



## OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL

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### SUMMARY MEMORANDUM

**To:** [REDACTED]  
**From:** [REDACTED]  
**Date:** August 12, 2019  
**Re:** **Warning Labels on Pornography**

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### CONSTITUTIONALITY OF A PORNOGRAPHY WARNING LABEL LAW

#### SUMMARY

- 1. Would a pornography warning label law that informs viewers of the adverse health impact on minors infringe on First Amendment protections?**

Even though a pornography warning label law would likely seek to inform pornography<sup>1</sup> viewers about the adverse public health impacts the material has on minors, it may nonetheless reach material constitutionally protected and legally accessible to adults. Therefore, the law would likely be interpreted as one regulating presumptively lawful “commercial speech” or even fully protected speech of pornography producers. Notwithstanding, if the law is drafted carefully, and labels provide only *factual* content, then the law would likely survive judicial review.

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<sup>1</sup> The term “pornography” will have to be understood by the definition written in the law. It is also important to note that legally defined obscenity (which has no First Amendment protection) is generally understood to be a subset of what most people would consider pornography. Therefore, some forms of generally understood pornography have First Amendment protection. Utah has already defined “pornographic material” in the State’s code. See UTAH CODE ANN. § 76-10-103. The State’s definition draws heavily from the seminal United States Supreme Court case *Miller v. California* and is meant to cover what the United States Supreme Court dubs “obscenity.” Additionally, the State draws on *Miller* and *Ginsberg v. State of New York* to define material that is “harmful to minors.” See UTAH CODE ANN. § 76-10-101(5). Both definitions are similar and neither have been thoroughly challenged in court. Lastly, Utah has also defined “child pornography,” which is found at § 76-5b-103(1).

## **2. Would a pornography warning label law infringe on the Constitution's Commerce Clause?**

While states have the power to control and manipulate commerce within their borders, the Constitution has afforded Congress the responsibility to manage commerce beyond any individual state's borders. This question is highly factual and may require separate analyses for internet-based content and all other tangible content. Nevertheless, the "putative local benefits" for a law regulating tangible materials would likely outweigh any burden on interstate commerce. However, it is less clear whether the putative local benefits for a law regulating internet material would outweigh its impact on interstate commerce. Helpful analogues include California's Proposition 65 (which recently incorporated a requirement for warning labels on internet sales), and the movement for warning labels of sugar sweetened beverages. Both efforts have recently gained traction.

## **3. Has Congress already taken steps to regulate this type of action?**

Congress attempted to pass a bill in 2006 that would have required warning labels on pornography; however, it did not pass. The federal law most likely to be implicated with a PWLL is the Communications Decency Act (CDA) of 1996. The CDA would only apply online content and would likely arise if the PWLL attempted to create liability for an internet service provider (like Comcast) for not ensuring that pornographic webpages have a warning label. This type of liability for third-party content has been struck down numerous times. That said, states and municipalities are taking new approaches to internet regulation and creative thinking in this area could push a PWLL from preempted (or ineffective) to effective pornography regulation upheld by the courts under a preemption challenge.

## **CONCLUSION**

At the outset of this research, there was a strong impression that a PWLL would almost certainly succumb to one constitutional challenge or another. However, research and recent case analysis suggests that a state may want to reinstate careful pornography legislation through a uniform warning label requirement. This is also true for internet regulation. Currently, municipalities are taking creative approaches to internet regulation and many courts seem to be open to this when the regulations are sensible, in-line with congressional intent, and not overly broad. Also, in the background, there appears to be a growing national appetite—due to a general fear over online privacy and the lack of internet regulation—for research and, potentially, implementation of more robust internet regulations in specific areas of the internet. From this, it is reasonable to conclude, given the recognized harm pornography can cause, that public support for this type of regulation could be relatively high. That said, a PWLL will almost certainly be challenged in court.

