

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 498

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO LIABILITY FOR PUBLISHERS AND DISTRIBUTORS OF MATERIAL HARMFUL TO MINORS ON THE INTERNET; AMENDING TITLE 6, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 38, TITLE 6, IDAHO CODE, TO PROVIDE LEGISLATIVE FINDINGS AND INTENT, TO DEFINE TERMS, TO PROHIBIT THE INTENTIONAL PUBLICATION OR DISTRIBUTION OF MATERIAL HARMFUL TO MINORS ON THE INTERNET, TO PROVIDE FOR A PRIVATE CAUSE OF ACTION, TO PROVIDE AFFIRMATIVE DEFENSES, TO PROVIDE FOR VENUE FOR CIVIL ACTIONS, TO PROVIDE FOR THE EXCLUSIVITY OF PRIVATE CIVIL ENFORCEMENT, TO PROVIDE FOR CERTAIN IMMUNITY AND LIMITS ON STATE COURT JURISDICTION, AND TO PROVIDE FOR SEVERABILITY; AND DECLARING AN EMERGENCY AND PROVIDING AN EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Title 6, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 38, Title 6, Idaho Code, and to read as follows:

CHAPTER 38

LIABILITY FOR PUBLISHERS AND DISTRIBUTORS OF MATERIAL HARMFUL TO MINORS ON THE INTERNET

6-3801. LEGISLATIVE FINDINGS AND INTENT. (1) The provisions of this chapter are intended to provide a civil remedy for damages against commercial entities that publish or distribute material that is harmful to minors on the internet. The legislature finds that pornography is creating a public health crisis and having a corroding influence on minors. Due to advances in technology, the universal availability of the internet, and limited age verification requirements, minors are exposed to pornography earlier in age. Pornography contributes to the hyper-sexualization of teens and pre-pubescent children and may lead to low self-esteem, body image disorders, an increase in problematic sexual activity at younger ages, and increased desire among adolescents to engage in risky sexual behavior. Pornography may also impact brain development and functioning, contribute to emotional and medical illnesses, shape deviant sexual arousal, and lead to difficulty in forming or maintaining positive, intimate relationships, as well as promote problematic or harmful sexual behaviors and addiction.

(2) As provided in the Idaho consumer protection act that was passed by the legislature in 1971 and allows consumers to seek legal remedies through private lawsuits, it is the intent of the legislature to enable a minor person, or the parent or guardian of such person, who is exposed to harmful material on the internet to bring an action to recover damages.

(3) It is the intent of the legislature that the sovereign immunity described in section 6-3808, Idaho Code, includes the constitutional sovereign immunity recognized by the court in *Seminole Tribe of Florida v.*

1 *Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999), which
 2 applies in both state and federal court, and which may not be abrogated by
 3 congress or by any state or federal court except pursuant to legislation au-
 4 thorized by section 5 of the fourteenth amendment to the constitution of the
 5 United States, by the bankruptcy clause of article I, by congress's powers to
 6 raise and support armies and to provide and maintain a navy, or by any other
 7 ground that might be recognized by the supreme court of the United States.

8 (4) With respect to the severability provisions of section 6-3809,
 9 Idaho Code, it is the intent of the legislature that any court construing
 10 such provisions be mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in
 11 which, in the context of determining the severability of a state statute,
 12 the supreme court of the United States held that an explicit statement of
 13 legislative intent is controlling. It is the intent of the legislature that
 14 every provision, section, subsection, sentence, clause, phrase, or word
 15 in this chapter, and every application of the provisions in this chapter to
 16 every person, group of persons, or circumstances, are severable from each
 17 other. The legislature further declares that it intends to enact this chap-
 18 ter, and each provision, section, subsection, sentence, clause, phrase, or
 19 word, and all constitutional applications of the provisions of this chapter,
 20 irrespective of the fact that any provision, section, subsection, sentence,
 21 clause, phrase, or word, or applications of this chapter could be declared
 22 invalid, preempted, or unconstitutional.

23 6-3802. DEFINITIONS. As used in this chapter:

24 (1) "Commercial entity" means a corporation, a limited liability com-
 25 pany, a partnership, a limited partnership, a sole proprietorship, or an-
 26 other legally recognized business entity.

