

Date of Hearing: June 13, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

SB 60 (Umberg) – As Amended June 8, 2023

SENATE VOTE: 39-0

SUBJECT: Social media platforms: controlled substances: order to remove

SYNOPSIS

This straightforward measure would authorize a person to seek a court order requiring social media platforms, as defined, to remove specified content that includes an offer to transport, import into this state, sell, furnish, administer, or give away a controlled substance in violation of an existing Code provision that declares it a felony to make such offers.

The bill is motivated by an ever-growing number of drug overdoses resulting from on-line sales of illegal drugs. Data from the National Center for Health Statistics indicates that 106,999 Americans died of drug-involved overdoses in 2021. Over 70,000 of those overdose deaths were due to synthetic opioids, primarily fentanyl. Social media platforms provide an easy, convenient method of connecting with strangers or acquaintances who distribute and sell illegal drugs. Because the clientele of many social media platforms skews younger, this distribution channel has been especially harmful to teens and young adults.

The bill amends a chapter of the Business and Professions Code that addresses drug safety policies on social media platforms. It will be limited to platforms operated by businesses with over \$100 million in gross annual revenues in the preceding year. The bill would require a person, prior to filing suit, to use any mechanism provided on the social media platform for reporting illegal or harmful content or behavior; if the social media platform removes the offending content within 48 hours of the report, the court could then dismiss the suit. The cause of action created by this bill will sunset along with the remainder of the chapter, on January 1, 2028.

This bill is supported by the Orange County Sheriff's Department and opposed by the Chamber of Progress.

If passed by this Committee, the bill will next be heard by the Assembly Judiciary Committee.

SUMMARY: Authorizes a person to seek a court order requiring a social media platform, as defined, to remove content that includes an offer to sell, transport, or otherwise provide specified controlled substances. Specifically, **this bill:**

- 1) Authorizes a person to seek a court order requiring a social media platform to remove content that includes an offer to transport, import into this state, sell, furnish, administer, or give away a controlled substance in violation of a Health and Safety Code provision that declares it a felony to make such offers.

- 2) Requires, if a social media platform has a reporting mechanism for illegal or harmful content or behavior, that a person use the mechanism to notify the platform of the content and request that it be removed prior to bringing an action under 1).
- 3) Provides, if a person provides notice to a social media platform and requests removal, the following:
 - a) The court may not issue a ruling on the request for an order to remove content under 1) until at least 48 hours have passed since the person used the social media platform's reporting mechanism.
 - b) The court may dismiss an action seeking an order to remove content under 1) if the social media platform deletes the relevant content before 48 hours have passed since the person used the social media platform's reporting mechanism.
- 4) Permits a person to bring an action for an order to remove content under 1), and the court to rule on the request, at any time if the social media platform does not have a reporting mechanism for illegal or harmful content or behavior.
- 5) Provides that a court shall award court costs and reasonable attorney's fees to a prevailing plaintiff.
- 6) Provides that a court may award reasonable attorney's fees to a prevailing defendant if the court finds that the plaintiff's prosecution of the action was not in good faith.
- 7) Adds the foregoing to a chapter of the Business & Professions Code addressing drug safety policies on social media platforms.

EXISTING LAW:

- 1) Makes it a felony, with exceptions for medical purposes, to transport for sale, import into the state, sell, furnish, administer, or give away, or to offer to do any of these things, or to attempt to import into the state or transport, any of the following: (Health and Saf. Code § 11352.)
 - a) Opiates, including fentanyl. (Health & Saf. Code §§ 11054(b), 11055(c).)
 - b) Opium derivatives. (Health & Saf. Code § 11054(c).)
 - c) Depressants. (Health & Saf. Code § 11054(e).)
 - d) Cocaine base. (Health & Saf. Code § 11054(f)(1).)
 - e) Mescaline. (Health & Saf. Code § 11054(d)(14).)
 - f) Peyote. (Health & Saf. Code § 11054(d)(15).)
 - g) Tetrahydrocannabinols. (Health & Saf. Code § 11054(d)(20).)
 - h) Opium and identified variants, hydrocodone, hydromorphone, metopon, morphine, oxycodone, oxymorphone, and thebaine. (Health & Saf. Code § 11055(b).)

