HOUSE BILL 73

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY
Christine Trujillo

AN ACT

RELATING TO INDECENT DECEPTIVE TRADE PRACTICES; ENACTING THE
HUMAN TRAFFICKING AND CHILD EXPLOITATION ACT; CREATING
CONTINUING DUTIES FOR RETAILERS OF INTERNET-ENABLED DEVICES;
CREATING A CIVIL ACTION, CONSUMER PROTECTION VIOLATIONS, AN
AFFIRMATIVE DEFENSE, UNLAWFUL ACTS, PENALTIES AND EXEMPTIONS;
ESTABLISHING THE NEW MEXICO HUMAN TRAFFICKING AND CHILD
EXPLOITATION PREVENTION GRANT FUND ADMINISTERED BY THE ATTORNEY
GENERAL FOR THE BENEFIT OF GOVERNMENTAL AND, ESPECIALLY, NON-
GOVERNMENTAL GROUPS WORKING TO UPHOLD CONTEMPORARY COMMUNITY
STANDARDS OF DECENCY OR TO COMBAT SEX-RELATED OFFENSES;
IMPOSING AN ADMISSION FEE ON LIVE ADULT ENTERTAINMENT
ESTABLISHMENTS; PROVIDING FOR A CONTINGENT EFFECTIVE DATE THAT
DEPENDS ON FOUR OTHER STATES ENACTING SIMILAR LEGISLATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:
SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Human Trafficking and Child Exploitation Act".

SECTION 2. [NEW MATERIAL] PURPOSE.--The purpose of the Human Trafficking and Child Exploitation Act is to regulate indecent deceptive trade practices, cause existing laws to catch up to modern technology and deter the erosion of contemporary community standards of decency.

SECTION 3. [NEW MATERIAL] LEGISLATIVE FINDINGS.--The legislature finds that:

A. the United States supreme court in Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004), found the legislative branch "may undoubtedly act to encourage the use of filters . . . . It could also take steps to promote their development by industry, and their use by parents", which was the United States supreme court's way of signaling to the legislative branch to pass filter legislation that requires consumers to opt in to having access to obscene materials that are harmful to minors on internet-enabled devices, since filters are the least restrictive means;

B. the United States supreme court found in Ginsberg v. New York, 390 U.S. 629 (1968), that a physical display state statute that required physical brick and mortar stores to put physical obscene material behind a physical blinder rack was constitutional under first amendment heightened scrutiny, which means that a digital blinder rack
statute that requires digital retailers to put digital obscene material behind a digital blinder rack is also constitutional on the same legal basis;

C. because the United States supreme court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), made it clear that the states have a compelling interest to uphold community standards of decency, a statute requiring a filter deactivation fee regarding websites displaying obscene material and an adult service business admission fee are constitutional for being rationally related to a narrowly tailored compelling state interest;

D. the Texas supreme court in *Combs v. Texas Entertainment Association, et al.*, 347 S.W.3d 277 (Sup. Ct. Tex. 2011), relying on federal constitutional law, found that a statute that required a five-dollar ($5.00) admission fee to an adult service business that was to be remitted back to the state to enable the state to uphold community standards of decency was constitutional under first amendment heightened scrutiny, which means that a one-time twenty-dollar ($20.00) filter deactivation fee to enter the digital strip club on internet-enabled devices is constitutional on the same legal basis, if remitted to the state to be used in the same manner;

E. human trafficking has substantially moved from the street corner to the smart phone, which means that making websites that facilitate human trafficking and prostitution
inaccessible by default on internet-enabled devices will do
more to curb the demand for such offenses, more so than any
other measure since the inception of the internet;

F. live adult entertainment establishments
contribute to a culture that tolerates the sexual
objectification and exploitation of women and contribute to the
need for community-based services to respond to victims of all
forms of sexual exploitation, including sexual harassment,
trafficking and sexual assault;

G. crime statistics show that the presence of live
adult entertainment establishments may result in an increase in
prohibited secondary sexual activities, such as prostitution
and other crimes, in the surrounding community; and

H. the legislature is generally opposed to online
censorship unless the content is injurious to children or
promotes human trafficking; only then does the legislature
condone limited censorship.

