Indicates Matter Stricken

Indicates New Matter

Committee Amendment Adopted and Amended

May 01, 2024

H. 3424

Introduced by Reps. T. Moore, Carter, McCravy, Lawson, Beach, Pope, Nutt, Oremus, Vaughan, Long, Haddon, Burns, Chumley, Kilmartin, Cromer, O'Neal, Yow, Gilliam, W. Newton, Guest, Schuessler, Moss, Magnuson, Harris, Pace, Brittain, Bailey, Robbins, Sessions, Ligon, Felder, B. L. Cox, Guffey, Bradley, Murphy, Brewer, Connell, Hiott, Mitchell, Hager, Erickson, B. J. Cox, Blackwell, Wooten, Ballentine, Hyde, Wheeler, Calhoon, M. M. Smith, Davis, B. Newton, Elliott, Forrest, Willis, Hixon, Taylor, J. E. Johnson, Chapman and Ott

S. Printed 05/01/24--S. [SEC 5/2/2024 12:01 PM]

Read the first time February 1, 2024

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A bill

to amend the South Carolina Code of Laws by adding Section 39-5-190 so as to PROVIDE DEFINITIONS, TO PROVIDE THAT IT IS UNLAWFUL FOR AN OPERATOR TO MAKE A PORNOGRAPHIC WEBSITE AVAILABLE TO PERSONS UNDER THE AGE OF EIGHTEEN, TO PROVIDE THAT THE ATTORNEY GENERAL SHALL CREATE CERTAIN PROCEDURES, AND TO PROVIDE FOR A PRIVATE RIGHT OF ACTION.

 Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 1, Title 39 of the S.C. Code is amended by adding:

 Section 39-1-100. (A) As used in this section:

 (1) “Child pornography” means any material depicting a person under the age of eighteen years doing or assisting in doing an act or thing constituting an offense pursuant to Chapter 15, Title 16 and involving any material, act, or thing that is obscene within the meaning of Section 16-15-305.

 (2) “Child sexual exploitation” is defined as the term is used in Sections 16-15-395, 16-15-405, and 16-15-410.

 (3) “Commercial entity” includes corporations, limited liability companies, partnerships, limited partnerships, sole proprietorships, or other legally recognized entities.

 (4) “Digitized identification card” means a data file available on any mobile device which has connectivity to the Internet through a state-approved application that allows the mobile device to download the data file from a state agency or an authorized agent of a state agency that contains all of the data elements visible on the face and back of a license or identification card and displays the current status of the license or identification card.

 (5) “Distribute” means to issue, sell, give, provide, deliver, transfer, transmit, circulate, or disseminate by any means.

 (6) “Internet” means the international computer network of both federal and nonfederal interoperable packet switched data networks.

 (7) “Material harmful to minors” is defined as those terms are used in Section 16-15-375.

 (8) “Obscene material” is defined as the term is used in Section 16-15-305.

 (9) “Minor” is defined as the term is used in Section 16-15-375.

 (10) “News-gathering organization” means any of the following:

 (a) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, while operating as an employee as provided in this subsection, who can provide documentation of such employment with the newspaper, news publication, or news source; or

 (b) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service while operating as an employee as provided in this subsection, who can provide documentation of such employment.

 (11) “Publish” means to communicate or make information available to another person or entity on a publicly available Internet website.

 (12) “Reasonable age verification methods” means verifying that the person seeking to access the material is eighteen years old or older by using any of the following methods:

 (a) use of a digitized identification card as defined in this subsection;

 (b) verification through an independent, third-party age verification service that compares the personal information entered by the individual who is seeking access to the material that is available from a commercially available database, or aggregate of databases, that is regularly used by government agencies and businesses for the purpose of age and identity verification; or

 (c) any commercially reasonable method that relies on public or private transactional data to verify the age of the person attempting to access the material.

 (13) “Substantial portion” means more than thirty-three and one-third percent of total material on a website, which meets the definition of “material harmful to minors” as defined in this section.

 (14)(a) “Transactional data” means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event.

 (b) “Transactional data” includes records from mortgage, education, and employment entities.

 (B)(1) Any commercial entity that knowingly and intentionally publishes or distributes obscene material, or material that depicts, describes, or promotes child pornography or child sexual exploitation, on the Internet may be held liable to an individual for nominal damages, actual damages, court costs, and reasonable attorney’s fees as ordered by the court.

 (2) A commercial entity that has violated this section in a manner that satisfies the standards for imposition of punitive damages elsewhere provided by law may be held liable to an individual for punitive damages.

 (3) Individual claims that satisfy the generally applicable standards for joinder or class action elsewhere provided by law or rules of court, as applicable, may combine their claims in a single action.

