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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CHILD & FAMILY SECURITY
ANALYSIS

BILL #: CS/HB 203

RELATING TO: Improper Activity over the Internet

SPONSOR(S): House Committee on Information Technology, Representative(s) Ryan, Hogan, Paul, Melvin, Stansel, Kendrick, Spratt, Brutus, Henriquez, Smith, Justice, Fiorentino, Gelber and Mahon

TIED BILL(S): SB 144

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) INFORMATION TECHNOLOGY YEAS 11 NAYS 0
(2) CHILD & FAMILY SECURITY
(3) JUVENILE JUSTICE
(4) COUNCIL FOR READY INFRASTRUCTURE
(5)

I. SUMMARY:

The CS for HB 203 proposes to amend ch. 827, F.S., related to abuse of children, to revise the definition of "sexual conduct" in s. 827.071 (1) (g), and to amend ch. 847, F.S., related to obscene literature and profanity to add definitions of "child pornography" and "transmit" to s. 847.001, to revise the definition of "person" in s. 847.001 (6) and the definition of "sexual conduct" in s.847.001 (11), to amend s. 847.0135, F.S., the "Computer Pornography and Child Exploitation Prevention Act of 1986" to give effect to the prohibition against computer pornography found in s. 847.0135(2), to create s. 847.0137, F.S., to make transmission of child pornography to a person anywhere and transmission of any image, information or data harmful to minors to a minor in Florida a third degree felony, and to create s. 847.0139 to provide immunity from civil liability for any person who reports to a law enforcement officer what is believed to be evidence of child pornography, transmission of child pornography, or transmission of any image, information or data harmful to minors to a minor in Florida Under the CS for HB 203, any person in Florida who knowingly transmits child pornography would be guilty of a third degree felony.

If enacted, the CS for HB 203 would likely face challenges under the First Amendment and Commerce Clause of the United States Constitution. Similar legislation recently enacted by other states to regulate Internet communications has been held unconstitutional under the First Amendment and the Commerce Clause. Legislation enacted by Congress to prohibit Internet transmission of child pornography has also been held unconstitutional under the First Amendment.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [X]	N/A []
2.	Lower Taxes	Yes []	No [X]	N/A []
3.	Individual Freedom	Yes []	No [X]	N/A []
4.	Personal Responsibility	Yes [X]	No []	N/A []
5.	Family Empowerment	Yes [X]	No []	N/A []

For any principle that received a "no" above, please explain:

The CS for HB 203 would probably increase the burdens on, and costs of operating, the criminal justice system due to increased prosecutions. The bill would also restrain individual freedom to disseminate child pornography and "images harmful to minors."

B. PRESENT SITUATION:

The Computer Pornography and Child Exploitation Act of 1986

Chapter 847, F.S., regulates the dissemination of obscene literature and profanity. Section 847.0135, F.S., is cited as the "Computer Pornography and Child Exploitation Prevention Act of 1986" ("the Act"). The Act is intended to prevent computers and computer on-line services from being used as tools for the exploitation and abuse of minors.

Section 847.0135(2), F.S., relates to computer pornography and addresses offenders who use a computer to facilitate, encourage, offer, or solicit sexual conduct of or with a minor or the visual depiction of such conduct. Section 847.0135(2) intends to proscribe the compilation, publication or transmission by means of a computer of any identifying information about a minor, such as the minor's name, residence, or phone number, for the purpose of soliciting sexual conduct of or with the minor or for the purposes of soliciting a visual depiction of sexual conduct with the minor. The subsection provides in the last sentence that any person who violates its provisions commits a third degree felony. However, due to an apparent grammatical error, there is presently no language in the subsection that directly ties the prohibited conduct specified in s. 847.0135(2) to the language that intends to make such conduct a third-degree felony. The absence of such language could arguably inhibit successful prosecutions.

