

SENATE BILL 2380

By Stevens

AN ACT to amend Tennessee Code Annotated, Title 4;
Title 47 and Title 65, relative to online
communications.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, is amended by adding the following
as a new chapter:

65-16-101. Short title.

This chapter is known and may be cited as the "Protecting Online Free Speech
Act."

65-16-102. Chapter definitions.

As used in this chapter:

(1) "Active state user" means a person who uses a particular online
platform's platform services three (3) or more times in a quarter while located in
this state;

(2) "Adversely treat," with respect to content, means to delete, remove,
demonetize, or restrict access to, or availability of, the content;

(3) "Annual gross revenues" means income or revenue from all sources,
before expenses or taxes, computed according to generally accepted accounting
principles;

(4) "Annual gross revenues attributable to users located in this state"
means the part of the annual gross revenues of the corporation that is computed
using the apportionment fraction, the numerator of which is the population of
residents of this state aged seventy-three (73) years of age or older, and the

denominator of which is the population of the United States aged seventy-three (73) years of age or older, both as reported in the most recent annual estimates produced by the United States census bureau;

(5) "Content moderation not taken in good faith":

(A) Means an online platform adversely treating content of an information content provider in this state, or lawful content posted, uploaded, or published by an information content provider in this state, in a manner that is pretextual or inconsistent with the online platform's terms of service; and

(B) Includes an online platform selectively applying the platform's terms of service to adversely treat content posted, uploaded, or published by an information content provider in this state that is similarly situated to content that the platform intentionally declines to adversely treat;

(6) "Demonetize" means to exclude or restrict an information content provider from participating in the platform's advertisement revenue sharing arrangements;

(7) "Deplatform" means an online platform restricting, in whole or in part, covertly or overtly, the ability of an information content provider to post, upload, or publish content, as opposed to the platform taking the action on a case-by-case basis against specific and particular content produced by the information content provider;

(8) "Information content provider" has the same meaning as provided in 47 U.S.C. § 230(f)(3);

(9) "Interactive computer service" has the same meaning as provided in 47 U.S.C. § 230(f)(2);

(10) "Market dominant" means an online platform:

(A) With one (1) or more platform services that are actively used by a majority of the residents of this state who are thirteen (13) years of age and older. As used in this subdivision (10), "actively use" means to use the platform services an average of at least once a month over a calendar or fiscal year; or

(B) With a majority market share in this state for one (1) or more platform services the platform offers. As used in this subdivision (10)(B), "market share" means the majority of the platform services for general internet search, microblogging social networking, and online photo-sharing services, and the majority of time spent using the services for personal social networking and online video sharing. However, an online platform may also be considered market dominant based on its market share in the United States, if insufficient data exists to determine whether the platform has majority market share in this state;

(11) "Online platform":

(A) Means a website or application that is open to the public and allows users to create and share content electronically or engage in social networking, or a general search engine; and

(B) Does not include:

(i) Electronic mail services; or

(ii) A website or application that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is created or preselected by the provider and for which chat, comments, or interactive functionality is incidental

to, directly related to, or dependent upon the provision of the information or content;

(12) "Platform services" means the distinct category of services an online platform offers to the public for creating and sharing content electronically, engaging in social networking, or searching for content. As used in this subdivision (12), "distinct category of services" includes the following categories:

(A) Internet-based software that:

(i) Responds to a user's textual query by using an algorithm or other method to produce potentially relevant responses to the query; and

(ii) Responds to general queries, not simply those confined to a particular subject or featuring results from a specific website;

(B) An internet-based service that allows users to construct public or semi-public profiles, publish content on the profiles, articulate a list of other users with whom the users share a connection, and view or exchange content with the users, without the service being oriented toward a specific interest or service, such as career networking or romantic connections;

(C) A combination of blogging and instant messaging focused around users creating short messages to be posted and shared on an online social networking service;

(D) An internet-based service that allows users to upload and store videos and share them with other users, and that is primarily focused on the posting and transmission of user-provided videos; and

