

Date of Hearing: April 16, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Rebecca Bauer-Kahan, Chair

AB 3080 (Alanis) – As Amended March 21, 2024

AS PROPOSED TO BE AMENDED

SUBJECT: Age verification: obscene and indecent material

SYNOPSIS

The proposition behind this author-sponsored bill is straightforward and intuitive: just as children are not allowed to buy pornography in a brick-and-mortar store, so too should they be prevented from accessing it online. But the bill's means of doing so—a requirement, enforceable by a private right of action, that websites trafficking in “materials harmful to children” use age-verification technology—poses logistical and legal challenges, arguably placing at odds this Committee's dual priorities of consumer protection and privacy.

A number of other states—Arkansas, Mississippi, Montana, North Carolina, Texas, Utah, Virginia, and most recently Kentucky—have adopted similar age verification requirements aimed at pornographic websites, based on model legislation from the Center For Renewing America, a socially conservative think tank. These efforts have generated concerns over privacy, internet freedom, and free speech. In Arizona, Governor Katie Hobbs recently vetoed such a bill, stating that any solution should “work within the bounds of the First Amendment, which this bill does not.” Meanwhile, major pornography sites, such as Pornhub, have blocked users in these states from visiting their sites, leading to spikes in searches for virtual private networks, which enable users to mask their geographic location.

Supporters include several organizations, such as California Family Council, Family Policy Alliance, and the Institute for Family Studies, who point to the many harms that online pornography can inflict on minors, including how it warps perceptions of what healthy sex looks like—leading to sexual violence against young women. They also point to correlations between the rise of online consumption of pornography and the increase in sex trafficking, child pornography, and sexual abuse.

Opponents include privacy and free speech advocates, organizations that promote reproductive freedom and the interests of LGBTQ+ individuals, and the adult content industry. They echo the larger debate about these legislative efforts, question the efficacy of age-verification technology, and raise alarm about its privacy tradeoffs. Additionally, they argue that the bill, through vaguely defined terms, reaches not just legal content but also educational resources and communal spaces that are essential for vulnerable communities.

Committee amendments overhaul the bill by deleting its contents and situating a more narrowly-casted version in an existing age-verification scheme applicable to certain products and services that are illegal to sell to minors.

If the bill passes this Committee, it will next be heard by the Judiciary Committee.

SUMMARY: Requires a covered platform that publishes or distributes “material harmful to minors”—defined as material that is indecent, obscene, or child pornography—to perform reasonable age verification methods and prevent access by minors to the materials. Subjects violations to a private right of action by any individual. Specifically, **this bill:**

- 1) Requires a covered platform that publishes or distributes material harmful to minors to perform reasonable age verification methods to verify the age of each individual attempting to access the material and to prevent access by minors to the material.
- 2) Provides that reasonable age verification methods include specified government-issued identification, a credit or debit card, bank account information, and any other means or method that reliably and accurately can determine whether the user is a minor.
- 3) Prohibits covered platforms from retaining any identifying information of the individual after access has been granted to the material.
- 4) Provides that various types of agreements that are contrary to the bill’s provisions are void and unenforceable.
- 5) Provides that enforcement of the bill is limited to private right of actions. Such actions may be brought by the parent or legal guardian of a minor for a violation of the bill, or by any individual after access to material harmful to minors has been granted to the individual.
- 6) Contains the following definitions:
 - a. “Covered platform” means an entity for which all of the following are true:
 - i. The entity makes available an internet website;
 - ii. It is in the regular course of the trade or business of the entity to create, host, or make available material harmful to minors; and
 - iii. The material harmful to minors is provided by the entity, user, or other information content provider with the objective of earning a profit.
 - b. “Material harmful to minors” means any visual media that is indecent, obscene, or child pornography.
 - c. “Indecent” means any image, video, audio recording, audiovideo file, film, written material, document, software, data file, scripting language, computer code, game, virtual reality technology, interactive and noninteractive streaming service, interactive and noninteractive streaming software, and downloadable application that, consistent with referenced Federal Communications Commission regulations, meets any of the following conditions:
 - i. Would be found by the average person, applying contemporary statewide standards, to be generally harmful to minors;
 - ii. Depicts, describes, exposes, or presents sexual conduct in a patently offensive way; or
 - iii. Taken as a whole, lacks serious literary, artistic, or scientific value for the purpose of educating minors.
 - d. “Obscene” means any image, video, audio recording, audiovideo file, film, written material, document, software, data file, scripting language, computer code, game,

- virtual reality technology, interactive and noninteractive streaming service, interactive and noninteractive streaming software, and downloadable application that, consistent with *Miller v. California* (1973) 413 U.S. 15, meets any of the following conditions:
- i. Would be found by the average person, applying contemporary statewide standards, to appeal to the prurient interest;
 - ii. Depicts, describes, exposes, or presents sexual conduct in a patently offensive way; or
 - iii. Taken as a whole, lacks serious literary, artistic, or scientific value.
- 7) Specifies that it does not apply to the extent it violates federal law and various provisions of the federal constitution. Contains a severability clause.