 (C)(1) Beginning January 1, 2025, a commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on the Internet from a website that contains a substantial portion of such material must be held liable if the entity fails to perform reasonable age verification methods to verify the age of an individual attempting to access the material.

 (2) A commercial entity that is found to have violated this section is liable to the minor, by and through the minor’s parent or legal guardian, for damages resulting from a minor’s accessing the material, including liability for nominal damages, actual damages, court costs, and reasonable attorney’s fees as ordered by the court.

 (3) A commercial entity that has violated this section in a manner that satisfies the standards for imposition of punitive damages elsewhere provided by law may be held liable to the minor, by and through the minor’s parent or legal guardian, for punitive damages.

 (4) Individual claims that satisfy the generally applicable standards for joinder or class action elsewhere provided by law or rules of court, as applicable, may combine their claims in a single action.

 (5) A commercial entity may not be held liable under this section for allowing access to its website if the entity uses reasonable age verification methods to verify that the individual attempting to access the material from its website is not a minor.

 (6) A commercial entity or third party that uses reasonable age verification methods may not retain any identifying information of the individual after access has been granted to the material.

 (7) A commercial entity that is found to have knowingly retained identifying information of the individual after access has been granted to the individual is liable to the individual for damages resulting from retaining the identifying information, including court costs and reasonable attorney fees as ordered by the court.

 (8) This section does not apply to any bona fide news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization, unless the organization’s website contains a substantial portion of material harmful to minors.

 (9) An Internet service provider, affiliate or subsidiary of an Internet service provider, search engine, or cloud service provider may not be held to have violated the provisions of this section solely for providing access or connection to or from a website or other information or content on the Internet, or a facility, system, or network not under that provider’s control, including transmission, downloading, storing, or providing access, to the extent that such provider is not responsible for the creation of the content of the communication that constitutes material harmful to minors.

 (D) The Attorney General may seek injunctive and other equitable relief against a commercial entity that fails to comply with the provisions of this section.

SECTION 2. Section 16‑15‑375 of the S.C. Code is amended to read:

 Section 16‑15‑375. The following definitions apply to Section 16‑15‑385, disseminating or exhibiting to minors harmful material or performances; Section 16‑15‑387, employing a person under the age of eighteen years to appear in a state of sexually explicit nudity in a public place; Section 16‑15‑395, first degree sexual exploitation of a minor; Section 16‑15‑405, second degree sexual exploitation of a minor; Section 16‑15‑410, third degree sexual exploitation of a minor; Section 16‑15‑415, promoting prostitution of a minor; and Section 16‑15‑425, participating in prostitution of a minor.

 (1) “Harmful to minors” means that quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:

 (a) the average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and

 (b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and

 (c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

 (2) “Material” means pictures, drawings, video recordings, films, digital electronic files, computer generated images or pictures, or other visual depictions or representations but not material consisting entirely of written words.

 (3) “Minor” means an individual who is less than eighteen years old.

 (4) “Prostitution” means engaging or offering to engage in sexual activity with or for another in exchange for anything of value.

 (5) “Sexual activity” includes any of the following acts or simulations thereof:

 (a) masturbation, whether done alone or with another human or animal;

 (b) vaginal, anal, or oral intercourse, whether done with another human or an animal;

 (c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female;

 (d) an act or condition that depicts bestiality, sado‑masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;

 (e) excretory functions;

 (f) the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

 (6) “Sexually explicit nudity” means the showing of:

 (a) uncovered, or less than opaquely covered human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or

 (b) covered human male genitals in a discernibly turgid state.

 (7) “Identifiable minor”

 (a) means a person who:

 (1) was a minor at the time the image was created, adapted, or modified, or whose image as a minor was used in the creating, adapting, or modifying of the image; and

 (2) is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.

 (b) shall not be construed to require proof of the actual identity of the identifiable minor.

 (8) “Morphed image” means any visual depiction or representation, including any photograph, film, video, picture, or computer or computer‑generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where such visual depiction or representation has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct or sexually explicit activity or appearing in a state of sexually explicit nudity.

SECTION 3. Section 16‑15‑395(A)(4) of the S.C. Code is amended to read:

 (A) An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

 (4) records, photographs, films, develops, duplicates, produces, or creates a digital electronic file for sale or pecuniary gain material that contains a visual representation depicting a minor or a morphed image of an identifiable minor engaged in sexual activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

Section 16-15-395 of the S.C. Code is amended by adding:

 (E) The offense is a misdemeanor to be heard by the family court if the person charged under the provisions of subsection (A)(4) is a minor and the offense is the minor’s first offense related to a morphed image of an identifiable minor. The family court may order behavioral health counseling from an appropriate agency or provider, as a condition of adjudicating a minor.

