

LFC Requester:

Emily Hilla

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 01/15/2025

Check all that apply:

Bill Number: HB44

Original X Correction
Amendment Substitute

Sponsor: REP. JOHN BLOCK

Agency Name and Code Number: 305 - New Mexico Department of Justice

Short Title: Protection of Minors from Distribution of Harmful Material Act

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Table with columns: Appropriation (FY25, FY26), Recurring or Nonrecurring, Fund Affected. Values: N/A

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Table with columns: Estimated Revenue (FY25, FY26, FY27), Recurring or Nonrecurring, Fund Affected. Values: N/A

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	N/A	N/A	N/A	N/A	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: N/A

Duplicates/Relates to Appropriation in the General Appropriation Act N/A

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis: HB44 defines “commercial entity” and “material harmful to minors” and mandates that commercial entities shall use reasonable age verification methodologies before allowing access to a website on which more than one-third of the content is material harmful to minors. Commercial entities shall not retain any identifying information of the individual after access to the website has been granted.

HB44 provides civil remedies for failing to perform its requirements under the act. A private right of action is included in the proposed statute. There is no criminal penalty for violating the Act, and there is no role specified for the Attorney General or any other public officer to enforce it.

FISCAL IMPLICATIONS

N/A

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

Over the past few years, numerous jurisdictions in the United States have enacted “harmful to minors” laws (also sometimes referred to as “child online safety laws”) to protect those younger than 18 from pornography, obscenity, and other materials that may harm them. The laws that have been enacted have had varying purposes and language and have met with various results regarding constitutional challenges raised by so-called free speech advocates.

Several laws regulating the manner of physically displaying sexually explicit materials have been upheld. *See American Booksellers v. Webb* (11th Cir. 1990) (Georgia), and *Davis-Kidd Booksellers v. McWherter* (Tenn. 1993) [both involving mandated opaque barriers covering the lower 2/3 of the displays].

By contrast, some other harmful-to-minors laws purporting to limit the availability of pornography online have been struck down on free speech and Commerce Clause grounds. One

example is *American Civil Liberties Union v. Johnson* (10th Cir. 1999) (New Mexico). The statute in *Johnson* was NMSA 30-37-1, which criminalized online transmission of material harmful to minors. The 10th Circuit found that the statute's broad language violated the First Amendment and also noted a potential violation of the Commerce Clause, as it attempted to criminalize actions wholly outside of New Mexico.

Most recently, a number of states have proposed/enacted verbatim, or close to verbatim, harmful-to-minors statutes intended to avoid the constitutional pitfalls of other laws addressing internet issues. HB44 is one of these statutes.

Two similar statutes have recently been the subject of constitutional challenges. One is *Free Speech Coalition v. Anderson* (10th Cir. Oct. 1, 2024) (Utah). The other is *Free Speech Coalition v. Paxton* (5th Cir. Mar. 7, 2024) (Texas), *cert. Granted*.

The plaintiffs in *Anderson* sought to prevent the Attorney General of Utah and the Commissioner of Public Safety from enforcing Utah's new Online Pornography Viewing Age Requirements Act, which (like HB44) allows private parties to sue commercial entities that provide certain restricted content without first verifying that the user is at least 18 years old. The 10th Circuit affirmed the district court's dismissing plaintiff's complaint on the grounds that the state's Eleventh Amendment sovereign immunity applies to the Attorney General and the Commissioner in their official capacities, as neither official enforces or gives effect to the Act. A similar result would likely apply to HB44 under similar circumstances, if enacted.

The plaintiffs in *Paxton* sought to enjoin the Texas Attorney General from enforcing Texas HB 1181, which requires commercial pornographic websites to verify the age of their visitors (Like HB44) and to display health warnings about consuming pornography (unlike HB44). Texas HB 1181 provides strictly civil penalties which (unlike HB44 and Utah's Online Pornography Viewing Age Requirements Act) are enforceable by the Texas Attorney General. The district court entered injunctions against both the age verification and health warning requirements of Texas HB 1181. On appeal, the 5th Circuit reversed the age verification injunction based on *Ginsberg v. New York*, 390 U.S. 629 (1968), which found that New York could rationally find that exposure to pornography is harmful to minors and criminalize selling pornography to minors, even though it is legal to sell to adults, so long as the underlying statute explicitly states that such materials are obscene *for minors* (emphasis in original). (Note that HB44 is also explicit in that regard.)

The 5th Circuit upheld the injunction against health warnings for reasons not relevant to this analysis.

Certiorari was granted in *Paxton*, and we understand that argument before the Supreme Court occurred on, January 15, 2025.

The bottom line is that the potential constitutional issues involved in HB44 are unresolved at this time. If the Supreme Court were to affirm the 5th Circuit, HB44 would likely also withstand similar constitutional challenges. However, that is impossible to know at this time.

PERFORMANCE IMPLICATIONS

No performance implications are known at this time.

ADMINISTRATIVE IMPLICATIONS

No administrative implications are known at this time.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

No conflicts, duplication, companionship or relationship are known at this time.

TECHNICAL ISSUES

There are unsettled constitutional dimensions to HB44, as discussed above in the Significant Issues Section.

OTHER SUBSTANTIVE ISSUES

There are unsettled constitutional dimensions to HB44, as discussed above in the Significant Issues Section.

ALTERNATIVES

None known

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS

N/A