EXISTING LAW:

- 1) Requires sellers of products or services that are illegal to sell to minors to take reasonable steps to ensure that the purchaser is of legal age at the time of the purchase or delivery, including but not limited to verifying the age of the purchaser. (Civ. Code § 1798.99.1(a).)
- 2) Provides that reasonable steps include:
 - a. The provision of a government-issued identification, subject to all laws governing retention, use, and disclosure of personally identifiable information,
 - b. Requiring the purchaser to use a nonprepaid credit card for an online purchase, or
 - c. Implementing a system that restricts individuals with accounts designated as minor accounts from purchasing the prohibited products. (Civ. Code § 1798.99.1(a)(2).)
- 3) Prohibits a person or business subject to 1) from retaining, using, or disclosing any information it receives from a purchaser or recipient in an effort to verify age for any purpose other than as required by law. (Civ. Code § 1798.99.1(a)(6).)
- 4) Subjects violators of 1) to a civil penalty of up to \$7500 in actions brought by public prosecutors. (Civ. Code § 1798.99.1(d).)

FISCAL EFFECT: As currently in print, this bill is keyed nonfiscal.

COMMENTS:

- 1) **Author's statement.** The author writes:

Over the past decade, a remarkable shift has occurred: today's youth have unlimited access to pornographic content around the clock. Smartphones have rendered explicit sexual imagery pervasive, discreet, and easily accessible. Children often encounter this material without seeking it, with social media frequently serving as the gateway to pornographic websites. Many of the filters parents use to protect their children from such content have workarounds and glitches.

Pornography adversely affects the developing brains of children, hindering their growth. Studies indicate that it impacts users similarly to a drug, leading to addiction, altering neural connections, and diminishing the prefrontal cortex's ability to regulate executive functions

and control impulses. Furthermore, it has degraded, and in numerous instances, undermined, the dynamics between genders. Some studies have even shown correlations between the rise of consumption of porn and the increase in sex trafficking, child pornography, and sexual abuse. California has long been on the forefront of legislation that aims to protect children from abuse and exploitation, yet, not restricting access to pornographic content leaves California minors at risk of psychological damage that could last a lifetime.

Just like retail and restaurant establishments are required to make a reasonable effort to verify the age of customers buying alcohol to prevent the negative effects on minors, AB 3080 prevents mental, emotional, physical, and developmental harm to California minors by requiring websites containing obscene and indecent material to adopt and operate reasonable age verification measures to ensure that users accessing the platform are not minors.

2) Online pornography’s harms to minors. Supporters and opponents alike agree that minors should be protected from content that is not age-appropriate. The harms of online pornography to minors are well documented. Common Sense Media reports “that the majority of teen respondents age 13–17 have watched pornography online—and some have seen it by age 10 or younger. And while some have discovered it accidentally, a significant number of teens said they were viewing online pornography intentionally on a regular basis.”¹ The report notes that pornography can be part of a healthy exploration of sex, particularly for LGBTQ+ teens. But too often “exposure to pornography will influence unrealistic or even dangerous representations of what healthy sexual relationships look like.”² In particular, 52% “had seen pornography depicting what appears to be rape, choking, or someone in pain.”³

A recent *New York Times* article entitled “The Troubling Trend in Teen Sex” described a study finding that nearly two-thirds of the students at a major Midwestern university had experienced “rough sex,” particularly sexual strangulation, which was rarely consensual. Over the past four years, “[t]he rate of those women who said they were between the ages of 12 and 17 the first time that happened shot up to 40 percent from one in four.” The article connected this trend directly to the availability of free online pornography:

Sexual strangulation, nearly always of women in heterosexual pornography, has long been a staple on free sites, those default sources of sex ed for teens. As with anything else, repeat exposure can render the once appalling appealing. It’s not uncommon for behaviors to be normalized in porn, move within a few years to mainstream media, then, in what may become a feedback loop, be adopted in the bedroom or the dorm room.⁴

Writing in support, the California Catholic Conference writes:

Minors exposed to pornography are more likely to experience depression, anxiety, loneliness, worse academic performance, and poorer overall mental health. Consuming pornography can also damage development of children’s prefrontal cortex, the problem solving center of the brain, leading to impulsivity, irrational behavior, executive dysfunction, and even addiction.

¹ Common Sense Media, *Teens and Pornography* (January 10, 2023) [Teens and Pornography | Common Sense Media](#).

² *Ibid.*

³ *Id.* at p. 7.

⁴ Orenstein, *The Troubling Trend in Teenage Sex* (Apr. 12, 2024) *New York Times*, [Opinion | The Troubling Trend in Teenage Sex - The New York Times \(nytimes.com\)](#).

Minors often feel pressure to imitate what they view in porn, reinforcing gender stereotypes, impossible standards of body image, and unhealthy expectations of relationships.

Pornography messages to children that partners are objects for use, and that the sexism, racism, physical and sexual violence depicted are acceptable forms of behavior. As a result, adolescent pornography consumption is associated with more sexist attitudes, greater acceptance of sexual coercion, increased sexual aggression, and perpetration of sexual violence.

