

Senator Jeff Barta  
Chairman  
Industry and Business Committee  
NORTH DAKOTA LEGISLATIVE ASSEMBLY

8<sup>th</sup> February 2025

Dear Senator Barta and Committee Members,

**SB 2380: Relating to a commercial entity's liability for publishing or distributing mature content; to provide a penalty; and to provide an effective date.**

We are the global trade body for suppliers of online age verification and age estimation technologies. We are a politically neutral organization, and write to the Committee to provide technical information in support of its consideration of the above Bill.

We generally support any measure that is effective in protecting children from harm. We are therefore reluctant to criticize this Bill and submit this brief as a neutral contribution. However, we do have significant technical concerns about its efficacy that we will share with the Committee to inform your deliberations.

It is important to note at the outset that this Bill takes a radically different approach from statutes with similar objectives in other states. Instead of placing the responsibility for preventing children from being exposed to pornography on the commercial websites which directly profit from it, the Bill seeks to give this task principally to Apple and Google.

We note that this Bill attracts the support of the Free Speech Coalition, the trade body representing the pornography industry and understand that one or more major adult websites are funding the heavy promotion of this Bill. It would be great to bring the adult industry on board in solving this problem, but their enthusiasm for this Bill may arise from the fact it requires no new action on their part. All the effort to comply is required of others – and those others will resist this strongly.

A more conventional age verification Bill requiring the adult sites to check the age of their users, was considered by the Supreme Court on January 15<sup>th</sup> 2025. While we do not yet have sight of their judgement, the questions they asked suggested they would be likely to agree that age verification can survive the strict scrutiny applied to measures that might touch on 1<sup>st</sup> Amendment issues. In particular, several Justices noted that the filtering approach they'd favored in a judgement 20 years ago, and is core to SB 2380, has failed to deliver the states' legitimate policy objectives.

We have a number of other concerns about this bill:

- Controls should be placed as close as possible to the harm they seek to prevent. Porn sites are not only accessed from smartphones, but also through laptops, PCs and other connected devices. This Bill only deals with phones.
- The Bill is unclear as to where responsibility falls listing three options - a manufacturer of a device, an operating system for a device, or an App Store.
- It only takes effect on “activation” of a phone. Phones are shared and handed down from adults to children but this Bill would define the device as an adult or child device indefinitely.
- It applies to sites with one third or more mature content – it could therefore apply to sites with a mix of harmless and harmful content, potentially burdening access to a lot of protected free speech.
- It is unclear how exact the age recorded by the device will be as the Bill allows the covered manufacturer to either “determine” or “estimate” the age of the device’s primary user. (Age Estimation is getting better all the time, but will never be able to tell if a user is exactly 18 years old – the best in class has a mean average error of just over +/- 1 year.)

We would, of course, make our technologies available to covered manufacturers if this Bill comes into force. They would need to fund that service, and are then liable for any failure. The Committee should anticipate strong objections from large global tech companies being asked to bear the costs and liabilities of age verification on behalf of the porn industry.

The technology for this approach does not exist today. It would need to be designed, built, tested, and rolled out, involving several, possibly many global players. It requires agreement across multiple stakeholders on the technical standards that will deliver it. You must assume this is a matter of years not months, even if all those involved were doing so enthusiastically without fundamental objections to the principle. By contrast, to give one notable example, Pornhub implemented age verification in France with just ten days’ notice.

This approach has not been tested in Federal courts. The conventional age verification bills have been considered already right up to the Supreme Court and observers are confident the Court will enable age verification that is well designed to protect privacy, be convenient and inexpensive, as our latest technology delivers.

The Committee may wish to be innovative and experiment with this new approach. We will certainly do our best to support its implementation if it becomes law. But we recommend carefully weighing this Bill against a more standard Bill that puts the obligation to keep kids off their sites squarely on the porn sites themselves.

Yours sincerely,

**Iain Corby**  
Executive Director