SECTION 4. Section 16‑15‑405(A) of the S.C. Code is amended to read:

 (A) An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:

 (1) records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor or a morphed image of an identifiable minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation; or

 (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor or a morphed image of an identifiable minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

Section 16-15-405 of the S.C. Code is amended by adding:

 (E) The offense is a misdemeanor to be heard by the family court if the person charged under the provisions of subsection (A) is a minor and the offense is the minor’s first charge related to a morphed image of an identifiable minor. The family court may order behavioral health counseling from an appropriate agency or provider, as a condition of adjudicating a minor.

SECTION 5. Section 16‑15‑410(A) of the S.C. Code is amended to read:

 (A) An individual commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor or a morphed image of an identifiable minor engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

Section 16-15-410(D) of the S.C. Code is amended to read:

 (D) This section does not apply to an employee of a law enforcement agency, including the State Law Enforcement Division, a prosecuting agency, including the South Carolina Attorney General's Office, or the South Carolina Department of Corrections who, while acting within the employee's official capacity in the course of an investigation or criminal proceeding, is in possession of material that contains a visual representation of a minor engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation. The employee’s official capacity in the course of such investigation or criminal proceeding includes making materials available for inspection to the defendant’s counsel in response to discovery requests.

Section 16-15-410 of the S.C. Code is amended by adding:

 (E) The offense is a misdemeanor to be heard by the family court if the person charged under the provisions of subsection (A) is a minor and the offense is the minor’s first offense related to a morphed image of an identifiable minor. The family court may order behavioral health counseling from an appropriate agency or provider, as a condition of adjudicating a minor.

SECTION 6. Section 23-3-430(C)(1) of the S.C. Code is amended to read:

 (C)(1) For purposes of this article, a person who has been convicted of, or pled guilty or nolo contendere to any of the following offenses shall be referred to as a Tier I offender:

 (a) criminal sexual conduct in the third degree (Section 16-3-654);

 (b) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

 (c) incest (Section 16-15-20);

 (d) buggery (Section 16-15-120);

 (e) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470);

 (f) a person, regardless of age, who has been convicted or pled guilty or nolo contendere in this State, or who has been convicted or pled guilty or nolo contendere in a comparable court in the United States, or who has been convicted or pled guilty or nolo contendere in the United States federal courts of indecent exposure or of a similar offense in other jurisdictions is required to register pursuant to the provisions of this article if the court makes a specific finding on the record that, based on the circumstances of the case, the convicted person should register as a sex offender;

 (g) sexual intercourse with a patient or trainee (Section 44-23-1150);

 (h) administering, distributing, dispensing, delivering, or aiding, abetting, attempting, or conspiring to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit a crime listed in Section 44-53-370(f), except petit larceny or grand larceny;

 (i) any other offense as described in Section 23-3-430(D)~~,~~;or

 (j) any other offense required by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA);.

 (k) criminal sexual exploitation of a minor, first degree (Section 16-15-395), provided the offense is related to a morphed image of an identifiable minor. If the offender is under eighteen years of age and the offense is related to a morphed image of an identifiable minor, the adjudicated minor is not an offender and is not required to register pursuant to the provisions of this article;

 (l) criminal sexual exploitation of a minor, second degree (Section 16-15-405), provided the offense is related to a morphed image of an identifiable minor. If the offender is under eighteen years of age and the offense is related to a morphed image of an identifiable minor, the adjudicated minor is not an offender and is not required to register pursuant to the provisions of this article;

 (m) criminal sexual exploitation of a minor, third degree (Section 16-15-410), provided the offense is related to a morphed image of an identifiable minor. If the offender is under eighteen years of age and the offense is related to a morphed image of an identifiable minor, the adjudicated minor is not an offender and is not required to register pursuant to the provisions of this article; or

 (n) obscene visual representation of child sexual abuse (Section 16-15-390). If the person is under eighteen years of age and was adjudicated in the family court, the adjudicated minor is not an offender and is not required to register pursuant to the provisions of this article..

SECTION 7. Section 23-3-430(C)(2) of the S.C. Code is amended to read:

 (C)(2) For purposes of this article, a person who has been convicted of, or pled guilty or nolo contendere, to any of the following offenses shall be referred to as a Tier II offender:

 (a) criminal sexual conduct in the second degree (Section 16-3-653);

 (b) engaging a child for sexual performance (Section 16-3-810);

 (c) producing, directing, or promoting sexual performance by a child (Section 16-3-820);

 (d) trafficking in persons (Section 16-3-2020) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

 (e) criminal sexual conduct with minors, second degree (Section 16-3-655(B)). If evidence is presented at the criminal proceeding, or in any court of competent jurisdiction, and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2), provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;

 (f) criminal sexual conduct with minors, third degree (Section 16-3-655(C)). If evidence is presented at the criminal proceeding, or in any court of competent jurisdiction, and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2), provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;

 (g) criminal solicitation of a minor if the purpose or intent of the solicitation or attempted solicitation was to:

 (i) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5);

 (ii) perform a sexual activity in the presence of the person solicited (Section 16-15-342); or

 (h) violations of Article 3, Chapter 15, Title 16 involving a minor, except as otherwise provided in this article;.