27 (2) "Digitized identification card" means a data file available on any
 28 mobile device that has connectivity to the internet through a state-approved
 29 application that allows the mobile device to download a data file that con-
 30 tains all of the data elements visible on the face and back of a license or
 31 identification card and displays the current status of the license or iden-
 32 tification card.

33 (3) "Harmful to minors" means:

34 (a) Material that the average person applying contemporary community
 35 standards would find, taking the material as a whole and with respect to
 36 minors, is designed to appeal to, or is designed to pander to, the pruri-
 37 ent interest;

38 (b) Material that is devoted to or principally consists of descriptions
 39 of actual, simulated, or animated displays or depictions of any of the
 40 following, in a manner patently offensive with respect to minors:

41 (i) Pubic hair, anus, vulva, genitals, or nipple of the female
 42 breast;

43 (ii) Touching, caressing, or fondling of nipples, breasts, but-
 44 tocks, anuses, or genitals; or

45 (iii) Sexual intercourse, masturbation, sodomy, bestiality, oral
 46 copulation, flagellation, excretory functions, exhibitions, or
 47 any other sexual act; and

48 (c) Material that, taken as a whole, lacks serious literary, artistic,
 49 political, or scientific value for minors.

1 (4) "Information content provider" means any person or entity that is
2 responsible, in whole or in part, for the creation or development of informa-
3 tion provided through the internet or any interactive computer service.

4 (5) "Interactive computer service" means any information service, sys-
5 tem, or access software provider that provides or enables computer access
6 by multiple users to a computer server, including specifically a service or
7 system that provides access to the internet and such systems operated or ser-
8 vices offered by libraries or educational institutions.

9 (6) "Internet" means the international computer network of both fed-
10 eral and nonfederal interoperable packet-switched data networks.

11 (7) "Minor" means any person under the age of eighteen (18) years.

12 (8) (a) "News-gathering organization" means any of the following:

13 (i) An employee of a newspaper, news publication, or news source
14 that is printed or on an online or mobile platform, of current news
15 and public interest, while operating as an employee of such news-
16 gathering organization, who can provide documentation of such em-
17 ployment with the newspaper, news publication, or news source; or

18 (ii) An employee of a radio broadcast station, television broad-
19 cast station, cable television operator, or wire service while op-
20 erating as an employee of such news-gathering organization, who
21 can provide documentation of such employment.

22 (b) A website or an interactive computer service is not deemed to be a
23 news-gathering organization unless its primary business is as an infor-
24 mation content provider, news publisher, or broadcaster of current news
25 and public interest.

26 (9) "Publish" means to communicate or make information available to an-
27 other person or entity on a publicly available internet website. A commer-
28 cial entity shall not be considered the publisher of any material or informa-
29 tion provided by another information content provider.

30 (10) "Reasonable age verification methods" include verifying that the
31 person seeking to access the material is eighteen (18) years of age or older
32 by:

33 (a) Providing a digitized identification card as defined in this sec-
34 tion; or

35 (b) Requiring that the person attempting to access the material com-
36 plies with a commercial age verification system that verifies age in one

37 (1) or more of the following ways:

38 (i) Government-issued identification; or

39 (ii) Public or private transactional data.

40 (11) "Substantial portion" means more than one-third (1/3) of total ma-
41 terial on a website. If a website links by hypertext link to the material of
42 a third-party website, the material on such third-party website shall not be
43 considered toward the total percentage of material if that third-party web-
44 site does not contain material harmful to minors and if such linking does not
45 constitute an attempt to intentionally dilute the percentage calculation of
46 material harmful to minors in order to evade the provisions of this section.

47 (12) "Transactional data" means a sequence of information that docu-
48 ments an exchange, agreement, or transfer between an individual, commercial
49 entity, or third party used for the purpose of satisfying a request or event.

1 Transactional data may include but is not limited to records from mortgage,
2 education, and employment entities.

3 6-3803. INTENTIONAL PUBLICATION OR DISTRIBUTION OF MATERIAL HARMFUL
4 TO MINORS ON THE INTERNET. (1) Any commercial entity that knowingly and
5 intentionally publishes material that is harmful to minors on the internet
6 from a website that contains a substantial portion of such material shall be
7 liable if the entity fails to perform reasonable age verification to verify
8 the age of individuals attempting to access the material or, after verifying
9 the age of the individual, provides a minor access to the material.

