

A BILL

FOR AN ACT protecting minor children and preserving the right and duty of parents to protect their minor children when accessing electronically provided expression.

Be it enacted by the people of the State of _____,

SECTION 1. The legislature finds that:

- (1) parents have the right and the duty to care for their minor children, as recognized by the Supreme Court in *Pierce v. Society of Sisters* and *Troxel v. Granville*;
- (2) interactive computer services can easily be accessed by minor children on their own without parental knowledge, let alone supervision, and parents cannot readily know or evaluate what their minor children have viewed;
- (3) interactive computer services are therefore distinguishable from the videogames discussed in *Brown v. Entertainment Merchants Association*, in which the United States Supreme Court observed that “minors cannot purchase” videogames on their own and that “parents who care about the matter can readily evaluate” the expression on such games;
- (4) interactive computer services have adverse effects on children’s mental and physical health and welfare, including sleep deprivation, attention deficits, loss of concentration, loss of self-esteem, addiction, self-harm, suicidal thoughts, cyber bullying, and sexual and other exploitation;
- (5) interactive computer services have enabled unrelated adults to target minor children and establish contact with them that is dangerous, unsafe, or otherwise bad for their health and welfare;
- (6) interactive computer services have made expression available to minor children that is dangerous, unsafe, or otherwise bad for their health and welfare, have targeted such children with such expression, and have opened themselves up for others to target such children with such expression;
- (7) this state has the power to protect minor children from such dangers and to preserve the right and duty of parents to protect their minor children from such dangers, and it has an interest of the highest order in exercising such power;
- (8) as originally drafted, the Communications Decency Act of 1996 included protections for minors in Section 223, which were declared unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997), leaving a hole in the protection for minors;
- (9) after Section 223 was held unconstitutional by the Supreme Court in *Reno v. ACLU*, Congress in Section 231 limited the knowing commercial distribution of material harmful to minors on the World Wide Web, and in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Supreme Court upheld a preliminary injunction against enforcement of Section 231 because blocking or filtering technology might be as effective as Section 231’s age restrictions, without being as burdensome on speech; but:

(A) the Supreme Court did not hold that that blocking or filtering technology was actually as effective as Section 231's age restrictions or that such technology was actually less burdensome on speech;

(B) since 2004, it has become apparent that blocking and filtering technologies tend to bar much that they should permit and tend to permit much that they should block; and

(C) even if such technologies were not inadequately effective and were not unduly restrictive of speech, they are no substitute for the authority of parents over their children, including the authority of parents over their children's contracts and other agreements, over the access of strangers to their children, and more generally over their children;

(10) Although Section 230(c)(1) of the Communications Decency Act of 1996 protects interactive computer services from being "treated as the publisher or speaker of any information provided by another information content provider," that provision was adopted to protect interactive computer services from defamation law, in which publishing material is an element of the tort, and it therefore does not preclude a state law such as this one, in which publication is not an element;

(11) Section 230 preempts state law only in cases involving conflict preemption—that is, only in cases involving an actual conflict between Section 230 and the relevant state law:

(A) Section 230(e)(3) states: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is *consistent* with this section" and "No cause of action may be brought and no liability may be imposed under any State or local law that is *inconsistent* with this section";

(B) in thus speaking of state law that is "consistent" or "inconsistent" with Section 230, that section expressly adopts a standard of conflict preemption and disavows other types of preemption of state law, such as "obstacle" and "field" preemption;

(C) Section 230 therefore cannot be read to justify any preemption of state law, except on the basis of inconsistency with Section 230.

SECTION 2. The _____ Revised Code is amended by adding Chapter XX to read as follows:

CHAPTER XX. PROTECTING CHILDREN ON INTERACTIVE SERVICE PROVIDERS

Sec XX-01. TITLE. This chapter shall be known as the Child Safety Act.

Sec. XX-02. DEFINITIONS. In this chapter:

(1) an “interactive computer service” is an interactive computer service as defined by 47 U.S.C. § 230(f)(2), but not a service or system that provides access to the Internet or such systems operated or services offered by libraries or educational institutions;

(2) a “child” means an individual under the age of 18;

(3) an “adult” means an individual or other person who is 18 or older;

(4) “consent” with respect to a child means:

(A) the consent of:

(i) both parents where two parents share legal custody of the child;

(ii) one parent where one parent has sole legal custody of the child;

(iii) the legal guardian where the child has one legal guardian;

(iv) both legal guardians where the child has co-legal guardians;

(v) any state agency having legal custody of the child;

(vi) both foster parents where the child has two foster parents sharing legal custody of the child; or

(vii) one foster parent where the child has one foster parent exercising legal custody of the child;

(B) consent that is express and active;

(C) consent that is given independently by each parent, legal guardian, state agency, or foster parent; and