 (i) sexual exploitation of a minor, first degree (Section 16-15-395), except as otherwise provided in this article;

 (j) sexual exploitation of a minor, second degree (Section 16-15-405), except as otherwise provided in this article; or

 (k) sexual exploitation of a minor, third degree (Section 16-15-410), except as otherwise provided in this article.

SECTION 8. Section 23-3-462(A) of the S.C. Code is amended to read:

 (A) After successful completion of the requirements of this section, an offender may apply to the South Carolina Law Enforcement Division for the termination of the requirements of registration pursuant to this article. If it is determined that the offender has met the requirements of this section, SLED shall remove the offender's name and identifying information from the sex offender registry and shall notify the offender within one hundred twenty days that the offender has been relieved of the registration requirements of this article.

 (1) An offender may file a request for termination of the requirement of registration with SLED, in a form and process established by the agency:

 (a) after fifteen years of having been registered for at least fifteen years, or after fifteen years from the date of discharge from incarceration without supervision or the termination of active supervision of probation, parole, or any other alternative to incarceration, if the offender was required to register based on an adjudication of delinquency or the offender was required to register as is a Tier I offender;

 (b) after twenty-five years of having been registered for at least twenty-five years, or after twenty-five years from the date of discharge from incarceration without supervision or the termination of active supervision of probation, parole, or any other active alternative to incarceration, if the offender was convicted as an adult, and was required to register as is a Tier II offender;

 (c) an a Tier I or Tier II offender who was required to register as an offender because of a conviction in another state or because of a federal conviction may apply to be removed from the requirements of the registry if he is eligible to be removed under the laws of the jurisdiction where the conviction occurred.

 (2) An offender who was convicted as an adult, and who is required to register as a Tier III offender may not file a request for termination of registration with SLED nor shall any such request be granted pursuant to this subsection.

 (3) The requesting offender must have successfully completed all sex offender treatment programs that have been required.

 (4) The requesting offender must not have been convicted of failure to register within the previous ten years.

 (5) The offender must not have been convicted of any additional sexual offense or violent sexual offense after being placed on the registry.

 (6) A filing fee, as set by SLED but not to exceed two hundred fifty dollars, shall be paid to file the request for termination of registration requirements. The initial application may be filed with SLED and the administrative review may begin one hundred twenty days prior to the date specified in subsection (A)(1); however, any removal may not occur prior to the date specified.

SECTION 9. Article 3, Chapter 15, Title 16 of the S.C. Code is amended by adding:

 Section 16‑15‑390. (A) As used in this section:

 (1) “Obscene” has the same meaning as Section 16‑15‑305.

 (2) “Visual depiction or representation” means and includes undeveloped film and videotape, and data stored on a computer disk or by electronic means that is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer‑generated image or picture, whether made or produced by electronic, mechanical, or other means.

 (B) Any person who knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction or representation of any kind, including a drawing, cartoon, sculpture, or painting that depicts a minor engaging in sexually explicit conduct, sexually explicit activity, or sexually explicit nudity, and is obscene, or attempts or conspires to do so, is guilty of a felony and, upon conviction, must be imprisoned not less than two years nor more than ten years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence.

 (C) Any person who knowingly possesses a visual depiction or representation of any kind, including a drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct, sexually explicit activity, or sexually explicit nudity, and is obscene, or attempts or conspires to do so is guilty of a felony and, upon conviction, must be imprisoned no more than ten years.

 (D) The offense is a misdemeanor to be heard by the family court if the person charged under this section is a minor, and the minor has no prior adjudication under this section or for any offense for which a person may be included in the sex offender registry. The family court may order behavioral health counseling from an appropriate agency or provider, as a condition of adjudicating a minor.

 (E) It is not a required element of any offense under this section that the minor depicted actually exists.

 (F) This section does not apply to an employee of a law enforcement agency, including the State Law Enforcement Division, a prosecuting agency, including the South Carolina Attorney General’s Office, or the South Carolina Department of Corrections, who, while acting within the employee’s official capacity in the course of an investigation or criminal proceeding, is in possession of material that contains a visual representation of a minor engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation. An employee’s official capacity in the course of such investigation or criminal proceeding includes making materials available for inspection to the defendant’s counsel in response to discovery requests.

SECTION 10. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 11. This act takes effect upon approval by the Governor.

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