Recommendations of the Information Service Technology Development Task Force

In 1999, the Legislature created the Information Service Technology Development Task Force ("Task Force") within the Department of Management Services. *See* Ch. 99-354, L.O.F. The Task Force, whose two-year term expires on June 11, 2001, is comprised of 34 bipartisan members from the public and private sector. The Task Force divided its stated directives among eight subcommittees. On February 14, 2000, the Task Force issued the first of two annual reports containing numerous policy recommendations and implementation strategies. *See 2000 Annual Report to the Legislature*, Information Service Technology Development Task Force (February, 14, 2000). The Task Force released its second annual report on February 14, 2001. *See 2001 Annual Report to the Legislature*, Information Service Technology Development Task Force, *available at*

http://www.itflorida.com/pdfs/2001_legislative_report.pdf (February 14, 2001). In that report, the eLaws - Civil and Criminal Subcommittee ("subcommittee") of the Task Force noted that, while Internet development is a rapidly expanding enterprise and the issue of transmission of adult and child pornography is difficult to resolve, legislation should be enacted to address the problem.[1]

The Task force stated that legislation should be enacted to address the following situations:

1. where a person in or outside of the State of Florida knowingly (or should have known) transmits any type of pornography to a minor in Florida, a crime has occurred and Florida has jurisdiction;

2. where a person in the State of Florida transmits child pornography to anyone in or outside the State of Florida a crime has occurred and Florida has jurisdiction;

3. where a person outside the State of Florida knowingly (or should have known) transmits child pornography to anyone in the State of Florida, a crime has occurred and Florida has jurisdiction."

The Task Force also stated that "Legislation should be enacted which would grant civil immunity to any computer repair person, photo developer, or any other person who reports what they reasonably believe to be child pornography to the appropriate law enforcement agents. This would include immunity if they furnish a copy of a photograph or other evidence to law enforcement. *However, no mandatory "snitch" provision should be included in a law enacted.*" (emphasis in original).

C. EFFECT OF PROPOSED CHANGES:

Section 1: Revises Definition of "Sexual Conduct" in s. 827.071 (1) (g), F. S.

Section 1 of the CS for HB 203 would amend s. 827.071 (1) (g) to revise the definition of "sexual conduct" to conform with the definition of "sexual conduct" in s. 847.001 (11).

Section 2: Adds and Modifies Definitions in s. 847.001, F.S.

Section 1 of the CS for HB 203 would amend s. 847.001, F.S., to add a definition for "child pornography," in a new subsection (1), would revise the definition of "harmful to minors" in subsection (4), would revise the definition of "person" in subsection (6), would revise the definition of "sexual conduct" in subsection (11), and would add a definition for "transmit" or "transmission" in a new subsection (15), and would renumber the subsections of s. 847.001 accordingly.

Section 3: Clarifies the Language of s. 847.0135, F.S.

Subsection 847.0135 (2), F.S., defines "computer pornography" but does not classify the enumerated acts as criminal. Section 3 of the CS for HB 203 would amend subsection 847.0135 (2) to provide that anyone guilty of the conduct specified in the subsection commits a felony of the third degree and to replace the word "or" with the word "of" to correct a grammatical error.

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[1] A report released by the National Center for Missing and Exploited Children supports the Task Force's findings regarding the pervasiveness of child pornography and the use of the Internet to victimize children by exposing them to pornographic materials. *See* National Center for Missing and Exploited Children, *"Online Victimization: A Report on the Nation's Youth"*(June 2000) *available at* www.ncmec.org (visited March 2, 2001).

Presently, it may be unclear whether subsection 847.0135 (2) prohibits the compilation and distribution of "any notice, statement, or advertisement" or just those notices, statements, and advertisements that meet the requirements set forth in the remainder of the subsection relating to the personal identification information of a minor. The CS for HB 203 would correct this grammatical inconsistency and ensure that notices, statements, or advertisements that contain information regarding a minor's personal identification information used for the purposes of eliciting sexual conduct of or with a minor are prohibited.

Section 4: Criminalizes of Transmission of Child Pornography and Images 'Harmful to Minors' over the Internet

Section 4 of the CS for HB 203 would create s. 847.0137, F.S., to criminalize transmission of two types of content: (1) child pornography transmitted to any person and (2) any image, information or data harmful to minors to any minor in Florida. The prohibition would extend to transmissions by persons in and outside Florida.

