

## STATE-BASED ONLINE RESTRICTIONS: AGE-VERIFICATION AND THE VPN OBSTACLE IN THE LAW

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**Abstract:** Since the inception of the internet, the availability of online pornography to minors has been a major concern, and the federal government has tried and failed to effectively prohibit minors' access to these materials online. Some states have enacted legislation to force commercial entities distributing this harmful material online to enact reasonable age-verification. These "porn" statutes may be subject to constitutional challenges on the basis of overbreadth and privacy. Outside of potential constitutional challenges, these laws are indicative of a potential national trend in state-created online pornography restrictions, and the issues of ineffectiveness and inconsistency present within the laws themselves merit an analysis. Additionally, this paper will use these recent laws and their issues as a basis to explain the place of virtual private networks ("VPNs") in the law. Particularly, VPNs are the most common method to circumvent state-enforced online regulation and yet they tend to be ignored or overlooked by statutes despite their popularity. Causing VPN companies to profit from these "porn" law restrictions, by giving online, and potentially minor, users the ability to ignore most age-verification measures put in place by these laws.

**Keywords:** State-Based; Online Restrictions; Age-Verification; VPN

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## INTRODUCTION

There has been a recent wave of state-enacted laws mandating the incorporation of more stringent age-verification systems on websites that distribute material harmful to minors online.<sup>1</sup> These laws are essentially modern state attempts of the Child Online Protection Act, that attempt to detect where an online user is searching from to enforce the relevant state's required age-verification.<sup>2</sup> While these "online pornography restriction" laws have been passed in multiple states, such as Louisiana, Virginia, Arkansas, and Utah,<sup>3</sup> for the purposes of this paper, Mississippi's law will be the primary example evaluated.<sup>4</sup> But the critiques and concerns about the Mississippi law will be applicable to most of the other equivalent state statutes.

On top of constitutional concerns regarding these laws, they are a characteristic example of how the American legal system tends to treat virtual private networks, which is to ignore them. These laws show how despite the impact virtual private networks can have on the enforcement of these and other laws, virtual private networks are routinely ignored, or allowed to skirt through vague legal provisions, that may or may not apply to them.<sup>5</sup> This ignorance towards VPNs and their potential uses must cease to increase the effectiveness of laws in an online context, while addressing concerns of users online who may be unsure on the legality of specific VPN uses.

The Mississippi law expressly prohibits internet service providers, and search engines from liability under this law, so long as these excluded entities are not directly responsible for the creation of "material harmful to minors."<sup>6</sup> The following discussion will not cover the excluded entities, even if their involvement may affect the created regulations.

Critics of these laws argue that they violate the individual's right to privacy.<sup>7</sup> But while aware of the possible privacy issues surrounding this law, this paper will not

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<sup>1</sup> See generally Miss. Code Ann. § 11-77-5; A.C.A. § 4-88-1305; La. R.S. § 51:2121.

<sup>2</sup> See generally ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 9-10 (2022) (outlining the Child Online Protection Act and why it was passed).

<sup>3</sup> See Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat.*, POLITICO (Aug. 8, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148>.

<sup>4</sup> See Miss. Code Ann. §§ 11-77-1 – 11-77-7.

<sup>5</sup> See Kyle Berry, *This Content is Unavailable in Your Geographic Region: The United States' and the European Union's Implementation of Anti-Circumvention Measures*, 55 VAND. J. TRANSNAT'L. 485, 517 (2022) (there are circuit splits in the United States on if the act of circumvention, like when using VPNs to change your online location, "is sufficient for liability or whether the act of circumvention must be connected to an act of infringement."). This ambiguity allows VPNs to facilitate infringing acts without legal repercussions because they are not adequately addressed by the American legal system, even when their use directly inhibits a statute's goal such as in the case of the Mississippi statute. See Miss. Code Ann. §§ 11-77-1 – 11-77-7 (VPNs are not addressed in the statute).

<sup>6</sup> Miss. Code Ann. § 11-77-7.

<sup>7</sup> Lacey Alexander, *Pornhub blocks access in Mississippi in response to new law*, MISS. PUB. BROAD. (Jul. 5, 2023), <https://www.mpbonline.org/blogs/news/pornhub-blocks-access-in-mississippi-in-response-to-new-law/>.

delve deeply into the matter. Especially as lawsuits on the issue have already been filed, this paper will not address them in depth.<sup>8</sup>

The Mississippi law will be analyzed in the following ways. Part II will outline the elements of the law,<sup>9</sup> the technology required to enforce the law, the effects of the contemplated and not contemplated technology used, and the common responses to the law’s enactment. Part III will consist of constitutional challenges that the law will likely be subject to, including the constitutionality of banning the narrower category of obscenity online, a first amendment facial challenge, a constitutional argument for the law’s underinclusivity and overinclusivity in achieving its compelling government interest. And Part IV will address the broad concerns of these laws through the lens of a national trend, issues with specific provisions of the Mississippi law, and the technological concerns tied to the law, including what it highlights about the use of virtual private networks and how they are generally treated in the law.

## I. BACKGROUND

### A. Mississippi’s Online Age-Verification Law Explained

Senate Bill No. 2346, now classified as Miss. Code Ann. §§ 11-77-1 – 11-77-7 (subsequently referred to as the “Mississippi law” or “Mississippi statute” in this paper), took effect in July, 2023, making commercial entities who distribute “material harmful to minors” online liable to the individual for damages resulting from a minor accessing their website, if the commercial entity fails to perform “reasonable age-verification.”<sup>10</sup> This age-verification is to prevent minors from accessing these platforms online, so long as the website is made up of a “substantial portion” of this “material harmful to minors.”<sup>11</sup> Commercial entities or third parties performing this “reasonable age-verification” are not to keep any identifying information collected, once a user’s age is verified, and is granted access to the restricted website.<sup>12</sup>

Affected commercial entities that do not comply can be liable to an individual for damages a minor sustained from accessing their platform, this may include court costs and attorney fees.<sup>13</sup> Minors are any individual under the age of eighteen, despite the age of consent in Mississippi being sixteen years of age.<sup>14</sup> The statute’s goal is to restrict the access of minors, not adults, to harmful material online.<sup>15</sup>

#### 1. “Material Harmful to Minors”

The statute restricts more than just obscenity.<sup>16</sup> The statute’s definition of “material harmful to minors” uses very similar language as the three-pronged *Miller*

<sup>8</sup> See e.g., *Free Speech Coal., Inc. v. Anderson*, 2023 U.S. Dist. LEXIS 134645 (D. Utah Aug. 1, 2023).

<sup>9</sup> Particularly that while advertised as a porn restriction, the statute restricts the much broader category of “material harmful to minors.” See Miss. Code Ann. §§ 11-77-3 – 11-77-5.

<sup>10</sup> Miss. Code Ann. § 11-77-5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at § 11-77-3; Miss. Code Ann. § 97-3-65 (there is no statutory rape charge in Mississippi if the younger individual is sixteen years of age or older, indicating sixteen is the state’s age of consent).

<sup>15</sup> See Miss. Code Ann. § 11-77-5.

<sup>16</sup> See *Id.* at § 11-77-3.

obscenity test, but broadens its scope to relate to the sensibilities of minors.<sup>17</sup> Even content that has serious value and is excluded from this harmful material definition is framed in how it applies to minors, and not all individuals.<sup>18</sup> This harmful material definition coincides with the doctrine from *Ginsberg v. State of N.Y.*, that non-obscene material for adults, can be regulated for minors if it is considered harmful to them, also known as “variable obscenity.”<sup>19</sup> This is broader than obscenity for adults, but as it concerns children, the government has greater power to restrict content that falls under this variable obscenity scope.<sup>20</sup> The Mississippi statute’s definition of “material harmful to minors” is essentially applying *Ginsberg* “variable obscenity” in a modern online setting, where it faces difficulties that were not present when *Ginsberg* was decided.

Additionally, the serious value exception to “material harmful to minors” is difficult to apply in an online context depending on the material at hand.<sup>21</sup> The exact meaning and scope of the serious value exception has not been sufficiently determined, especially when restricting content for minors.<sup>22</sup> This vagueness is compounded when it comes to evaluating new technology, and whether its use have serious value or not, such as the use of deepfakes to create pornographic content, which some argue inherently has serious technological value, but the existence of this debate shows how problematic applying the serious value exception can become.<sup>23</sup> The Mississippi statute currently leaves this exception quite vague. Which can make it difficult for those who want to seek damages against a commercial entity, as they may be unsure if content qualifies, or for commercial entities who may not know if the content they distribute falls under this serious value exception.

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<sup>17</sup> Compare *Miller v. California*, 413 U.S. 15, 24 (1973) (the *Miller* test is: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”), with Miss. Code Ann. § 11-77-3 (the Mississippi law defines material harmful to minors as: “(i) Any material that the average person, applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (ii) Any of the following material that exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated display or depiction of any of the following, in a manner patently offensive with respect to minors...; and (iii) The material taken as a whole lacks serious literary, artistic, political, or scientific value for minors.”).

<sup>18</sup> Compare *Miller v. California*, 413 U.S. 15, 24 (1973) (The *Miller* test’s exception to obscenity is “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”), with Miss. Code Ann. § 11-77-3 (The Mississippi law’s exception to material harmful to minors is “[t]he material taken as a whole lacks serious literary, artistic, political, or scientific value for **minors**.”) (emphasis added).

<sup>19</sup> See *Ginsberg v. State of N. Y.*, 390 U.S. 629, 631-34, 636, 673 (1968) (The court upheld a verdict that a store owner was guilty of violating a New York penal statute for selling a 16-year-old boy a magazine that was obscene for minors, but not obscene for adults.).

<sup>20</sup> *Id.* at 636.

<sup>21</sup> See Miss. Code Ann. § 11-77-3.

<sup>22</sup> See Todd E. Pettys, *Serious Value, Prurient Appeal, and "Obscene" Books in the Hands of Children*, 31 WM. & MARY BILL OF RTS. J. 1003, 1040 (2023).

<sup>23</sup> See Bradley Waldstreicher, *Deeply Fake, Deeply Disturbing, Deeply Constitutional: Why the First Amendment Likely Protects the Creation of Pornographic Deepfakes*, 42 CARDOZO. L. REV. 729, 755-57 (2021).

## 2. Individual Damages

The Mississippi law holds commercial entities liable for the individual damages that a minor can accrue from consuming “material harmful to minors” commercial entities distribute without employing age-verification.<sup>24</sup> The language of the law indicates this liability is to the individual harmed or their representative, and to seek damages from a specific commercial entity, then that individual must pursue damages in court.<sup>25</sup> The law creates a cause of action against these commercial entities.<sup>26</sup>

While the law treats this as a private cause of action, there is a possibility the state can pursue action itself.<sup>27</sup> The “parens patriae” doctrine may be an avenue for the State to sue non-complying commercial entities on behalf of their citizens.<sup>28</sup> As the Mississippi statute highlights the state’s compelling interest to protect minors from accessing restricted material, and may give the state third-party standing to sue affected commercial entities.<sup>29</sup>

## 3. “Reasonable” Age-Verification

The Mississippi law is not a complete bar to the distribution of “material harmful to minors” online, but it restricts the access of minors to this content by mandating the use of “reasonable age-verification.”<sup>30</sup> This verifies whether a user is a minor, and thus barred, or an adult and allowed access to an affected website. Commercial entities verify user ages by collecting their personal information, to verify the user’s true age.<sup>31</sup> Commercial entities are liable if they are found retaining any of this identifying information, or if they fail to use reasonable age-verification, which should be more thorough than the “honor-system” frequently used today.<sup>32</sup>

### B. Age-Verification Technology

Reasonable age-verification needs users to provide proof of their age.<sup>33</sup> This requires two technical components to function: the use of geoblocking and providing personal information to an online party.<sup>34</sup>

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<sup>24</sup> Miss. Code Ann. § 11-77-5.

