

**SUBJECT:** Prohibiting viewpoint-based censorship by some social media platforms

**COMMITTEE:** Constitutional Rights and Remedies, Select — committee substitute recommended

**VOTE:** 9 ayes — Ashby, Clardy, Geren, Jetton, Klick, Landgraf, Lozano, Shaheen, White

5 nays — S. Thompson, Bucy, A. Johnson, Longoria, Moody

1 absent — Neave

**WITNESSES:** For — W. Scott McCollough, Giganews and Golden Frog; Paul Hodson, Grassroots Gold; Sheena Rodriguez, Latinos for America First, Texans Against Illegal Immigration; Donald Garner, Texas Faith & Freedom Coalition; and 10 individuals; (*Registered, but did not testify:* Charles Simmons, Inda Simmons, Craig Weisman, Wesley Whisenhunt, Grassroots Gold; Alan Vera, Harris County Republican Party Ballot Security Committee; Jonathan Covey, Texas Values Action; Robert L. Green, Travis Co. Republican Party Election Integrity Committee; Kathleen Ocker, We the People Liberty in Action; Marcia Strickler, Wilco We The People; and 18 individuals)

Against — Tom Giovanetti, Institute for Policy Innovation; James Hines, Internet Association; Steve DelBianco, NetChoice; Servando Esparza, TechNet; Paula Kothmann; (*Registered, but did not testify:* Matt Simpson, ACLU of Texas; Dionna Hardin, Black Voters Matter; Adrian Shelley, Public Citizen; and 16 individuals)

**DIGEST:** CSHB 20 would establish complaint procedures and disclosure requirements for social media platforms regarding the management and removal of content. The bill would prohibit censorship by social media platforms based on a user's viewpoint. The bill's provisions on social media platforms would apply only to a platform or service that functionally had more than 50 million active monthly users in the United States.

**Definitions.** "Social media platform" would mean a website or application that was open to the public, allowed a user to create an account, and enabled users to communicate with other users for the primary purpose of posting information, comments, messages, or images. "User" would mean a person who posted, uploaded, transmitted, shared, or otherwise published or received expression through a social media platform, including a person who had an account disabled or locked by the social media platform.

**Discourse on social media platforms.** CSHB 20 would 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:

- 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 the state.

The prohibition would apply regardless of whether the viewpoint was expressed on the social media platform or another medium. It would apply only to a user who resided in, did business in, or shared or received expression in Texas, and only to expression that was shared or received in Texas. A waiver or purported waiver of the protections provided by the bill would be void as against public policy, and could not be enforced by a court.

*User Remedies.* A user could bring an action against a social media platform that violated the bill with respect to the user. A user that proved a violation would be entitled to recover declaratory relief, including costs and reasonable attorney's fees, and injunctive relief. A court would have to hold a platform that failed to promptly comply with a court order in contempt and would have to use all lawful measures to secure immediate compliance with the order, including daily penalties sufficient to secure immediate compliance. A user could bring an action under the bill regardless of whether another court had enjoined the attorney general

from enforcing the bill's provisions or declared any provisions unconstitutional unless that court decision was binding on the court where the action was brought.

CSHB 20 would not subject a social media platform to damages or other legal remedies to the extent the platform was protected from those remedies under federal law. A social media platform would not be prohibited from censoring expression that:

- the platform was specifically authorized to censor by federal law;
- was the subject of a referral or request from an organization whose purpose is to prevent the sexual exploitation of children and protect survivors of childhood sexual abuse from ongoing harassment;
- directly incited criminal activity or consisted 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
- was unlawful expression.

The bill could not be construed to prohibit or restrict a social media platform from authorizing or facilitating a user's ability to censor specific expression at the request of that user. The bill also could not be construed to limit or expand intellectual property law.

**Public disclosure.** A social media platform would have to publicly disclose accurate information on its content management, data management, and business practices, including specific information about how the platform:

- curates and targets content to users;
- places and promotes content, services, and products, including its own;
- 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 would have to be sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform. The disclosure would have to be published on a website easily accessible to the public.

*Acceptable use policy.* A social media platform would have to publish an acceptable use policy in a location easily accessible to a user. The policy would have to:

- 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 content that potentially violates the acceptable use policy, illegal content, or illegal activity, including an email address or complaint intake mechanism, a complaint system described by the bill, and;
- include publication of a biannual transparency report.

*Transparency report.* The biannual transparency report would include the total number of instances in which the platform was alerted to illegal content, illegal activity, or potentially policy-violating content and the number of instances in which the platform removed content, suspended or removed an account, or took other action as specified in the bill. The transparency report would have to categorize information by the rule violated and whether the source of the alert included 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 platform would have to publish the quarterly transparency report with an open license, in a machine-readable and open format, and in a location that was easily accessible to users.

**Complaint procedures.** CSHB 20 would require a social media platform to provide an easily accessible complaint system to enable a user to

submit a complaint in good faith and keep track of 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. A platform would have to make a good-faith effort to evaluate the legality of the content or activity within 48 hours of receiving notice of illegal content or illegal activity, excluding weekend hours and subject to reasonable exceptions based on concerns about the legitimacy of the notice.

*Content removal.* If a social media platform removed content based on a violation of its acceptable use policy, the platform would have to:

- notify the user who provided the content of the removal and explain why it was removed;
- allow the user to appeal the decision; 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 decision to remove the content, the reason for the reversal.

A platform would not have to provide notice to a user who could not be contacted after reasonable steps to make contact or if the platform knew that the potentially policy violating content related to an ongoing law enforcement investigation.