Person in Florida is the Sender

Under Section 4, any person in Florida who knows or reasonably should have known he or she is transmitting child pornography to any person in Florida or to any person in another jurisdiction would commit a third degree felony. Thus, irrespective of its destination, *any knowing transmission of child pornography from a person in Florida to another person anywhere would fall within the prohibition.*

Similarly, Section 4 provides that any person in Florida who knowingly transmits any image, information or data "harmful to minors"[2] to a person in Florida known to be a minor would be guilty of a third degree felony.

Person in Another Jurisdiction is the Sender

Section 4 would make the knowing transmission of child pornography to any person in Florida by a person in another jurisdiction a third degree felony. Section 4 would also make the knowing transmission of any image, information or data "harmful to minors" by a person in another jurisdiction to a person in Florida known to be a minor a third degree felony.

Other Issues

Section 4 would also provide that prosecution in Florida or in other jurisdictions for any violation of Florida law, including any law providing for greater penalties than provided by s. 847.0137 for transmission of child pornography or transmission of any image, information or data harmful to minors is not prohibited by s. 847.0137. Section 4 would further provide a person is subject to prosecution in Florida, pursuant to ch. 910, F.S., for any act or conduct proscribed by s. 847.0137.

[2] "Harmful to minors," as used in Section 3, is presently defined in s. 847.001(3), proposed to be renumbered s. 847.001(4), as material that depicts nudity, sexual conduct, or sexual excitement that: (a) predominantly appeals to the prurient, shameful or morbid interest of minors, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material to minors, and (c) taken as a whole, is without serious literary, artistic, political, or scientific value for minors. That standard is the standard adopted by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973) and remains unchanged by recent Supreme Court opinions.

Whether or not Florida can assert criminal jurisdiction over a person in another state is determined by s. 910.005, F.S.[3] A person is subject to prosecution in this state for an offense that he or she commits, while either within or outside the state, if:

a) The offense is committed wholly or partly within the state;
b) The conduct outside the state constitutes an attempt to commit an offense within the state;
c) The conduct outside the state constitutes a conspiracy to commit an offense;
d) The conduct within the state constitutes a conspiracy to commit an offense in another jurisdiction; or
e) The conduct constitutes a knowing violation of s. 286.011, F.S., relating to public meetings and records.

An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element occurs within the state. It is not known whether and, if so, to what extent the state may be able to enforce jurisdiction over this type of on-line crime initiated from out-of-state. However, when enforcing these provisions of the CS for HB 203, the state would bear the burden to establish beyond a reasonable doubt that the essential elements of the offense were committed within the State of Florida. *See Ross v. State*, 665 So.2d 1004 (Fla. 4th DCA 1996), *rehearing and rehearing en banc denied*, *review granted* 682 so.2d 1100, *review dismissed* 696 So.2d 701.

Exceptions

Section 4 would provide that the provisions of s. 847.0137 do not apply to subscription-based transmissions such as list servers.

Section 5: Establishes Civil Immunity for Persons Reporting Child Pornography to Law Enforcement

Section 5 would create s. 847.0139, providing that a person who reports to a law enforcement officer what he or she reasonably believes is evidence of child pornography, transmission of child pornography, or transmission of any image, information or data harmful to minors to a minor in Florida may not be held civilly liable for reporting the information. Furnishing the law enforcement officer with a copy of a photograph or other evidence of what the person reasonably believes is child pornography would be included in the immunity.

Section 6: Provides Severability

Section 6 would provide for severance of any part of the bill that may be ruled unconstitutional so that the remainder of the bill would not be affected by the ruling and would continue in effect.

Section 7: Provides Effective Date

Section 7 would provide that the effective date of the bill is July 1, 2001.

[3] Section 910.005 essentially codified the holding in *Lane v. State*, 388 So. 2d 1022 (Fla. 1980), that a person who commits a crime partly in one state and partly in another state may be tried in either state under the sixth amendment of the United States Constitution. The *Lane* court acknowledged, however, that this broader jurisdiction still required the prosecution to establish beyond a reasonable doubt that essential elements of the offense were committed within the jurisdiction of the State of Florida.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

HB 203 would generate no new revenues, except through the collection of any fine imposed as a criminal penalty for conviction of any prohibited act.