(E) An internet-based service that allows users to upload and store photographs and share them with other users, and that is primarily focused on the posting and transmission of user-provided photos; and

(13) "Restricting access to" or "availability of content":

(A) Means an online platform restricting, in whole or in part, covertly or overtly, manually or algorithmically, the visibility or distribution of content posted, uploaded, or published by an information content provider; and

(B) Does not encompass the output of an algorithm for presenting or prioritizing content when the algorithm is:

(i) Generally applicable;

(ii) Viewpoint neutral; and

(iii) Not designed to restrict the visibility or distribution of

content of a particular information content provider.

65-16-103. Duties of market dominant online platforms.

(a) A market dominant online platform engaged in commerce in this state shall furnish the platform services in which the platform is market dominant to information content providers within this state, without discrimination, and upon just and reasonable terms. The platform:

(1) Shall describe relevant content moderation policies applicable to information content providers in this state in plain and particular terms of service or use that are available at the time of use;

(2) Shall not deplatform or otherwise categorically deny service to information content providers within this state;

(3) Shall not adversely treat content on the basis of philosophical, political, ideological, or religious views expressed; provided, this subdivision (a)(3) does not prevent a platform from removing content that is obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable on similar grounds because the content also expresses philosophical, political, ideological, or religious views;

(4) Shall refrain from content moderation not taken in good faith; and

(5) When adversely treating content posted, uploaded, or published by an information content provider in this state, shall:

(A) Provide the aggrieved information content provider with a written explanation of the action taken and the reason for the action, including an identification of the specific term of service violated and the specific content deemed in violation of the term of service, within seven (7) days of the action being taken; and

(B) Provide the aggrieved information content provider with a timely, meaningful, and good faith opportunity to appeal content moderation decisions allegedly not taken in good faith. With each appeal decision that sustains, in whole or part, an initial decision to adversely treat an information content provider's content, the market dominant platform shall certify that the decision did not constitute content moderation not taken in good faith.

(b) A market dominant online platform shall not assert that content moderation allegedly not taken in good faith was consistent with the platform's terms of service, unless the platform shows that the content was not permitted under the platform's plain and particular terms of service. For the platform services in which the platform is market

dominant, the terms of service must not permit the online platform to adversely treat content posted, uploaded, or published in this state without an information content provider in this state, or the provider's content, violating one (1) or more plain and particular terms of service.

(c) A market dominant online platform shall, for the platform services in which the platform is market dominant, publish statistics on a quarterly basis of the number of posts and information content providers within this state subject to actions described under subdivision (a)(5), the number of appeals filed, and the number of appeals granted.

(d) This section does not prevent an online platform from adversely treating content the platform objectively and reasonably believes to be:

(1) Constitutionally unprotected content in furtherance of unlawful activity, including, but not limited to, content in furtherance of human or drug trafficking, terrorism, or cyberstalking;

(2) Content in violation of federal intellectual property laws;

(3) Content subject to a final judgment of a United States federal or state court directing the removal of the content; or

(4) Obscenity.

65-16-104. Penalties and enforcement.

(a) The attorney general and reporter has sole initial authority to bring actions to recover damages on behalf of users affected by violations of § 65-16-103, as well as injunctive relief on behalf of this state. The attorney general and reporter may issue civil investigative demands, consistent with the authority provided in § 47-18-114, to investigate instances of market dominant online platforms violating § 65-16-103. The

attorney general and reporter may bring an action within the ordinary statutory period, irrespective of other consumer or user-generated suits.

(b) If the attorney general and reporter does not bring an action within thirty (30) days of notice of an alleged violation, then an information content provider or user may bring a cause of action against a market dominant online platform in a trial court in the county in which the plaintiff resides to enforce § 65-16-103. A plaintiff is not required to exhaust an online platform's appeals process before bringing a cause of action.