(D) consent that does not purport to be effective for more than 365 days;

(5) a “responsible adult” with respect to a child means any person described in section 1(4) whose informed consent is necessary with respect to the child;

(6) “expression” means any audio, visual, or otherwise perceivable word, number, music, sound, image, moving image, information, or other expression;

(7) “unlawful” with respect to expression means expression:

(A) that is unlawfully harassing as defined by Chapter _____ of the laws of this state;

(B) that unlawfully solicits, persuades, induces, entices, or coerces (or attempts to solicit, persuade, induce, entice, or coerce) any individual to engage in prostitution or any other sexual activity, as prohibited by Chapter _____ of the laws of this state or 18 U.S.C. § 2422(b);

(C) that solicits, persuades, induces, entices, or coerces (or attempts to solicit, persuade, induce, entice, or coerce) any individual to engage in conduct that is unlawful under the laws of this state; or

(D) that is otherwise unlawful under the laws of this state or the United States;

(8) “sexually explicit” with respect to expression means expression that, in whole or in part, depicts, appears to depict, or plausibly purports to depict sexually explicit conduct as defined by 18 U.S.C. § 2256(2)(A) or (B);

(9) “violently explicit” with respect to expression means expression that is sexually explicit and that (in or in relation to any of its sexually explicit aspects) depicts, appears to depict, or plausibly purports to depict:

(A) rape or sexual assault as defined by Chapter _____ of the laws of this state;

(B) murder, homicide, or manslaughter as defined by Chapter _____ of the laws of this state;

(C) abduction or kidnapping as defined by Chapter _____ of the laws of this state; or

(D) assault as defined by Chapter _____ of the laws of this state;

(10) “sexual depiction of a child” with respect to expression means:

(A) child pornography as defined by 18 U.S.C. § 2256(8); or

(B) expression that depicts, appears to depict, or plausibly purports to depict child pornography as defined by 18 U.S.C. § 2256(8);

(11) “sexual solicitation” with respect to a child means any communication that solicits or attempts to solicit prostitution or unlawful sexual activity as defined in 18 U.S.C. 2422(b).

(12) “indecent” with respect to expression means expression that portrays sexual or excretory organs or activities in a way that is patently offensive;

(13) “profane” with respect to expression means expression that includes grossly offensive language that is considered a common nuisance, a public nuisance, disorderly conduct, or a misdemeanor in this state;

(14) “informed” with respect to consent as to a child means consent:

(A) that is obtained only after the responsible adult or adults with respect to the child acknowledge reading the following prominently stated warning:

- Parents and other guardians are legally accountable for protecting their children.
- You are responsible for protecting your child from harmful content and conduct, including that which could harm your child’s self-esteem and mental health or that could endanger your child’s safety.
- Be careful about exposing your child to:
 - unlawful expression
 - child pornography or other sexual depiction of children
 - sexually explicit expression
 - violently explicit expression
 - indecent expression
 - expression that a reasonable person would consider lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable for a child

- profane expression
- solicitation of child prostitution
- solicitation of statutory rape
- other sexual solicitation
- cyber bullying
- sexual predators;

(B) that includes acknowledgment by the responsible adult or adults with respect to the child that the responsible adult or adults understand that the interactive computer service is apt to let their child gain access to whichever of the following sorts of expression or conduct has been carried by the interactive computer service at any time during the past year:

- (i) unlawful expression;
- (ii) child pornography or other sexual depiction of a child;
- (iii) sexually explicit expression;
- (iv) violently explicit expression;
- (v) indecent expression;
- (vi) expression that a reasonable person would consider lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable for a child;
- (vii) profane expression;
- (viii) solicitation of child prostitution;
- (ix) solicitation of statutory rape; or
- (x) other sexual solicitation; and

(C) where informed consent is given in accord with Section XX-03(a), that prominently includes, in a distinct paragraph in bold font, the following acknowledgment by the responsible adult or adults with respect to the child:

- I hereby authorize and take responsibility for [insert name of the interactive computer service] to give my child [insert name] access to expression depicting sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, and depicting masturbation.

Sec. XX-02. DUTIES OF INTERACTIVE COMPUTER SERVICES

(a) An interactive computer service shall not enter a contract or other agreement with a child or allow a child to open an account, without first getting informed consent from the child's responsible adult or adults.

(b) An interactive computer service shall not provide its service to a child or permit a child to gain access to its service, without first getting informed consent from the responsible adult or adults with respect to the child.