2. Expenditures:

HB 203 would require the State fund its proportionate share of the additional cost of prosecuting, convicting, incarcerating and supervising persons convicted of any prohibited act and from defending the law from any constitutional challenges.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

HB 203 would generate no new revenues, except through collection of any fine imposed as a penalty for conviction of any prohibited act.

2. Expenditures:

HB 203 would require local governments to fund their proportionate shares of the additional costs of prosecuting, convicting, incarcerating and supervising persons convicted of a prohibited act and the costs of defending the law from constitutional challenges.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that persons transmitting child pornography or images “harmful to minors” earn revenues from such transmissions, successful prosecutions under HB 203 should reduce such revenues.

D. FISCAL COMMENTS:

No reliable estimate of the economic impact of HB 203 can be made until affected agencies of government provide any required fiscal information.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

HB 203 is expressly excepted from analysis under this part because it would be a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

HB 203 is expressly excepted from analysis under this part because it would be a criminal law.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

HB 203 is expressly excepted from analysis under this part because it would be a criminal law.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Conforming the Definition of "Sexual Conduct" in s. 847.001 (11), F. S., to Recent Florida Supreme Court Rulings

As noted above, the CS for HB 203 would amend the definition of "sexual conduct" in subsection 847.001 (11). The purpose of the amendment is to clarify the criminal intent element of the prohibited activity. The present definition of "sexual conduct" in s. 847.001 (11), F. S. is constitutionally deficient. This deficiency in the present definition is apparent from comparison of that definition with the definition of "sexual conduct" in s. 827.071 (g), F.S. The latter definition, as it existed in 1987, was the subject of judicial scrutiny when challenged as unconstitutionally overbroad and vague in the case of *Schmitt v. State*, 590 So.2d 404 (Fla. 1991). In holding part of that definition unconstitutionally overbroad and vague, the Supreme Court of Florida affirmed the decision of the Fourth District Court of Appeal in *Schmitt v. State,* 563 So.2d 1098, and found void the portion of the definition of "sexual conduct" in s. 827.071 (g), F.S., that consists of "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast;…," The Court severed that part from the remainder of the definition and found that Ch. 827, F.S., was otherwise constitutional.

In 1986, the Legislature amended Ch. 827, F.S., and Ch. 847, F.S., to make consistent the definitions provided in s. 827.071, F.S., and the definitions provided in s. 847.001, F.S. See Ch. 86-238, Laws of Florida, thereby making the definition of "sexual conduct" the same in s. 827.071 (g), F.S., and in s. 847.001 (11), F.S. In 1991, in response to the judicial determinations described above, the Legislature amended s. 827.071 (g), F. S., to insert the words "actual physical contact with a person's clothed or unclothed genital, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party" to cure the constitutional deficiency in the definition there provided for "sexual conduct", but failed to amend s. 847.001 (11) to the same extent to cure the same constitutional deficiency existent in the definition there provided for "sexual conduct." See Ch. 91-33, Laws of Florida.

In 1993, the Legislature amended the definition of "sexual conduct" provided in s. 847.001 (11), F.S., to add to the end of the definition the sentence "A mother's breastfeeding of her baby does not under any circumstance constitute 'sexual conduct'" to make it clear that such activity is not within scope of prohibited conduct. See Ch 93-4, Laws of Florida. However, the definition of "sexual conduct" in s. 827.071 (g), F.S., has not yet been the subject of a like amendment. Therefore, in order to make the definition of "sexual conduct" the same in s. 827.071(g), F.S., and in s. 847.001 (11), F.S., s. 827.071 (g), F.S., would have to be amended to add at the end of the definition the sentence "A mother's breastfeeding of her baby does not under any circumstance constitute 'sexual conduct'."

Federal Constitutional Challenges under the First Amendment and Commerce Clause

If the CS for HB 203 is enacted, Section 4 of the bill may face constitutional challenges under the First Amendment and the Commerce Clause of the United States Constitution.