10 (2) Any commercial entity or third party that takes steps to perform a
11 reasonable age verification required pursuant to this chapter shall not re-
12 tain any identifying information of the individual after age verification
13 has been performed.

14 (3) This chapter shall not apply to any bona fide news or public inter-
15 est broadcast, website video, report, or event and shall not be construed to
16 affect the rights of any news-gathering organizations.

17 (4) No internet service provider, affiliate of an internet ser-
18 vice provider, subsidiary of an internet service provider, search engine
19 provider, web browser provider, smart device manufacturer, computer man-
20 ufacturer, or cloud service provider shall be held to have violated the
21 provisions of this chapter solely for providing access or connection to
22 or from a website or other information or content on the internet or a fa-
23 cility, system, or network not under that provider's control, including
24 transmission, downloading, intermediate storage, or access software, to the
25 extent such provider is not responsible for the creation of the content of
26 the communication that constitutes material harmful to minors. However, an
27 interactive computer service is subject to the provisions of this section if
28 it knowingly benefits from:

29 (a) Being the information content provider for a commercial entity that
30 knowingly and intentionally publishes material harmful to minors in vi-
31 olation of subsection (1) of this section; or

32 (b) Being in a venture with a commercial entity that knowingly and in-
33 tentively publishes material harmful to minors in violation of sub-
34 section (1) of this section.

35 (5) Nothing in this chapter shall be construed to create a conflict with
36 applicable federal law.

37 6-3804. PRIVATE CAUSE OF ACTION. (1) Any person exposed to material
38 harmful to minors in violation of section 6-3803, Idaho Code, including the
39 parent or guardian of a child exposed to material harmful to minors, has
40 standing to bring a civil action against any person or entity that is liable
41 under section 6-3803, Idaho Code, provided that no lawsuit may be brought
42 under this section against a provider or a user of an interactive computer
43 service if such lawsuit would be preempted by 47 U.S.C. 230(c).

44 (2) If a claimant prevails in an action brought under this section, the
45 court shall award:

46 (a) Injunctive relief sufficient to prevent the defendant from engag-
47 ing in the conduct described in section 6-3803, Idaho Code;

48 (b) Nominal and compensatory damages;

1 (c) Statutory damages in an amount no less than ten thousand dollars
2 (\$10,000); and

3 (d) Court costs and reasonable attorney's fees.

4 (3) Notwithstanding any other provision of law to the contrary, a per-
5 son may bring an action under this section no later than four (4) years after
6 the date the cause of action accrued.

7 (4) Notwithstanding any other provision of law to the contrary, the
8 following shall not be a defense to an action brought under this section:

9 (a) Ignorance or mistake of law;

10 (b) A defendant's belief that the requirements or provisions of this
11 chapter are unconstitutional or were unconstitutional;

12 (c) A defendant's reliance on any court decision that has been vacated,
13 reversed, or overruled on appeal or by a subsequent court, even if that
14 court decision had not been vacated, reversed, or overruled when the
15 cause of action accrued;

16 (d) A defendant's reliance on any state or federal court decision that
17 is not binding on the court in which the action has been brought;

18 (e) A defendant's reliance on any federal statute, agency rule or ac-
19 tion, or treaty that has been repealed, superseded, or declared invalid
20 or unconstitutional, even if that federal statute, agency rule or ac-
21 tion, or treaty had not been repealed, superseded, or declared invalid
22 or unconstitutional when the cause of action accrued;

23 (f) Nonmutual issue preclusion or nonmutual claim preclusion;

24 (g) Contributory or comparative negligence;

25 (h) Assumption of risk;

26 (i) Any claim that the enforcement of this chapter or the imposition of
27 civil liability against the defendant will violate the constitutional
28 rights of third parties, except as provided by section 6-3805, Idaho
29 Code.