3) **Related efforts.** A number of other states—Arkansas, Mississippi, Montana, North Carolina, Texas, Utah, Virginia, and most recently Kentucky—have adopted age-verification requirements aimed at pornographic websites, based on model legislation from the Center For Renewing America, a socially conservative think tank.⁵ These efforts have generated concerns over privacy, internet freedom, and free speech. In Arizona, Governor Katie Hobbs recently vetoed such a bill, stating that any solution should “work within the bounds of the First Amendment, which this bill does not.”⁶ Meanwhile, major pornography sites, such as Pornhub, have blocked users in these states from visiting their sites, leading to spikes in searches for virtual private networks, which enable users to mask their geographic location.⁷

Here in California, AB 1501 (Hoover, 2023) would have required a commercial entity that knowingly and intentionally publishes or distributes sexually explicit material on the internet from a sexually explicit website to use an age-verification method that prevents minors from accessing sexually explicit material. The bill was referred to this committee but was not heard.

4) **Age-verification concerns.** This bill requires a covered platform that publishes or distributes “material harmful to minors” to perform reasonable age-verification methods and prevent access by minors to the materials. The bill prohibits covered platforms from retaining any identifying information of the individual after access has been granted to the material.

The Age Verification Providers Association, although neutral on the bill, writes to comment about “the ease of use of the wide variety of methods of age verification, and the data minimization designed into these approaches so personally identifiable data need never be retained.” They state that “reasonable age verification methods” include:

Remote electronic identification verification technology (eIDVT) – government issued physical identity documents such as passports or driving licenses are scanned as an image using the user’s mobile phone camera or webcam, or, in some cases where this is included, a computer chip in the document can be read by a smartphone. The user is asked to provide a live selfie image which can then be electronically compared to the image from the ID, and provided the two match, then the age information is recorded and can then be used as the basis of age verification.

[...]

⁵ Center for Renewing America, *Combatting Obscenity on the Internet*, [Combating Obscenity on the Internet: A Legal and Legislative Path Forward | The Center for Renewing America \(americarenewing.com\)](https://www.americarenewing.com)

⁶ Barchenger, *Arizona will not require age verification for porn sites after Governor vetoes GOP bill* (Apr. 8, 2024) Arizona Republic, <https://www.msn.com/en-us/news/politics/arizona-will-not-require-age-verification-for-porn-sites-after-governor-vetoes-gop-bill/ar-BB1linhy>.

⁷ Brown, *Pornhub Pulls Out of Seventh State* (Mar. 18, 2024), Reason.com, [Pornhub Pulls Out of Texas Because of Age Verification Law \(reason.com\)](https://reason.com).

Online banking integration – Some AV providers have reached agreement with banks to allow a customer to log into their online banking and give consent for the bank to confirm their date of birth to the AV provider.

Credit Reports and other transactional databases – A user can give consent for an AV provider to check with Credit Report bureau if the age they are claiming is accurate. Typically, the user will have to give some further reassurance that they are the person whose credit report they are claiming belongs to them; for example, knowing about some recent payments they have made. Other authoritative databases can play a similar role, with their own approaches to authentication of the user claiming the age data relates to them.

Facial age estimation – through machine learning, algorithms can now predict to within 1 ½ years mean average error the age of a user from a selfie image. The National Institute of Standards and Technology (NIST) have been testing competing solutions from providers and are expected to publish their findings this week, prior to the Committee’s hearing. While some people have expressed concerns about adults sharing a selfie image for this purposes, it should be noted that the estimation can be made locally on the user’s own phone or PC, so the image need never be shared with a third party. Given there is a margin for error, typically this would be made available as an option for users who are several years over 18 – for example, 23 – when it is statistically proven that the vast majority of minors under 18 would not be estimated to look at least 23. Users who are closer to 18 will need to use an alternative mechanism.

[...]

Reusable digital identity – Digital ID is becoming increasingly available. Several US states issue mobile drivers licenses, for example. Users can give consent for the age to be selectively shared with AV providers, typically using an approach called Verifiable Credentials.

Opponents argue that there are other more privacy-protective methods of protecting children from prurient online content. The Free Speech Coalition, which advocates for the adult industry, argues a more effective solution with fewer tradeoffs can be found in content-filters installed on personal computers:

Such filters are regularly used by our schools and workplaces, and adult businesses already voluntarily register our sites with them to make sure our sites are effectively blocked. In fact, we pioneered the protocols that allow filters to easily do so.

Such filters are already available on phones, tablets, laptops and home WiFi networks. They are easy to set up and, for the most part, free to use. They put power in the hands of parents, rather than the government.

More importantly, filters can not be evaded by use of VPN — the virtual private networks that allow users to evade the regulations by accessing the internet through another state or country. Filters can be tailored to remove sites like Twitter and Reddit which allow adult content, but may not reach the threshold required for liability under this bill. Filters can also trigger “safe search” settings on search engines, which prevent adult content or sites from appearing in search results.