The First Amendment

Section 4 of the CS for HB 203 is a content-based regulation of speech because it regulates the transmission of images "harmful to minors." Whether or not an image is "harmful to minors" is based on the statutory definition and reflects a legislative choice to shield certain persons from certain material. All content-based speech regulations promulgated by government are

presumptively invalid and are subject to strict scrutiny to ensure they do not violate the First Amendment.[4] This level of scrutiny occurs when regulatory action criminalizes speech because the stigma of a criminal conviction could cause both prohibited and permissible speech to be chilled. *See ACLU v. Reno,* 521 U.S. 844, 872 (1997) (holding that strict scrutiny applies to content-based regulation of Internet speech).

To survive such scrutiny, the government must demonstrate that it has a compelling interest in restricting the speech. Additionally, the restriction must be narrowly tailored via the least restrictive means possible to ensure that constitutionally protected speech is not also prohibited. *See ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999).

It is well-settled law that government has a compelling interest in preventing child pornography and in protecting the physical and psychological well being of minors.[5] Legislation intended to restrict the dissemination of child pornography, however must be carefully drawn to ensure that it does not prohibit or restrict protected speech. Although some laws enacted to restrict child pornography have been upheld,[6] broad regulation of images "harmful to minors" has received greater scrutiny and many such laws have been struck down.

Cases Interpreting State Legislation

The restraints that Section 4 of the bill would impose on child pornography and images 'harmful to minors' may be subject to constitutional challenges under the First Amendment because such restraints may be over-inclusive. At least four other states, New York, New Mexico, Virginia and Michigan, have passed statutes attempting to regulate Internet transmission of materials harmful to minors.[7] All of these statutes have been struck down.[8] Unlike the CS for HB 203, several of these statutes contained affirmative defenses against conviction for improper transmission of materials harmful to minors such as where the sender makes a good-faith reasonable effort to ascertain the age of the minor and the sender is misled by the actions of the minor. *See, e.g., N.Y. Penal Law* § 235.23(3)(a). Additionally, parents are permitted the right to make individual decisions about whether their children view images which might be deemed harmful to minors. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968). This might be especially true in the context of the Internet, as compared to broadcast media, because viewing images is largely by choice and can be blocked on a household-by-household basis. *Compare United States v. Playboy Entertainment Group*, 120 S.

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[4] *See PSINet Inc. v. Chapman*, 108 F. Supp. 2d 611, 624 (W.D. Va. 2000) (citing *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

[5] *See Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). The Supreme Court in *Ferber* noted that the prevention of exploitation and abuse of children is a substantial government interest. States are entitled to greater leeway in regulating child pornography. The Supreme Court also noted that child pornography is harmful to the emotional well-being of children and that state efforts to eradicate the market for child pornography, if properly drafted, were legitimate. Additionally, in *Osborne*, the Supreme Court noted that visual records of child pornography subjected children to ongoing injury.

[6] *See* N.Y. PENAL LAW § 263.15 (1982) (prohibiting promotion of performances involving child pornography by distributing material advertising the performance) (upheld in *Ferber*, 458 U.S. 747); OHIO REV. CODE ANN. § 2907.323(A)(3) (Supp. 1989) (prohibiting possession of child pornographic materials) (upheld in *Osborne*, 495 U.S. 103).

[7] N.Y. PENAL LAW § 253.21(3) (1996); VA. CODE ANN. § 18.2-390, 18.2-391 (Michie Supp. 1999); N.M. STAT. ANN. § 30-37-22(c) (1998); MICH. COMP. LAWS ANN. § 722.675(1) (West 1999) (as amended by 1999 Mich. Pub. Acts 33).

[8] *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York); *PSINet*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (Virginia); *ACLU v. Johnson*, 194 F.3d 1149 (New Mexico); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (Michigan). *But see Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding prohibition on print media sale of images harmful to minors to persons under 17).

Ct. 1878, 1887 (2000) *with ACLU v. Reno*, 521 U.S. at 854. Thus, because the CS for HB 203 restricts the transmission of content deemed harmful to minors rather than allowing individual parents to make decisions about the content their children view, it may be argued that Section 4 of the CS for HB 203 is not the least restrictive means of limiting speech.

