

BILL ANALYSIS

Senate Research Center

S.B. 90
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Social media sites are the modern public square, and while almost all 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 speech selection by social media companies.

Under federal law, social media sites are expressly protected from liability for certain content moderation decisions. However, under the same section of federal law, states are expressly allowed to regulate websites so long as those regulations are consistent with the federal law.

S.B. 90 includes a legislative finding that the biggest social media sites are common carriers. These sites need to moderate content like violent or overtly sexual posts. However, they cannot deny you participation based on your viewpoint, including your political preferences or religion.

To bring transparency, this bill requires a social media platform to publicly disclose on an accessible website how the platform selects the content users see and what sorts of content it allows.

It also requires a social media platform to implement an easily accessible complaint procedure for users to submit a complaint regarding illegal content or the platform's allegedly wrongful removal of content.

The bill would also require the platform to investigate any report of illegal content within 48 hours of receipt of complaint and allow a user whose content has been removed to file a complaint and receive feedback and a review of that removal decision.

Under this bill, a social media site of over 50 million users is prohibited from censoring a person or the content that person posts based on the person's viewpoint or on the viewpoint expressed in the post. If the site does block or restrict a user based on viewpoint, that user can file suit against the site to get back online and make the site pay their attorney's fees. Alternatively, the attorney general's office can bring suit on behalf of a user or group of users.

S.B. 90 also prohibits an email service provider from selectively limiting the user's receipt of certain emails based on the content of those emails unless the email contains other certain offensive or dangerous content or the limitation or impediment is provided for under other law.

As proposed, S.B. 90 amends current law relating to censorship of or certain other interference with digital expression, including expression on social media platforms or through electronic mail messages.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Provides that the legislature finds that:

- (1) each person in this state has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information;
- (2) this state has a fundamental interest in protecting the free exchange of ideas and information in this state;
- (3) 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
- (4) social media platforms with the largest number of users are common carriers by virtue of their market dominance.

SECTION 2. Amends Subtitle C, Title 5, Business & Commerce Code, by adding Chapter 120, as follows:

CHAPTER 120. SOCIAL MEDIA PLATFORMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 120.001. DEFINITIONS. Defines "social media platform" and "user."

Sec. 120.002. APPLICABILITY OF CHAPTER. (a) Provides that this chapter applies only to a user who resides in this state, does business in this state, or shares or receives content on a social media platform in this state.

(b) Provides that this chapter applies only to a social media platform that functionally has more than 50 million active users in the United States in a calendar month.

Sec. 120.003. CONSTRUCTION OF CHAPTER. Prohibits this chapter from being construed to limit or expand intellectual property law.

SUBCHAPTER B. DISCLOSURE REQUIREMENTS

Sec. 120.051. PUBLIC DISCLOSURES. (a) Requires a social media platform, in accordance with this subchapter, to publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding the manner in which the social media platform:

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

(b) Requires that the disclosure required by Subsection (a) be sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform.

(c) Requires a social media platform to publish the disclosure required by Subsection (a) on an Internet website that is easily accessible by the public.

Sec. 120.052. ACCEPTABLE USE POLICY. (a) Requires a social media platform to publish an acceptable use policy in a location that is easily accessible to a user.

(b) Requires that a social media platform's acceptable use policy:

(1) reasonably inform users about the types of content allowed on the social media platform;

(2) explain the steps the social media platform will take to ensure content complies with the policy;

(3) explain the means by which users can notify the social media platform of content that potentially violates the acceptable use policy, illegal content, or illegal activity, which includes:

(A) subject to Subsection (c), making available a live company representative to take user complaints through a toll-free telephone number that users are authorized to call during regular business hours;

(B) an e-mail address or relevant complaint intake mechanism to handle user complaints; and

(C) a complaint system described by Subchapter C; and

(4) include publication of a biannual transparency report outlining actions taken to enforce the policy.

Sec. 120.053. BIANNUAL TRANSPARENCY REPORT. (a) Requires a social media platform, as part of the social media platform's acceptable use policy under Section 120.052, to publish a biannual transparency report that includes, with respect to the preceding six-month period:

(1) the total number of instances in which the social media 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 social media platform, or an internal automated detection tool;

(2) subject to Subsection (b), the number of instances in which the social media 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 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;

(3) the country of the user who provided the content for each instance described by Subdivision (2);

(4) the number of coordinated campaigns, if applicable;

(5) the number of instances in which a user appealed the decision to remove the user's potentially policy-violating content;

(6) the percentage of appeals described by Subdivision (5) that resulted in the restoration of content; and

(7) a description of each tool, practice, action, or technique used in enforcing the acceptable use policy.