- i) Certain hallucinogenic substances. (Health & Saf. Code § 11056(h).)
- 2) Defines “content” as statements or comments made by users and media that are created, posted, shared, or otherwise interacted with by users on an internet-based service or application. (Bus. & Prof. Code § 22945(a)(1)(A).)
- 3) Excludes from the definition of “content” media put on a service or application exclusively for the purpose of cloud storage, transmitting files, or file collaboration. (Bus. & Prof. Code § 22945(a)(1)(B).)
- 4) Defines “controlled substance” as a drug, substance, or immediate precursor which is listed in specified sections of the Business and Professions Code. (Bus. & Prof. Code § 22945(a)(2).)
- 5) Defines “social media platform” as a public or semipublic internet-based service or application that has users in California and that meets both of the following criteria:
 - a) A substantial function of the service or application is to connect users in order to allow them to interact socially with each other within the service or application. (A service or application that provides email or direct messaging services does not meet this criterion based solely on that function.)
 - b) The service or application allows users to do all of the following:
 - i) Construct a public or semipublic profile for purposes of signing into and using the service or application.
 - ii) Populate a list of other users with whom an individual shares a social connection within the system.
 - iii) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users. (Bus. & Prof. Code § 22945(a)(3).)
- 6) Requires social media platforms to create, and publicly post on the platform’s internet website, a policy statement that includes all of the following:
 - a) The social media platform’s policy on the use of the platform to illegally distribute a controlled substance.
 - b) A general description of the platform’s moderation practices employed to prevent users from posting or sharing electronic content pertaining to the illegal distribution of a controlled substance. However, this description must not include information that might compromise operational efforts to identify prohibited content or user activity, or otherwise endanger user safety.
 - c) A link to mental health and drug education resources provided by governmental public health authorities.
 - d) A link to the social media platform’s reporting mechanism for illegal or harmful content or behavior, if one exists.

- e) A general description of the platform's policies and procedures for responding to law enforcement inquiries, including warrants, subpoenas, and other court orders compelling the production of or access to electronic communication information, as that term is defined under the California Electronic Communications Privacy Act (CalECPA). (Bus. and Prof. Code § 22945(b).)
- 7) Allows the policy statement required by 6) to be posted separately or incorporated within another document or post, including the platform's terms of service or community guidelines. (Bus. and Prof. Code § 22945(c).)
- 8) Requires a person or entity operating a social media platform to update as necessary the policy statement required by 6). Encourages platforms to consult with specified stakeholders to assist in developing and supporting the policy statement. (Bus. and Prof. Code § 22945(d).)
- 9) Applies the foregoing only to a business that generated \$100 million or more in gross revenue in the preceding calendar year. (Bus. and Prof. Code § 22945(e).)
- 10) Sunsets the foregoing as of January 1, 2028. (Bus. and Prof. Code § 22945(f).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS:

1) **Background.** Data from the National Center for Health Statistics indicates that 106,999 Americans died of drug-involved overdoses in 2021. (National Institutes of Health, National Institute on Drug Abuse, *Drug Overdose Death Rates* (Feb. 9, 2023), available at <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates>.) Over 70,000 of those overdose deaths were due to synthetic opioids, primarily fentanyl.

This epidemic of overdoses is exacerbated by the ability of interested parties to use social media platforms to connect with strangers or acquaintances who distribute and sell opioids, making illegal drugs easier and more convenient to purchase. Because the clientele of many social media platforms skews younger, this distribution channel has been especially harmful to teens and young adults. According to a 2021 *Washington Post* article:

DEA Administrator Anne Milgram specifically called out Snapchat and TikTok, two apps that are popular with teenagers and young adults, for not doing more to combat sales....

For years, illegal drug sales have been a scourge on Facebook, Snapchat, TikTok and other social media apps. Companies have repeatedly said they're working to rid their sites of drug deals by hiring extra moderators, using artificial-intelligence algorithms to root out illegal material and limiting searches for keywords related to drugs. But prescription and other drugs can still easily be found for sale. [...]