A 2022 report by France’s National Commission on Informatics and Liberty (CNIL) “analysed the main types of age verification systems in order to clarify its position on age verification on the Internet, particularly on pornographic sites for which such verification is mandatory. It specifies how such publishers could fulfil their legal obligations. However, CNIL finds that such current systems are circumventable and intrusive, and calls for the implementation of more privacy-friendly models.”⁸ A *Verge* article describing this report states: “CNIL notes that identifying someone’s age with a credit card would be relatively easy since the security infrastructure is already there for online payments. But some adult users — especially those with lower incomes — may not have a card, which would seriously limit their ability to access online services. The same goes for verification methods using government-issued IDs. Children can also snap up a card that’s lying around the house to verify their age.”⁹

In opposition, Electronic Frontier Foundation writes:

Age verification laws don’t just impact young people — it’s necessary to confirm the ages of all website visitors. It is a significant privacy violation to require all people to submit either their official government-issued identification credentials, or to delve into their transactional history—including “bank account information”—to attempt to determine their age, particularly if that person is an adult for whom there are no restrictions to view such material. Given the stigma around sexually explicit material online, if a bank or other records-holder was told why a site wanted to verify information, it could also have unfair and serious consequences for an adult viewing these sites.

Additionally, while an age-verification system would collect far more information than is necessary or reasonable for its state purpose, it is unlikely to keep minors from viewing this material. In 2022, France’s Audiovisual and Digital Communication Regulatory Authority ordered several sites with adult content to implement age verification. Then, France’s National Commission on Informatics and Liberty, CNIL, published a detailed analysis of current age verification methods. It found that no method has the following three important elements: “sufficiently reliable verification, complete coverage of the population, and respect for the protection of individuals’ data and privacy and their security.” (Footnote omitted.)

Oakland Privacy, also opposing, adds:

Age-gating pornography sites is compelling unsafe behavior. It is demanding that people relinquish their personal information to shady unaccountable operators who cannot assure customers that they will, or even can, protect it. Moreover, attempts to avoid the age-gating mechanism may drive porn users, old and young, even farther afield to even shadier foreign websites that may defer the age-gating, but are cesspools of viruses, ransomware and theft. If the intent is to keep youth safe, age-gating may well have exactly the opposite effect of what is intended.

5) **Concerns with the bill.** This bill requires a covered platform that publishes or distributes “material harmful to minors”—defined as material that is indecent, obscene, or child

⁸ *Online age verification: balancing privacy and the protection of minors* (Sept 22, 2022), <https://www.cnil.fr/en/online-age-verification-balancing-privacy-and-protection-minors>.

⁹ Roth, *Online age verification is coming, and privacy is on the chopping block* (May 15, 2023) *The Verge*, <https://www.theverge.com/23721306/online-age-verification-privacy-laws-child-safety>.

pornography—to perform reasonable age-verification methods and prevent access by minors to the materials. At the outset, it is worth noting that if the bill applies to “indecent” content, it necessarily embraces obscenity and child pornography. The inclusion of the latter, furthermore, is confusing since it seemingly implies child pornography may be viewed by verified adults, which of course is not the intent of the bill.

“Indecent” is broadly defined to mean any image, video, audio recording, audiovideo file, film, written material, document, software, data file, scripting language, computer code, game, virtual reality technology, interactive and noninteractive streaming service, interactive and noninteractive streaming software, and downloadable application that meets any of the following conditions:

- Would be found by the average person, applying contemporary statewide standards, to be generally harmful to minors;
- Depicts, describes, exposes, or presents sexual conduct in a patently offensive way; or
- Taken as a whole, lacks serious literary, artistic, or scientific value for the purpose of educating minors.

Thus, “materials harmful to minors” are, circularly, those found “to be generally harmful to minors” under “statewide standards.” Covered platforms, moreover, are not limited to sites that principally and knowingly traffic in such materials. As such, the bill would apply to a wide range of content and platforms, well afield of the author’s stated focus. Moreover, under the bill, a private right of action may be brought by *any individual* if the individual is granted access to the website without proper verification, not just parents and guardians of minors who are granted access to such materials. The potential for abuse is evident.

A broad coalition of organizations that advocate on behalf of LGBTQ+ rights and reproductive freedom “strongly oppose[s] the age-verification bills being put forward by state legislatures to prevent access to ‘material harmful to minors’ online. These bills violate internet privacy and freedom and access to legal content, including education and resources through vague and subjective definitions.” In their view, such efforts are “just another strategy in a broader attack on free expression that includes book bans, censorship of reproductive health information, attacks on LGBTQ+ youth, and other violations of our constitutional rights.” They continue:

In our digital age, safeguarding personal information is paramount, yet these bills demand invasive measures such as ID uploads, facial scans, or background checks, leaving individuals rightfully apprehensive about the fate of their browser history, identity documents, and other sensitive data. The potential for cyberattacks looms large, with no ironclad assurances of data security or non-storage provided. The risks inherent in accessing lawful content under such surveillance are immense. Even good actors and governments struggle to secure this type of data, as we’ve seen countless times in recent years. Promises that the information will not be stored or will be secure in transit can in no way be guaranteed, and the risks with accessing that content can be great.