(b) Requires that the information described by Subsection (a)(2) be categorized by:

(1) the rule violated; and

(2) the source of the alert for 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.

(c) Requires a social media platform to publish the information described by Subsection (a) with an open license, in a machine-readable and open format, and in a location that is easily accessible to users.

SUBCHAPTER C. COMPLAINT PROCEDURES

Sec. 120.101. COMPLAINT SYSTEM. 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 social media platform to remove content posted by the user.

Sec. 120.102. PROCESSING OF COMPLAINTS. Requires a social media platform that receives notice of illegal content or illegal activity on the social media platform to 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.

Sec. 120.103. REMOVAL OF CONTENT; EXCEPTIONS. (a) Requires the social media platform, except as provided by Subsection (b), if a social media platform removes content based on a violation of the platform's acceptable use policy under Section 120.052, concurrently with the removal, to:

(1) notify the user who provided the content of the removal and explain the reason the content was removed;

(2) allow the user to appeal the decision to remove the content to the platform; and

(3) provide written notice to the user who provided the content of the determination regarding an appeal requested under Subdivision (2) and in the case of a reversal of the social media platform's decision to remove the content, the reason for the reversal.

(b) Provides that a social media platform is not required to provide a user with notice or an opportunity to appeal under Subsection (a) if the social media platform is unable to contact the user after taking reasonable steps to make contact or knows that the potentially policy-violating content relates to an ongoing law enforcement investigation.

Sec. 120.104. APPEAL PROCEDURES. Requires the social media platform, if a social media platform receives a user complaint on the social media platform's removal from the platform of content provided by the user that the user believes was not potentially policy-violating content, not later than the 14th day, excluding Saturdays and Sundays, after the date the platform receives the complaint, to:

(1) review the content;

- (2) determine whether the content adheres to the platform's acceptable use policy;
- (3) take appropriate steps based on the determination under Subdivision (2); and
- (4) notify the user regarding the determination made under Subdivision (2) and the steps taken under Subdivision (3).

SUBCHAPTER D. ENFORCEMENT

Sec. 120.151. ACTION BY ATTORNEY GENERAL. (a) Authorizes the attorney general to bring an action against a social media platform to enjoin a violation of this chapter.

(b) Authorizes the attorney general, if an injunction is granted in an action brought under Subsection (a), to recover costs incurred in bringing the action, including reasonable attorney's fees and reasonable investigative costs.

SECTION 3. Amends the heading to Chapter 321, Business & Commerce Code, to read as follows:

CHAPTER 321. REGULATION OF ELECTRONIC MAIL

SECTION 4. Amends Subchapter B, Chapter 321, Business & Commerce Code, by adding Section 321.054, as follows:

Sec. 321.054. IMPEDING ELECTRONIC MAIL MESSAGES PROHIBITED. (a) Defines "computer virus."

(b) Prohibits an electronic mail service provider from intentionally impeding the transmission of another person's electronic mail message based on the content of the message unless:

(1) the provider is authorized to block the transmission under Section 321.114 (Authority to Block Certain Commercial Electronic Mail Messages; Qualified Immunity) or other applicable state or federal law; or

(2) 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.

SECTION 5. Amends Section 321.105(a), Business & Commerce Code, as follows:

(a) Authorizes a person injured by a violation of Chapter 321 arising from the transmission of an unsolicited or commercial electronic mail message or by a violation of Section 321.054, rather than injured by a violation of Chapter 321 arising from the transmission of an unsolicited or commercial electronic mail message, to recover, in lieu of actual damages, an amount equal to the lesser of:

(1) \$10 for each unlawful message or each message unlawfully impeded, as applicable, rather than \$10 for each unlawful message; or

(2) \$25,000 for each day the unlawful message is received or the message is unlawfully impeded, as applicable, rather than \$25,000 for each day the unlawful message is received.

SECTION 6. Amends Title 6, Civil Practice and Remedies Code, by adding Chapter 143A, as follows:

CHAPTER 143A. DISCOURSE ON SOCIAL MEDIA PLATFORMS

Sec. 143A.001. DEFINITIONS. Defines "censor," "expression," "receive," "social media platform," "unlawful expression," and "user."

Sec. 143A.002. CENSORSHIP PROHIBITED. (a) Prohibits 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:

- (1) the viewpoint of the user or another person;
- (2) the viewpoint represented in the user's expression or another person's expression; or
- (3) a user's geographic location in this state or any part of this state.