SECTION 4. [NEW MATERIAL] DEFINITIONS.--As used in the
Human Trafficking and Child Exploitation Act:

A. "cellular telephone" means a communication
device containing a unique electronic serial number that is
programmed into its computer chip by its manufacturer and whose
operation is dependent on the transmission of that electronic
serial number along with a mobile identification number, which
is assigned by the cellular telephone carrier, in the form of
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radio signals through cell sites and mobile switching stations;

B. "child pornography" has the same meaning as set forth in 18 U.S.C. Section 2256 and describes an offense pursuant to Section 30-6A-3 NMSA 1978;

C. "computer" has the same meaning as set forth in 18 U.S.C. Section 1030;

D. "consumer" means an individual, business or entity that purchases or leases for personal, family or household purposes, or for any other reason, an internet-enabled device;

E. "data communications device" means an electronic device that receives electronic information from one source and transmits or routes it to another, including any such bridge, router, switch or gateway;

F. "filter" means a digital blocking capability, hardware or software that restricts or blocks internet access to websites, electronic mail, chat or other internet-based communications based on category, site or content, and the term means a digital blinder rack that can be deactivated by a retailer upon the satisfaction of certain nominal conditions;

G. "harmful to minors" has the same meaning as set forth in Subsection F of Section 30-37-1 NMSA 1978;

H. "hate speech" means a phrase concerning content that an individual finds offensive based on the individual's personal moral code;
I. "human trafficking" has the same meaning as set forth in Section 30-52-1 NMSA 1978;

J. "internet" has the same meaning as given in 31 U.S.C. Section 5362;

K. "internet-enabled device" means a cellular telephone, computer, data communications device or other product manufactured, distributed or sold in New Mexico that provides internet access or plays a material role in distributing content on the internet;

L. "internet service provider" means a person engaged in the business of providing a computer and communications facility through which a consumer may obtain access to the internet. The term does not include a common carrier if it provides only telecommunications service;

M. "live adult entertainment establishment" means a business in which, as the major activity, customers congregate primarily for the purpose of viewing or associating with employees who display anatomical areas designed to provide sexual stimulation or sexual gratification, including human genitals, the immediate pubic region or pubic hair, buttocks to the extent of exposing the immediate anal area, female breasts to points below the nipples, male genitals in a state of erection, even if covered with opaque clothing, and all of the above anatomical areas when covered only by transparent or diaphanous clothing;
N. "minor" has the same meaning as set forth in Section 30-37-1 NMSA 1978;

O. "obscene material" means content:

(1) that the average individual applying contemporary community standards would find, when considered or taken as a whole, appeals to prurient interests;

(2) depicting or describing sexual conduct in a patently offensive way by audio or visual representations, actual or simulated masturbation, excretory functions or exhibitions of a specified anatomical area of oneself or another, or tactile stimulation of the covered or uncovered genitals of oneself or another;

(3) that, when considered or taken as a whole, lacks serious literary, artistic, political or scientific value; and

(4) on websites that:

(a) are known to facilitate human trafficking or prostitution; and

(b) display or depict images that are harmful to minors or that constitute sado-masochistic abuse, sexual excitement, sexual conduct or revenge pornography;

P. "personal identification information" means any information that identifies a person, including an individual's photograph, social security number, driver identification number, name, email address, address or telephone number;
Q. "prostitution" has the same meaning as set forth in Section 30-9-2 NMSA 1978;

R. "retailer" means any person who regularly engages in the manufacturing, sale, offer for sale or lease of internet-enabled devices or services in New Mexico that make content accessible on the internet; the term includes internet service providers;

S. "revenge pornography" means images that promote the exposure of a person and that is an offense as set forth in Section 30-37A-1 NMSA 1978;

T. "sado-masochistic abuse" has the same meaning as set forth in Subsection E of Section 30-37-1 NMSA 1978;

U. "sexual conduct" has the same meaning as set forth in Subsection C of Section 30-37-1 NMSA 1978;

V. "sexual excitement" has the same meaning as set forth in Subsection D of Section 30-37-1 NMSA 1978; and

W. "social media website" means an internet website or application that enables users to communicate with each other by posting information, comments, messages or images and that meets all of the following requirements:

(1) is open to the public;

(2) has more than seventy-five million subscribers;

(3) from its inception, has not been specifically affiliated with any one religion or political
party; and

(4) provides a means for the website's users to report obscene materials and has in place procedures for evaluating those reports and removing obscene material.

