2025 South Dakota Legislature

Draft 127

Requested by: ***Representative*** *Soye*

An Act to require age verification by websites containing material harmful to minors.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 22-24-27 be AMENDED:

22-24-27. Terms used in §§ 22-24-25 to 22-24-37, inclusive, and sections 2 to 7, inclusive, of this Act, mean:

(1) "Contemporary community standard," the contemporary community standard of the state in which the question of obscenity is to be tested, by the average person, of the state;

(2) "Covered platform," a website ~~for which it is~~ that, in the regular course of the website's trade or business ~~to create, host, or make available~~, creates, hosts, or makes available content, of which a substantial portion is material harmful to minors;

~~(2)~~(3) "Distributed," to transfer possession of, whether with or without consideration;

~~(3)~~(4) "Exhibit," to show or display;

~~(4)~~(5) "Harmful to minors," includes in its meaning the quality of any material or of any performance or of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, if it:

(a) Predominantly appeals to the prurient, shameful, or morbid interest of minors; ~~and~~

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Is without serious literary, artistic, political, or scientific value;

~~(5)~~(6) "Magistrate," any circuit court or magistrate judge;

~~(6)~~(7) "Material," anything tangible ~~which~~ that is harmful to minors, whether derived through the medium of reading, observation, or sound;

~~(7)~~(8) "Matter" or "material," any book, magazine, newspaper, or other printed or written material; ~~or~~ any picture, drawing, photograph, motion picture, or other pictorial representation; ~~or~~ any statue or other figure; ~~or~~ recording, transcription or

mechanical, chemical, or electrical reproduction; or any other articles, equipment, machines, or materials;

~~(8)~~(9) "Minor," any person less than eighteen years of age;

~~(9)~~(10) "Nudity," ~~within the meaning of subdivision (4) of this section,~~ the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, ~~or~~ the showing of the female breast with less than a full opaque covering or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state;

~~(10)~~(11) "Obscene live conduct," any physical human body activity, whether performed or engaged in alone or with other persons, including singing, speaking, dancing, acting, simulation, or pantomiming, where:

(a) The dominant theme of such conduct, taken as a whole, appeals to a prurient interest;

(b) The conduct is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

(c) The conduct is without serious literary, artistic, political, or scientific value.

In prosecutions under §§ 22-24-27 to 22-24-37, inclusive, if circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, ~~such~~ the evidence is probative with respect to the nature of the conduct;

~~(11)~~(12) "Obscene material," material:

(a) The dominant theme of which, taken as a whole, appeals to the prurient interest;

(b) ~~Which~~ That is patently offensive because it affronts contemporary community standards relating to the description or representation of sado-masochistic abuse or sexual conduct; and

(c) ~~Lacks~~ That lacks serious literary, artistic, political, or scientific value.

In prosecutions under §§ 22-24-27 to 22-24-37, inclusive, if circumstances of production, presentation, sale, dissemination, or publicity indicate that the matter is being commercially exploited by the defendant for the sake of its prurient appeal, ~~such~~ the evidence is probative with respect to the nature of the matter;

~~(12)~~(13) "Prurient interest," a shameful or morbid interest in nudity, sex, or excretion, ~~which~~ that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience or clearly defined deviant sexual group, the appeal of the subject matter ~~shall~~ must be judged with reference to such audience or group;

(14) "Reasonable age verification," any method by which a covered platform confirms that an individual attempting to access material harmful to minors is at least eighteen years of age by verifying:

(a) A state-issued driver license or non-driver identification card;

(b) A military identification card;

(c) The individual's bank account information;

(d) A debit or credit card from the individual that requires the individual in ownership of the card to be at least eighteen years of age; or

(e) Any other method that reliably and accurately determines if a user of a covered platform is a minor and prevents a minor from accessing the content of a covered platform;

~~(13)~~(15) "Sado-masochistic abuse," flagellation or torture by or upon a person who is nude or clad in undergarments, a mask, or bizarre costume~~,~~; or the condition of being fettered, bound, or otherwise physically restrained on the part of one who is nude or so clothed;

~~(14)~~(16) "Sexual conduct," ~~within the meaning of subdivision (4) of this section,~~ any act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or if such person be a female, the breast; ~~and~~

~~(15)~~(17) "Sexual excitement," the condition of human male or female genitals when in a state of sexual stimulation or arousal; and

(18) "Substantial portion," an amount of content created by or hosted or made available on a website that is at least thirty-three and one-third percent of the total content created by or hosted or made available on the website.

Section 2. That a NEW SECTION be added to chapter 22-24:

A covered platform must implement reasonable age verification on the platform to verify the age of any individual who attempts to access material harmful to minors on the ~~internet~~ covered platform and prevent a minor's access to that material.

A violation of this section is a Class 1 misdemeanor. A subsequent violation of this section by the same covered platform is a Class 6 felony.