(b) Provides that this section applies regardless of whether the viewpoint is expressed on a social media platform or through any other medium.

Sec. 143A.003. WAIVER PROHIBITED. (a) Provides that a waiver or purported waiver of the protections provided by this chapter is void as unlawful and against public policy, and prohibits a court or arbitrator from enforcing or giving effect to the waiver, including in an action brought under Section 143A.007, notwithstanding any contract or choice-of-law provision in a contract.

(b) Provides that the waiver prohibition described by Subsection (a) is a public-policy limitation on contractual and other waivers of the highest importance and interest to this state, and this state is exercising and enforcing this limitation to the full extent permitted by the United States Constitution and Texas Constitution.

Sec. 143A.004. APPLICABILITY OF CHAPTER. (a) Provides that this chapter applies only to a user who resides in this state, does business in this state, or shares or receives expression in this state.

(b) Provides that this chapter applies only to expression that is shared or received in this state.

(c) Provides that this chapter applies only to a social media platform that functionally has more than 50 million active users in the United States in a calendar month.

(d) Provides that this chapter applies to the maximum extent permitted by the United States Constitution and the laws of the United States but no further than the maximum extent permitted by the United States Constitution and the laws of the United States.

Sec. 143A.005. LIMITATION ON EFFECT OF CHAPTER. Provides that this chapter does not subject a social media platform to damages or other legal remedies to the extent the social media platform is protected from those remedies under federal law.

Sec. 143A.006. CONSTRUCTION OF CHAPTER. (a) Provides that this chapter does not prohibit a social media platform from censoring expression that:

- (1) the social media platform is specifically authorized to censor by federal law;
- (2) 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;

(3) 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

(4) is unlawful expression.

(b) Prohibits this chapter from being construed to prohibit or restrict a social media 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.

(c) Prohibits this chapter from being construed to limit or expand intellectual property law.

Sec. 143A.007. USER REMEDIES. (a) Authorizes a user to bring an action against a social media platform that violates this chapter with respect to the user.

(b) Provides that if the user proves that the social media platform violated this chapter with respect to the user, the user is entitled to recover declaratory relief under Chapter 37 (Declaratory Judgments), including costs and reasonable and necessary attorney's fees under Section 37.009 (Costs), and injunctive relief.

(c) Requires the court, if a social media platform fails to promptly comply with a court order in an action brought under this section, to hold the social media platform in contempt and to use all lawful measures to secure immediate compliance with the order, including daily penalties sufficient to secure immediate compliance.

(d) Authorizes a user to bring an action under this section regardless of whether another court has enjoined the attorney general from enforcing this chapter or declared any provision of this chapter unconstitutional unless that court decision is binding on the court in which the action is brought.

(e) Provides that nonmutual issue preclusion and nonmutual claim preclusion are not defenses to an action brought under this section.

Sec. 143A.008. ACTION BY ATTORNEY GENERAL. (a) Authorizes any person to notify the attorney general of a violation or potential violation of this chapter by a social media platform.

(b) Authorizes the attorney general to bring an action to enjoin a violation or a potential violation of this chapter. Authorizes the attorney general, if the injunction is granted, to recover costs and reasonable attorney's fees incurred in bringing the action and reasonable investigative costs incurred in relation to the action.

SECTION 7. (a) Provides that, 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, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and application of the provisions in this Act, are severable from each other.

(b) Requires that the remaining applications of that provision to all those persons and circumstances, if any application of any provision in this Act to any person, group of persons, or circumstance is found by a court to be invalid or unconstitutional, be severed and prohibits them from being affected. Requires that all constitutionally valid applications of this Act 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.

(c) Requires that the applications, if any court declares or finds a provision of this Act facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstance without violating the United States Constitution or Texas Constitution, be severed from all remaining applications of the 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.

(d) Provides that the legislature further declares that it would have enacted this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, phrase, or word or applications of this Act, were to be declared unconstitutional.

(e) Requires, if any provision of this Act is found by any court to be unconstitutionally vague, that the applications of that provision that do not present constitutional vagueness problems be severed and remain in force.

(f) Prohibits any court from declining to enforce the severability requirements of Subsections (a), (b), (c), (d), and (e) of this section on the ground that severance would rewrite the state statute or involve the court in legislative or lawmaking activity. Provides that a court that declines to enforce or enjoins a state official from enforcing a statute provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. Provides that a judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting an 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;

(2) is not a formal amendment of the language in a statute; and

(3) 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.

SECTION 8. Provides that Chapter 143A, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act.

SECTION 9. Effective date: the 91st day after the last day of the legislative session.