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S.69 Schmitt_Substitute

S.L.C.

AMENDMENT NO._____ Calendar No._____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—119th Cong., 2d Sess.

S. 69

To amend the Communications Act of 1934 to address governmental interference in content moderation decisions by providers of interactive computer services, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by _____

Viz:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Curtailing Online Limitations that Lead Unconstitutionally to Democracy's Erosion Act" or the "COLLUDE Act".

SEC. 2. CONTENT MODERATION, CREATION AND DEVELOPMENT, AND DISTRIBUTION.

Section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) is amended by adding at the end the following:

"(3) LOSS OF PROTECTION IN CASES OF GOVERNMENTAL CENSORSHIP.—

"(A) DEFINITIONS.—In this paragraph:

"(i) AGENCY.—The term 'agency' has the meaning given the term in section 3502 of title 44, United States Code.

"(ii) CONTENT ACTION.—The term 'content action', with respect to an interactive computer service, means—

"(I) adding information to, altering information on, or removing information from the interactive computer service, including with respect to a label appended to information;

"(II) altering the presentation of information on the interactive computer service, including such presentation by a recommendation system of the interactive computer service;

"(III) limiting interaction by an information content provider with the interactive computer service, including terminating or suspending an information content provider from the interactive computer service;

"(IV) limiting the association of an information content provider with another information content provider on the basis of the viewpoint of either such information content provider; or

"(V) altering a policy of the interactive computer service affecting the moderation of information.

"(iii) COVERED PROVIDER.—The term 'covered provider' means a provider of an interactive computer service that—

"(I) is a social media platform; and

"(II)(aa) earned not less than $250,000,000 in revenue in the preceding 12-month period, including affiliate revenue; or

"(bb) had not fewer than 10,000,000 global monthly active users for at least 3 of the preceding 12 months.

"(iv) INFORMATION.—The term 'information' means lawful expression protected by the First Amendment to the Constitution of the United States.

"(v) NATIONAL SECURITY PURPOSE.—The term 'national security purpose' means, with respect to a communication, that the purpose of the communication relates to—

"(I) intelligence activities;

"(II) cryptologic activities that relate to the national security of the United States;

"(III) command and control of the Armed Forces;

"(IV) equipment that is an integral part of a weapon or a weapons system; or

"(V) the direct fulfillment of a military or intelligence mission.

"(vi) PROHIBITED CONTENT ACTION.—

"(I) IN GENERAL.—The term 'prohibited content action' means a content action taken by the provider of an interactive computer service that—

"(aa) directly or indirectly affects information provided by

an information content provider to the interactive computer service; and

"(bb) is taken as a result of an agency, an officer or employee of the United States under color or pretense of office or employment, or a nongovernmental entity acting at the request or behest of such an agency, officer, or employee, taking or attempting to take an adverse action, implying the possibility of taking such action, or threatening to take such action for the purpose of, or if a reasonable person would understand the action to be for the purpose of, incentivizing the provider to take the content action.

"(II) FACTORS.—In determining for purposes of subclause (I)(bb) whether an action (including an attempted, implied, or threatened action) of an agency, officer, employee, or nongovernmental entity was for the

purpose of, or a reasonable person would have understood the action to be for the purpose of, incentivizing the provider of an interactive computer service to take a content action, a court shall consider the totality of the circumstances, including—

"(aa) the word choice and tone of any relevant communication from the agency, officer, employee, or nongovernmental entity;

"(bb) the existence of any Federal regulatory or enforcement authority over the recipient of any relevant communication from the agency, officer, employee, or nongovernmental entity;

"(cc) whether any relevant communication from the agency, officer, employee, or nongovernmental entity referred to adverse consequences to the recipient;

"(dd) whether any relevant communication from the agency, officer, employee, or nongovernmental entity was private or public;

"(ee) whether any relevant communication from the agency, officer, employee, or nongovernmental entity included an affirmative disclaimer that the communication lacked legal force;

"(ff) whether any relevant communication from the agency, officer, employee, or nongovernmental entity included a factual statement without legal force that could be useful to the decision-making of the recipient;

"(gg) whether any relevant communication from the agency, officer, employee, or nongovernmental entity was for the purpose of aiding compliance with existing law; and

"(hh) whether any relevant communication from the agency, officer, employee, or nongovernmental entity led the recipient to act contrary to its own policies.

"(III) EXCEPTIONS.—The term 'prohibited content action' does not include a content action taken as a result of an action, a threat to take action, a direction, or a communication that is—

"(aa) an action that is taken pursuant to a lawful investigation under, or the enforcement of, Federal law;

"(bb) an action or threat to take action authorized by a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

"(cc) a direction from an agency, an officer or employee of the United States, or a non-governmental entity acting at the request or behest of such an agency, officer, or employee, to the provider of an interactive computer service to take an action directly relating to the Federal Government's own information provided to the provider; or

"(dd) a communication related to a national security purpose.

"(vii) RECOMMENDATION SYSTEM.—The term 'recommendation system' means a fully or partially automated system used by an interactive computer service to suggest, promote, or rank information provided by an information content provider.

"(viii) SOCIAL MEDIA PLATFORM.—

"(I) IN GENERAL.—The term 'social media platform' means a website, online service, online application, or mobile application that—

"(aa) serves the public; and

"(bb) primarily provides a forum for user-generated content, including messages, videos, images, games, and audio files.

"(II) EXCLUSIONS.—The term 'social media platform' does not include the following:

"(aa) A telecommunications service.

"(bb) Electronic mail.

"(cc) A website, online service, online application, or mobile application—

"(AA) that consists primarily of content that is not user generated but is preselected by the provider of such website, online service, online application, or mobile application; and

"(BB) for which any chat, comment, or interactive functionality is incidental to, directly related to,

or dependent on the provision of the content described in subitem (AA).