Section 3. That a NEW SECTION be added to chapter 22-24:

A covered platform or third party that performs the age verification required by section 2 of this Act on behalf of a covered platform may not retain any identifying information of an individual after the covered platform grants the individual access to the material.

A violation of this section is a Class 1 misdemeanor. A subsequent violation of this section is a Class 6 felony.

Section 4. That a NEW SECTION be added to chapter 22-24:

Any covered platform found to be in violation of section 2 or 3 of this Act is subject to an injunction and liable for a civil penalty of not more than five thousand dollars per incident of a minor accessing material harmful to minors. The civil penalty may be assessed and recovered only in a civil action brought by the attorney general or state's attorney in the county where the affected child resides. The attorney general or state's attorney shall forward any civil penalty collected under this section to the state treasurer, for deposit in the state general fund.

~~Nothing in this section limits the rights of a private person to pursue a civil action under sections 2 to 7, inclusive, of this Act.~~ Nothing in this section may be construed to serve as the basis for a new private right of action for any violation of section 2 or 3 of this Act.

Section 5. That a NEW SECTION be added to chapter 22-24:

If a covered platform is not in substantial compliance with the requirements of section 2 or 3 of this Act, the attorney general or the state's attorney in the county where the affected child resides must provide written notice to the covered platform before initiating an action pursuant to sections 2 to 4, inclusive, of this Act. The attorney general or state's attorney shall identify in the notice the specific provision that is alleged to have

been violated, and what measures must be implemented by the covered platform to prevent future violations.

If the covered platform implements the measures stated in the notice and provides the attorney general or notifying state's attorney a written statement under oath that the measures stated in the notice have been implemented, within ninety days of the notice provided under this section, the covered platform is not criminally liable or liable for a civil penalty for any cured violation of section 2 or 3 of this Act.

~~**Section 6. That a NEW SECTION be added to chapter 22-24:**~~

~~A parent, guardian, or custodian of a minor may bring a civil action against a covered platform for a violation of sections 2 of this Act and shall recover damages in the amount of five thousand dollars for each separate instance that the covered platform fails to perform reasonable age verification, actual damages resulting from a minor accessing the material, court costs, and reasonable attorney fees.~~

~~A covered platform or third party that knowingly retains identifying information of an individual in violation of section 3 of this Act is liable to the individual for damages for retaining the identifying information, court costs, and reasonable attorney fees.~~

~~**Section 7. That a NEW SECTION be added to chapter 22-24:**~~

~~Any waiver, purported waiver, or estoppel of an individual's right to bring a civil action under sections 2 to 7, inclusive, of this Act is void. No court or arbitrator may enforce or give effect to the waiver or estoppel, notwithstanding any choice-of-law or other provision in any contract or other agreement.~~

Section 6. That a NEW SECTION be added to chapter 22-24:

The provisions of sections 2 to 7, inclusive, of this Act do not apply to any general-purpose search engine, internet service provider or its affiliates or subsidiaries, web browser provider, smart device manufacturer, application store, or cloud service provider.

Section 7. That § 22-24-29 be AMENDED:

22-24-29. A person is guilty of disseminating material harmful to minors if that person knowingly gives or makes available to a minor or promotes or possesses with intent to promote to minors, or if that person knowingly sells or loans to a minor for monetary consideration, any material described in ~~subdivision § 22-24-27(4)~~ § 22-24-27.

Section 8. That § 22-24-58 be AMENDED:

22-24-58. For the purposes of §§ 22-24-55 to 22-24-59, inclusive, obscene material is defined pursuant to ~~subdivision 22-24-27(11)~~ § 22-24-27.

Section 9. That § 37-24-6 be AMENDED:

37-24-6. It is a deceptive act or practice for any person to:

(1) Knowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise or the solicitation of contributions for charitable purposes, regardless of whether any person has in fact been misled, deceived, or damaged thereby;

(2) Advertise price reductions without satisfying one of the following:

(a) Including in the advertisement the specific basis for the claim of a price reduction; or

(b) Offering the merchandise for sale at the higher price from which the reduction is taken for at least seven consecutive business days during the sixty-day period prior to the advertisement.