30 (5) This chapter may not be construed to impose liability on speech or
31 conduct protected by the first amendment to the constitution of the United
32 States, as made applicable to the states through the supreme court of the
33 United States' interpretation of the fourteenth amendment to the constitu-
34 tion of the United States, or by section 9, article I of the constitution of
35 the state of Idaho.

36 (6) (a) Notwithstanding any other law to the contrary, neither the state
37 nor any of its political subdivisions nor any district or county attor-
38 ney, nor any officer or employee of this state or a political subdivi-
39 sion may:

40 (i) Act in concert or participation with anyone who brings suit
41 under this section;

42 (ii) Establish or attempt to establish any type of agency or fidu-
43 ciary relationship with a person who brings suit under this sec-
44 tion;

45 (iii) Make any attempt to control or influence a person's decision
46 to bring suit under this section or that person's conduct of the
47 litigation; or

48 (iv) Intervene in any action brought under this section.

49 (b) This subsection does not prohibit a person or entity described by
50 this subsection from filing an amicus curiae brief in the action as long

1 as that person or entity does not act in concert or participation with
2 the plaintiff or plaintiffs who sue under this section or violate any
3 provision of this subsection.

4 (7) Notwithstanding any other provision of law to the contrary, a court
5 may not award costs or attorney's fees to a litigant who is sued under this
6 section.

7 (8) Notwithstanding any other provision of law to the contrary, a civil
8 action under this section may not be brought against any person or entity in
9 response to conduct taken at the behest of federal agencies, contractors, or
10 employees that are carrying out duties under federal law if doing so would
11 violate the doctrines of preemption or intergovernmental immunity.

12 (9) Notwithstanding any other provision of law to the contrary, includ-
13 ing section 5-514, Idaho Code, the courts of this state shall have personal
14 jurisdiction over any defendant sued under this chapter to the maximum ex-
15 tent permitted by the fourteenth amendment to the constitution of the United
16 States.

17 (10) Notwithstanding any other provision of law to the contrary, the law
18 of Idaho shall apply to any civil action brought under this section, to the
19 maximum extent permitted by the constitution of the United States and the
20 constitution of the state of Idaho.

21 (11) Notwithstanding any other provision of law to the contrary, in-
22 cluding Idaho rule of civil procedure 77, a civil action under this section
23 may not be litigated on behalf of a plaintiff class or a defendant class, and
24 no court may certify a class under Idaho rule of civil procedure 77 in any
25 civil action brought under this section.

26 (12) Any waiver or purported waiver of the right to sue under this sec-
27 tion or chapter shall be void as against public policy and shall not be en-
28 forceable in any court.

29 6-3805. AFFIRMATIVE DEFENSES. (1) A defendant against whom an action
30 is brought under section 6-3804, Idaho Code, may assert an affirmative de-
31 fense to liability under this section if:

32 (a) The imposition of civil liability on the defendant will violate
33 constitutional or federally protected rights that belong to the defen-
34 dant personally; or

35 (b) The defendant:

36 (i) Has standing to assert the rights of a third party under the
37 tests for third-party standing established by the supreme court of
38 the United States; and

39 (ii) Demonstrates that the imposition of civil liability on the
40 defendant will violate constitutional or federally protected
41 rights belonging to that third party.

42 (2) The defendant shall bear the burden of proving the affirmative de-
43 fense that is provided for in subsection (1) of this section by a preponder-
44 ance of the evidence.

45 (3) Nothing in this chapter shall limit or preclude a defendant from as-
46 serting the unconstitutionality of any provision or application of Idaho law
47 as a defense to liability under section 6-3804, Idaho Code, or from asserting
48 any other defense that might be available under any other source of law.

1 6-3806. VENUE. (1) Notwithstanding any other provision of law to the
2 contrary, including chapter 4, title 5, Idaho Code, a civil action brought
3 under section 6-3804, Idaho Code, may be brought in:

4 (a) The county in which all or a substantial part of the events or omis-
5 sions giving rise to the claim occurred;

6 (b) The county of residence for any of the natural person defendants at
7 the time the cause of action accrued;

8 (c) The county of the principal office in this state of any of the defen-
9 dants that is not a natural person; or

10 (d) The county of residence for the claimant, if the claimant is a natu-
11 ral person residing in this state.