SECTION 5. [NEW MATERIAL] CONTINUING DUTIES OF RETAILERS OF INTERNET-ENABLED DEVICES--FILTERS.--

A. A retailer that manufactures, sells, offers for sale, leases or distributes an internet-enabled device shall ensure that the product is equipped with an active and operating filter prior to sale that blocks by default websites that:

(1) are known to facilitate human trafficking or prostitution; and

(2) display child pornography, revenge pornography or obscene material harmful to minors.

B. A retailer that manufactures, sells, offers for sale, leases or distributes an internet-enabled device shall:

(1) make reasonable and ongoing efforts to ensure that the device's filter functions properly;

(2) establish a reporting mechanism, such as a website or call center, to allow a consumer to report unblocked websites displaying content described in Paragraphs (1) and (2) of Subsection A of this section or to report blocked websites that are not displaying content described in those paragraphs;

(3) report child pornography received through
the reporting mechanism to the national center for missing and
exploited children's cyber tip line in accordance with
Subsection A of 18 U.S.C. Section 2258; and

(4) not block access to websites that:

(a) are social media websites that
provide a means for the website's users to report obscene
materials and have in place procedures for evaluating those
reports and removing obscene material;

(b) serve primarily as a search engine;

or

(c) display complete movies that meet
the qualifications for a "G", "PG", "PG-13" or "R" rating by
the classification and ratings administration, as those
qualifications existed on September 1, 2020.

C. A retailer of an internet-enabled device shall
not provide to a consumer methods, source code or other
operating instructions for deactivating a product's filter.

D. A retailer of an internet-enabled device shall
deactivate the filter after a consumer:

(1) requests that the capability be disabled;

(2) presents personal identification
information to verify that the consumer is eighteen years of
age or older;

(3) acknowledges receiving a warning regarding
the potential danger of deactivating the filter; and
(4) pays a one-time twenty-dollar ($20.00) filter deactivation fee to be remitted quarterly to the taxation and revenue department to be deposited into the New Mexico human trafficking and child exploitation prevention grant fund established pursuant to Subsection A of Section 9 of the Human Trafficking and Child Exploitation Act.

E. The filter deactivation fee imposed by Paragraph (4) of Subsection D of this section is not content-based but collected and remitted to the taxation and revenue department to help New Mexico bear the costs of upholding community standards of decency and of combating sex-related offenses and is to be used as set forth in Subsection E of Section 9 of the Human Trafficking and Child Exploitation Act. The taxation and revenue department shall prescribe the administration, payment, collection and enforcement of the fee imposed by Paragraph (4) of Subsection D of this section. The taxation and revenue department may annually adjust the one-time fee to account for inflation.

F. Nothing in the Human Trafficking and Child Exploitation Act shall be construed to prevent a retailer of an internet-enabled device from charging a reasonable separate fee to deactivate the filter, which it may retain for profit.

G. The attorney general shall prepare and make available to retailers a form that includes all content that is required in the warning pursuant to Paragraph (3) of Subsection
D of this section.

H. Nothing in the Human Trafficking and Child Exploitation Act shall be construed to require a retailer of an internet-enabled device to create a database or registry that contains the names or personal identification information of adults who knowingly chose to deactivate a product's filter. A retailer of an internet-enabled device shall take due care to protect the privacy rights of adult consumers pursuant to this section and shall not disclose the names or personal identification information of an adult consumer who decided to deactivate a product's filter.