(c) Whenever an interactive computer service (i) determines, knows, or should have known that a person, an account, or an account with an associated email or IP address is or was in violation of the interactive computer service's terms and conditions relating to sexual content or is engaged or has engaged in sexual solicitation or sexual depiction of a child or (ii) is informed by a state or federal officer that a person, an account, or an email or IP address is or was reasonably suspected of being in violation of its terms and conditions relating to sexual content or in violation of 18 U.S.C. § 2422(b) or any law on sexual solicitation or sexual depiction of a child, the interactive computer service shall:

(1) if any such violation, solicitation, or depiction is an apparent violation of law, follow the reporting requirements set forth in 18 U.S.C. 2258A with respect to the violation;

(2) notify the responsible adults for any child or child's account with whom the individual, account, or email or IP address has had any contact within the past two years and shall inform the responsible adults of the nature of the risk to a child (for example, "sexual depiction of a child" or "statutory rape");

(3) notify any such responsible adults about their options for protecting their child; and

(4) preserve for at least three years the content and other evidence that is associated with the person, account, or email or IP address and that would be relevant for a criminal prosecution or a civil action under state or federal law.

(d) An interactive computer service shall not give any child access to expression:

(1) that is sexually explicit;

(2) that is violently explicit; or

(3) that includes sexual depiction of a child;

(e) an interactive computer service shall not knowingly, recklessly, or negligently give any child access to expression:

(1) that is sexually explicit;

(2) that is violently explicit; or

(3) that includes sexual depiction of a child;

Sec. XX-03. LIMITS ON DUTIES OF INTERACTIVE COMPUTER SERVICES.

Notwithstanding anything in Section XX-02:

(a) when the responsible adult or adults for a child give informed consent, an interactive computer service may give a child access to expression that is sexually explicit to the extent it, in whole or in part, depicts, appears to depict, or plausibly purports to depict sexually explicit

conduct as defined by 18 U.S.C. § 2256(2)(A)(i), (iii), and (v); provided that such consent shall not be effective for more than 90 days;

(b) an interactive computer service shall not be in violation of Section XX-02(b), for a child's access to its service or expression to the extent the service or expression (i) is accessed by another person, who is not an interactive computer service, and (ii) is shared with the child; but

(c) an interactive computer service shall not enjoy the benefit of Section XX-03(b) with respect to a child's access to its services or expression if it has reason to believe that:

(1) the child's access is without the consent required by Section XX-02;

(2) the child's access is forbidden by Section XX-02; or

(3) the person sharing access with the child (i) is sharing the services or expression in violation of Section XX.04 or (ii) has been in violation of Section XX.04 at any time during the past 365 days.

Sec. XX-04. DUTIES OF OTHER PERSONS.

(a) A person who is not an interactive computer service shall not knowingly, recklessly, or negligently allow any child to:

(1) enter a contract or other agreement;

(2) open an account;

(3) get or gain access to service; or

(4) access expression;

in circumstances in which an interactive computer service would be in violation of Section XX-02.

(b) A person who is not an interactive computer service shall not knowingly, recklessly, or negligently:

(1) make an inaccurate representation to an interactive computer service that a child has no other responsible adult; or

(2) fail to correct such a representation.

Sec. XX-05. RELIANCE ON REPRESENTATION OF RESPONSIBLE ADULT. An interactive computer service may rely on the representation of a child's responsible adult (other than a state agency) that the child has no other responsible adult, but:

(1) only after that responsible adult has expressly and actively represented to the interactive computer service that the child has no other responsible adult; and

(2) only after that responsible adult has expressly and actively represented to the interactive computer service that it will correct any such representation if is or becomes inaccurate; but

(3) provided that the interactive computer service may not rely on any representation that the child has no other responsible adult if the interactive computer service knows or reasonably should know that the representation is or has become inaccurate.

Sec. XX-06. DUTY REGARDING CONSENT. In obtaining consent with respect to a child under this chapter, an interactive computer service shall offer the responsible adult or adults the option to choose any period of days less than 365 days in which their consent will be effective.

Sec. XX-07. INTERMEDIARIES. Nothing in this chapter shall bar the use of intermediaries to obtain or offer consent, including consent as to multiple children and multiple interactive computer services.

Sec. XX-08. VOID ARRANGEMENTS. Any contract, agreement, or other arrangement made or entered in violation of this chapter shall be contrary to law and public policy and shall be void and unenforceable.

Sec. XX-09. REMEDIES.

(a) Any responsible adult with respect to a child may bring a civil action sounding in tort against any person for violating Section XX-02 with respect to the child, and:

(1) if the defendant is found to have violated Section XX-02 (a), (b), (c), or (d), the plaintiff shall recover damages with respect to each such child in an amount of \$1,000 per day that the defendant was in violation of the section with respect to the child; and

(2) if the defendant is found to have violated Section XX-02(e), the plaintiff shall recover damages with respect to each such child in an amount of \$5,000 per day that the defendant was in violation of the section with respect to the child; and

(b) Any responsible adult or adults with respect to a child may bring a civil action sounding in tort against any person for violating Section XX-04 with respect to the child, and if the defendant is found to have violated Section XX-04, the plaintiff shall recover damages with respect to each such child in an amount of \$250 per day that the defendant was in violation of the section with respect to the child.