12 (2) If a civil action is brought under section 6-3804, Idaho Code, in
13 any of the venues described in subsection (1) of this section, then the ac-
14 tion may not be transferred to a different venue without the written consent
15 of all parties.

16 6-3807. PRIVATE CIVIL ENFORCEMENT EXCLUSIVE. (1) Notwithstanding any
17 other provision of law to the contrary, the requirements of this chapter
18 shall be enforced exclusively through the private civil actions described in
19 section 6-3804, Idaho Code.

20 (2) No direct or indirect enforcement of this chapter may be taken or
21 threatened by the state, a political subdivision, a district or county at-
22 torney, or any officer or employee of this state or a political subdivision
23 against any person or entity by any means. No violation of this section may
24 be used to justify or trigger the enforcement of any other law or any type of
25 adverse consequence under any other law, except as provided in this section.

26 (3) This section does not preclude or limit the enforcement of any other
27 law or regulation against conduct that is independently prohibited by such
28 other law or regulation and that would remain prohibited by such other law or
29 regulation in the absence of this chapter.

30 6-3808. IMMUNITY FROM SUIT AND LIMITS ON STATE-COURT JURISDIC-
31 TION. (1) Notwithstanding any other provision of law to the contrary, the
32 state and each of its subdivisions and their officers and employees shall
33 have sovereign immunity, governmental immunity, and official immunity, as
34 appropriate, in any action, claim, counterclaim, or any type of legal or
35 equitable action that challenges the validity of any provision or applica-
36 tion of this chapter, on constitutional grounds or otherwise, or that seeks
37 to prevent or enjoin the state or its political subdivisions or any of their
38 officers, employees, or agents from enforcing any provision or application
39 of this chapter, or from hearing, adjudicating, or docketing a civil action
40 brought under section 6-3804, Idaho Code, unless that immunity has been
41 abrogated or preempted by federal law in a manner consistent with the con-
42 stitution of the United States. The sovereign immunity conferred by this
43 section on the state and each of its officers and employees includes the con-
44 stitutional sovereign immunity recognized by the supreme court of the United
45 States.

46 (2) Notwithstanding any provision of law to the contrary, the immuni-
47 ties conferred by subsection (1) of this section shall apply in every court,

1 both state and federal, and in every adjudicative proceeding of any type
2 whatsoever.

3 (3) Notwithstanding any other provision of law to the contrary, no pro-
4 vision of state law may be construed to waive or abrogate an immunity de-
5 scribed in subsection (1) of this section unless it expressly waives or ab-
6 rogates immunity with specific reference to this section.

7 (4) Notwithstanding any other provision of law to the contrary, no at-
8 torney representing the state, its political subdivisions, or any officer,
9 employee, or agent of this state or a political subdivision is authorized or
10 permitted to waive an immunity described in subsection (1) of this section or
11 take any action that would result in a waiver of that immunity, and any such
12 action or purported waiver shall be regarded as a legal nullity and an ultra
13 vires act.

14 (5) Notwithstanding any other provision of law to the contrary, includ-
15 ing title 1, Idaho Code, chapter 12, title 10, Idaho Code, and Idaho appel-
16 late rules 5, 13, and 43, no court of this state may award declaratory or in-
17 junctive relief, or any type of stay or writ, including a writ of prohibi-
18 tion, that would pronounce any provision or application of this chapter in-
19 valid or unconstitutional or that would restrain or prevent the state, its
20 political subdivisions, any officer, employee, or agent of this state or a
21 political subdivision, or any person from implementing or enforcing any pro-
22 vision or application of this chapter, or from hearing, adjudicating, dock-
23 eting, or filing a civil action brought under section 6-3804, Idaho Code, and
24 no inferior court of this state shall have jurisdiction to consider any ac-
25 tion, claim, or counterclaim that seeks such relief.

26 (6) Nothing in this section or chapter shall be construed to prevent a
27 litigant from asserting the invalidity or unconstitutionality of any pro-
28 vision or application of this chapter as a defense to any action, claim, or
29 counterclaim brought against that litigant.