In sustaining constitutional challenges to these statutes, federal courts have noted the inherent difficulty of verifying the age of the person to whom a communication is sent over the Internet. *See American Libraries*, 969 F. Supp. at 167; *ACLU v. Reno*, 521 U.S. at 856. Federal courts have also emphasized that less restrictive means of limiting the exposure of children to harmful images, such as the utilization of filtering software by parents, are available to serve the state's interests. *See PSINet*, 108 F. Supp. 2d at 625; *Cyberspace Communications*, 55 F. Supp. 2d at 750-51.

Cases Interpreting Federal Legislation

Legislation enacted by Congress to regulate the transmission of material harmful to minors has been successfully challenged on First Amendment grounds. In *ACLU v. Reno*, the U.S. Supreme Court invalidated the Communications Decency Act (CDA), which was enacted to regulate transmission of indecent materials to minors. The CDA, codified at 47 U.S.C. § 223(a), prohibited the knowing transmission of obscene or indecent material to any recipient who is under 18 years of age. The Court invalidated the CDA, concluding that the law was overly broad as it also impinged on communications between adults. Noting that current technology provides no method for identifying the age of an Internet mail recipient, the Court reasoned that an adult, who intent upon sending an email to the members of a 100-person chat room, could likely be imputed with knowledge that at least one of the intended recipients is a minor. The result would be that, under the CDA, an adult would be prohibited from sending any such message to such an audience; thus, the CDA would have the operative effect of restricting constitutionally permitted speech along with the intended prohibited speech. In striking down the CDA, the Court reasoned that the statute was not drafted with the precision that the First Amendment requires when a statute regulates the content of speech. *See ACLU v. Reno*, 521 U.S. at 876.

In response to the Supreme Court's ruling, Congress passed the Child Online Protection Act (COPA) to specifically address the Court's concerns with the CDA. *See* Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231). The U.S. Court of Appeals for the Third Circuit, however, has held this law unconstitutional, as violative of the First Amendment. *See ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000) ("Reno II").

Because Section 4 of the CS for HB 203 would prohibit images "depicting or intending to depict" child pornography, the bill could be challenged as overbroad. Section 4 may be overbroad because the bill arguably does not distinctly limit its prohibition to images of actual children. Images "intending to depict child pornography" could, for example, include images of consenting adults with a youthful appearance engaging in pornographic acts. Even though such images do not involve a minor, they may nonetheless fall within the definition of "child pornography" used by the CS for HB 203. In addition, the justifications for prohibiting child pornography, such as preventing the emotional or physical abuse of the child in the image, are lessened when the subject is actually an adult. As such, Section 4 of the CS for HB 203 may be challenged as overbroad.

'Virtual pornography' may also fall within the definition of "child pornography" used by the CS for HB 203 if the virtual image intends to depict a minor engaged in "sexual conduct." The recent advent of digital imaging technology has heightened the ability of pornographers to fabricate life-like images that appear to contain minors engaged in sexual conduct. Congress attempted to address this area by passing the Child Pornography Protection Act of 1996 (CPPA). *See* 18 U.S.C.A. § 2256(8)(B) (West Supp. 1999). The definition of child pornography in the CPPA included "any visual depiction,

including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means" of sexual conduct involving a minor. In striking down the CPPA as unconstitutional when applied to virtual pornography, the U.S. Court of Appeals for the Ninth Circuit noted that the justifications for restricting actual child pornography are not as strong for virtual child pornography. *See Reno v. Free Speech Coalition*, 198 F.3d 1083, 1093 (9th Cir. 1999). The *Free Speech Coalition* court also noted that Congress had no compelling interest in restricting virtual pornography that did not involve actual children. *See id.* at 1092. This case is currently on appeal, and the Supreme Court has agreed to review the case. However, the CPPA has been held to be constitutional when applied to images of actual children. *See United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999).

The Commerce Clause

The CS for HB 203 could also arguably be challenged as violative of the Commerce Clause of the United States Constitution. Article I, Section 8 of the U.S. Constitution grants Congress the power to regulate interstate commerce. The U.S. Supreme Court has held that the power of Congress in this area is exclusive. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although the Commerce Clause is an affirmative grant of power to Congress, the exclusive nature of the power prohibits states from interfering with interstate commerce. This negative power of the Commerce Clause is known as the "dormant" Commerce Clause.