<sup>25</sup> See *Id.*

<sup>26</sup> See *Id.*

<sup>27</sup> See Alexander, *supra* note 7 (reporting commercial entities may face fines from the attorney general for not complying with the Mississippi statute).

<sup>28</sup> See Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 44 (2014).

<sup>29</sup> See *Id.* at 22-23.

<sup>30</sup> Miss. Code Ann. § 11-77-5 (“Reasonable age verification methods’ include verifying that the person seeking to access the material is eighteen (18) years of age or older by using any of the following methods: (i) Provide a digitized identification card; (ii) Require the person attempting to access the material to comply with a commercial age verification system that verifies in ... the following ways: 1. Government-issued identification; or 2. Any commercially reasonable method ... to verify the age of the person....”).

<sup>31</sup> *Id.* at § 11-77-3.

<sup>32</sup> See *Id.* at § 11-77-5; Christine Marsden, *Age-Verification Laws in the Era of Digital Privacy*, 10 NAT’L. SEC. L.J. 210, 214 (2023).

<sup>33</sup> Miss. Code Ann. § 11-77-3.

<sup>34</sup> See Tal Kra-Oz, *Geoblocking and the Legality of Circumvention*, 57 IDEA 385, 388 (2017); Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 VT. L. REV. 43, 68-69 (2020).

## 1. Geoblocking Explained

Geoblocking is technology used to locate the approximate geographic location of an online user,<sup>35</sup> and to restrict their access to certain content based on their physical location.<sup>36</sup> The geoblocking component of age-verification is the most common method commercial entities use to assess if a user is coming from the state of Mississippi to then apply the Mississippi law's age-verification.<sup>37</sup> As not all places in the country or the world require these entities to enforce stringent age-verification, so the commercial entities use geoblocking to identify the approximate location of users through the user's IP address.<sup>38</sup> If the IP address is found to come from Mississippi, then users who access the website are redirected to the age-verification system, or equivalent response, established by the website.<sup>39</sup> This redirection only occurs to users identified as being physically located in states mandating age verification, to prevent one state's law from affecting out-of-state users of the website.<sup>40</sup>

## 2. Personal Information Requirement

The other component of age-verification, is that once redirected, the commercial entity must verify the user's age by evaluating the user's personal information. The user provides a form of valid identification to the age-verification system, which requires the user to have some government or digital ID present in the database's system.<sup>41</sup> Once user age is determined, minors are barred access, but adult users can access restricted websites.<sup>42</sup>

Privacy concerns were contemplated, so the Mississippi statute makes commercial entities liable if they retain any identifying information of a user after the age-verification.<sup>43</sup> Some commercial entities have banned all Mississippi users from accessing their website due to privacy concerns.<sup>44</sup> These privacy concerns regarding personal identifying information persist, despite the use of identification to verify age required to access other material in society such as "purchasing alcohol."<sup>45</sup>

## C. Age-Verification Circumvention

### 1. Virtual Private Networks

A Virtual Private Network (VPN) is a service internet users can employ to increase the privacy and the protection of their online activities, especially when using

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<sup>35</sup> See Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 585-86 (2012) ("Trimble I").

<sup>36</sup> Peter K. Yu, *A Hater's Guide to Geoblocking*, 25 B.U.J. SCI. & TECH. L. 503, 504 (2019).

<sup>37</sup> See Marketa Trimble, *Copyright and Geoblocking: The Consequences of Eliminating Geoblocking*, 25 B.U.J. SCI. & TECH. L. 476, 483 (2019) ("Trimble II").

<sup>38</sup> See Alexander, *supra* note 7.

<sup>39</sup> *Id.*

<sup>40</sup> See *Id.*

<sup>41</sup> Miss. Code Ann. § 11-77-3.

<sup>42</sup> See *Id.* at § 11-77-5.

<sup>43</sup> *Id.*

<sup>44</sup> See Alexander, *supra* note 7 ("We are sorry to let our loyal visitors in these states down but we have opted to comply with the newly effective law in this way because it is ineffective and worse, will put both user privacy and children at risk." Pornhub said in a tweet.)

<sup>45</sup> Marsden, *supra* note 32 at 239.



public Wi-Fi.<sup>46</sup> These VPNs allow their users to hide their IP address location, to circumvent geoblocks that companies, such as Netflix, and commercial entities affected by the Mississippi statute employ.<sup>47</sup> Meaning a VPN allows an internet user, located in Mississippi, to appear as if they are in a different state or nation, allowing them to access content restricted in Mississippi but not in their pretend location.<sup>48</sup> Using VPNs to circumvent geoblocks put into place by commercial entities would allow Mississippi users to disregard any age-verification mandated by the Mississippi statute, unless the website applies age-verification to all of its users regardless of location.<sup>49</sup> Following the passage of Virginia’s age-verification law, and “after Pornhub pulled out of Virginia, searches for VPNs spiked in the state,” suggesting a connection between the use of geoblocking and increases in the use of VPNs.<sup>50</sup>

## 2. Effects of Circumvention

When users alter their online location with a VPN, the user is subject to geoblocks and content specified for the location their IP address is disguised as coming from.<sup>51</sup> VPN services heavily advertise these “cybertraveling” features.<sup>52</sup> Most popular VPN services can be used for under three dollars a month, and less secure free VPNs can be used and obtained without any age-verification.<sup>53</sup> Under the Mississippi law, user circumvention of age-verification systems and VPNs are not addressed, so a commercial entity is still in compliance if they instituted age-verification for users flagged as coming from Mississippi.<sup>54</sup> Leading to situations, where a minor is harmed from accessing “material harmful to minors” distributed online by using a VPN, but so long as the commercial entity is complying with the Mississippi statute, then the minor has no culpable party to obtain damages for their injuries.

### D. Commercial Entity Response

In response to the Mississippi law, affected commercial entities responded in a few ways. The first response was to use geoblocking systems, and to enforce age-verification on all users found coming from Mississippi.<sup>55</sup> While this likely occurred

<sup>46</sup> Steve Symanovich, *What is a VPN?*, NORTON (Feb. 24, 2022), <https://us.norton.com/internetsecurity-privacy-what-is-a-vpn.html> (“A virtual private network... gives you online privacy and anonymity by creating a private network from a public internet connection. VPNs mask your internet protocol (IP) address so your online actions are virtually untraceable. ... VPN services establish secure and encrypted connections to provide greater privacy .... A VPN creates a type of tunnel that hides your online activity... so that cybercriminals, businesses, government agencies, or other snoops can't see it.”).

<sup>47</sup> Berry, *supra* note 5 at 488-89.

<sup>48</sup> See Sabrina Earle, *The Battle against Geo-Blocking: The Consumer Strikes Back*, 15 RICH. J. GLOBAL L. & BUS. 1, 11 (2016).

<sup>49</sup> See Romney, *supra* note 34 at 72.

<sup>50</sup> See Novicoff, *supra* note 3.

<sup>51</sup> See Earle, *supra* note 48 at 11.

<sup>52</sup> See generally Trimble I, *supra* note 35.

<sup>53</sup> Best VPNs of September 2023, USA TODAY (June 21, 2023, 9:55 AM), [https://www.usatoday.com/money/blueprint/l/best-vpns/?utm\\_content=150585994043&utm\\_term=kwd-320157419234&utm\\_campaign=20344709965&gclid=Cj0KCCQjwl8anBhCFARIsAKbbpyT4eTusULLebNGtLY-cwfZIVghg\\_n29ArFUGL3HzbBWWsRVMSsP7kaAgq7EALw\\_wcB](https://www.usatoday.com/money/blueprint/l/best-vpns/?utm_content=150585994043&utm_term=kwd-320157419234&utm_campaign=20344709965&gclid=Cj0KCCQjwl8anBhCFARIsAKbbpyT4eTusULLebNGtLY-cwfZIVghg_n29ArFUGL3HzbBWWsRVMSsP7kaAgq7EALw_wcB); See e.g. Lawrence Wachira, *How to Unblock Porn Sites From Anywhere in 2023*, VPN MENTOR (Sept. 15, 2023), <https://www.vpnmentor.com/blog/how-to-unblock-porn-sites-from-anywhere/>.

<sup>54</sup> See Miss. Code Ann. § 11-77-5.

<sup>55</sup> See *Id.*

during the statute's enactment, this has fallen out of favor and has been mainly replaced by the next response.<sup>56</sup>

The second response was to completely block all Mississippi users from accessing affected websites. The commercial entities use geoblocking, but instead of verifying user age, they ban all Mississippi users from accessing their websites.<sup>57</sup> This is a form of malicious compliance to the Mississippi statute. This has become the common response for many of the larger commercial entities that are easier to hold liable.<sup>58</sup> Especially for the commercial entities that produce and distribute harmful material, such as the various affiliates of "MindGeek," the largest pornography company globally.<sup>59</sup>

The final response is non-compliance with Mississippi's statute, allowing users from anywhere to access their website with little to no age-verification.<sup>60</sup> Since larger companies complied with Mississippi's law, "Pornhub... claims that traffic soared for its noncompliant competitors."<sup>61</sup> While no data was provided for this claim, if true, then smaller commercial entities distributing "material harmful to minors" may risk lawsuits for their non-compliance in exchange for greater traffic and profit on their platforms. Unless the Mississippi law can make the cost of non-compliance severe enough to warrant enacting age-verification systems, then many affected commercial entities will continue not to comply for greater profits.

## II. CONSTITUTIONAL CHALLENGES

The Mississippi law likely violates the first amendment's freedom of expression, incorporated under the fourteenth amendment.<sup>62</sup> This analysis will entail evaluating the constitutionality of completely banning obscenity online, a facial challenge to the law, and an analysis of the law's underinclusive and overinclusive restrictions.

While online activity is usually private action that receives stronger constitutional protection, the distribution of material harmful to minors by commercial entities online will likely be considered public rather than private. As the act of

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<sup>56</sup> See Courtney Ann Jackson, Two new Mississippi laws are designed to protect kids from easy access to porn, WLBT 3 (Jul. 3, 2023, 9:32 PM), <https://www.wlbt.com/2023/07/04/two-new-mississippi-laws-are-designed-protect-kids-easy-access-porn/>.

<sup>57</sup> Alexander, *supra* note 7.

<sup>58</sup> See *Id.*

<sup>59</sup> See Joe Castaldo, *Lifting the veil of secrecy on MindGeek's online pornography empire*, THE GLOBE & MAIL (Feb. 4, 2021), [https://www.theglobeandmail.com/business/article-mindgeeks-business-practices-under-srutiny-as-political-pressure/#:~:text=MindGeek%2C%20which%20operates%20from%20Montreal,revenue%20and%201%2C800%20employees%20globally](https://www.theglobeandmail.com/business/article-mindgeeks-business-practices-under-srutiny-as-political-pressure/#:~:text=MindGeek%2C%20which%20operates%20from%20Montreal,revenue%20and%201%2C800%20employees%20globally.). When Mississippi users access the top pornography companies' websites, they are directed to a video explaining users in the state are banned from accessing their website in response to the law. See Novicoff, *supra* note 3.