30 (7) Notwithstanding any other provision of law to the contrary, any ju-
31 dicial relief issued by a court of this state that disregards the immunities
32 conferred by subsection (1) of this section, or the limitations on jurisdic-
33 tion and relief imposed by subsection (5) of this section, shall be regarded
34 as a legal nullity because it was issued by a court without jurisdiction and
35 may not be enforced or obeyed by any officer, employee, or agent of this state
36 or a political subdivision, judicial or otherwise.

37 (8) Notwithstanding any other provision of law to the contrary, any
38 stay, writ, injunction, or declaratory judgment issued by a court of this
39 state that purports to restrain or prevent the state, its political sub-
40 divisions, any officer, employee, or agent of this state or a political
41 subdivision, or any person from hearing, adjudicating, docketing, or filing
42 a civil action brought under section 6-3804, Idaho Code, shall be regarded as
43 a legal nullity and a violation of the due process clause of the fourteenth
44 amendment to the constitution of the United States and may not be enforced
45 or obeyed by any officer, employee, or agent of this state or a political
46 subdivision, judicial or otherwise.

47 (9) Notwithstanding any other provision of law to the contrary, includ-
48 ing Idaho rule of civil procedure 77, no court may certify a plaintiff or
49 defendant class with respect to any claim that seeks declaratory or injunc-
50 tive relief, or any type of stay or writ, that would pronounce any provision

1 or application of this chapter invalid or unconstitutional, or that would
2 restrain or prevent the state, its political subdivisions, any officer,
3 employee, or agent of this state or a political subdivision, or any person
4 from enforcing any provision or application of this chapter, or from hear-
5 ing, adjudicating, docketing, or filing a civil action brought under section
6 6-3804, Idaho Code.

7 6-3809. SEVERABILITY. (1) If any application of any provision in this
8 chapter to any person, group of persons, or circumstances is found by a court
9 to be invalid, preempted, or unconstitutional, for any reason whatsoever,
10 then the remaining applications of that provision to all other persons and
11 circumstances shall be severed and preserved and shall remain in effect. All
12 constitutionally valid applications of the provisions in this chapter shall
13 be severed from any applications that a court finds to be invalid, preempted,
14 or unconstitutional because it is the legislature's intent and priority that
15 every single valid application of every statutory provision be allowed to
16 stand alone.

17 (2) If any provision of this chapter is found by any court to be uncon-
18 stitutionally vague, then the applications of that provision that are not
19 found to be constitutionally vague shall be severed and remain in force, con-
20 sistent with the severability requirements of this section.

21 (3) No court may decline to enforce the severability requirements of
22 this section or this chapter on the ground that severance would rewrite the
23 statute or involve the court in legislative or lawmaking activity. A court
24 that declines to enforce or enjoins a state official from enforcing a statu-
25 tory provision is never rewriting a statute or engaging in legislative or
26 lawmaking activity, as the statute continues to contain the same words as be-
27 fore the court's decision. A judicial injunction or declaration of uncon-
28 stitutionality:

29 (a) Is nothing more than an edict prohibiting enforcement of the dis-
30 puted statute against the named parties to that lawsuit, which may
31 subsequently be vacated by a later court if that court has a different
32 understanding of the requirements of the constitution of the state of
33 Idaho or United States constitution;

34 (b) Is not a formal amendment of the language in a statute; and

35 (c) No more rewrites a statute than a decision by the executive not to
36 enforce a duly enacted statute in a limited and defined set of circum-
37 stances.

38 (4) If any state or federal court disregards any of the severability
39 requirements of this section or this chapter and declares or finds any pro-
40 vision of this chapter facially invalid, preempted, or unconstitutional,
41 when there are discrete applications of that provision that can be enforced
42 against a person, group of persons, or circumstances without violating fed-
43 eral law or the federal or state constitutions, then that provision shall
44 be interpreted, as a matter of state law, as if the legislature had enacted
45 a provision limited to the persons, group of persons, or circumstances
46 for which the provision's application will not violate federal law or the
47 federal or state constitutions, and every court shall adopt this saving
48 construction of that provision until the court ruling that pronounced the

1 provision facially invalid, preempted, or unconstitutional is vacated or
2 overruled.

3 SECTION 2. An emergency existing therefor, which emergency is hereby
4 declared to exist, this act shall be in full force and effect on and after
5 July 1, 2024.