SECTION 6. [NEW MATERIAL] FILTER QUALITY CONTROL--CIVIL ACTION--UNFAIR AND DECEPTIVE TRADE PRACTICE VIOLATION--AFFIRMATIVE DEFENSE.--

A. Pursuant to Paragraph (2) of Subsection B of Section 5 of the Human Trafficking and Child Exploitation Act, if the filter blocks a website that is not displaying content described in Subsection A of Section 5 of that act and the block is reported to a call center or reporting mechanism, the website shall be unblocked within a reasonable time, but in no event later than five business days after the block is first reported. A consumer may seek judicial relief to unblock a website that was wrongfully blocked by the filter. The prevailing party in a civil litigation may seek attorney fees, costs and other forms of relief.
B. Pursuant to Paragraph (2) of Subsection B of Section 5 of the Human Trafficking and Child Exploitation Act, if a retailer of an internet-enabled device is unresponsive to a report of a website displaying content described in Subsection A of Section 5 of that act, the attorney general or a consumer may file a civil lawsuit. The attorney general or a consumer may seek damages of up to five hundred dollars ($500) for each website that was reported but not subsequently blocked. The prevailing party in the civil action may seek attorney fees, costs and other forms of relief.

C. If a retailer of an internet-enabled device fails to comply with a duty described in Subsections A and B of this section, it has engaged in an unfair or deceptive trade practice in violation of the Unfair Practices Act and is subject to penalties for violating that act.

D. It shall be an affirmative defense in a civil action to a charge of violating this section that the dissemination of the content described in Subsection A of Section 5 of the Human Trafficking and Child Exploitation Act was limited to institutions or organizations having scientific, educational or other similar justifications for displaying the material.

SECTION 7. [NEW MATERIAL] UNLAWFUL ACTS--PENALTIES.--

A. A retailer of an internet-enabled device is guilty of an offense if it knowingly:
(1) sells an internet-enabled device without activated blocking capability that at least makes an attempt to block by default websites that display content described in Subsection A of Section 5 of the Human Trafficking and Child Exploitation Act;

(2) violates Subsection C of Section 5 of the Human Trafficking and Child Exploitation Act;

(3) fails to comply with the requirements of Subsection D of Section 5 of the Human Trafficking and Child Exploitation Act before deactivating a product's filter; or

(4) discloses to a third party the name or the personal identification information of adult consumers who have elected to deactivate a product's filter in violation of Subsection H of Section 5 of the Human Trafficking and Child Exploitation Act without a court order directing otherwise.

B. A retailer of an internet-enabled device that commits an offense pursuant to Subsection A of this section shall be fined no more than one thousand dollars ($1,000) for a first offense and no more than two thousand five hundred dollars ($2,500) for any subsequent offenses.

C. A retailer of an internet-enabled device that commits an offense pursuant to Subsection A of this section with two prior convictions pursuant to that subsection is guilty of a petty misdemeanor.

D. A retailer of an internet-enabled device that
commits an offense pursuant to Subsection A of this section has engaged in an unfair and deceptive trade practice in violation of the Unfair Practices Act and is subject to the penalties for violating that act.

E. Only the attorney general or a district attorney is authorized to enforce this section.

SECTION 8. [NEW MATERIAL] EXEMPTIONS.--

A. The Human Trafficking and Child Exploitation Act shall not apply to:

(1) an occasional sale of an internet-enabled device by a person that is not regularly engaged in the trade business of selling internet-enabled devices;

(2) products produced or sold before enactment of the Human Trafficking and Child Exploitation Act; and

(3) independent third-party routers that are not affiliated with an internet service provider.

B. The Human Trafficking and Child Exploitation Act does not apply to a retailer of an internet-enabled device that is not subject to the jurisdiction of New Mexico.

SECTION 9. [NEW MATERIAL] NEW MEXICO HUMAN TRAFFICKING AND CHILD EXPLOITATION PREVENTION GRANT FUND.--

A. There is established in the state treasury a special fund to be known as the "New Mexico human trafficking and child exploitation prevention grant fund" to be administered by the attorney general or the attorney general's
designee.

B. The purposes of the fund are:

(1) to promote the development throughout New Mexico of locally based and supported nonprofit programs for the survivors of sex-related offenses and to support the quality of services provided;

(2) to empower any governmental and, especially, non-governmental groups working to uphold community standards of decency, to protect children, to strengthen families or to develop, expand or prevent or offset the costs of sex-related offenses; and

(3) not to promote a culture of perpetual victimhood but to maximize human flourishing and to protect the public's safety, health and welfare.