<sup>60</sup> See Meghan McIntyre, *Many pornography websites aren't complying with new Va. age verification law*, VA. MERCURY (Aug. 23, 2023, 12:04 AM), <https://www.virginiamercury.com/2023/08/23/many-pornography-websites-arent-complying-with-new-va-age-verification-law/>. (Non-compliance reported with Virginia's law, also occurs for Mississippi's law.).

<sup>61</sup> Novicoff, *supra* note 3.

<sup>62</sup> See U.S. Const. amend. I; U.S. Const. amend. XIV, § 1.

purchasing or accessing this material online could be private to individual users.<sup>63</sup> But the distribution of content online goes beyond private possession for the commercial entities, and since the State has wide discretion in regulating obscenity, the distribution of content online could be regulated as public action.<sup>64</sup> A public action determination gives the State more leeway in restricting material distributed by these commercial entities regardless of enacted disclaimers or age-verification.<sup>65</sup> Public action can be regulated at greater levels than purely private action at home, even if not to the level as a “place of public accommodation.”<sup>66</sup>

### A. Possibility of Complete Online Obscenity Ban

Before addressing the Mississippi law’s constitutionality, an analysis on restricting the broader concept of online obscenity is required. As if a complete restriction on online obscenity is unconstitutional, then restricting “material harmful to minors,” which is broader than obscenity, would be unconstitutional.

Under *Miller*, anything found to be obscene is not protected by the first amendment, and the government can regulate as it sees fit.<sup>67</sup> Meaning the government can likely regulate purely online obscenity, if the restricted content is obscene under the *Miller* test.<sup>68</sup> As states are given wide discretion when regulating obscenity due to the lack of constitutional protection given to obscene speech.<sup>69</sup>

The exception to this government interest, would be if the online obscenity falls under the right to sexual privacy.<sup>70</sup> But even if the government still recognizes a right to sexual privacy in the context of online obscenity, “the government would remain free to enforce obscenity statutes for publicly distributed obscene” online material.<sup>71</sup> So the Mississippi law is constitutional when regulating obscene content, but not necessarily for all “material harmful to minors,” as the Mississippi statute only restricts the distribution of this content not the possession of it.<sup>72</sup>

Alternatively, it is possible that while the State can restrict obscene material online, non-complying commercial entities could escape liability under Section 230 of the Communications Decency Act of 1996 (CDA).<sup>73</sup> Which states “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>74</sup> And since the Mississippi law relates to commercial entities distributing “material harmful to minors” online, the Mississippi law may violate this provision of the CDA, as it attempts to hold

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<sup>63</sup> See Jennifer M. Kinsley, *Sexual Privacy in the Internet Age: How Substantive Due Process Protects Online Obscenity*, 16 VAND. J. ENT. & TECH. L. 103, 117 (2013).

<sup>64</sup> See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

<sup>65</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973).

<sup>66</sup> *Id.* at 57 & 69.

<sup>67</sup> See generally *Miller v. California*, 413 U.S. 15 (1973).

<sup>68</sup> See *Id.* at 24.

<sup>69</sup> *Roth v. United States*, 354 U.S. 476, 481 (1957).

<sup>70</sup> See e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>71</sup> Kinsley, *supra* note 63 at 131.

<sup>72</sup> Miss. Code Ann. § 11-77-5.

<sup>73</sup> See 47 U.S.C. § 230.

<sup>74</sup> *Id.* at § 230(c)(1).

commercial entities liable for the distribution of content, if posted by third-party creators. If this occurs, the Mississippi law would likely be invalid under Federal law.

## **B. Facial Challenge**

### **1. Public Right of Action**

The Mississippi statute holds non-complying commercial entities that knowingly distribute “material harmful to minors” liable.<sup>75</sup> This civil liability can be pursued by the minors, or their representatives, who are damaged from exposure to restricted content on a non-complying website.<sup>76</sup> This may be construed as a private right of action, where the government allows litigation to occur without government action.<sup>77</sup>

This is really an implied public right of action, as while the State is not seeking damages, the statute’s mere existence promotes the State’s interest of restricting “material harmful to minors.”<sup>78</sup> The Mississippi statute forces commercial entities to follow this government restriction or risk lawsuits. The statute could give the State standing to sue non-abiding commercial entities on behalf of damaged individuals, under the “*parens patriae*” doctrine.<sup>79</sup> Here, the State may argue that its compelling interests in protecting minors from harmful material online gives it third-party standing<sup>80</sup> to sue non-complying entities. Transforming a private cause of action into essentially a government fine through litigation. The statute does not mention government action in response to non-complying entities, but the lack of disclaimer on potential state action creates implications of potential government action, rather than private action. Overall, this means any arguments attempting to posit the Mississippi statute is not state action, are misleading and attempting to discount the State’s involvement in restricting “material harmful to minors” online.

### **2. Overbreadth**

The goal of the Mississippi law is to prevent minors from accessing harmful online content.<sup>81</sup> The law requires adults to provide commercial entities with identifying information to access “material harmful to minors,” so adults are not prevented from accessing this content.<sup>82</sup> This may not be an issue if the law outright banned pornography in Mississippi, but since the law limits this restriction to minors, possible overbreadth by the law, and an impermissible burden on the rights of adults may be a concern.<sup>83</sup>

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<sup>75</sup>Miss. Code Ann. § 11-77-5.

<sup>76</sup> *Id.*

<sup>77</sup> See Davis, *supra* note 28 at 71.

<sup>78</sup> See *Id.* at 9 & 17.

<sup>79</sup> *Id.* at 44 (“In *Massachusetts v. Bull HN Information Systems, Inc.*, for example, the district court held that the Age Discrimination in Employment Act authorizes a *parens patriae* suit by defining a ‘person aggrieved’ under the statute to include ‘legal representatives.’”).

<sup>80</sup> See *Id.* at 23.

<sup>81</sup> See Miss. Code Ann. § 11-77-5.

<sup>82</sup> *Id.*

<sup>83</sup>See *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989).

This overbreadth analysis will focus on broader concepts of “material harmful to minors.” While obscenity is not protected speech under the first amendment,<sup>84</sup> “material harmful to minors, the Mississippi law restricts, includes obscenity and material that is protected speech for adults, but still harmful to minors.<sup>85</sup> This restricted material beyond traditional obscenity’s scope is grounds for an analysis on the constitutional overbreadth of the Mississippi law.

A successful overbreadth analysis renders the law “invalid in all its applications.”<sup>86</sup> To challenge a statute on overbreadth grounds, the statute’s overreach must be substantial in relation to the statute’s legitimate scope, and the law must be the least-restrictive means of achieving the government’s compelling interest.<sup>87</sup> An overbreadth argument is difficult to apply regarding commercial speech restrictions, as commercial speech is treated as more resilient to “chilling effects” that may occur from speech restrictions, when compared to noncommercial speech restrictions.<sup>88</sup>

The Mississippi statute restricting commercial entities distributing “material harmful to minors,”<sup>89</sup> will likely be considered commercial speech. Despite a large amount of the content being posted by individual users,<sup>90</sup> the commercial entities distributing this content are the ones subject to liability. And the distribution of content is for some commercial gain, transforming the restricted content into commercial speech.<sup>91</sup> But while the First and Fourteenth Amendments “protect commercial speech from unwarranted government intervention,” the online restrictions of “material harmful to minors” are to an extent considered a compelling government interest, circumventing some of the protections attributed to this commercial speech.<sup>92</sup>

The identification requirement attached to the statutory age-verification could be an overbreadth of the statute’s goals. It may create a chilling effect for adults who want to partake in the restricted material legally. The law requires adults to give personal identifying information to verify their age.<sup>93</sup> This may dissuade adults who would otherwise access this material, due to the fear of having to announce, even in an online setting, that they desire access to restricted content. By taking advantage of the adults’ embarrassment, the Mississippi law creates a form of identity-based chilling, which may constitute overbreadth by the law in achieving its goals.<sup>94</sup> While the restrictions may be on commercial speech, the effects of the restrictions are felt by the website users. An adult, who would otherwise partake in the content, even if not

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<sup>84</sup> Roth v. United States, 354 U.S. 476, 481 (1957).

<sup>85</sup> Ginsberg v. State of N. Y., 390 U.S. 629, 636 (1968).

<sup>86</sup> Bd. of Trs. v. Fox, 492 U.S. 469, 483 (1989).

<sup>87</sup> See *Id.* at 485.

<sup>88</sup> *Id.* at 481.

<sup>89</sup> Miss. Code Ann. § 11-77-5.

<sup>90</sup> See *How Many People are on Porn Sites Right Now? (Hint: It’s a Lot.)*, FIGHT THE NEW DRUG, [HTTPS://FIGHTTHENEWDRUG.ORG/BY-THE-NUMBERS-SEE-HOW-MANY-PEOPLE-ARE-WATCHING-PORN-TODAY/](https://fightthenewdrug.org/by-the-numbers-see-how-many-people-are-watching-porn-today/).

<sup>91</sup> Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 562 (1980).

<sup>92</sup> *Id.* at 561; Romney, *supra* note 34 at 100 (citing Ashcroft v. ACLU, 542 U.S. 656, 675 (2004)) (holding that protecting minors from exposure to sexually explicit materials is a compelling government interest).

<sup>93</sup> Miss. Code Ann. § 11-77-3(h).

<sup>94</sup> See Bd. of Trs. v. Fox, 492 U.S. 469, 481 (1989).

obscene, may be unwilling to access the website in fear of losing their anonymity. Making the reach of the statute much wider than the statute proposes.

Additionally, the Mississippi statute is unclear on what databases must be used to verify the age of users.<sup>95</sup> This vagueness makes the statute's application difficult, as it is unknown how non-residents in the state will be affected. The databases used may not contain information on an international user, whose identification is from another country. Leading to situations where access is barred for an adult who should be able to access the content, if not for the age-verification systems required by the Mississippi statute.

This bar to users without acceptable forms of identification, may not be enough to challenge the law's constitutionality, if this obstacle is merely incidental to the state's compelling interest to restrict material harmful to minors. This requires a determination of if the Mississippi statute is the least-restrictive means of enforcement.<sup>96</sup>

The Mississippi statute creates obstacles for adults to access the restricted content as allowed by the statute. In the context of noncommercial speech, the obstacles of a chilling effect from providing identifying information in a traditionally anonymous space, combined with the required geolocation the commercial entities use to identify Mississippi users may be found to be more than incidental. But in this commercial speech context, these user obstacles to accessing restricted content is likely acceptable under an overbreadth analysis.<sup>97</sup> The saving-grace against an overbreadth challenge is the statute's threshold determination.<sup>98</sup> Addressing arguments that society is restricted to only material deemed suitable for minors.<sup>99</sup> Overall, the Mississippi statute will likely survive an overbreadth challenge to its constitutionality, as while its effects may be overbroad in certain situations, the threshold for unconstitutionality in an overbreadth challenge, especially for commercial speech, is very high. The statute may be constitutional in certain situations, depending on the content restricted, so an overbreadth argument would likely fail as the statute would not be "invalid in all its applications."<sup>100</sup>

### C. Underinclusivity

The Mississippi law fails to address concerns with the imposed "reasonable" age-verification. The law creates inherent inequalities in treatment with its arbitrary thresholds and the vague language of the law itself. Underinclusive concerns, discussed in *Brown v. Entertainment Merchants Association*, may apply to the Mississippi law.<sup>101</sup> When dealing with first amendment rights, as the Mississippi law does here, they must be pursued by means that are not seriously underinclusive to be constitutional.<sup>102</sup>

<sup>95</sup> See Miss. Code Ann. § 11-77-3(h) (nothing is mentioned on the age-verification system's scope).