The public health crisis is renewing calls from not just law enforcement groups but concerned parents and researchers for the social media companies to do more. They want the companies to be more transparent about what's happening on their platforms.... (Lerman & De Vynck, *Snapchat, TikTok, Instagram face pressure to stop illegal drug sales as overdose*

deaths soar, Washington Post (Sep. 28, 2021), available at <https://www.washingtonpost.com/technology/2021/09/28/tiktok-snapchat-fentanyl/>.)

Last year's AB 1628 (Ramos, Chap. 432, Stats. 2022) was enacted in response to such calls for transparency in social media platforms' practices. The bill required each large social media platform to publicly post on its internet website a policy statement containing information such as (i) the platform's policy on the use of the platform to illegally distribute a controlled substance; (ii) a description of the platform's moderation practices employed to prevent users from sharing content regarding illegal distribution of a controlled substance; (iii) the platform's policies and procedures for responding to law enforcement inquiries, including warrants, subpoenas, and other court orders compelling production of electronic communications information; and (iv) a link to the platform's reporting mechanism for illegal or harmful content or behavior, if such a mechanism exists.

This bill would bolster AB 1628 by providing a means for a person to obtain a court order to remove content from large social media platforms in which specified controlled substances are offered for sale, transport, or other means of provision.

The bill is modeled on last year's SB 1056 (Umberg, Chap. 881, Stats. 2022), by the same author, which provided a means for a person who is the target of a violent post to obtain a court order requiring the social media platform to remove that post.

2) Author's statement. According to the author:

With the growth of social media and the proliferation of smartphones, a dangerous and deadly new drug threat has emerged: criminal drug networks that are abusing social media to expand their reach, create new markets, and target new clientele.

No longer confined to street corners and the dark web, criminal drug networks are now in every home and school in America because of the internet apps on our smartphones.

Drug traffickers solicit customers via social media platforms such as Snapchat, Facebook, Instagram, Twitter, TikTok, and YouTube. In addition, fentanyl and other drugs are often falsely marketed as legitimate prescription pills, but instead are counterfeit pills that are illicitly manufactured and are illegally distributed. Causing unintentional poisoning and drug overdoses.

As lawmakers, we have a moral, ethical, and legal obligation to protect lives in California. The scourge of synthetic opioids like fentanyl is unlike anything we have ever seen. We have lost more people to opioid overdose in the last year alone than the number of U.S. military personnel killed during the Korean, Vietnam, Iraq and Afghanistan wars combined—we cannot continue to throw up our hands in confusion while an entire generation of Americans perishes.

As a society, we bear a collective responsibility to care for the health and safety of our citizens. That responsibility extends to private companies. Social media companies find themselves in a unique position in terms of their monopolization of communication between people of all ages. With this in mind, companies and sites should be more proactive and aggressive in their enforcement of their terms of service, especially when it comes to prohibitions on drug sales. SB 60 is an attempt to stop drug traffickers from using social

media to distribute drugs and prevent unintentional overdoses. It will authorize a person to seek a court order requiring a social media platform to remove accounts pertaining to the sale of illegal drugs.

As the former Deputy Director of the White House Office of National Drug Control Policy, Chair of the Senate Judiciary Committee, a former U.S. Attorney, and a career prosecutor, I have dedicated my life to the equal pursuit of justice for all. Drug addiction, treatment, and rehabilitation will always be a focus for lawmakers as a consequence of drug use and addiction. In the meantime, we must do everything we can to prevent fentanyl poisonings and deaths in an effort to save the lives of Californians.