C. The purposes of the fund shall be interpreted broadly to meet the evolving needs of New Mexico.

D. The fund shall consist of:

(1) deactivation fees collected by the taxation and revenue department from retailers of internet-enabled devices pursuant to Paragraph (4) of Subsection D of Section 5 of the Human Trafficking and Child Exploitation Act;

(2) admission fees collected by the taxation and revenue department from live adult entertainment establishments pursuant to Subsection A of Section 10 of the Human Trafficking and Child Exploitation Act; and
(3) any other appropriations, gifts, grants, donations and bequests.

E. Money deposited into the fund may be used only by:

(1) the attorney general or the attorney general's designee for grants to governmental and, especially, non-governmental entities and individuals that are working to uphold community standards of decency, to protect children, to strengthen families, or to develop, expand or strengthen programs for victims of human trafficking or child exploitation, including providing grants for:

(a) the needs of human trafficking victim advocates as set forth in Paragraph (2) of Subsection G of Section 30-52-2 NMSA 1978;

(b) the needs of the benefits and services for human trafficking victims established pursuant to Section 30-52-2 NMSA 1978;

(c) the needs of the New Mexico's internet crimes against children task force;

(d) the needs of the attorney general's human trafficking task force and any other task force or coalition located in New Mexico;

(e) the needs of victim compensation;

(f) services to help women with substance abuse problems stay clean;
(g) counselors and victim advocates who are trained to assist victims of domestic violence and sexual abuse;

(h) shelters for women, particularly those who have been exposed to prostitution or human trafficking;

(i) research-based organizations;

(j) faith-based organizations working to uphold community standards of decency and assisting victims of human trafficking or other sex offenses;

(k) child advocacy centers;

(l) organizations that provide legal advocacy to abused, neglected and at-risk children;

(m) physical and mental health services;

(n) temporary and permanent housing placement;

(o) employment, placement, education and training;

(p) independent school districts;

(q) family counseling and therapy;

(r) law enforcement;

(s) musical, writing, design, cinematic, or pictorial creative art projects that promote decency;

(t) regional nonprofit providers of civil legal services to provide legal assistance for sexual
assault victims;

(u) grants to support technology in rape crisis centers;

(v) sexual violence awareness and prevention campaigns; and

(w) scholarships for students demonstrating outstanding character or leadership skills; and

(2) any other state agency or organization for the purpose of conducting human trafficking enforcement programs or to uphold community standards of decency.

F. Interest accruing on investments and deposits of the fund shall be credited to the fund shall not revert to the general fund and shall be carried forward into subsequent fiscal years.

G. Any balance in the fund remaining unexpended at the end of a fiscal year shall not revert to the general fund but shall be carried forward into subsequent fiscal years.

H. The attorney general or the attorney general's designee shall evaluate activities conducted pursuant to this section each year and, on or before February 15 of each year, submit an annual report containing the evaluation to the chief clerk of the senate and chief clerk of the house of representatives and notify the legislature that the report is available. The report shall include:

(1) the amount of filter deactivation fees
received pursuant to Paragraph (4) of Subsection D of Section 5 of the Human Trafficking and Child Exploitation Act;

(2) the amount of admission fees received pursuant to Subsection A of Section 10 of the Human Trafficking and Child Exploitation Act;

(3) the manner in which the funds in the account maintained pursuant to Subsection E of this section were distributed; and

(4) the manner in which each entity receiving a grant pursuant to Subsection E of this section used the grant money.

I. The attorney general or the attorney general's designee may by rule:

(1) determine eligibility requirements for any grant awarded pursuant to this section;

(2) require a grant recipient to offer minimum services for a period of time before receiving a grant and to continue to offer minimum services during the grant period; and

(3) require a grant recipient to submit financial and programmatic reports.

J. The attorney general or the attorney general's designee shall not spend more than ten percent of the available funds on the administration of the fund.