(c) As to a cause of action arising under § 65-16-103, the trial court may exercise personal jurisdiction over a nonresident defendant in the same manner as if the defendant were a person domiciled in this state, if the defendant:

(1) Makes the interactive computer service available to residents of this state; or

(2) Enters into agreements with residents of this state for the provision of interactive computer services.

(d) The trial court shall award a plaintiff that prevails against a market dominant online platform for a violation of § 65-16-103 with, at least, the following:

(1) Actual damages;

(2) Statutory damages of:

(A) One thousand dollars (\$1,000) for each day an information content provider is deplatformed or otherwise categorically denied service;

(B) One thousand dollars (\$1,000) for each incident of adversely treating an information content providers' content based on the philosophical, political, ideological, or religious viewpoints expressed;

(C) One thousand dollars (\$1,000) for each incident of content moderation not taken in good faith;

(D) One thousand dollars (\$1,000) for each violation of § 65-16-103(a)(5); and

(E) One thousand dollars (\$1,000) dollars for the failure to disclose the statistics required by § 65-16-103(c);

(3) Court costs, fees, and reasonable attorney fees; and

(4) Injunctive relief, if deemed appropriate.

(e) The Tennessee public utility commission shall issue annual determinations identifying market dominant online platforms in this state and the platform services in which those platforms are market dominant and to which § 65-16-103 applies. The commission may make this determination based on reputable commercially available data or on a statistically representative survey of residents of this state who are thirteen (13) years of age and older with a sample size sufficient to produce a margin of error of less than two percent (2%) at the ninety-five-percent confidence level.

65-16-105. Platform fees to support universal service programs.

(a) The Tennessee public utility commission shall assess a corporation with annual gross revenues attributable to users located in this state of more than ten million dollars (\$10,000,000) and that owns or operates an online platform, in addition to taxes, fees, or other charges required by law, a quarterly platform fee on platform services actively used by ten percent (10%) or more of individuals located in this state who are thirteen (13) years of age and older. The platform fee:

(1) Must be equal to:

(A) Seven dollars and fifty cents (\$7.50) per quarter per active state user of the corporation's general internet search platform services;

(B) Five dollars (\$5.00) per quarter per active state user of the corporation's personal social networking platform services;

(C) One dollar and fifty cents (\$1.50) per quarter per active state user of the corporation's microblogging social networking platform services;

(D) One dollar and fifty cents (\$1.50) per quarter per active state user of the corporation's online video sharing platform services; and

(E) Four dollars (\$4.00) per quarter per active state user of the corporation's online photo sharing platform services; and

(2) On each platform service must not exceed fifteen percent (15%) of the annual gross revenues attributable to users located in this state that the corporation generates through the platform service.

(b) The commission shall determine the number of applicable platform services' active state users on which platform fees are owed, and the proportion of individuals located within this state who actively use the platform services, as follows:

(1) The commission shall estimate the quarterly number and proportion of active state users by:

(A) Utilizing reputable commercially available estimates of the platform services' active state users who are thirteen (13) years of age and older, and computing the proportion of active state users by dividing the number by the most recent annual estimates for the state population who are thirteen (13) years of age or older produced by the United States census bureau; or

(B) Conducting a statistically representative survey of individuals located within this state who are thirteen (13) years of age and older with

a sample size sufficient to produce a margin of error of less than two percent (2%) at the ninety-five-percent confidence level. The survey must estimate, for each corporation subject to online platform fees, the proportion of persons located within this state who used each applicable platform service three (3) or more times in the previous quarter. The estimated active state users for that quarter is the product of that proportion and the most recent annual estimates for the state population who are thirteen (13) years of age and older produced by the United States census bureau; and

(2) The commission shall transmit the commission's estimated number of active state users to the applicable corporations within sixty (60) days of the end of the applicable quarter. The proportion and number of active state users are the estimated proportion and estimated number of active state users for that quarter, unless the online platform provides administrative records demonstrating by a preponderance of evidence that a different number of users within this state used the applicable platform services three (3) or more times in the previous quarter. In that case, the platform fee is owed on the administratively determined number of active state users, and the proportion is calculated by dividing the administratively determined number by the most recent annual estimates for the state population who are thirteen (13) years of age and older produced by the United States census bureau.

