

BILL ANALYSIS

C.S.H.B. 20
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Constitutional Rights & Remedies, Select
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Social media sites are seen by many as the modern public square. While most speech is protected from governmental censorship, private digital spaces that host public speech present a novel challenge. Although these sites are privately owned, the nearly universal adoption of a few sites has created a need for protection from censorship or discriminatory enforcement of content regulations. C.S.H.B. 20 seeks to provide protections from censorship and other interference with digital expression by regulating:

- social media platforms, including by imposing disclosure requirements and requirements to provide certain user complaint procedures and by prohibiting the censorship of users' expression; and
- email service providers by prohibiting the impedance of certain email messages.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 20 sets out disclosure requirements and complaint procedures for certain social media platforms with respect to the management and removal of content and sets out provisions relating to the censorship of users' expression by these platforms. The bill also establishes a prohibition against impeding email messages based on the content of the message, with certain exceptions.

Legislative Findings

C.S.H.B. 20 states the following legislative findings:

- that each person in Texas has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information;
- that the state has a fundamental interest in protecting the free exchange of ideas and information in Texas;
- that social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and
- that social media platforms with the largest number of users are common carriers by virtue of their market dominance.

Applicability of Bill Provisions Regarding Social Media Platforms

C.S.H.B. 20 restricts the application of its provisions regarding social media platforms and discourse on social media platforms to:

- a social media platform that functionally has more than 50 million active users in the United States in a calendar month; and
- a user who resides in Texas, does business in Texas, or shares or receives in Texas:
 - social media platform content; or
 - expression.

The bill provides that such provisions may not be construed to limit or expand intellectual property law.

C.S.H.B. 20 defines "social media platform" for purposes of applicable bill provisions as a website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images. The term expressly does not include the following:

- an Internet service provider, as defined by statutory provisions governing consumer protection against computer spyware;
- email; or
- an online service, application, or website that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider and for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content.

The bill defines "user" as a person who posts, uploads, transmits, shares, or otherwise publishes or receives expression or content, as applicable, through a social media platform, including a person who has a social media platform account that the platform has disabled or locked.

Disclosure Requirements and Complaint Procedures for Social Media Platforms

C.S.H.B. 20 amends the Business & Commerce Code to require a social media platform to publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding the manner in which the platform does the following:

- curates and targets content to users;
- places and promotes content, services, and products, including its own content, services, and products;
- moderates content;
- uses search, ranking, or other algorithms or procedures that determine results on the platform; and
- provides users' performance data on the use of the platform and its products and services.

The disclosure must be sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform. A social media platform must publish its disclosure on a website that is easily accessible by the public.

C.S.H.B. 20 requires a social media platform to publish an acceptable use policy in a location that is easily accessible to a user and requires the policy to do the following:

- reasonably inform users about the types of content allowed on the platform;
- explain the steps the platform will take to ensure content complies with the policy;
- explain the means by which users can notify the platform of illegal content, illegal activity, or content that potentially violates the acceptable use policy, which includes a user complaint system as described by the bill and an email address or relevant complaint intake mechanism to handle user complaints; and
- include publication of a biannual transparency report outlining actions taken to enforce the policy.

C.S.H.B. 20 requires a social media platform, as part of its acceptable use policy, to publish a biannual transparency report that includes, with respect to the preceding six-month period, the following information:

- the total number of instances in which the platform was alerted to illegal content, illegal activity, or potentially policy-violating content by a user complaint, an employee of or person contracting with the platform, or an internal automated detection tool;
- the number of instances, categorized as prescribed by the bill, in which the platform took action with respect to illegal content, illegal activity, or potentially policy-violating content known to the platform due to the nature of the content as illegal content, illegal activity, or potentially policy-violating content, including the following:
 - content removal;
 - content demonetization;
 - content deprioritization;
 - the addition of an assessment to content;
 - account suspension;
 - account removal; or
 - any other action taken in accordance with the platform's acceptable use policy;
- the country of the user who provided the content for each such instance in which the platform took action;
- the number of coordinated campaigns, if applicable;
- the number of instances in which a user appealed the decision to remove the user's potentially policy-violating content;
- the percentage of those user appeals that resulted in the restoration of content; and
- a description of each tool, practice, action, or technique used in enforcing the acceptable use policy.

Regarding the reported instances in which the platform took action with respect to illegal content, illegal activity, or potentially policy-violating content known to the platform due to the nature of the content as illegal content, illegal activity, or potentially policy-violating content, the bill requires those instances to be categorized by the following:

- the rule violated; and
- the source for the alert of illegal content, illegal activity, or potentially policy-violating content, including:
 - a government;
 - a user;
 - an internal automated detection tool;
 - coordination with other social media platforms; or
 - persons employed by or contracting with the platform.