<sup>96</sup> *Bd. of Trs. v. Fox*, 492 U.S. 469, 478 (1989).

<sup>97</sup> See *Id.* at 477.

<sup>98</sup> Miss. Code Ann. § 11-77-3(i) (enacted) (Age-verification is not required for commercial entities whose platform is less than 33 and ½% "material harmful to minors").

<sup>99</sup> *Butler v. State of Mich.*, 352 U.S. 380, 383-84 (1957).

<sup>100</sup> *Bd. of Trs. v. Fox*, 492 U.S. 469, 483 (1989).

<sup>101</sup> See generally *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011).

<sup>102</sup> *Id.* at 805.

## 1. Issues with the Obscenity Threshold

The Mississippi law only restricts commercial entities whose websites are made of at least 33% of material harmful to minors, and does not require age-verification on websites that do not meet this threshold, even if those commercial entities distribute harmful material just at a lower ratio.<sup>103</sup> Allowing most social media platforms to operate unaffected by the Mississippi law, many of which distribute large amounts of harmful material online.<sup>104</sup> Allowing minors to access harmful material through these unrestricted avenues under the Mississippi law.<sup>105</sup>

This is underinclusive because it gives commercial entities the ability to escape liability, while distributing harmful material to minors online in Mississippi. This runs counter to the Mississippi statute's intended effect, which is to combat negative effects on the development of minors from early exposure to harmful material online.<sup>106</sup> By allowing some commercial entities to distribute this content without age-verification, and mandating the enforcement of age-verification systems on other commercial entities based on an arbitrary threshold, the statute is underinclusive due to an inequality in treatment. This is apparent when considering the threshold used is a ratio rather than an amount, meaning that some commercial entities affected by this law may distribute less overall "material harmful to minors" than a social media company, but the former entity will be subject to the law because their platform is smaller.

Additionally, the 33% threshold gives commercial entities a method to escape liability while distributing "material harmful to minors" without age-verification. The affected entities can inundate their websites with non-harmful material until the harmful material makes up less than a third of their website. Allowing websites to legally distribute harmful material without employing age-verification. The Mississippi statute does not prevent unaffected commercial entities from highlighting "material harmful to minors" present on their website, nor are there any bad faith considerations.<sup>107</sup> This inundation of content could be structure where the harmful material is easily found on the website, allowing any commercial entity to receive the same treatment as social media under this statute.<sup>108</sup>

This 33% threshold also creates unequal treatment of "material harmful to minors" online compared to in-person restrictions for this material. Rather than focusing on the restricted material itself, the law focuses on the entities distributing this content.<sup>109</sup> Different from how things are generally regulated in-person. For example, age-restricted content such as purchasing alcohol is regulated on the product, not the distributor, so nearly everyone verifies their age when purchasing the specific product,

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<sup>103</sup> Miss. Code Ann. § 11-77-3.

<sup>104</sup> See Mike Wright, *Majority of teenagers 'now watching pornography on social media'*, The Telegraph (May 5, 2021, 6:00 AM), <https://www.telegraph.co.uk/news/2021/05/05/majority-teenagers-now-watching-pornography-social-media/#:~:text=The%20majority%20of%20teenagers%20are,messaging%20and%20social%20networking%20apps>.

<sup>105</sup> See *Id.*

<sup>106</sup> See Miss. Code Ann. § 11-77-1.

<sup>107</sup> Cf. *Id.* at § 3 (The statute's language does not consider actions taken by commercial entities under the 33% threshold, and does not consider possible actions affected commercial entities could take to escape liability outside of direct compliance with the statute).

<sup>108</sup> See Alexander, *supra* note 7.

<sup>109</sup> Miss. Code Ann. § 11-77-5.

not when entering the store selling the product. If the framework of regulation applied to commercial entities by the Mississippi law were to occur in-person, then minors could purchase alcohol from Walmart because the majority of Walmart's sales are in non-harmful markets. If the Mississippi law's regulatory scheme would leave "material harmful to minors" accessible to minors without age-verification if applied in-person, then the Mississippi law is necessarily underinclusive for doing so online.<sup>110</sup>

This underinclusivity argument is supported by *Brown*, where the law at issue restricted violent video games, but not violence in Saturday morning cartoons, leaving children easy access to the subject-matter the law aimed to restrict.<sup>111</sup> The Mississippi law's 33% threshold does the same, as it only targets commercial entities distributing "material harmful to minors" whose platform is primarily made of this restricted content, while leaving other platforms distributing the harmful material the law aims to regulate free from restriction and accessible to minors. This underinclusive restriction raises doubts on the statute's true goal. Mississippi could be attempting to disfavor the business of certain commercial entities like pornography websites within the state, rather than legitimately pursuing the stated interest of restricting minors from accessing harmful material online.<sup>112</sup> Even if Mississippi is not maliciously targeting pornographic websites, the Mississippi statute is seriously underinclusive due to its exclusion of other commercial entities distributing harmful material online.

## 2. VPNs Ignored

Additionally, the Mississippi law disregards the potential use of VPNs by users to circumvent georestrictions put into place by commercial entities.<sup>113</sup> The law does not mention VPNs, and since liability is only possible for commercial entities, user actions seem irrelevant to the law's enforcement.<sup>114</sup> Meaning minors could still access restricted harmful material without age-restrictions blocking them, and the harmed individuals would have no recourse against the distributing commercial entity, if they are performing reasonable age-verification. As commercial entities are only forced to apply age-verification as outlined in the statute to users located in Mississippi. The best way to identify Mississippi users is through geolocation, but if the users located in Mississippi use a VPN to camouflage their physical location from geolocating technology, then users will not be subject to age-verification if they appear to be located in a different state or country.<sup>115</sup>

Commercial entities will only employ age-verification where it is required, and even if it is required in the location users pretend to be, the age-verification employed may be different than what is required by the Mississippi statute. Since the Mississippi law does not address this possibility, nor VPN use, then an individual harmed by accessing "material harmful to minors" would have no avenue to recover damages.<sup>116</sup> The Mississippi statute creates legal liability for commercial entities, while simultaneously restricting the efforts of individuals to recover damages through the statute. Because even if construed broadly, VPN companies do not meet the definition

<sup>110</sup> See *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 801-02 (2011).

<sup>111</sup> See *Id.*

<sup>112</sup> See *Id.* at 802.

<sup>113</sup> See *Earle*, *supra* note 48 at 11.

<sup>114</sup> See Miss. Code Ann. § 11-77-5.

<sup>115</sup> See *Earle*, *supra* note 48 at 11.

<sup>116</sup> See Miss. Code Ann. § 11-77-5.



of a commercial entity distributing “material harmful to minors” online.<sup>117</sup> Since VPN companies may enable individuals to access harmful material by circumventing the georestrictions for Mississippi, the VPN companies themselves do not meet the 33% threshold as they are a tool, and VPNs just provide their users a camouflaged IP address, they do not intentionally distribute harmful material to minors.<sup>118</sup> Leaving VPN companies and their users outside the Mississippi statute’s scope.

VPNs are not a niche service that only a handful of individuals have access to. They are used by a large portion of the U.S. population for a variety of reasons, and the number of people using VPNs grows daily.<sup>119</sup> Many VPN services actively advertise their capability to hide a user’s physical location from georestrictions, usually in the context of accessing alternate titles on streaming services.<sup>120</sup> Meaning VPN services are openly advertising a method for anyone in Mississippi to circumvent restrictions established by the statute. There are entire webpages dedicated to showing how to use a VPN to access pornographic material online.<sup>121</sup>

Laws restricting content online that do not account for VPN use are not narrowly tailored and are too underinclusive to be constitutional despite the government’s compelling interest to protect minors from harmful content.<sup>122</sup> Because the Mississippi statute does not address VPNs, the law is underinclusively unconstitutional when compared to its asserted justification of restricting “material harmful to minors” online, which can include protected speech for adults.<sup>123</sup> This underinclusivity weakens the statute’s justifications for restricting protected speech, even in a narrow manner, as the underinclusivity shows the statute can be further narrowed,<sup>124</sup> and currently the lack of VPN considerations likely makes the Mississippi statute unconstitutionally underinclusive.

### 3. Parental Veto

By placing the duty to act on a commercial entity’s liability on the individual,<sup>125</sup> the Mississippi statute creates a “parental veto” in its enforcement. Since not all parents or individuals would pursue action against commercial entities because a minor accessed harmful material on their website.<sup>126</sup> If a parent allows their minor child to access this harmful material, then the law is only restricting the content to minors with parents prohibiting their child’s access to harmful material online.<sup>127</sup> This “parental veto” shows the Mississippi statute is underinclusively unconstitutional because it is unequally applied and enforced.

Similar to how the violent video game restriction in the *Brown* case was deemed unconstitutionally underinclusive because a child can still access violent video games

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at § 11-77-3; Berry, *supra* note 5 at 488-89.

<sup>119</sup> Chauncey Crail, *VPN Statistics and Trends In 2023*, FORBES ADVISOR (Feb. 9, 2023, 12:51 AM), <https://www.forbes.com/advisor/business/vpn-statistics/>.

<sup>120</sup> Kyle Berry, *supra* note 5 at 489.

<sup>121</sup> *Se e.g.*, Lawrence Wachira, *supra* note 53.

<sup>122</sup> *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011).

<sup>123</sup> *Id.*; *Ginsberg v. State of N. Y.*, 390 U.S. 629, 636 (1968).

<sup>124</sup> *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011).

<sup>125</sup> Miss. Code Ann. § 11-77-5.

<sup>126</sup> *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011).

<sup>127</sup> *Id.*

so long as a single authority figure gives permission.<sup>128</sup> So, if a parent wants their children exploring “material harmful to minors” online, and gives them access to circumvention tools, like a VPN or their ID, then commercial entities distributing harmful content to those minors would not be liable if they enforce reasonable age-verification.

Since the Mississippi law’s goal is to prevent minors from accessing “material harmful to minors” online,<sup>129</sup> then lack of state enforcement combined with the potential use of a “parental veto” would be underinclusive because it allows some children to access this material. It also permits noncomplying websites to escape liability, so long as minors who access them, have parental permission to consume potentially harmful material online. This “is not how one addresses a serious social problem,”<sup>130</sup> such as restricting access to “material harmful to minors” online. Currently, most commercial entities use an honor system as an age-verification method to prevent minors from accessing their websites. Unless the State shows that parents have a substantial need to prevent their children from accessing this harmful material, but are unable to do so, then the law’s underinclusiveness may prevent the State’s compelling interest from rising to the level of restricting constitutionally protected material online that is encompassed under “material harmful to minors.”<sup>131</sup>

Overall, the various aspects of regulating the distribution of “material harmful to minors” online the Mississippi law fails to account for show the law’s underinclusiveness. While the State may have a compelling interest in restricting this material, the statute’s threshold determination, its failure to address VPNs, and the presence of a parental veto, harm Mississippi’s justifications for restricting otherwise constitutionally protected material, likely making the statute itself unconstitutional on first amendment grounds for its underinclusive provisions.