(c) The commission shall deposit platform fees collected under this section in the following manner:

(1) Sixty percent (60%) of the fees must be deposited into a fund controlled by the commission and used for the sole purpose of enforcing this chapter; and

(2) Forty percent (40%) of the fees must be deposited into the Tennessee broadband accessibility fund created by § 4-3-708.

(d)

(1) Each corporation that owns or operates an online platform subject to platform fees under this section shall complete, under oath, and file with the commission a return for quarterly fee payments, along with the fee payment, within one hundred twenty (120) days of the completion of the applicable quarter; provided, the commission may extend this deadline for good cause related to administratively determining the number of active state users in the applicable quarter.

(2) A person, including an officer of a corporation, who willfully files a false return under this section with the intent to evade the payment of platform fees due under this section is subject to prosecution for perjury pursuant to title 39, chapter 16, part 7.

(3) A person, including an officer of a corporation, who is required to file a platform fee return, and who willfully fails to file the return as required under this section, commits a Class E felony, subject to a fine not exceeding seventy thousand dollars (\$70,000), imprisonment not exceeding five (5) years, or both.

(e)

(1) The commission shall assess interest on unpaid platform fees from the due date to the date on which the fee is paid, if a person who is required to

pay platform fees under this section fails to pay an installment when due or pays less than the amount due.

(2) In addition to interest, the commission shall assess a penalty not exceeding twenty-five percent (25%) of the amount due if a corporation required to pay a platform fee under this section fails to pay the tax within seven hundred eighty (780) days of the due date of the fee.

(f) The commission shall promulgate rules governing the assessment and collection of platform fees under this section, including the process for corporations to provide administrative data on the number of active state users on which platform fees are owed and certifying corporations for exemption under § 65-16-106. The rules must be promulgated within six (6) months of the effective date of this act.

65-16-106. Fee exemption for platforms that foster open discourse.

Notwithstanding § 65-16-105, a corporation shall not owe platform fees, nor be required to file a platform fee return, for platform services for which, whether or not the platform services are market dominant, the corporation:

- (1) Publishes the statistics called for by § 65-16-103(c); and
- (2) Incorporates into the platform service's terms of service applicable to users in this state the following contractual terms:

"Section [Appropriate Section Number] - Open Discourse and Fair Treatment:

Part I. Coverage and Scope.

This section applies to individuals who are residents of and physically located in the state of Tennessee and are either users, or desired users, of our service.

In the event of a conflict between the provisions of this section and any other provision in these terms of service, the provisions of this section shall prevail.

Part 2. Definitions.

For the purpose of this section:

The phrase "restricting access to or availability of content" means our restricting, in whole or in part, covertly or overtly, manually or algorithmically, the availability, visibility, or distribution of content a user posts, uploads, or publishes; provided, that this phrase does not encompass the output of an algorithm we use for presenting or prioritizing content when such algorithm is (i) generally applicable; (ii) viewpoint neutral; and (iii) not designed to restrict the visibility or distribution of content of a specific user.

The term "demonetize" refers to excluding or restricting a user from participating in user advertisement revenue sharing arrangements.

The term "deplatform" means our restricting, in whole or in part, covertly or overtly, a user or desired users' ability to post, upload, or publish content, as opposed to our taking such actions on a case-by-case basis against specific and particular content produced by such individual.

Part 3. Commitments to Open Discourse and Fair Treatment.

We promise:

(a) We will not deplatform or otherwise categorically deny service to you, although this commitment does not prejudice the ability of other users to decide with whom they interact, continue to interact with, or accept dialogue from.

(b) We will provide you an open forum for public debate or dialogue, without regard to differing ideological, political, philosophical, or religious perspectives.

(c) We will not demonetize or restrict access to or availability of your content based on ideological, political, philosophical, or religious views implied or expressed; provided, that nothing in this paragraph prevents us from removing content that is otherwise obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable on similar grounds even though such content may also express philosophical, political, ideological, or religious views.