The bill requires the platform to publish the information contained in the report with an open license, in a machine-readable and open format, and in a location that is easily accessible to users.

C.S.H.B. 20 requires a social media platform to provide an easily accessible complaint system to enable a user to submit a complaint in good faith and track the status of the complaint, including a complaint regarding illegal content or activity or a decision made by the platform to remove content posted by the user. A social media platform that receives notice of illegal content or illegal activity on the platform must make a good faith effort to evaluate the legality of the content or activity within 48 hours of receiving the notice, excluding hours during a Saturday or Sunday and subject to reasonable exceptions based on concerns about the legitimacy of the notice.

C.S.H.B. 20 requires a social media platform that removes content based on a violation of the platform's acceptable use policy to take the following actions concurrently with the removal:

- notify the user who provided the content of the removal and explain the reason the content was removed;
- allow the user to appeal the decision to remove the content to the platform; and

- provide written notice to the user who provided the content of the determination regarding a requested appeal and, in the case of a reversal of the platform's decision to remove the content, the reason for the reversal.

A social media platform is not required to provide a user with notice or an opportunity to appeal if the platform is unable to contact the user after taking reasonable steps to do so or knows that the potentially policy-violating content relates to an ongoing law enforcement investigation.

C.S.H.B. 20 requires a social media platform that receives a user complaint on the platform's removal from the platform of content provided by the user that the user believes was not potentially policy-violating content to do the following, not later than the 14th day after the date the platform receives the complaint, excluding Saturdays and Sundays:

- review the content and determine whether the content adheres to the platform's acceptable use policy;
- take appropriate steps based on that determination; and
- notify the user regarding the determination made and the steps taken.

C.S.H.B. 20 authorizes the attorney general to bring an action against a social media platform to enjoin a violation of the bill's provisions regarding disclosure requirements and complaint procedures and, if an injunction is granted, to recover costs incurred in bringing the action, including reasonable attorney's fees and reasonable investigative costs.

Discourse on Social Media Platforms

C.S.H.B. 20 amends the Civil Practice and Remedies Code to prohibit a social media platform from censoring a user, a user's expression, or a user's ability to receive the expression of another person based on any of the following:

- the viewpoint of the user or another person;
- the viewpoint represented in the user's expression or another person's expression; or
- a user's geographic location in Texas or any part of Texas.

This prohibition applies regardless of whether the viewpoint in question is expressed on a social media platform or through any other medium.

C.S.H.B. 20 authorizes a user to bring an action against a social media platform that violates the bill's provisions relating to discourse on social media platforms with respect to the user. The bill entitles such a user who proves that the platform was in violation to injunctive relief and to declaratory relief, including costs and reasonable and necessary attorney's fees. If the platform fails to promptly comply with a court order in such an action, the court is required to hold the platform in contempt and use all lawful measures to secure immediate compliance with the order, including daily penalties. The bill provides that a user may bring an action regardless of whether another court has enjoined the attorney general from enforcing the bill's provisions regarding discourse on social media platforms or declared any such provision unconstitutional unless that court decision is binding on the court in which the action is brought. The bill further provides that nonmutual issue preclusion and nonmutual claim preclusion are not defenses to the action.

C.S.H.B. 20 authorizes any person to notify the attorney general of a violation or potential violation of the bill's provisions relating to discourse on social media platforms and authorizes the attorney general to bring an action to enjoin such a violation or potential violation. If the injunction is granted, the attorney general may recover costs and reasonable attorney's fees incurred in bringing the action and reasonable investigative costs incurred in relation to the action.

C.S.H.B. 20 provides the following with respect to its provisions relating to discourse on social media platforms:

- the provisions apply only to expression that is shared or received in Texas;

- the provisions apply to the maximum extent permitted by the U.S. Constitution and federal law but no further;
- the provisions do not subject a platform to damages or other legal remedies to the extent the platform is protected from those remedies under federal law;
- the provisions do not prohibit a platform from censoring expression that:
 - the platform is specifically authorized to censor by federal law;
 - is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment;
 - directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge; or
 - is unlawful expression;
- the provisions may not be construed to prohibit or restrict a platform from authorizing or facilitating a user's ability to censor specific expression on the user's platform or page at the request of that user; and
- the provisions apply only to a cause of action that accrues on or after the bill's effective date.