#### D. Overinclusivity

The Mississippi law is also unconstitutionally overinclusive in what it restricts and the method it employs to do so. As stated in *Brown*, content restrictions must be narrowly tailored to serve the government’s compelling interest.<sup>132</sup> The restriction of material harmful to minors is a compelling government interest, even though not everything restricted is obscene or harmful to adults.<sup>133</sup> But as society is not under the obligation of consisting of material only “fit for children,”<sup>134</sup> then restrictions on material that are only “variably obscene,”<sup>135</sup> must have strong justifications, or they are first amendment violations. The Mississippi law must likely survive a strict scrutiny analysis to be constitutional.<sup>136</sup> The following subsections show how the Mississippi law is not narrowly tailored to achieve its goal, and thus unconstitutionally overinclusive.

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<sup>128</sup> *Id.*

<sup>129</sup> See Miss. Code Ann. §§ 11-77-1 & 11-77-5.

<sup>130</sup> *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011).

<sup>131</sup> See *Id.* at 803.

<sup>132</sup> *Id.* at 799.

<sup>133</sup> *Ginsberg v. State of N. Y.*, 390 U.S. 629, 640 (1968).

<sup>134</sup> *Butler v. State of Mich.*, 352 U.S. 380, 383-84 (1957).

<sup>135</sup> *Ginsberg v. State of N. Y.*, 390 U.S. 629, 635-366 (1968).

<sup>136</sup> See *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011).

## 1. Disregard for Different Classes of Minors

The Mississippi law does not differentiate between different classes of minors below the age of eighteen.<sup>137</sup> By restricting all minors under the age of 18, the law is overinclusive. As the harms of the restricted content on minors, and the enforced age-verification may not apply nor be as effective for minors in the 16-18 age range.<sup>138</sup> This is especially prevalent in Mississippi where the age of consent is 16, rather than the national age of consent of 18.<sup>139</sup>

This lack of distinction supports the assertion the law is overinclusive and broad in relation to its inherent goal of preventing developmental harms in minors due to exposure to “material harmful to minors.” Mississippi law allows 16-year-old minors to engage in sexual relations with older individuals, the effect of exposure to “material harmful to minors,” would by comparison fall flat, and have a lower effect on these minors, compared to a young child exposed to harmful material. This difference in effect plus the similar restrictions faced by older and younger minors, hampers the first amendment rights of older minors. Older minors may not fall into the category of being affected by “material harmful to minors,” especially if they can legally have intercourse with adults.<sup>140</sup> The Mississippi statute is being overinclusive in its restrictions, as older minors are being unnecessarily deprived of aspects of their first amendment rights as they would not be harmed by the restricted material similar to adult individuals.

The Mississippi law does not address whether emancipated minors would also be subject to restrictions, especially when emancipation occurs due to marriage.<sup>141</sup> The Mississippi law does not mention emancipation, so it can be assumed they will be subject to its age restrictions.<sup>142</sup> If so, then like older minors, the Mississippi statute is overinclusive as it restricts the first amendment rights of emancipated minors to “material harmful to minors.” The law’s restriction on this class of minors is unnecessary to achieve the State’s compelling interest making the restriction unconstitutional.

## 2. Commercial Entity Response Effects

The Mississippi law addresses the liability of non-complying commercial entities, by allowing individuals to sue non-complying entities for damages minors experience due to this distribution of “material harmful to minors.”<sup>143</sup> But the Mississippi statute does not account for malicious compliance complying entities, where instead of enforcing age-verification for users, the companies blocked all Mississippi users from accessing their websites.<sup>144</sup> The Mississippi statute is a

<sup>137</sup> See Miss. Code Ann. § 11-77-5 (the law applies to all individuals below under eighteen).

<sup>138</sup> See *Id.* at § 11-77-1 (Nothing in the statute’s legislative findings indicate what age the negative effects found are most likely to occur when minors are exposed to harmful material.); Romney, *supra* note 34 at 72 & 103.

<sup>139</sup> See Miss. Code Ann. § 97-3-65.

<sup>140</sup> See *generally Id.* (If there are no supposed negative effects when a 16-year-old minor engages in sexual intercourse, then Mississippi’s law is overinclusive for treating older minors as being just as in danger of harm from exposure to harmful material as younger minors).

<sup>141</sup> Miss. Code. Ann. § 93-11-65.

<sup>142</sup> Miss. Code Ann. § 11-77-5.

<sup>143</sup> *Id.*

<sup>144</sup> See Alexander, *supra* note 7.

restriction for minors, not adults.<sup>145</sup> This malicious compliance transforms an obstacle to access “material harmful to minors” for adults, into a ban.

The complete ban of Mississippi in response to this law may be considered overinclusive state action. As while no direct state action enforced these bans, they would never have occurred if not for this law, so even though commercial entities banned Mississippi as private actors, this is arguably a form of indirect state action.<sup>146</sup> Making this an overinclusive ban of “material harmful to minors” in effect, as the law allows companies to act this way, leaving adults with potentially no access to this material which is unconstitutional, as it could restrict online material available to just what is “fit for children.”<sup>147</sup> Though content restrictions aimed at minors, are given greater leeway, this total ban effect exceeds the reasonable allowance of broader restrictions.<sup>148</sup> This ban being a form of state action must be limited to protect the first amendment rights of adults in Mississippi. The statute needs account for malicious compliance to narrowly tailor the law as a restriction. Otherwise, the Mississippi statute should be reformulated as a ban for all users to encompass this malicious compliance.

### 3. Restrictions on Parental Autonomy

The parental veto discussed above may be used to argue the Mississippi law’s overinclusivity<sup>149</sup> because some parents may believe allowing their children to access restricted material online is beneficial to the minor. By highlighting the harms of minors accessing “material harmful to minors,”<sup>150</sup> the State implies parents “ought” to stop their children and worry about their exposure to this material.<sup>151</sup> The Mississippi law is overinclusive for infringing on parental autonomy, rather than simply aiding in parental duties.<sup>152</sup>

Restriction on parental autonomy would occur in cases, where parents do not believe their child accessing what the law considers “material harmful to minors” to be harmful. Some Parent may even encourage their child to do so for sexual education. The Mississippi statute is taking the side of one type of parenting by restricting the content for minors completely, restricting the choice of parents on what values and methods they use to educate their children on subjects that are sexual in nature.<sup>153</sup> Even when protecting children’s interests, constitutional limits on government action apply,<sup>154</sup> which should limit the Mississippi statute’s application.

This alludes to the chilling effect of the law, which could render it unconstitutional if it stymies parental autonomy.<sup>155</sup> Some parents who want to sue a non-complying entity for damages, may not do so due to the embarrassment of the subject matter. The law creates this embarrassment, as it infers minors accessing this

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<sup>145</sup> See Miss. Code Ann. § 11-77-5.

<sup>146</sup> See Davis, *supra* note 28 at 17.

<sup>147</sup> Butler v. State of Mich., 352 U.S. 380, 383-84 (1957).

<sup>148</sup> See Ginsberg v. State of N. Y., 390 U.S. 629, 640 (1968).

<sup>149</sup> See Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 804 (2011).

<sup>150</sup> Miss. Code Ann. § 11-77-1.

<sup>151</sup> See Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 804 (2011).

<sup>152</sup> *Id.*

<sup>153</sup> See *Id.*

<sup>154</sup> *Id.* at 804-05.

<sup>155</sup> See *Id.* at 805.

material is wrong, and damages subsequently occur.<sup>156</sup> Leading to situations where parents may not want to identify themselves, as it may raise concerns on the parent's ability to parent, as their child accessed this harmful material despite their parental efforts. The Mississippi statute's stance on this issue, could overinclusively burden parental autonomy.

### III. PUBLIC POLICY CONSIDERATIONS AND SOLUTIONS

While the above constitutional concerns are relevant, the Mississippi law and others like it could change to better limit the distribution of material harmful to minors online. The following are less restrictive and potentially more effective alternatives the current law. This will be explained through public policy considerations the law evokes. And suggested changes to the law to better enforce Mississippi's compelling interest in restricting minors' access to "material harmful to minors" online.

#### A. Broad Concerns

##### 1. Ineffectiveness of the Law

A law's effectiveness has no strong bearing on any equal protection constitutional challenges it may face,<sup>157</sup> but addressing the Mississippi law's effectiveness is necessary when considering public policy that fueled its enactment. The legislative findings of the statute indicate the Mississippi law was enacted because of the harms the restricted material was found to have on minors' development.<sup>158</sup> The Mississippi statute framed itself as the answer to this public health concern.

If the Mississippi statute's goal is to prevent minors from accessing this material online, and not to restrict adults, then the ineffectiveness of the law should be addressed rather than be allowed to continue, so that it does not become perverse in its effect.<sup>159</sup> Otherwise, there are chances the effects of this law may turn out like mandated abstinence sexual education, where the law's effect became an obstacle, as instead of lowering rates pre-marital intercourse between minors, the abstinence education contributed to increased numbers in teen pregnancies and sexually transmitted diseases because of a lack of direct education.<sup>160</sup> Regarding the Mississippi statute, the number of minors exposed to harmful material online may increase because of age-verification, as it may push minors to find ways around restrictions rather than leaving them be. While complying websites are facing lower user circulation, there is no telling how much activity increased on non-complying websites.<sup>161</sup>

A counter-point is the Mississippi law may be ineffective towards minors actively seeking age-restricted material, but it is effective in preventing unknowing minors from finding restricted material accidentally.<sup>162</sup> This is potentially incorrect for

<sup>156</sup> See Miss. Code Ann. § 11-77-1.

<sup>157</sup> *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

<sup>158</sup> Miss. Code Ann. § 11-77-1.

<sup>159</sup> Meghan Boone, ALSO FEATURING: Perverse & Irrational, 16 HARV. L. & POL'Y REV. 393, 409-10 (2022).

<sup>160</sup> *Id.* at 430-434.

<sup>161</sup> Brenna Goth, *Porn Site Age Checks Required by Growing Number of States*, BLOOMBERG L. (Jul. 26, 2023, 4:00 AM), <https://news.bloomberglaw.com/in-house-counsel/porn-site-age-checks-required-by-growing-number-of-states>.

<sup>162</sup> Marsden, *supra* note 32 at 231.

two reasons. The first is while minors may stumble into restricted material accidentally, the presence of the law's age-verification may stoke the minors' curiosity. The age-verification's existence may compel minors to learn more about the subject because of the restrictions put into place. If this occurs, then minors may become part of the class of minors actively seeking age-restricted content online. If this occurs then the law's ineffectiveness, due to the ease in circumvention and many non-complying commercial entities, will come into play, allowing minors to be harmed by the material the statute aims to restrict. Since the Mississippi statute is so new, its effectiveness compared to the problematic honor system currently in use is unknown,<sup>163</sup> but it may not be an adequate replacement, especially if there is no incentive to increase compliance with the law.

The second issue with this accidental prevention argument, is if the goal of the legislature was only to prevent younger minors from accidentally discovering "material harmful to minors" then the statute would have been written reflecting that goal. Instead, the statute is written to prevent the access of all minors, and places a duty on certain commercial entities.<sup>164</sup> If the law wanted to only prevent accidental access to this material, then the statute should have included a liability exception for entities whose age-verification was actively bypassed by a user.<sup>165</sup> The Mississippi law creates potential liability for commercial entities, and disregards any potential user liability.<sup>166</sup> This lack of addressing user circumvention, shows the Mississippi statute's goal is to prevent all minors from, accidentally or purposefully, accessing "material harmful to minors" online. Meaning when minors circumvent the age-verification systems of commercial entities, under the current law, there is no recourse for damages because the commercial entity complied with the law. Creating scenarios where the law's ineffectiveness allows minors to legally experience harms the law was created to prevent.<sup>167</sup> If this is the stance the State wants to take on the issue of distributing "material harmful to minors" online, then it should try preventing these harms from occurring more often than not.