"(B) LOSS OF PROTECTION.—If a covered provider takes a prohibited content action, this subsection shall not be available as an affirmative defense to any claim that—

"(i) directly arises from the prohibited content action; and

"(ii) is brought against the covered provider by the information content provider who provided the information subject to the prohibited content action, including in a civil action brought pursuant to subparagraph (C).

"(C) PRIVATE RIGHT OF ACTION.—

"(i) IN GENERAL.—It shall be unlawful for a covered provider to take a prohibited content action.

"(ii) CIVIL ACTION.—If a covered provider takes a prohibited content action, the information content provider that provided the information subject to the prohibited content action may bring a civil action in

an appropriate district court of the United States against the covered provider.

"(iii) RELIEF.—In a civil action brought under clause (ii)—

"(I) the applicable information content provider may obtain—

"(aa) with respect to a prohibited content action to which any of subclauses (I) through (IV) of subparagraph (A)(ii) applies—

"(AA) the greater of statutory damages of $1,000,000 or 3 times the amount awarded in compensatory damages under item (cc); and

"(BB) punitive damages in an amount that is not more than 5 times the amount awarded under subitem (AA);

"(bb) with respect to a prohibited content action to which

subparagraph (A)(ii)(V) applies—

"(AA) statutory damages of $5,000; and

"(BB) punitive damages in an amount that is not more than $10,000;

"(cc) compensatory damages; and

"(dd) the cost of the civil action, including reasonable attorney fees and other litigation costs (including expert fees), reasonably incurred; and

"(II) the court may, in addition to any other relief available at law, grant preliminary or equitable relief that may be appropriate.

"(iv) CONSIDERATION OF GOVERNMENT CONDUCT.—When awarding punitive damages under clause (iii), in addition to any other evidence or factor, the court shall—

"(I) consider as a mitigating factor the severity of the conduct en-

gaged in by an agency, an officer or employee of the United States, or a nongovernmental entity acting at the request or behest of such an agency, officer, or employee to induce the applicable prohibited content action, including the nature of the adverse action, the likelihood that the adverse action would be taken against the applicable covered provider, and the degree of harm that the adverse action, if taken, would cause the applicable covered provider;

"(II) in carrying out subclause (I), analyze the factors described in subparagraph (A)(vi)(II) with respect to the conduct engaged in by an agency, an officer or employee of the United States, or a nongovernmental entity acting at the request or behest of such an agency, officer, or employee;

"(III) consider as an aggravating factor the applicable covered provider not resisting or not objecting to the

conduct engaged in by an agency, an officer or employee of the United States, or a nongovernmental entity acting at the request or behest of such an agency, officer, or employee to induce the applicable prohibited content action, if the court first determines that the covered provider would not have taken the prohibited content action but for that conduct;

"(IV) consider as a mitigating factor the applicable covered provider resisting or objecting to the conduct engaged in by an agency, an officer or employee of the United States, or a nongovernmental entity acting at the request or behest of such an agency, officer, or employee to induce the applicable prohibited content action; and

"(V) consider as a mitigating factor the applicable covered provider disclosing to an information content provider subject to the applicable prohibited content action the existence of the conduct engaged in by an agency,

an officer or employee of the United States, or a nongovernmental entity acting at the request or behest of such an agency, officer, or employee to induce the applicable prohibited content action before that information content provider brought the civil action relating to that prohibited content action.

"(v) PRETRIAL MOTION FOR LIMITED DISCOVERY.—

"(I) IN GENERAL.—If a party to a civil action brought under this subparagraph moves to dismiss the action under paragraph (1) or (6) of Rule 12(b) of the Federal Rules of Civil Procedure, or moves to dismiss the action for lack of standing—

"(aa) the party that opposes that motion to dismiss may file a pretrial motion for limited discovery; and

"(bb) the court shall grant a pretrial motion for limited discovery described in item (aa) un-

less the court determines that the civil action is frivolous.

"(II) LIMITATION.—If a court grants a pretrial motion for limited discovery under subclause (I), the court shall enter an order limiting that discovery to—

"(aa) a period of not more than 30 days; and

"(bb) evidence (including from any relevant agency, officer or employee of the United States, or nongovernmental entity allegedly acting at the request or behest of such an agency, officer, or employee) that permits the party that did not move to dismiss the civil action to respond to the merits of the motion to dismiss.

"(III) EXTENSION.—A court that has entered an order under subclause (II) may—

"(aa) upon request, hold a hearing to determine whether to

extend discovery by not more than 1 additional 30-day period; and

"(bb) for good cause shown by the party seeking an extension described in item (aa), extend discovery, as described in that item.

"(vi) NO IMMUNITY FROM LIABILITY FOR SUBJECTIVE BELIEF OF UNPROTECTED SPEECH.—No party to a civil action brought under this subparagraph shall be immune from liability on the basis of a finding that the party had a subjective belief that the information that is the subject of the claim in the civil action was not lawful expression protected by the First Amendment to the Constitution of the United States.

"(vii) FEE SHIFTING FOR FRIVOLOUS ACTIONS.—If a court determines that a civil action brought under this subparagraph is frivolous, the court shall order the information content provider who brought the action to pay the covered provider that

is the defendant in the action the cost of the civil action, including reasonable attorney fees and other litigation costs reasonably incurred.

"(D) INFLATION ADJUSTMENT.—In applying any dollar amount under this paragraph, a court shall adjust that amount to reflect the cumulative increase, if any, in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor during the period beginning on the date of enactment of this paragraph and ending on the date on which the court applies that amount.".