We are deeply troubled by the broad strokes with which these bills paint the notion of “material harmful to minors,” a brush that risks tainting even non-explicit material and could be applied to literature, art, and education. The nebulous definition of “material harmful to minors,” as written in these bills leaves LGBTQ+ literature, sex education materials, and

artistic expressions vulnerable to censorship, echoing past instances of suppression in libraries and classrooms nationwide.

Furthermore, these bills fail to recognize the nuanced differences among minors, lumping together content suitable for a seventeen-year-old with that which may be wholly inappropriate for a much younger child. This lack of discernment places educators, creators, and platforms in a precarious position, unsure of what may trigger liability under the law.

The arbitrary threat of enforcement means that these bills, like others passed last year, will have a chilling effect on those who produce or distribute significant amounts of content that deals with sex or sexuality. The cost of defending oneself against a civil lawsuit brought by a parent or caregiver is extremely high, and so is the damage to a website's reputation. These laws offer no shield against frivolous claims, potentially weaponizing legislation against already marginalized voices and platforms. (Footnotes omitted.)

6) First Amendment concerns. The United States and California Constitutions prohibit abridging, among other fundamental rights, freedom of speech.¹⁰ This bill requires covered platforms that publish or distribute “material harmful to minors”—defined to include materials that are obscene, indecent, or child pornography—to perform reasonable age-verification methods on all individuals attempting to access the material. This broad infringement on accessing specific content implicates the First Amendment’s guarantee of freedom of speech.

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”¹¹ Government cannot “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,”¹² nor regulate speech “because of disapproval of the ideas expressed.”¹³ As opponents of the bill note, age verification as a condition of accessing “indecent” or “obscene” online materials may require individuals to, in effect, divulge details about intimate and private matters. The vague scope of the bill could have a significant chilling effect not just on access to the salacious but also to materials that, depending on one’s conception of “statewide standards,” may be indecent or indispensable. Opponents argue that the bill could encompass, for example, content about sexuality, gender, and reproductive choice.

Sexual expression that is indecent but not obscene is protected by the First Amendment.¹⁴ Thus, in *Ginsberg v. New York* (1968) 390 U.S. 629, the United States Supreme Court held that a New York statute barring the sale of obscene materials to minors under the age of seventeen did not violate the First Amendment. Because “obscenity is not protected expression,” the New York

¹⁰ U.S. Const., 1st and 14th Amends; Cal. Const. art. I, § 2.

¹¹ *Turner Broad. Sys., Inc. v. F.C.C.* (1994) 512 U.S. 622, 641.

¹² *Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 642.

¹³ *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

¹⁴ *Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126. *Miller v. California* (1973) 414 U.S. 15 set forth the test for obscenity: “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” (*Id.* at p. 24 [internal quotation marks and citations omitted].)

statute could be sustained so long as the Legislature’s judgment that the proscribed materials were harmful to children “was not irrational.”¹⁵

As opposed to this lenient “rational basis” approach that *Ginsberg* applied to unprotected speech, protected speech is subject to a more exacting standard of judicial review. Content-based restrictions on protected speech, including sexual speech that is not obscene, are subject to “strict scrutiny” and thus are presumptively unconstitutional, valid only if the government proves they are narrowly tailored to further a compelling interest.¹⁶

While protecting the psychological well-being of children is a compelling government purpose,¹⁷ courts have generally found that government regulation of adult speech to protect children is not sufficiently tailored to serve this purpose. Thus, *Butler v. Michigan* (1957) 352 U.S. 380, 383 held that a statute criminalizing the sale, to any person, of materials “tending to the corruption of the morals of youth” was “burn[ing] the house to roast the pig.” Similarly, *Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126 held unconstitutional a “statute’s denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages.”

As for government regulation of sexual speech on the internet, the United States Supreme Court in *Reno v. ACLU* (1997) 521 U.S. 844, 849 invalidated provisions of the Communications Decency Act of 1996 that established criminal penalties for the knowing transmission of obscene or indecent material in a manner likely to be accessible to a minor. Under the statute, an affirmative defense was available to “those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code.”¹⁸ Stressing the vagueness and breadth of the statute, the Supreme Court reiterated the principle that the government’s interest in protecting children “does not justify an unnecessarily broad suppression of speech addressed to adults.”¹⁹ The court also relied on the lower court’s findings that there was no effective way to verify a user’s age, it would be prohibitively expensive for the noncommercial—as well as some commercial—entities that the statute embraced, and that user-based software offered a less restrictive alternative.²⁰

Congress responded by passing the Child Online Protection Act (COPA), which imposed criminal penalties on operators of websites that knowingly post, for commercial purposes, material that is “harmful to minors,” defined in terms similar to this bill, including that the average person “applying contemporary community standards” would find the objectionable content was designed to appeal or pander to “the prurient interest.”²¹ An affirmative defense, again, was available for those who take reasonable measures to prevent minors from accessing the website, including age verification.²² In *Ashcroft v. ACLU* (2004) 542 U.S. 656, the United States Supreme Court affirmed the lower court’s ruling that enforcement of the law should be

¹⁵ *Id.* at p. 641.