Any person advertising consumer property or services in this state, which advertisements contain representations or statements as to any type of savings claim, including reduced price claims and price comparison value claims, shall maintain reasonable records for a period of two years from the date of sale and advertisement, which records shall disclose the factual basis for such representations or statements and from which the validity of any such claim be established. However, these reasonable record provisions do not apply to the sale of any merchandise that is of a class of merchandise that is routinely advertised on at least a weekly basis in newspapers, shopping tabloids, or similar publications and that has a sales price before price reduction that is less than fifteen dollars per item;

(3) Represent a sale of merchandise at reduced rates due to the cessation of business operations and after the date of the first advertisement remain in business under the same, or substantially the same, ownership or trade name, or continue to offer for sale the same type of merchandise at the same location for more than one hundred twenty days;

(4) Give or offer a rebate, discount, or anything of value to a person as an inducement for selling consumer property or services in consideration of giving the names of prospective purchasers or otherwise aiding in making a sale to another person, if the earning of the rebate, discount, or other thing of value is contingent upon the occurrence of an event subsequent to the time the person agrees to the sale;

(5) Engage in any scheme or plan for disposal or distribution of merchandise whereby a participant pays a valuable consideration for the chance to receive compensation primarily for introducing one or more additional persons into participation in the planner's scheme or for the chance to receive compensation when the person introduced by the participant introduces a new participant;

(6) Send, deliver, provide, mail, or cause to be sent, delivered, provided, or mailed any bill or invoice for unordered property or unordered service provided;

(7) Advertise a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is not in fact available to the public under the terms advertised. It is not a violation of this subdivision to establish contract rates which are different than public rates;

(8) Charge a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is different than the rate, price, or fee charged on the first night of the guest's stay unless, at the initial registration of the guest, a written notification of each price, rate, or fee to be charged during the guest's reserved continuous stay is delivered to the guest and an acknowledgment of receipt of the notice is signed by the guest and kept by the innkeeper for the same period of time as is required by § 34-18-21;

(9) Knowingly fail to mail or to deliver by electronic means to a future guest a written confirmation of the date and rates of reservations made for any accommodation at a hotel, motel, campsite, or other lodging accommodation when a written request for confirmation is received from the future guest;

(10) Require money in advance of arrival or a handling fee in the event of cancellation of any hotel, motel, campsite, or other lodging accommodation unless the innkeeper has a written policy or a separate contract with the guest stating so that is mailed or delivered by electronic means to the guest at or near the making of the reservation;

(11) Knowingly advertise or cause to be listed through the internet or in a telephone directory a business address that misrepresents where the business is actually located or that falsely states that the business is located in the same area covered

by the telephone directory. This subdivision does not apply to a telephone service provider, an internet service provider, or a publisher or distributor of a telephone directory, unless the conduct proscribed in this subdivision is on behalf of the provider, publisher, or distributor;

(12) Sell, market, promote, advertise, or otherwise distribute any card or other purchasing mechanism or device that is not insurance that purports to offer discounts or access to discounts from pharmacies for prescription drug purchases if:

(a) The card or other purchasing mechanism or device does not expressly state in bold and prominent type, prevalently placed, that discounts are not insurance;

(b) The discounts are not specifically authorized by a separate contract with each pharmacy listed in conjunction with the card or other purchasing mechanism or device; or

(c) The discount or access to discounts offered, or the range of discounts or access to the range of discounts, is misleading, deceptive, or fraudulent, regardless of the literal wording.

The provisions of this subdivision do not apply to a customer discount or membership card issued by a store or buying club for use in that store or buying club, or a patient access program voluntarily sponsored by a pharmaceutical manufacturer, or a consortium of pharmaceutical manufacturers, that provide free or discounted prescription drug products directly to low income or uninsured individuals either through a discount card or direct shipment;

(13) Send or cause to be sent an unsolicited commercial electronic mail message that does not include in the subject line of such message "ADV:" as the first four characters. If the message contains information that consists of explicit sexual material that may only be viewed, purchased, rented, leased, or held in possession by an individual eighteen years of age and older, the subject line of each message shall include "ADV:ADLT" as the first eight characters. An unsolicited commercial electronic mail message does not include a message sent to a person with whom the initiator has an existing personal or business relationship or a message sent at the request or express consent of the recipient;

(14) Violate the provisions of § 22-25-52;

(15) Knowingly fail to disclose the amount of any mandatory fee when reservations are made by a future guest at a hotel, motel, campsite, or other lodging accommodations. A mandatory fee under this subdivision includes any resort fee or parking fee charged by the lodging accommodations whether or not the guest utilizes the amenities or the parking facility for which the fee is assessed; ~~or~~

(16) Cause misleading information to be transmitted to users of caller identification technologies or otherwise block or misrepresent the origin of a telephone solicitation. No provider of telephone caller identification services, telecommunications, broadband, or voice over internet protocol service may be held liable for violations of this subdivision committed by other individuals or entities. It is not a violation of this subdivision:

(a) For a telephone solicitor to utilize the name and number of the entity the solicitation is being made on behalf of rather than the name and number of the telephone solicitor;

(b) If an authorized activity of a law enforcement agency; or

(c) If a court order specifically authorizes the use of caller identification manipulation; or

(17) Violate section 2 or 3 of this Act.

Each act in violation of this section under one thousand dollars is a Class 1 misdemeanor. Each act in violation of this statute over one thousand dollars but under one hundred thousand dollars is a Class 6 felony. Each act in violation of this section over one hundred thousand dollars is a Class 5 felony.