3) **What this bill would do.** This bill provides a narrow court remedy to ensure the removal of illegal offers to sell drugs on social media platforms (those operated by businesses with more than \$100 million in revenue in the preceding year). If a person finds content on such a platform that includes an offer to transport, import into the state, sell, furnish, administer, or give away a controlled substance, as defined (“drug trafficking content”) and wishes to have that content removed, this bill would provide that person the following process to use:

1. The person must check whether the platform has a mechanism to report illegal or harmful content or behavior. If so, then the person must first use this mechanism to notify the platform of the content and request that it be removed.
2. The person can file a lawsuit seeking a court order to have the drug trafficking content removed.
3. If the person provided notice of the drug trafficking content to the platform, the court must wait at least 48 hours from provision of notice to rule on the request for an order.
4. If the platform deletes the drug trafficking content before 48 hours have passed, the court may dismiss the action.
5. The court must award reasonable attorney fees to a prevailing plaintiff.
6. Alternately, if the court rules against the plaintiff, the court may award reasonable attorney fees to the defendant if the court determines that the plaintiff’s prosecution of the action was not in good faith.

4) **Analysis.** This bill should enable social media platforms to promptly remove drug trafficking content of which they were unaware. Social media companies contend that they are taking significant steps to curtail drug trafficking on their platforms. For example, “Snap said it took action on 144,000 drug-related accounts in the United States from July to December [2021]. That figure doesn’t include the 88 percent of drug-related content that was pre-emptively detected by artificial intelligence software, which monitors terms that could signify drug deals.” (Hoffman, *Fentanyl Tainted Pills Bought on Social Media Cause Youth Drug Deaths to Soar*, New York Times (May 19, 2022), available at <https://www.nytimes.com/2022/05/19/health/pills-fentanyl-social-media.html>.) But, obviously, many illicit offers remain undetected. By enabling people who discover drug trafficking content to seek its removal, this bill should supplement and bolster the platforms’ own efforts in this regard.

In particular, this bill should incentivize the creation of reporting mechanisms for drug trafficking content on social media platforms. This bill would require that such content be reported before a lawsuit could be filed—but only if the platform provides a mechanism for reporting such content. These platforms would then have 48 hours to remove reported content before a court could rule on the lawsuit. Platforms without a reporting mechanism, by contrast, could be subject to an immediate lawsuit for removal of specific drug trafficking content.

The sole opposition to this bill is from the Chamber of Progress, a tech industry coalition. Several of the arguments in its opposition letter are discussed below.

First, the Chamber of Progress contends that under SB 60, “websites that fail to remove reported content risk incurring steep financial penalties.” But the bill does not provide for financial penalties. The sole remedies available under this bill are (i) injunctive relief, in the form of an order to remove drug trafficking content, and (ii) attorney’s fees and costs to a prevailing plaintiff. The latter will only be “steep” if a defendant contends that it need not remove reported content, engages in protracted litigation, and then loses the case. It is difficult to imagine this occurring in practice. If the content that is the subject of the case includes an offer to transport, import into this state, sell, furnish, administer, or give away one of the designated controlled substances, the defendant can promptly remove the content and thereby end the lawsuit.

Next, the opposition claims that this bill “could force websites to remove life-saving resources and addiction recovery materials, defeating its very purpose.” But, again, the bill only requires removal of content on a social media platform that is identified by a person seeking its removal, and then, only if the content includes an offer to transport, import into this state, sell, furnish, administer, or give away one of the designated controlled substances. If the social media platform includes a reporting mechanism, the platform need only respond to the reports being made through that mechanism to end litigation over the content. And if it turns out that the reported content is actually beneficial, e.g., it provides information about Narcan or addiction recovery, then the platform need not remove the content and is likely entitled to its attorney fees if the plaintiff persists with a lawsuit.

5) Potential constitutional and federal preemption concerns. Legislation that seeks to regulate content on the internet, as this bill would, must be weighed against the protections for freedom of speech enshrined in the United States and California constitutions. (U.S. Const., 1st Amend; Cal. Const., art 1, § 2.) First Amendment protections do not extend to offers to sell controlled substances. “[O]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.” (*U.S. v. Williams* (2008) 553 U.S. 285, 297.) Moreover, while “[a]s a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart,” (*Griset v. Fair Political Practices Comm’n.* (1994) 8 Cal. 4th. 851, 866 n. 5), California courts have recognized that “speech which is integral to criminal conduct is not constitutionally protected.” (*Larson v. City and County of San Francisco* (2011) 192 Cal. App. 4th 1263, 1285.) Accordingly, this bill does not appear to present a facial violation of free speech guarantees under either the federal or state constitutions.