¹⁶ *Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126.; *Ashcroft v. ACLU* (2004) 542 U.S. 656, 670; see *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 222; *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

¹⁷ *Sable Communications of Cal. v. FCC*, *supra*, 492 U.S. at p. 126.

¹⁸ *Id.* at pp. 860-861.

¹⁹ *Id.* at p. 875.

²⁰ *Id.* at pp. 876-877.

²¹ *Ashcroft v. ACLU*, *supra*, 542 U.S. at p. 661.

²² *Id.* at p. 662.

suspended during a pending lawsuit because the statute likely violated the First Amendment. The Court found that COPA was likely unconstitutional because content filters installed on computers by parents were less restrictive and more likely to be effective than age verification.²³

Earlier this year, however, the Fifth Circuit Court of Appeals departed from these precedents in a case involving a Texas law requiring commercial pornographic websites to verify the age of their users.²⁴ Instead of applying the “strict scrutiny” test used in the precedents described above, the court concluded that the proper standard was the lenient “rational basis” test, which asks whether a speech restriction is rationally related to the government’s legitimate interest. Applying this test, the court concluded that the age-verification requirement does not violate the First Amendment. In doing so, the court relied not on *Reno* or *Ashcroft* but rather on *Ginsberg*—the 1968 case, described above, that upheld a statute barring children from accessing obscene materials. However, as discussed, *Ginsberg* applied to obscenity and the Supreme Court has since consistently applied strict scrutiny to content-based regulations that infringe upon adults’ ability to access sexual content.

This bill fits squarely in those precedents. Thus, it would likely be invalidated unless the government could prove it is sufficiently narrowly tailored to serve the compelling interest of protecting children from accessing pornographic materials.

7) Committee amendments. Given the exacting standard the bill must meet, the author has agreed to amend it. The amendments will delete the current language of the bill and instead amend The Parent’s Accountability and Child Protection Act (AB 2511, Chau; Ch. 872, Stats. 2018), which requires sellers of products or services that are illegal to sell to minors to take reasonable steps to ensure that the purchaser is of legal age at the time of the purchase or delivery, including but not limited to verifying the age of the purchaser. Reasonable steps include (1) the provision of a government-issued identification, subject to all laws governing retention, use, and disclosure of personally identifiable information, (2) requiring the purchaser to use a nonprepaid credit card for an online purchase, or (3) implementing a system that restricts individuals with accounts designated as minor accounts from purchasing the prohibited products. The act prohibits a person from retaining, using, or disclosing any information it receives from a purchaser or recipient in an effort to verify age, unless required by law. Violators are liable for a civil penalty of up to \$7500 in actions brought by public prosecutors.²⁵

The amendments would integrate within that scheme “pornographic websites,” defined as a website on which the owner of the website, for commercial gain, knowingly publishes sexually explicit content that, on an annual basis, exceeds one-third of the contents published on the website. Thus, unlike the bill in print, the amended version will apply to websites that deliberately and substantially traffic in pornography. “Sexually explicit” content, in turn, is defined as “visual imagery of an individual or individuals engaging in an act of masturbation, sexual intercourse, oral copulation, or other overtly sexual conduct that, taken as a whole, lacks serious literary, artistic, political, or scientific value.” This draws from both the definition of revenge pornography²⁶ as well as a component of the constitutional test for defining obscenity.²⁷

²³ *Id.* at p. 673.

²⁴ *Free Speech Coal., Inc. v. Paxton* (5th Cir. 2024) 95 F.4th 263.

²⁵ Civ. Code § 1798.99.1.

²⁶ Pen. Code § 647(j)(4)(A).

In contrast to the bill in print, this narrower approach significantly enhances the likelihood the bill will survive a constitutional challenge. Despite the unfavorable precedents described above, there may be a few bases for distinguishing the bill, including that it imposes civil rather than criminal penalties and that age-verification methods have advanced in the years since *Reno* and *Ashcroft*. Nevertheless, these improvements do not guarantee the bill will pass constitutional muster. As such, the author may wish to continue to seek ways of further narrowing and refining the bill.

The proposed new language of the bill is as follows:

SEC. 1. 1798.99.1.

(a) (1) A person or business that conducts business in California, and that seeks to sell any product or service in or into California that is illegal under state law to sell to a minor, as described in subdivisions (b) and (c), ***or to make available a product as described in subdivision (d)***, shall, notwithstanding any general term or condition, take reasonable steps to ensure that the purchaser is of legal age at the time of purchase or delivery, including, but not limited to, verifying the age of the purchaser.