Regarding an appeal by a user over removed content that the user believed was not potentially policy-violating content, the platform would have to, not later than the 14th day after the date the platform received the complaint:

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

**Email.** CSHB 20 would prohibit an electronic mail service provider from

intentionally impeding the transmission of another person's e-mail message based on the content of the message unless the provider was authorized to block the transmission under certain provisions of the Business and Commerce Code or other state or federal law, or had a good-faith, reasonable belief that the message contained a computer virus or material that was obscene, depicted sexual conduct, or violated other law.

A person injured by a violation of this prohibition could recover an amount equal to the lesser of \$10 for each message unlawfully impeded or \$25,000 for each day the message was unlawfully impeded.

**Enforcement.** The attorney general could bring an action to enjoin a violation or potential violation of the bill's provisions and could recover costs, reasonable attorney's fees, and reasonable investigative costs. Any person could notify the attorney general of a violation or potential violation of the bill's provisions regarding viewpoint censorship.

**Severability.** The bill would provide for the severability of every provision, section, subsection, sentence, or clause, and of every application of its provisions to any person, group of persons, or circumstances. The Legislature would further declare that it would have enacted the act, each provision, section, subsection, sentence, or clause of the bill, and all constitutional applications of the bill, regardless of the fact that any provision, section, subsection, sentence, or clause of the bill or application of the bill were to be declared unconstitutional. The bill would provide that if any provision was found by any court to be unconstitutionally vague, the applications of that provision that did not present constitutional vagueness problems would be severed and remain in force. The bill would establish that no court could decline to enforce the bill's severability requirements on the ground that severance would rewrite the statute or involve the court in legislative activity.

The bill would take effect on the 91st day after the last day of the current legislative session, and would apply only to a cause of action that accrued on or after that date.

**SUPPORTERS  
SAY:**

CSHB 20 would recognize that prominent social media sites have come to dominate public discourse in Texas and should be regulated to prevent them from unfairly discriminating against certain viewpoints and ensure they are accountable for their actions when they remove content. The bill also would bring transparency to the companies' content moderation policies and actions.

Laws that Congress crafted when social media companies were in their infancy have shielded them from liability for their content, but as the companies' influence has grown, those laws have become outdated, making it important for Texas to act. CSHB 20 would hold social media platforms to basic standards of accountability by requiring them to publicly disclose how they target content to users, promote products and services, and use algorithms to determine results on their platform. They would have to publish an acceptable use policy concerning their content moderation policies, publish biannual reports about the content they remove, and create an appeal process for content that had been taken down.

CSHB 20 would curtail big tech companies' ability to silence viewpoints on their platforms by prohibiting viewpoint censorship and allowing users who were wrongly censored to sue the company and, if successful, recover costs and attorney fees. The bill also would require social media companies to implement an easily accessible complaint procedure for users to submit complaints about illegal content or the platform's allegedly wrongful removal of content. CSHB 20 also would prohibit the blocking of email based on the content of a message, while ensuring that providers could block messages containing viruses or unlawful material.

While the bill would prohibit censorship based on a user's viewpoint, it would not restrict social media platforms' ability to remove certain kinds of objectionable content, including obscene or offensively violent material otherwise protected by the First Amendment but subject to control under the Communications Decency Act. The bill also would not penalize social media companies for blocking content that incited criminal activity or threatened violence, and would allow for removal of content in order to

prevent sexual exploitation of children.

While some say that as private companies, large social media companies have the right to control the content on their platforms, such companies have essentially become the gatekeepers of free speech and have acted to limit mostly, though not exclusively, conservative views. The bill would allow the public and the attorney general to serve as watchdogs over unwarranted content removal and viewpoint censorship. Regulating the content moderation policies of big tech companies would not violate their First Amendment rights since due to their dominant market shares they function as common carriers of public speech and, as such, can be prohibited by the government from discriminating against their customers. The bill would not compel speech on the part of social media companies, only prevent their censorship of others' speech. The bill's limitation to platforms with 50 million domestic monthly users would ensure that it applied only to companies that effectively functioned as common carriers and served as the new public square.

The bill is unlikely to lead to a rash of lawsuits being filed in Texas courts by social media users against the companies because the bill contains no cause of action for damages. CSHB 20 also would not share the provisions that have caused other bills related to social media censorship to be enjoined by federal court in other states. Large social media companies have already invested substantially in Texas, so it is unlikely that the bill would have any significant negative impact on the state's economy and business environment.

**CRITICS  
SAY:**

CSHB 20 would run counter to the First Amendment by prohibiting a private business from controlling its own content based on dubious claims that social media platforms are censoring certain viewpoints. Social media companies' market power and hosting of private speech do not transform them into a public forum or common carrier subject to First Amendment restraints, and no law or court ruling has found social media companies to be common carriers. By forcing social media platforms to host any and all viewpoints, the bill would compel political speech. The bill's 50 million user threshold would be arbitrary and discriminatory and could unfairly



target certain companies on the basis of perceived liberal bias. CSHB 20 could face a costly legal challenge and be found unconstitutional. Similar bills outside of Texas have already been enjoined by a federal court.

CSHB 20's distinction between viewpoint and content is unclear. Content moderation is at the core of the business models for social media companies, who seek to create a welcoming environment for users and advertisers. Companies generally take their responsibility seriously and try to remove harmful content in an unbiased manner while keeping their services open to a broad range of views and ideas. The bill could create an incentive for companies to not remove content that may be objectionable but not unlawful, such as bullying, misinformation, or even hate speech, in order to avoid being accused of violating the bill. Content moderation decisions could lead to numerous costly lawsuits for a social media company. Requiring social media platforms to publicize their content moderation policies also could make it easier for bad actors to circumvent those policies.

By subjecting social media companies to burdensome regulation and exposing them to expensive litigation, HB 20 could inhibit the state's efforts to persuade technology companies to locate Texas through policies that are conducive to business and job creation and harm Texas' reputation as a business-friendly state.