The lack of policing method to monitor non-complying commercial entities diminishes the law's effectiveness. While it need not be perfect, if the most common results from online searches of subject under the "material harmful to minors" umbrella do not consist of complying commercial entities, then the law is so ineffective, that it is inconsequential in its effect and enforcement.<sup>168</sup> This non-compliance counters arguments for the Mississippi law's enforcement that since many common activities require valid identification, then verifying age to access this harmful material should be treated similarly.<sup>169</sup> Because if an individual is never asked to reasonably verify

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<sup>163</sup> See *Id.* at 227.

<sup>164</sup> Miss. Code Ann. § 11-77-5.

<sup>165</sup> See *Id.*

<sup>166</sup> See *Id.*

<sup>167</sup> See *Id.* at § 11-77-1.

<sup>168</sup> This standard is difficult to determine as search results for the same search terms vary based on factors such as time, user location, and the user's past searches, but if non-complying websites appear more often due to online porn restrictions, then these laws' effectiveness should be further analyzed. See generally *Why your Google Search results might differ from other people*, GOOGLE ((last visited Dec. 12, 2023), <https://support.google.com/websearch/answer/12412910?hl=en>).

<sup>169</sup> Marsden, *supra* note 32 at 239 ("The ultimate response is that valid forms of ID are required for many day-to-day activities, including driving, purchasing alcohol, voting, and even going to the movies. Therefore, it is also reasonable to require those who access pornography to show that they are legally permitted to consume it.").

their age, due to non-compliance, then the law is ineffective since the State cannot make entities comply. Especially for the distribution of harmful material online, as much of it is available for free, and not subject to age-verification at the “point of delivery,” or pay walls like when purchasing alcohol, meaning minors can access the harmful material immediately if there is no age-verification.<sup>170</sup>

It is unclear if the State can enforce fines on non-complying entities, but some sources report that it will occur.<sup>171</sup> The threat of fines or lawsuits against non-complying commercial entities are less effective for those based outside of the United States, as they are not subject to much “legal jeopardy” compared to domestically based commercial entities.<sup>172</sup> Even if fines becomes the predominant enforcement mechanism of the Mississippi statute, “if the law’s enforcement is so rare that the lawmaker’s coercive intent is not translated to non-complying commercial entities to alter their behavior, then the law itself is as coercive as a parent’s rules to their children, which depend on the parent to follow through with their enforcement.”<sup>173</sup> The Mississippi law only seems to be effective once damages are sought after the fact, and if law’s goal is preventative, then it needs to be more coercive to alter the behavior of non-complying commercial entities to prevent minors from accessing “material harmful to minors” online.<sup>174</sup>

## 2. Implications of a National Trend

This Mississippi law is indicative of a national trend towards stricter age-verification online. The Mississippi statute is one in a trend of other states, like Louisiana and Virginia, in establishing this type of online restriction for minors.<sup>175</sup> The issues in the Mississippi law, both in its constitutionality and effectiveness, must be evaluated with greater scrutiny, as this trend shows this law is not an outlier, but part of a new movement. Showing a willingness from states to create legislation using geoblocking to restrict online content. Before this trend of states action, georestricting was mainly used to enforce licensing agreements between companies.<sup>176</sup>

This growing trend of states enforcing georestriction-based age-verification systems on commercial entities, like the Mississippi statute,<sup>177</sup> increases the importance of analyzing the method of restricting content online these laws employ. This trend is especially apparent when comparing the language of the laws themselves, many of which use differing terms, and may not encompass all of the same material.<sup>178</sup> If the number of states employing this method of age-verification continues to expand,

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<sup>170</sup> See Jessica Muirhead, *Preventing underage alcohol purchasing online using payment card details*, INST. OF ALCOHOL STUD. 1, 7-10 (Dec. 2021), <https://www.ias.org.uk/wp-content/uploads/2021/12/IAS-Preventing-underage-alcohol-purchasing-online-using-payment-card-details.pdf>.

<sup>171</sup> See Miss. Code Ann. § 11-77-5; see e.g., Alexander, *supra* note 7. (reporting “Senate Bill 2346 became official ... websites considered pornographic or “obscene” must now have strict age verification processes or face a fine from the attorney general.”).

<sup>172</sup> See McIntyre, *supra* note 60.

<sup>173</sup> Joseph D’Agostino, *Law’s Necessary Violence*, 22 TEX. REV. LAW & POL. 121, 182-83 (2017).

<sup>174</sup> See *Id.*

<sup>175</sup> See Goth, *supra* note 161.

<sup>176</sup> See Earle, *supra* note 48 at 11.

<sup>177</sup> See Miss. Code Ann. §§ 11-77-1 – 11-77-7.

<sup>178</sup> Compare *id.* at § 11-77-5, with VA Code Ann. § 18.2-391 (Virginia’s version of Mississippi’s law), and A.C.A. § 4-88-1305 (Arkansas’ version of Mississippi’s law).

then the Mississippi law's issues outlined above, may be exacerbated, and states that do not mandate age-verification may be affected by laws enforced in other states. And rather than allow these issues to continue and worsen, it would be effective long-term, if states like Mississippi, who are employing restrictions on "material harmful to minors" online, address the statute's issues while the law's effect is relatively minimal. Even if only one state addresses these issues, it would serve as a blueprint for others who have enacted or are seeking to enact a similar law.

Outside of this "material harmful to minors" context, if these laws survive constitutional scrutiny, then they could be the foundation for how content is regulated online. The age-verification systems required by the Mississippi statute could be applied to things like online gambling and the sale of alcohol. Affecting much broader markets than just obscene or harmful material for minors. It is unknown what will be restricted online in the future as technology progresses, but addressing inefficiencies or constitutional concerns in the Mississippi law now, would ease the creation of future online restrictions.

### 3. International Solutions

Looking at how other nations regulate harmful material online, provides potential alternatives to the Mississippi law that could better survive constitutional scrutiny, or evoke compliance from commercial entities.

A feasible option is the "porn pass" distributed in the United Kingdom.<sup>179</sup> This is a physical form of age-verification, where users go to a store, show the clerk their identification and obtain a physical card, allowing them to access restricted online content.<sup>180</sup> This would treat accessing restricted content online similarly to purchasing alcohol in-person. Chilling effects of providing identifiable information would be reduced, as only a single clerk has to verify the user's age, in-person, with little chance of stealing their information compared to online age-verification. By removing online age-verification, many privacy concerns will be put to rest.<sup>181</sup> When accessing a restricted website, the user inputs the relevant information from their "porn pass" rather than providing websites identifying information directly. Classifying access to material harmful to minors in the same "day-to-day activities" group requiring valid identification to partake in.<sup>182</sup>

Alternatively, Germany regulates a self-regulating body for online content.<sup>183</sup> This self-regulating body is made of member organizations creating rules for members to follow when restricting content, based upon governmental guidelines.<sup>184</sup> Companies join this self-regulating organization to optimize "youth protection online," and to give commercial entities a say in the regulations' form, creating a method of "voluntary self-regulation."<sup>185</sup> The self-regulating body enacts and enforces online restrictions, while the government regulates the self-regulating body, instead of individual commercial

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<sup>179</sup> Romney, *supra* note 34 at 69.

<sup>180</sup> *Id.*

<sup>181</sup> See Alexander, *supra* note 7.

<sup>182</sup> See Marsden, *supra* note 32 at 239.

<sup>183</sup> Romney, *supra* note 34 at 76.

<sup>184</sup> *Id.* at 77.

<sup>185</sup> See FREIWILLIGE SELBSTKONTROLLE MULTIMEDIA-DIENSTEANBIETER, <https://www.fsm.de/en/fsm/> (last visited Nov. 11, 2023).



entities.<sup>186</sup> The government issues sanctions and takes legal action if commercial entities are violating laws on the dissemination of harmful online content, but if the self-regulating body is “acting within the scope of its discretionary powers,” and its members comply with its regulations, then the government is not to discipline individual entities.<sup>187</sup> If applied to Mississippi’s law, it could lead to greater compliance from affected commercial entities, as they will have an inputs on the regulation’s form. This requires greater resource investments, than just enacting the law, but could be useful in increasing the efficacy of age-verification, and commercial entity compliance. Creating clearer avenues to recover damages, as non-complying entities are distributors of “material harmful to minors,” and are monitored by the self-regulating body.<sup>188</sup>

The above two alternatives to the Mississippi law, show the goal of restricting online content is popular, but the method employed by Mississippi is not the only way to achieve it.

## **B. The Mississippi Law’s Problematic Provisions**

### **1. Issues with the Law’s “Serious Value Exception”**

The Mississippi law serves as a check and a guide for commercial entities of the law’s effect on them by defining “material harmful to minors.” The statute’s serious value exception prevents restrictions of “material harmful to minors” if the work taken as a whole has “serious literary, artistic, political, or scientific value for minors.”<sup>189</sup> The serious value exception, which mirrors the language in *Miller* but adds a focus for minors,<sup>190</sup> is inadequate as a guide for commercial entities due to difficulty in determining what harmful material has serious value. This is especially true for “material harmful to minors,” which is broader than obscenity as defined in *Miller*.<sup>191</sup> To serve as a preventative guide for commercial entities, the law must clarify whether certain categories of harmful material have serious value. This distinction does not have to encompass everything, but the law should define more common and emerging forms of online harmful material not contemplated when *Miller* was decided in 1973.<sup>192</sup>

The serious value exception’s scope for “material harmful to minors” must be clarified. Currently harmful “material taken as a whole which lacks serious literary, artistic, political, or scientific value for minors” is restricted by the Mississippi law, and counts towards the 33% threshold where commercial entities are subject to the law.<sup>193</sup> This definition excludes harmful and obscene material if they have serious value from this threshold determination. Courts subject harmful material to a balancing test to evaluate serious value, but this ambiguity of what has serious value leaves companies

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<sup>186</sup> See Romney, *supra* note 34 at 77-78.

<sup>187</sup> *Id.* at 77.

<sup>188</sup> See Miss. Code Ann. §§ 11-77-3 – 11-77-5.

<sup>189</sup> Miss. Code Ann. § 11-77-3.

<sup>190</sup> See generally *Miller v. California*, 413 U.S. 15 (1973); see also Miss. Code Ann. § 11-77-5.

<sup>191</sup> *Id.*; See generally *Miller v. California*, 413 U.S. 15 (1973) (the test for determining obscenity, does not apply to everything the Mississippi law could restrict).

<sup>192</sup> See generally *id.*

<sup>193</sup> Miss. Code Ann. § 11-77-3.

unaware if the material they distribute has serious value and excluded from the Mississippi law.

The law should classify categories of obscene material, that may have serious value, and clearly restrict them to avoid their availability online to minors. Or specifically exclude them from restrictions depending on the legislature's stance. This would address large categories of otherwise harmful material, excluding or including commercial entities specializing in their distribution from the Mississippi statute. Examples of harmful material with arguable value that should be addressed include: deepfake pornography (scientific value), obscene drawings (artistic value), and artificially generated images (artistic and scientific value). These all include harmful material to minors that are found online with no age-verification. The Mississippi law should address whether the above categories generally qualify for the serious value exception.<sup>194</sup> This determination would expand the effectiveness and the scope of the Mississippi statute for users and commercial entities who would be affected by the law depending on if this material lacks has serious value.