(2) Reasonable steps as used in paragraph (1) for the purchase of items described in subdivision (b) include, but are not limited to, any of the following:

(A) Requiring the purchaser or recipient to input, scan, provide, or display a government-issued identification, provided that the person or business complies with all laws governing the retention, use, and disclosure of personally identifiable information, including, but not limited to, subdivision (a) of Section 1749.65, paragraphs (3) to (7), inclusive, of subdivision (b) of, and subdivisions (c) to (f), inclusive, of, Section 1798.90, paragraph (1) of subdivision (a) of Section 1798.90.1, Sections 1798.29, 1798.81.5, and 1798.82, and Sections 22575 to 22579, inclusive, of the Business and Professions Code.

(B) Requiring the purchaser to use a nonprepaid credit card for an online purchase.

(C) Implementing a system that restricts individuals with accounts designated as minor accounts from purchasing the products listed in subdivision (b).

(D) Shipping the product or service to an individual who is of legal age.

(3) Reasonable steps as used in paragraph (1) for the purchase of items described in subdivision (c) include, but are not limited to, any of the following:

(A) Requiring the purchaser or recipient to input, scan, provide, or display a government-issued identification, provided that the person or business complies with all laws governing the retention, use, and disclosure of personally identifiable information, including, but not limited to, subdivision (a) of Section 1749.65, paragraphs (3) to (7), inclusive, of subdivision (b) of, and subdivisions (c) to (f), inclusive, of, Section 1798.90, paragraph (1) of subdivision (a) of Section 1798.90.1, Sections 1798.29, 1798.81.5, and 1798.82, and Sections 22575 to 22579, inclusive, of the Business and Professions Code.

²⁷ See fn. 14.

(B) Shipping the product or service to an individual who is of legal age.

(4) Reasonable steps as used in paragraph (1) for the provision of a product described in subdivision (d) include, but are not limited to, any of the following:

(A) Requiring the user to input, scan, provide, or display a government-issued identification, provided that the person or business complies with all laws governing the retention, use, and disclosure of personally identifiable information, including, but not limited to, subdivision (a) of Section 1749.65, paragraphs (3) to (7), inclusive, of subdivision (b) of, and subdivisions (c) to (f), inclusive, of, Section 1798.90, paragraph (1) of subdivision (a) of Section 1798.90.1, Sections 1798.29, 1798.81.5, and 1798.82, and Sections 22575 to 22579, inclusive, of the Business and Professions Code.

(B) Requiring the user to use a nonprepaid credit card or debit card for online access.

(C) Implementing a system that enables only individuals with accounts designated as adult accounts to access the website.

(5) Reasonable steps as used in paragraph (1) shall not include consent obtained through the minor.

(6) A seller's reasonable and good faith reliance on bona fide evidence of the purchaser or recipient's age shall constitute an affirmative defense to any action under this subdivision.

(7) A person or business required to comply with this section shall not retain, use, or disclose any information it receives from a purchaser or recipient in an effort to verify age pursuant to this section for any purpose other than as required to comply with, or as needed to demonstrate compliance with, this section, California law, or a state or federal court order.

(b) Products or services that are illegal to sell to a minor under state law that are subject to subdivision (a) include all of the following:

(1) An aerosol container of paint that is capable of defacing property, as referenced in Section 594.1 of the Penal Code.

(2) Etching cream that is capable of defacing property, as referenced in Section 594.1 of the Penal Code.

(3) Dangerous fireworks, as referenced in Sections 12505 and 12689 of the Health and Safety Code.

(4) Tanning in an ultraviolet tanning device, as referenced in Sections 22702 and 22706 of the Business and Professions Code.

(5) Dietary supplement products containing ephedrine group alkaloids, as referenced in Section 110423.2 of the Health and Safety Code.

(6) Body branding, as referenced in Sections 119301 and 119302 of the Health and Safety Code.

(c) Products or services that are illegal to sell to a minor under state law that are subject to subdivision (a) include all of the following:

(1) Firearms or handguns, as referenced in Sections 16520, 16640, and 27505 of the Penal Code.

(2) A BB device, as referenced in Sections 16250 and 19910 of the Penal Code.

(3) Ammunition or reloaded ammunition, as referenced in Sections 16150 and 30300 of the Penal Code.

(4) Any tobacco, cigarette, cigarette papers, blunt wraps, any other preparation of tobacco, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, as referenced in Division 8.5 (commencing with Section 22950) of the Business and Professions Code, and Sections 308, 308.1, 308.2, and 308.3 of the Penal Code.

(5) Electronic cigarettes, as referenced in Section 119406 of the Health and Safety Code.

(6) A less lethal weapon, as referenced in Sections 16780 and 19405 of the Penal Code.

(d) ***(1) Products that are illegal to make available to minors include pornographic websites.***

(2)(A) "Pornographic website" means a website on which the owner of the website, for commercial gain, knowingly publishes sexually explicit content that, on an annual basis, exceeds one-third of the contents published on the website.

(B) "Sexually explicit content" means visual imagery of an individual or individuals engaging in an act of masturbation, sexual intercourse, oral copulation, or other overtly sexual conduct that, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(e) In an action brought by a public prosecutor, a business or person that violates this section shall be subject to a civil penalty not exceeding seven thousand five hundred dollars (\$7,500) for each violation.