The "dormant" Commerce Clause restricts the abilities of individual states to interfere with interstate commerce in two ways. First, states cannot discriminate directly against interstate commerce by passing protective legislation that restricts out-of-state commerce from entering the state's market. *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Second, states may not create regulations that, although facially neutral, unduly burden interstate commerce. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). The need for Congress, rather than a state, to regulate a particular area of interstate commerce has been noted where the field contains unique characteristics that demand cohesive national treatment. *See American Libraries*, 969 F. Supp. at 169. As discussed below, this interest has been held to apply to the regulation of child pornography.

Several federal courts have held that state statutes attempting to regulate the content of Internet communications violate the Commerce Clause. In *American Libraries*[9], *Johnson*[10] and *PSINet*[11], the federal courts invalidated state statutes attempting to regulate the transmission of child pornography and images harmful to minors on the grounds that the statutes violated the Commerce Clause.[12] The courts all noted that if Internet content was to be regulated, the need for consistent, national regulations placed the power to do so with Congress.[13] In *Johnson*, the State, New Mexico tried to justify its statute by claiming that the state was merely trying to regulate the transmission of email communications between New Mexico citizens. However, the *Johnson* court dismissed this argument because a significant portion of emails between New Mexico citizens passed through out-of-state servers before reaching their destination. A similar argument also failed in *American*

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[9] *See American Libraries*, 969 F. Supp. at 183-84 (New York).

[10] *See Johnson*, 194 F.3d at 1161 (New Mexico).

[11] *See PSINet*, 108 F. Supp. 2d at 626-27 (Virginia).

[12] *See supra*, n. 6.

[13] *See American Libraries*, 969 F. Supp. at 181; *Johnson*, 194 F.3d at 1162; *PSINet*, 108 F. Supp. 2d at 627.

Libraries. Thus, the inherent interstate nature of the Internet prompted these courts to reject state attempts to regulate Internet content.

The federal courts in these cases have also noted the difficulty of identifying the geographic location of email recipients.[14] Because most email addresses do not contain information identifying the geographic location of the recipient, a sender may not know whether the recipient is in Florida. A person in another jurisdiction could, thus, unwittingly send prohibited material to a person in Florida. Under the CS for HB 203, even though a sender must knowingly transmit the prohibited images, a sender in another state arguably might self-censor themselves to prevent running afoul of the prohibitions of the bill. Arguably, the CS for HB 203 could impact the behavior of persons in other jurisdictions with less restrictive laws. These justifications have been cited as reasons for invalidating similar laws in the cases mentioned above on both Commerce Clause and First Amendment grounds.

The CS for HB 203 would regulate Internet "transmissions" of child pornography and transmissions of any image, information or data harmful to minors." Because "transmissions," as defined by the CS for HB 203, are "electronic mail communications," or emails, the changes in the law proposed by the bill would likely receive the same kind of Commerce Clause scrutiny as the statutes mentioned in the cases above. Regulating email transmissions received by Florida residents could impact interstate commerce because many emails traveling into Florida come from or go through other jurisdictions. Further, even emails between Florida residents could pass through servers in other states, making them a part of interstate commerce. Thus, even if Florida's compelling interest in eradicating child pornography could survive First Amendment scrutiny, an argument could be made that the CS for HB 203 is unconstitutional because of its impact on interstate commerce. Additionally, recent congressional attempts to regulate this subject matter, the CDA, CPPA and COPA, demonstrate that Congress is aware of the problem and is attempting to address it via nationwide regulations.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

[14] *See American Libraries*, 969 F. Supp. at 165, 167 ("Regardless of the aspect of the Internet they are using, Internet users have no way to determine the characteristics of their audience that are salient under the New York Act – age and geographic location."); *Johnson*, 194 F.3d at 1161; *PSINet*, 108 F. Supp. 2d at 616 ("The Internet also is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than to document geographic location...Most Internet addresses contain no geographic information at all…Participants in online chat rooms have no way to tell when participants from another state join the conversation.")

VII. SIGNATURES:

COMMITTEE ON INFORMATION TECHNOLOGY:

Prepared by: Staff Director:

John Barley Charles Davidson

Richard Martin

AS REVISED BY THE COMMITTEE ON CHILD & FAMILY SECURITY:

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