Deepfakes are altered videos, where deepfake technology puts the faces and expressions of others, like celebrities, onto the bodies of other people in videos.<sup>195</sup> This can be obscene, as many have put the faces of celebrities onto performers in explicit videos online.<sup>196</sup> Do the learning opportunities of this technology give it serious value here? Some say yes, as the "benefits of deepfakes' underlying technology" allow improvement of the technology underlying automated systems.<sup>197</sup> "Proponents for deepfake protection argue that any restrictions on deepfakes," even pornographic ones, "would have a chilling effect on deepfake technology," deepfake technology developers would fear the "possibility of facing a lawsuit."<sup>198</sup> This chilling effect may impact progress and development of new technology as outlined in the Constitution's Patents and Copyright section.<sup>199</sup> Others argue deepfake obscenity does not have serious value because they are "falsely depicting someone in pornography. Even people who create pornographic deepfakes acknowledge that what they do is derogatory."<sup>200</sup>

This debate's existence shows the serious value of deepfakes is unclear. Providing commercial entities distributing deepfakes plausible deniability for not instituting age-verification, as they can argue deepfakes, obscene or not, have serious technological value.<sup>201</sup> This vagueness in serious value determinations could be applied and argued to any of the above harmful material categories. Until case law, or the law itself, addresses this vagueness, commercial entities will distribute this harmful material to minors online without age-verification. Addressing the serious value exception's scope for these categories would allow commercial entities to evaluate the statute's applicability to them increasing their compliance.

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<sup>194</sup> See *id.*

<sup>195</sup> Waldstreicher, *supra* note 23 at 731-33.

<sup>196</sup> *Id.* at 733-34.

<sup>197</sup> *Id.* at 756.

<sup>198</sup> *Id.*

<sup>199</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>200</sup> Waldstreicher, *supra* note 23 at 755-56.

<sup>201</sup> See *Id.* at 756.

## 2. Alter the 33% Threshold

An alteration to the Mississippi statute could be changing the threshold requirement determining the commercial entities affected. The Mississippi statute affects commercial entities whose websites are at least 33 % “material harmful to minors.”<sup>202</sup> This threshold leaves much “material harmful to minors” available online without age-verification, and gives commercial entities a method of escaping liability by lowering the ratio of harmful material on their website to under 33%.<sup>203</sup>

The Mississippi law could be altered into a post-by-post restriction that directly targets “material harmful to minors.” Where all commercial entities would statutorily age-restrict any content on their websites that qualifies as “material harmful to minors.” Functioning similar to how YouTube age-restricts its content.<sup>204</sup> YouTube identifies elements of a post that are unsuitable for viewers under 18, and age-restricts specific posts with these elements.<sup>205</sup> Once age-restricted, the post becomes unviewable for users unless they log into their YouTube account which has verified their age as 18 or older.<sup>206</sup>

Mississippi could adopt YouTube’s age-restriction model, and require all commercial entities age-restrict any harmful material content on their websites.<sup>207</sup> The mandated age-verification, which requires valid identification,<sup>208</sup> could be instituted when users create their accounts, rather than when users access the website. Commercial entities could then mark specific accounts as age-verified, and provide users of those accounts access to restricted content, when logged into their age-verified account, allowing any non-verified user access to non-harmful material on website.

This restriction would apply to entities distributing “material harmful to minors” online, enforcing age-verification for all restricted content distributed online, not just websites with larger concentrations of this content.<sup>209</sup> Allow restrictions to occur on social media, where many minors are accessing harmful material, and other websites unrestricted under the Mississippi law.<sup>210</sup> Age-verification on account creation would prevent minors from creating age-verified accounts, while still providing access to the non-harmful materials on websites that are currently restricted. Commercial entities would have to flag and age-restrict content, similar YouTube, on their platform,<sup>211</sup> tailored to “material harmful to minors.”<sup>212</sup>

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<sup>202</sup> Miss. Code Ann. §§ 11-77-3 – 11-77-5.

<sup>203</sup> See Section III.C.1.

<sup>204</sup> See *Age-Restricted Content*, YOUTUBE HELP, (last visited Nov. 11, 2023), <https://support.google.com/youtube/answer/2802167?hl=en> (explaining YouTube age-restricts specific posts based on community guidelines and terms of service.).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See Miss. Code Ann. § 11-77-3.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.* at §§ 11-77-3 – 11-77-5 (age-verification is currently only enforced on entities whose websites are made of greater than 33% “material harmful to minors” regardless of the website’s size).

<sup>210</sup> See Wright, *supra* note 104.

<sup>211</sup> See *Age-Restricted Content*, *supra* note 204.

<sup>212</sup> See Miss. Code Ann. § 11-77-3.

## C. Technological Concerns

The Mississippi law and others like it highlight technological considerations that must be deliberated when enforcing online regulations. The law's constitutionality and effectiveness can hinge on current technological limitations of technology used to enforce legal mandates online, especially where a human presence is not present to enforce the law.<sup>213</sup>

### 1. Current Technological Limitations

Many issues with the Mississippi law because of limits in technology used for age-verification and geoblocking. To employ age-verification for Mississippi users, commercial entities must employ geolocation technology for companies to identify a user's location, to detect and restrict Mississippi users, while allowing users from non-restricting states to access their website as usual.<sup>214</sup> The biggest obstacle to effective geoblocking is the IPv4 system.<sup>215</sup> Under this IP system, the geolocation accuracy and subsequent restrictions are not 100% accurate, especially when identifying user's specific state, as user geolocation is about 50-80% accurate when determining the user's state within the country.<sup>216</sup> Meaning commercial entities may accidentally restrict non-Mississippi users in surrounding states, due to geolocation inaccuracy, when enforcing the Mississippi law, or vice versa, where Mississippi users are flagged as from different state, and allowed unrestricted access to websites age-restricting Mississippi users. Which is worse when compared to geolocation accuracy of 95-99% when distinguishing different countries.<sup>217</sup>

When devices transition to the IPv6 system, then of the law's restrictions will become easier to enforce due to device specific IP addresses making it easier to detect when VPNs were used.<sup>218</sup> As under IPv6, each device would have its own static IP address, due to larger numbers of available IP addresses, rather than randomly assigned addresses, used by anyone, anywhere.<sup>219</sup> Implementation of IPv6 is not complete, and less than 50% of devices have implemented this new system.<sup>220</sup>

Under IPv4, age-verification required by the Mississippi law is circumventable to the point where its enforcement may be unconstitutionally broad with current technology. In the past, the Supreme Court has focused on relating the constitutionality of online content restrictions to the limits of the technology performing the restrictions as narrowly defined by the law to not be unconstitutionally burdensome.<sup>221</sup> The lack

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<sup>213</sup> See HOLMES, *supra* note 2 at 14; see e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>214</sup> See Earle, *supra* note 48 at 7.

<sup>215</sup> Trimble I, *supra* note 35 at 595 (All conceivable IP addresses under the "IPv4 protocol have been assigned, internet service providers assign and reassign IP addresses from a common pool of them to internet users as they log in and off from online services," making it hard to track where an its user is actually located).

<sup>216</sup> Emma Jagger, *Why IP Geolocation Can Go Wrong: Causes and Fixes*, ABSTRACT API (Aug. 4, 2023), <https://www.abstractapi.com/guides/why-is-my-ip-geolocation-wrong>.

<sup>217</sup> *Id.*

<sup>218</sup> See Trimble I, *supra* note 35 at 595-97.

<sup>219</sup> *Id.*

<sup>220</sup> Josh Fruhlinger, *What is IPv6, and why is adoption taking so long?*, NETWORK WORLD (Mar. 21, 2022, 3:00 AM), <https://www.networkworld.com/article/3254575/what-is-ipv6-and-why-aren-t-we-there-yet.html>.

<sup>221</sup> HOLMES, *supra* note 2 at 14.

of available technology preventing the access of only minors from restricted content was why the CDA was repealed, while the existence of blocking technology already in use led the Court to concluding other less restrictive means of achieving the government's compelling interest exist.<sup>222</sup> Meaning if technology is not sufficiently advanced then the Mississippi law risks overboard enforcement.<sup>223</sup> So the Mississippi statute may not currently be constitutional, but when IPv6 is implemented the Mississippi statute could be applied effectively, narrowly, and within the constitutional scope for online content restrictions.

## 2. Address VPN Use

The Mississippi law needs to address VPN use. If law makers would prefer keeping user liability outside the law's scope, then making VPN companies liable for aiding user georestriction circumvention would address significant underinclusive arguments.<sup>224</sup> VPNs are used by consumers to trick georestrictions enforced by companies, to access copyrighted or restricted material in their area.<sup>225</sup> This ability to change online locations to circumvent georestrictions is advertised by VPN companies as a major feature of their service.<sup>226</sup>

Geotraveling can circumvent age-verification on websites complying with these "porn" laws, like the Mississippi statute, allowing minors to access harmful material online, and currently VPN companies are not liable these laws, as they do not meet their threshold requirements.<sup>227</sup> The presence of VPNs limits these laws' restriction to only minors who cannot access VPNs to circumvent age-verification.<sup>228</sup> VPNs allow technologically adept, usually older, minors to circumvent instituted age-verification,<sup>229</sup> which is counter to the Mississippi law's goal.<sup>230</sup> If the Mississippi law only wanted to restrict accidental exposure of younger minors to harmful material, then it would not have highlighted the negative effects pornography has on adolescents, by limiting the findings to only its effects on pre-pubescent minors.<sup>231</sup>

The Mississippi law could enforce age-verification to access VPN services, similar to how it restricts websites distributing "material harmful to minors."<sup>232</sup> It would be difficult to outright ban VPNs as they are used for privacy and security by individual users and companies.<sup>233</sup> Meaning age-verification for VPNs should be

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<sup>222</sup> *Id.* (referencing the holdings in *Reno v. ACLU*, 521 U.S. 844, (1998) and *Ashcroft v. American Civil Liberties Union (Ashcroft II)* 1 542 U.S. 656 (2004)).

<sup>223</sup> *See id.*

<sup>224</sup> *See* Section III.C.2; *see* Michelle Edelman, *The Thrill of Anticipation: Why the Circumvention of Geoblocks Should be Illegal*, 15 VA. Sports & Ent. L.J. 110, 129 (2015).

<sup>225</sup> *Id.* at 116.

<sup>226</sup> *Id.* at 120.

<sup>227</sup> *See* Wachira, *supra* note 53 ("Laws and regulations regarding ... porn vary significantly from region to region, while some local networks restrict access to porn sites.... A VPN is the easiest and most reliable way to get around these restrictions. This simple app changes your virtual location .... That way, you'll appear as if you're in another country that doesn't restrict access to porn sites."); *see also* Miss. Code Ann. § 11-77-3.

<sup>228</sup> Romney, *supra* note 34 at 72.

<sup>229</sup> *Id.*

<sup>230</sup> *See* Miss. Code Ann. §§ 11-77-3 – 11-77-5 (restricting minors under the age of 18 from harmful websites through age-verification).

<sup>231</sup> *See Id.* at § 11-77-1.

<sup>232</sup> *See Id.* at § 11-77-5.