SECTION 10. [NEW MATERIAL] LIVE ADULT ENTERTAINMENT ESTABLISHMENT.--

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A. A five-dollar ($5.00) admission fee is imposed for each entry by each customer admitted to a live adult entertainment establishment to be remitted quarterly to the taxation and revenue department and deposited into the New Mexico human trafficking and child exploitation prevention grant fund established pursuant to Subsection A of Section 9 of the Human Trafficking and Child Exploitation Act. The taxation and revenue department shall prescribe the method of administration, payment, collection and enforcement of the fee imposed by this section.

B. The admission fee is not content based but is imposed and remitted to New Mexico to offset secondary harmful effects, help the state uphold community standards of decency and combat sex-related crimes and is to be used as set forth in Subsection E of Section 9 of the Human Trafficking and Child Exploitation Act.

C. The admission fee is in addition to all other taxes imposed on a business that offers adult entertainment.

D. Each live adult entertainment establishment shall record daily in the manner required by the taxation and revenue department the number of customers admitted to the business. The business shall maintain the records for the period required by the taxation and revenue department and make the records available only for inspection and audit on request by that department. The records shall not contain the names or
personal information of any customer.

E. This section does not require a live adult entertainment establishment to impose a tax on a customer of the business. A business has the discretion to determine the manner in which the business derives the money required to pay the tax imposed pursuant to this section.

SECTION 11. [NEW MATERIAL] TEMPORARY PROVISIONS.--The legislature recognizes some non-governmental groups in New Mexico that have been either working to uphold community standards of decency or to combat sex-related offenses that could be prospective beneficiaries of the fund established pursuant to Subsection A of Section 9 of the Human Trafficking and Child Exploitation Act. These groups includes LEAD program, street safe New Mexico, spoken for, New Mexico dream center, freedom house, New Mexico organized against trafficking humans, New Mexico chapters of A21, New Mexico chapter of international justice mission, project zoe, New Mexico tribal task force on human trafficking, New Mexico's internet crimes against children task force, catholic charities (Albuquerque), enlace comunitario (Albuquerque), law office of J. Alison Cimino, P.C. (Albuquerque), Luna county healing house, Luna county casa program (Deming), New Mexico legal aid (Deming), esperanza house, inc. (Deming), family crisis center (Farmington), la casa, inc. (Las Cruces), la pinon (Las Cruces), salvation army (Las Cruces), domestic unity (Reserve),
Chaves county casa program (Roswell), city of Santa Fe domestic
and sexual violence prevention liaison, the life link (Santa
Fe), solace crisis treatment center (Santa Fe), youth shelters
and family services (Santa Fe), salvation army (El Paso), SE NM
child advocacy centers, Albuquerque family advocacy center,
oasis children's advocacy center, New Mexico voices for
children, New Mexico children's alliance, la pinon children's
advocacy center, joy junction, inc. (Albuquerque), steelbridge
(Albuquerque), good shepherd center (Albuquerque), St.
Elizabeth shelter corporation (Santa Fe), interfaith community
shelter at Pete's place (Santa Fe), PATH (Farmington),
Albuquerque opportunity center (Albuquerque), the rock at
noonday (Albuquerque), SAFE house (Albuquerque), new day youth
and family services (Albuquerque), jardin de los ninos (Las
Cruces), New Mexico veteran's integration center (Albuquerque),
James ranch youth shelter (Roswell), New Mexico coalition to
end homelessness (Santa Fe), Las Cruces gospel rescue mission
(Las Cruces), roof (Farmington), family promise of Albuquerque,
esperanza house (Roswell), Carlsbad community of hope center
(Carlsbad), amistad runaway facility (Albuquerque), poco loco
river trail (Albuquerque), IBC community outreach center
(Grants), rivers of life outreach (Roswell), Barrett house
(Albuquerque) and other similarly situated groups and
individuals.

SECTION 12. [NEW MATERIAL] CONTINGENT EFFECTIVE DATE--
NOTIFICATION.--

    A. This act shall take effect after the passage, approval, ratification and adoption by four other states of similar legislation.

    B. Within ten days of the date that four states adopt legislation similar to this act, the attorney general shall advise the governor, the speaker of the house of representatives and the president pro tempore of the senate of the effective date of this act.