(f) The provisions of this section do not apply to a business that is regulated by state or federal law providing greater protection to personal information or requiring greater age verification than provided by this section in regard to the subjects addressed by this section. Compliance with state or federal law shall be deemed compliance with this section with regard to those subjects. This subdivision does not relieve a business from a duty to comply with any other requirements of other state and federal law regarding the protection and privacy of personal information or age verification.

(g) For purposes of this section, a government-issued identification means any of the following:

(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, an identification card or a valid motor vehicle operator's license, including licenses or identification cards issued pursuant to Section

12801.9 of the Vehicle Code, that contains the name, date of birth, description, and picture of the person.

(2) A valid passport issued by the United States or by a foreign government.

(3) A valid identification card issued to a member of the United States Armed Forces that includes the date of birth and picture of the person.

(4) A valid consular identification document.

(5) An identification card issued by a federally recognized tribal government.

8) **Related legislation.** AB 1949 (Wicks, 2024) would prohibit a business from collecting the personal information of a consumer under 18 years of age unless the consumer, or the consumer's parent or guardian if under 13, affirmatively authorizes the collection. This committee passed the bill on an 8-0 vote.

AB 1501 (Hoover, 2023) would have required a commercial entity that knowingly and intentionally publishes or distributes sexually explicit material on the internet from a sexually explicit website to use an age verification method that prevents minors from accessing sexually explicit material. The bill was referred to this committee but was not heard.

ARGUMENTS IN SUPPORT:

Concerned Women for America write:

AB 3080 is a step toward protecting children from accidental or unintentional exposure to obscene and indecent images and videos. Requiring internet platforms that host adult content to employ the use of age verification software to prevent minors from accessing obscene and indecent material online will benefit children and families.

Family Policy Alliance writes:

Not only does pornography harm children's mental well-being – there is also a strong correlation between pornography, human trafficking, and sexual abuse. In fact, research reveals that it is impossible to determine whether pornographic videos portray consensual sex, as many adult sites contain explicit videos and images of adults and minors, who have not consented to filming such content. Sex trafficking is the supply side of the pornography industry. Therefore, age verification requirements are crucial to preventing such abuse by limiting the access of pornography and explicit material to minors, thereby curbing the demand for that supply.

Pacific Justice Institute writes:

Similar age-verification legislation has already passed in eleven (11) states and been introduced in at least twenty-four (24) others. Last month, the U.S. Court of Appeals for the Fifth Circuit in *Free Speech Coalition v. Paxton* upheld Texas's age verification law, HB 1181. In upholding the Texas law, the court expressly held that the new "age-verification requirement does not violate the First Amendment." Specifically, the court found that because the state has an interest in maintaining only age-appropriate access to certain content, it was not too burdensome to require the IDs of adults to purchase pornography.

Moreover, the court determined that in today's age, age verification on the internet need not be burdensome to adults and adult speech. With the development of techniques relying on zero-knowledge proofs - widely used in cryptocurrency - and other cryptographic techniques, anonymous online authentication of age, or of any other feature, is possible.

ARGUMENTS IN OPPOSITION:

Free Speech Coalition, which represents the adult content industry, argues the goal of this bill "is to impose an extremely conservative version of morality on our state, creating dangerous privacy risks for adults, and violating the First Amendment rights of both consumers and creators of protected expression in the process."

Oakland Privacy writes:

While the committee may prioritize keeping minors away from porn more highly than the safety of workers in the sex professions, we should understand that when the better-run and more legitimate sites are pushed away, the ones that fill the gap are more dangerous, especially to the women who appear on porn sites. Issues of consent, protections from sexually transmitted diseases, and the use of their bodies and faces without authorization have slowly started to be dealt with on the larger, more legitimate sites, but run rampant on the smaller, wilder, unregulated ones. Pushing the porn traffic to the furthest reaches of the web makes sex workers a lot more unsafe. This was clearly demonstrated by the passage of SESTA/FOSTA and the end of Backpage which sex workers continue to insist has made their lives many degrees more dangerous. (Footnotes omitted.)

REGISTERED SUPPORT / OPPOSITION:

Support

California Baptist for Biblical Values
California Catholic Conference
California Family Council
Church State Council
Concerned Women for America
Exodus Cry
Family Policy Alliance
Interfaith Statewide Coalition
Magdalene Hope, INC.
Pacific Justice Institute - Center for Public Policy
Real Impact

Opposition

Advocates for Youth
Center for LGBTQ Economic Advancement & Research (CLEAR)
Decriminalize Sex Work
EducateUs
Electronic Frontier Foundation
Equality Federation
Free Speech Coalition

GLSEN

National Abortion Federation

National Federation Against Censorship

National Working Positive Coalition

Netchoice

New Moon Network

NMAC

Oakland Privacy

Organization for Polyamory and Ethical Non-monogamy (OPEN)

Reproaction

Rise: Healthy for Life

Secular Student Alliance

Siecus: Sex Ed for Social Change

Woodhull Action Fund

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