(d) We will only demonetize or restrict access to, or availability of, your content if it is not permitted under specific and plain and particular provisions of either our community standards or other provisions of our terms of service. We will apply those community standards and terms of service transparently, consistently, in good faith, and without pretext. We will not apply our community standards or terms of service selectively to some users and not others. If we demonetize or restrict access to or availability of your content, evidence that we have intentionally declined to demonetize or restrict access to or availability of similarly situated content from other users may be taken as evidence we have violated our obligations under this paragraph.

(e) If we demonetize or restrict access to or availability of your content, we will give you written notification within seven (7) days of the action being taken. That notification will provide a specific and detailed explanation of the reason(s)

that content violated our community standards or terms of service, including a description of the plain and particular provisions of our community standards or terms of service such content violated.

(f) Appeals. Upon any restriction(s), demonetization(s), or content moderation as described above or under relevant law, you will have a meaningful opportunity to appeal to have such actions reversed. The grounds for appeal include, but are not limited to, the fact that our act of content moderation, whatever form it is in, must be made in good faith, without pretext, and applied consistently to all users.

Part 4. Limitations.

Nothing in this section affects our ability to demonetize or restrict access to or availability of content that is obscene or pornographic. Nor does anything in this section limit our ability to demonetize or restrict access to or availability of any content that is illegal under state or federal law, such as constitutionally unprotected content in furtherance of unlawful activity, content that is in violation of intellectual property laws, or content subject to a final judgment of a United States federal or state court directing the removal of such content.

Part 5. Enforcement and Damages.

The provisions of this section are contractual and are enforceable at law or in equity. We expressly do not contract for any venue, jurisdiction, judicial forum, or choice of law provision for enforcement of this section. Notwithstanding any other provision in these terms of service, we waive said forum and choice of law

provisions as applied to this section, allowing you or any proper legal authority to determine those, should the need arise, under all relevant and applicable laws.

If you bring an action against us to enforce the terms of this section and obtain a final judgement prevailing against us, we will, in addition to any other remedies or penalties provided by law:

(a) Reimburse your court costs, fees, and reasonable attorney fees; and

(b) Pay any actual damages you incurred through our failure to abide by the terms of this section."

Provided that the fee exemption provided under this section shall not apply to any corporation's platform services if a court of competent jurisdiction issues a final order holding the contractual language set forth in subsection (b) of this section unenforceable, in whole or in part, against such corporation and platform services. In such event the [appropriate state official] shall submit a notice within thirty (30) days informing such corporation that it will be liable for the platform fees described in Tenn. Code Ann. § 65-16-105. Such liability shall commence the first full quarter beginning after the Tennessee Public Utility Commission submits such notice.

65-16-107. Rules of construction.

(a) This chapter does not require an online platform to verify the state of residency of a user of their services. An online platform fulfills its duties under this chapter if it satisfies them with regard to conduct that occurs within this state.

(b) A court shall construe platform services as mutually distinct categories.

65-16-108. Severability.

(a) Except as provided in subsections (b) and (c), if a provision of this chapter or its application to a person or circumstance is held invalid, then the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to that end, the provisions of this chapter are severable.

(b) If § 65-16-103(a)(3) is held invalid because of the inclusion of the qualifying terms "philosophical, political, ideological, or religious," then those terms must be held inoperable, and § 65-16-103(a)(3) must be applied as though those qualifying terms were not present.

(c) The provisions of § 65-16-106 of this act are not severable. If a provision of § 65-16-106 or its application to a person or circumstance is held invalid, then all provisions and applications of § 65-16-106 are invalid and void.

SECTION 2. The headings in this act are for reference purposes only and do not constitute a part of the law enacted by this act. However, the Tennessee Code Commission is requested to include the headings in any compilation or publication containing this act.

SECTION 3. This act takes effect upon becoming a law, the public welfare requiring it.