<sup>233</sup> *Best VPNs of September 2023, supra* note 53.

limited to the cybertraveling features, rather than any security or privacy features the service provides. Allowing VPNs' cybertraveling feature to be used for "legitimate purposes" rather than for actively circumventing state laws.<sup>234</sup>

This would hold VPN services accountable for helping minors circumvent age-verification, even if this circumvention is not intended by the VPN companies. Entities currently restricted by the Mississippi law will not know if users circumventing their age-verification systems are minor, so this layer of age-verification on VPNs should reduce the number of minors able to circumvent these age-verification systems. Categorizing the use of VPNs to alter geolocation to access "material harmful to minors,"<sup>235</sup> with activities requiring valid identification to partake in.<sup>236</sup>

Others argue VPNs are not foolproof loopholes to age-verification because there is technology that detects VPN use and blocks commonly used IP addresses for geotraveling, preventing their circumvention of age-verification.<sup>237</sup> This technology is used by services like Netflix to enforce georestrictions, but are circumvented by more expensive VPNs.<sup>238</sup> Disregarding feasibility or expense issues related to enacting VPN detection systems, there is currently no incentive for commercial entities to use them, since the Mississippi law does not address VPNs. Commercial entities that enacted age-verification solely to comply with Mississippi's law will not use VPN detection systems if they are not mandated by the law. This desire not to act beyond the minimum mandates can be seen from the malicious compliance commercial entities have performed in response to Mississippi's law.<sup>239</sup>

If restricting access to VPNs would be difficult, then having VPN services give their users notice may be sufficient. This could be a disclaimer by VPN services on their interface, informing users that using VPNs to circumvent age-verification may have legal ramifications. This may not prevent VPN users from circumventing georestrictions, but the disclaimer should give parents, who may be unaware VPNs can bypass age-verification, notice.<sup>240</sup> Allowing parents to better monitor their children's online activities.

### 3. VPNs in the American Legal System

The Mississippi law and its failure to address VPNs highlights a tendency in the American legal system to ignore VPNs.<sup>241</sup> Reluctance to address VPNs occurs, not only for restrictions on "material harmful to minors" online, but VPNs are also ignored

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<sup>234</sup> See Trimble I, *supra* note 35 at 648-49.

<sup>235</sup> Miss. Code Ann. § 11-77-5.

<sup>236</sup> See Marsden, *supra* note 32 at 239 (positing that many "day-to-day activities" require valid ID to partake in, and pornography should be treated the same way).

<sup>237</sup> *Id.* at 238-239 (citing *Frequently Asked Questions for Clients*, AGE VERIFICATION PROVIDERS ASS'N <https://avpassociation.com/av-clients/faqs-for-clients/> (last visited Mar. 29, 2023)).

<sup>238</sup> *Id.*

<sup>239</sup> See Alexander, *supra* note 7 ("Pornhub — one of the largest and most well-known adult content websites in the U.S. — has banned Mississippi users from accessing its content in response" to the Mississippi law, rather than enforce the statute's age-verification on users.).

<sup>240</sup> See Marsden, *supra* note 32 at 212.

<sup>241</sup> See e.g. Miss. Code Ann. § 11-77-5.

in fields like online gambling<sup>242</sup> and the DMCA.<sup>243</sup> This reluctance to address VPN use, even though they create complications in multiple legal fields, is odd. This could indicate these online restrictions are forms of political theater, and lawmakers do not care to effectively regulate VPNs, so long as they receive political credit for enacting hot topic laws like online porn restrictions for minors.<sup>244</sup>

While VPNs have legitimate uses,<sup>245</sup> they can be used for illegitimate uses like violating user agreements and performing illegal acts online gambling, if users appear as being from a different location geographically.<sup>246</sup> This lack of laws addressing VPNs creates legal ambiguity, where VPN services are advertised as legitimate, despite facilitating the illegitimate acts of their users.<sup>247</sup> Users are unaware if their use of VPNs to circumvent georestrictions is an issue because the laws they are breaking never contemplated the legal ramifications of VPN use.<sup>248</sup>

*MGM Studios Inc. v. Grokster, Ltd.*, provides a potential framework for holding VPN companies accountable, at least regarding copyright infringement.<sup>249</sup> Holding that distributors of a device, or service in this case, promoting copyright infringing uses of their product may be secondarily liable for the direct infringement of third parties using that product, as the potential infringing use of a product alone is insufficient.<sup>250</sup> VPN companies actively advertise, usually through sponsorships, how their geolocation services can circumvent georestrictions in a user's area, encouraging the use of their VPN to new customers to aid in circumventing georestrictions used by

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<sup>242</sup> See MISSISSIPPI GAMING COMMISSION, *Frequently Asked Questions*, MS. GAMING COMM'N, <https://www.msgamingcommission.com/faqs#:~:text=internet%20gambling%20legal%3F-,No.,from%20Mississippi%20with%20these%20businesses> (last visited Nov. 17, 2023) ("Internet gambling is illegal under state law. Online sites may advertise they are 'legal' and 'licensed' forms of gaming. They may be legal or licensed where the bets are received, but it is illegal to place bets from Mississippi with these businesses."); see Miss. Code. Ann. § 97-33-1 (no mention of VPNs or circumventing restrictions on online gambling in Mississippi).

<sup>243</sup> See 17 U.S.C. § 1201 (Digital Millennium Copyright Act ("DMCA") section covering circumvention of copyright protection systems.); see Berry, *supra* note 5 at 517 (circuit split in the United States on if the act of circumvention "is sufficient for liability or whether the act of circumvention must be connected to an act of infringement.").

<sup>244</sup> This lack of VPN addressal shows a tendency in politics to portray complex matters into simple ones, to show constituents that change is being made, without regard to the details of the change itself. See Kenneth L. Karst, *Faiths, Flags, And Family Values: The Constitution of The Theater State*, 41 UCLA L. REV. 1, 5 (1993). This political theater is shown in how media has covered the enactment of these online porn restrictions, where the broad effects of the law, the bipartisan support, and the politicians taking credit for their enactment are highlighted, and the possibility of circumvention through VPNs is barely covered. See e.g., Jackson, *supra* note 56. If VPNs are mentioned in media coverage or by politicians, they are treated as inconsequential workarounds. See e.g., Novicoff, *supra* note 3.

<sup>245</sup> See *Best VPNs of September 2023*, *supra* note 53 (listing legitimate functions of VPNs for personal and business use).

<sup>246</sup> See Berry, *supra* note 5 at 488-89.

<sup>247</sup> See Crail, *supra* note 119 (outlining predominant uses for VPNs, while advertising three VPN services that perform all those services as legitimate.).

<sup>248</sup> See e.g., Miss. Code Ann. § 11-77-5; see also Miss. Code. Ann. § 97-33-1.

<sup>249</sup> See generally *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>250</sup> *Id.* at 941.

streaming services to access content available elsewhere.<sup>251</sup> Applying *Grokster* to VPNs is possible to induce secondary infringement because of their advertisements.

Outside of a copyright context, while *Grokster* may not apply, its reasoning could be applied to hold VPNs accountable in other legal contexts.<sup>252</sup> VPNs do not directly advertise that users should circumvent age-restrictions, but the infringing use these companies do advertise is so closely related to age-verification circumvention that VPNs should be held accountable. At least to inform lawmakers, so they can address VPNs in relation to laws like those restricting online gambling, and mandating age-verification online.<sup>253</sup>

Restricting VPN use may be difficult due to its virtual nature, and that many VPN companies are based outside of the United States,<sup>254</sup> but that has not stopped lawmakers from restricting content online.<sup>255</sup> Lawmakers should incorporate, at minimum, some form of notice regarding VPNs circumventing online restrictions. Allowing VPN users to be aware that using VPNs to circumvent georestrictions may lead to violating user agreements,<sup>256</sup> or potentially subject them to litigation if used to circumvent legally mandated online restrictions.<sup>257</sup> This notice could be the first step needed to begin addressing VPN use in the American legal system, as the need for stronger legislation grows with the popularity of VPNs.

## CONCLUSION

Overall, this wave of restrictions on the distribution of “material harmful to minors” online through enforcement of stricter age-verification systems has serious constitutional and public policy implications. While the laws’ constitutionality is debatable under the first amendment, the laws highlight how their enforcement mechanisms may be problematic in achieving their overarching goal, which is restricting minors from accessing harmful material online.<sup>258</sup> These laws show that

<sup>251</sup> See e.g., NORDVPN, *What is a VPN and how it works* | NordVPN, YOUTUBE ( Sep. 14, 2020), <https://www.youtube.com/watch?v=yCWNRzoQGis> (video posted on YouTube by a large VPN company, where one VPN feature is accessing blocked content.); Globku, *Ranking Every Naruto Storm Connections Ultimate*, YOUTUBE ( Nov. 18, 2023), <https://www.youtube.com/watch?v=aFzrAQNjsQs> (YouTube video sponsored by a VPN company, with an in-video advertisement, highlighting the use of the VPN to access Netflix libraries in other countries from minutes 1:53-3:16).

<sup>252</sup> See generally *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939-41 (2005) (the companies at issue were actively advertising how their users could infringe copyrights, and the entities selling the service profited off infringing uses of their service.).

<sup>253</sup> See e.g., Miss. Code Ann. § 11-77-5; see also Miss. Code Ann. § 97-33-1.

<sup>254</sup> Dovydas Vėsa, *Who owns your VPN? 105 VPNs run by just 24 companies*, VPN PRO (Aug. 10, 2023), <https://vpnpro.com/blog/hidden-vpn-owners-unveiled-97-vpns-23-companies/> (many VPNs are based outside of the United States in countries such as China, Pakistan, and Panama).

<sup>255</sup> See Miss. Code Ann. § 11-77-5 (restricting commercial entities distributing “material harmful to minors” online, without regard to where the commercial entities are based).

<sup>256</sup> See *Netflix Terms of Service*, NETFLIX (last updated Jan. 5, 2023), <https://help.netflix.com/legal/termsfuse> (Netflix’s terms of service prohibit users from “circumventing, removing, altering, deactivating, degrading, blocking, obscuring or thwarting any of the content protections ... of the Netflix service, including ... copyright notices, and trademarks.” (emphasis added)). This circumvention includes using VPNs, as if detected, Netflix will restrict users’ access to only content that Netflix holds a worldwide license to stream. *Watching TV shows and movies through a VPN*, NETFLIX, <https://help.netflix.com/en/node/114701>.

<sup>257</sup> See Miss. Code Ann. § 97-33-1 (violating Mississippi’s anti-gambling law can lead to a fine of up to \$500 and potentially up to 90 days of imprisonment.).

<sup>258</sup> See Miss. Code Ann. §§ 11-77-1 – 11-77-7.



despite VPNs' prevalence in the market, and their potential to circumvent online restrictions, that lawmakers tend to ignore their effect in undermining these laws' effectiveness. If state enforced online restrictions, like Mississippi's law, become the norm in the United States, then this lack of contemplation on VPNs' place in society will become an issue when enforcing these restrictions.

The online nature and multi-state push to restrict content online, may indicate this as an issue Congress should address, rather than leaving it to the states. Primarily as regulation would be easier on a national level for the government and the commercial entities. If the federal government passed a modern version of Mississippi's law nationally, then georestricting would be more accurate,<sup>259</sup> and commercial entities would only have to follow one set of rules rather than multiple varied sets of rules existing between each state's version the law.<sup>260</sup>

A national version of these laws could serve as the foundation for future laws restricting content online outside and within the context of material harmful to minors, and if the national law addressed VPN use, then lawmakers may begin to address VPNs in a direct manner that has yet to occur. As the current state of ignoring VPNs will not suffice going forward. The necessity of legal blueprints addressing VPNs is forming in our increasingly online world.

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<sup>259</sup> See Jagger, *supra* note 216 (IP geolocation between countries is 95-99% accurate, whereas IP geolocation between states is 55-80% accurate.).

<sup>260</sup> Compare Miss. Code Ann. §§ 11-77-1 – 11-77-7, and A.C.A. § 4-88-1305, with La. R.S. § 51:2121.