(c) A plaintiff shall not be required to allege or prove knowledge, recklessness, negligence, or any other scienter in any action brought under this chapter, except as specified by this chapter.

(d) If a defendant is found liable in any civil action under this chapter, the plaintiff may recover costs and reasonable and necessary attorney's fees.

(e) A plaintiff may bring an action under this section regardless of whether another court has declared any provision of this chapter unconstitutional unless that court decision is binding on the court in which the action is brought.

(f) Nonmutual issue preclusion and nonmutual claim preclusion are not defenses to an action brought under this section.

(g) Notwithstanding any other law:

(1) the requirements of this chapter shall be enforced exclusively through the private civil actions described in this section; and

(2) no direct or indirect enforcement of this chapter may be taken or threatened by the state, a political subdivision, a district attorney, or an executive or administrative officer or employee of this state against any person or entity, in any manner whatsoever, except as provided in this section.

Sec. XX-12. JURY TRIAL

(a) In any action brought under this chapter, the plaintiff shall have the right to a jury trial.

(b) In any jury trial brought under this chapter, the jury shall decide both guilt and any damages.

Sec. XX-13. WAIVER AND ESTOPPEL PROHIBITED.

(a) A waiver, purported waiver, or estoppel of a person's right to bring a civil action under this chapter, or of any remedy or any other protection provided by this chapter, is void as unlawful and against public policy, and a court or arbitrator may not enforce or give effect to such a waiver or estoppel, notwithstanding any choice-of-law or other provision in any contract or other agreement.

(b) The waiver and estoppel prohibition described by Subsection (a) shall not apply to contractual waivers to the extent any such application of the prohibition would impair the obligation of contract in violation of the constitution of this state or of the United States.

(c) The waiver and estoppel prohibition described by Subsection (a) is a public-policy limitation on contractual and other waivers or estoppels of the highest importance and interest to this state, and this state is exercising and enforcing this prohibition to the full extent permitted by the constitutions of this state and the United States.

Sec. XX-14. GEOGRAPHIC APPLICABILITY OF CHAPTER. This chapter applies only with a respect to a child:

(1) who is a permanent resident in this state;

(2) who has resided in this state for more than a year; or

(3) who has been sojourning in this state for at least 31 consecutive days.

Sec. XX-15. LIMITATION ON EFFECT OF CHAPTER.

(a) Nothing in this chapter shall be construed to treat any interactive computer service as a publisher.

(b) This chapter does not subject an interactive computer service to any cause of action or liability to the extent it is protected from causes of action or liability by federal law.

(c) Compliance with this chapter shall not excuse any person from any other legal duties or relieve any person from any other legal remedies.

(d) No violation of this chapter may be used to justify or trigger the enforcement of any other law or any type of adverse consequence under any other law, except as provided in this chapter; provided, that this section does not preclude the enforcement of any other law or regulation against conduct that is independently prohibited by such other law or regulation and that would remain prohibited by such other law or regulation in the absence of this chapter.

(e) This chapter's prohibitions do not apply in cases to the extent they would violate the doctrine on the dormant Commerce Clause enunciated by the Supreme Court of the United States.

Sec. XX-16. SEVERABILITY.

(a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other.

(b) If any application of any provision in this chapter to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this chapter shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds that a substantial amount of the provision's applications are unconstitutional, judged in relation to the provision's plainly legitimate sweep, the applications that do not violate the constitution of this state and the constitution and laws of the United States shall be severed from the remaining applications and shall remain in force, and the provision shall be interpreted, as a matter of state law, as if the provision contained explicit language limiting its application to the persons, group of persons, or circumstances for which the statute's application does not violate the constitution of this state and the constitution and laws of the United States.

(c) If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the constitution of this state and the constitution and laws of the United States, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted by every state and federal court, as a matter of state law, as if the provision contained explicit language limiting its application to the persons, group of persons, or circumstances for which the provision's application will not violate the constitution of this state and the constitution and laws of the United States.

(d) The legislature further declares that it would have enacted this chapter, and each constitutional provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this chapter, irrespective of the fact that any discrete provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter, were to

be declared unconstitutional or severed from the remainder of the chapter's provisions and applications.

(e) If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(f) No court may decline to enforce the severability requirements of Subsections (a), (b), (c), (d), and (e) on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision is never rewriting the statute, as the statute continues to contain the exact same words as it did before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the constitution of this state or the constitution or laws of the United States;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

SECTION 3. Chapter XX, as added by this Act, applies only to an action taken on or after the effective date of this Act.

SECTION 4. This Act takes effect on the ____ day after the last day of the legislative session.