C.S.H.B. 20 defines "censor," "expression," "receive," and "unlawful expression" as follows:

- "censor" means any action taken to edit, alter, block, ban, delete, remove, deplatform, demonetize, de-boost, regulate, restrict, inhibit the publication or reproduction of, or deny equal access or visibility to expression, to suspend a right to post, remove, or post an addendum to any content or material posted by a user, or to otherwise discriminate against expression, including an action taken to inhibit a social media platform user's ability to be viewed by or interact with another user of the platform;
- "expression" means any word, music, sound, still or moving image, number, or other perceivable communication;
- "receive," with respect to an expression, means to read, hear, look at, access, or gain access to the expression; and
- "unlawful expression" means an expression that is unlawful under the U.S. Constitution, the Texas Constitution, or state or federal law, including expression that constitutes a tort under state or federal law.

C.S.H.B. 20 establishes that a waiver or purported waiver of the protections provided by the bill's provisions relating to discourse on social media platforms is void as unlawful and against public policy, and a court or arbitrator may not enforce or give effect to the waiver, including in an applicable action brought under the bill, notwithstanding any contract or choice-of-law provision in a contract. The bill further establishes that this waiver prohibition is a public-policy limitation on contractual and other waivers of the highest importance and interest to the state, and the state is exercising and enforcing this limitation to the full extent permitted by the U.S. Constitution and Texas Constitution.

Regulation of Email

C.S.H.B. 20 amends the Business & Commerce Code to prohibit an email service provider from intentionally impeding the transmission of another person's email message based on the content of the message unless the provider is authorized to block the transmission under applicable state or federal law, including state law that authorizes certain commercial email messages to be blocked, or the provider has a good faith, reasonable belief that the message contains a computer virus, obscene material, material depicting sexual conduct, or material that violates other law. The bill authorizes a person injured by a violation of this prohibition to recover an amount equal to the lesser of \$10 for each message unlawfully impeded or \$25,000 for each day the message is unlawfully impeded. For purposes of these provisions, the bill defines "computer virus" as an unwanted computer program or other set of instructions inserted into a computer's memory, operating system, or program that is either:

- specifically constructed with the ability to replicate itself or to affect the other programs or files in the computer by attaching a copy of the unwanted program or other set of instructions to one or more computer programs or files; or
- intended to perform an unauthorized process that will adversely impact the confidentiality of information contained in or the integrity or availability of the computer's memory, operating system, or program.

Severability

C.S.H.B. 20 provides for the severability of the bill's provisions as follows:

- sets out the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in the bill, and every application of the provisions in the bill, are severable from each other, mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute the United States Supreme Court held that an explicit statement of legislative intent is controlling;
- if any application of any provision in the bill to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances are to be severed and may not be affected;
- all constitutionally valid applications of the bill are to be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone;
- if any court declares or finds a provision of the bill facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications are to be severed from all remaining applications of the provision, and the provision is to be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution;
- the legislature further declares that it would have enacted the bill, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of the bill, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of the bill, were to be declared unconstitutional;
- if any provision of the bill is found by any court to be unconstitutionally vague, the applications of that provision that do not present constitutional vagueness problems are to be severed and remain in force;
- prohibits any court from declining to enforce any of these severability requirements on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity and provides that a court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision; and
- a judicial injunction or declaration of unconstitutionality:
 - is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;
 - is not a formal amendment of the language in a statute; and
 - no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

EFFECTIVE DATE

91st day after the last day of the legislative session.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 20 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

While both the original and the substitute require applicable social media platforms to publish transparency reports, the original required the publication of quarterly reports covering the preceding three-month period while the substitute requires the publication of biannual reports covering the preceding six-month period.

The substitute extends the period within which a social media platform must process a complaint of illegal content or illegal activity on the platform and evaluate the legality of the content or activity from within 24 hours of receiving notice of the content or activity, as in the original, to within 48 hours of receiving the notice, excluding hours during a Saturday or Sunday.

With respect to the original's provisions prohibiting an email service provider from intentionally impeding the transmission of another person's email messages, the substitute does the following:

- limits the application of the prohibition to an act of impedance that is based on the content of the message being impeded;
- expands the exception for a provider authorized to block transmission under a specified state law relating to commercial email messages to include providers authorized to block transmission under any applicable state or federal law;
- changes the exception for messages containing a computer virus, obscene material, material depicting sexual conduct, or material violating other law by specifying that the exception applies to a provider with a good faith, reasonable belief that the message has such content; and
- replaces the original's reference to an existing Penal Code definition of the term "computer virus" with a newly established definition, which results in an expansion of the definition to include an unwanted computer program or other set of instructions inserted into a computer's memory, operating system, or program that is intended to perform an unauthorized process that will adversely impact the confidentiality of information contained in or the integrity or availability of the computer's memory, operating system, or program.