of the evidence and consideration of whether or not certain charges or enhancements can be proven to a jury beyond a reasonable doubt.

<sup>36</sup> All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

<sup>37</sup> S. 921.0022, F.S.

<sup>38</sup> S. 921.0022(2), F.S.

<sup>39</sup> Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third-degree felony defaults to a level 1; an unlisted second-degree felony defaults to a level 4; an unlisted first-degree felony defaults to a level 7; an unlisted first-degree felony punishable by life defaults to a level 9; and an unlisted life felony defaults to a level 10. S. 921.0023, F.S.

<sup>40</sup> Ss. 921.0022 and 921.0024, F.S.

<sup>41</sup> A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(1), F.S.

<sup>42</sup> If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a non-prison sanction, such as a county jail sentence, probation, or community control. S. 921.0024(2), F.S.

also specifies that a forcible felony or grand theft that is reclassified under the bill is ranked one level above the ranking normally specified in the OSRC for the offense committed.

The bill also prohibits a person who is arrested for a forcible felony or grand theft offense that is subject to reclassification under s. 843.22, F.S., from being released on bail until he or she appears for a first appearance hearing and a court determines bond.

The bill provides an effective date of upon becoming a law.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 843.22, F.S., relating to traveling across county lines with intent to commit a burglary.

**Section 2:** Provides an effective date of upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill may have a positive indeterminate impact on jail and prison beds by expanding the offenses eligible for reclassification when an offender travels across county lines with intent to commit one of the specified offenses, which may result in more jail and prison admissions and more offenders being held in jail prior to first appearance.

**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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**



26 registered.~~;~~

27 (e)5. The county in which a person is enrolled in an  
28 educational institution.~~;~~ ~~and~~

29 (f)6. The county in which a person is employed.

30 ~~(b) "Burglary" means burglary as defined in s. 810.02,~~  
31 ~~including an attempt, solicitation, or conspiracy to commit such~~  
32 ~~offense.~~

33 (2) If a person who commits a grand theft or a forcible  
34 felony, as defined in s. 776.08, ~~burglary~~ travels any distance  
35 with the intent to commit the offense ~~burglary~~ in a county in  
36 this state other than the person's county of residence, the  
37 degree of the offense ~~burglary~~ shall be reclassified to the next  
38 higher degree. For purposes of sentencing under chapter 921 and  
39 determining incentive gain-time eligibility under chapter 944,  
40 an offense a ~~burglary~~ that is reclassified under this section is  
41 ranked one level above the ranking specified in s. 921.0022 or  
42 s. 921.0023 for the offense ~~burglary~~ committed.

43 Section 2. This act shall take effect upon becoming a law.