This Committee’s prior analysis of SB 1056 (Umberg, Chap. 881, Stats. 2022) (authorizing courts to order social media platforms to remove content containing violent threats) noted the risk of preemption of that bill by Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230. Enacted in the 1990s, Section 230 insulates interactive computer service providers, such as social media platforms, from liability for material posted by their users in two ways:

(1) it prohibits an interactive computer service provider from being treated as the publisher or speaker of information provided by users, and (2) it clarifies that, if a service provider engages in content moderation of objectionable content, it does not lose its protection under part (1). “The touchstone of section 230...is that providers of interactive computer services are immune from liability for content created by third parties.” (*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2007) 489 F.3d 921, 925, *aff’d en banc* (9th Cir. 2008) 521 F.3d 1157.) There are limits to Section 230, however; the law is “not meant to create a lawless no-man’s-land on the Internet.” (*Ibid.*, 521 F.3d at 1164.)

SB 1056 took effect on January 1, 2023. The schema that bill provided for removing violent posts—requiring users to utilize any available mechanism for reporting such posts; providing a 48-hour window for social media platforms to remove reported content; providing for attorney’s fees and costs to prevailing plaintiffs—is quite similar to the mechanism this bill provides for removing drug trafficking content. The Committee is unaware of any litigation challenging SB 1056’s legality; research has failed to uncover any pending or decided case addressing the issue. The absence of such litigation suggests that the mechanism authorized by both bills may survive challenge under Section 230.

Moreover, as noted by the Senate Judiciary Committee in its analysis of the present bill:

This bill does not seek to hold social media platforms liable as the publisher or speaker of third-party offers to sell drugs on their sites. Instead, the bill provides law enforcement and users one more means to shut down the posts that offer to sell illegal drugs, allowing them to obtain an order requiring the social platform to take down [a] post that sells drugs.

Accordingly, it appears that this bill fits in the narrow window of action that a party can take against a social media platform under the state and federal courts’ interpretation of Section 230, and therefore is not clearly preempted by federal law.

6) **Related legislation.** AB 1027 (Petrie-Norris, 2023) would require a social media platform to publicly post on its internet website a general description of its policy regarding the retention of electronic communication information, including how long the platform retains that information. Status: Senate Judiciary Committee.

AB 587 (Gabriel, Chap. 269, Stats. 2022) required social media companies, as defined, to post their terms of service in a manner reasonably designed to inform all users of specified policies and further required social media companies to submit specified semiannual reports to the Attorney General, starting January 1, 2024.

AB 1628 (Ramos, Chap. 432, Stats. 2022) required social media platforms, as defined, that operate in this state to create and publicly post policy statements including specified information regarding platforms’ use to illegally distribute controlled substances.

SB 1056 (Umberg, Chap. 881, Stats. 2022) required social media platforms, as defined, to clearly and conspicuously state whether they have mechanisms for reporting violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed.

AB 1114 (Gallagher, 2021) would have required a social media company located in California to develop a policy or mechanism to address content or communications that constitute unprotected speech, including obscenity, incitement of imminent lawless action, and true threats, or that

purport to state factual information that is demonstrably false. AB 1114 died in the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

SB 890 (Pan, 2020) would have required social media companies to remove images and videos depicting crimes, as specified, and imposed civil penalties for failing to do so. SB 890 died in the Senate Judiciary Committee.

ARGUMENTS IN SUPPORT: The Orange County Sheriff's Department explains how this bill will aid its strategy to reduce fatalities stemming from online drug sales:

Over the past few year the Orange County Sheriff's Department has employed a new strategy for investigating drug-related deaths. Past practice for drug-related deaths primarily involved a coroner review of the death, with little to no attempt to identify the source of the lethal drug. Now drug-related deaths in Sheriff's jurisdiction are investigated with the intent of identifying the drug's supplier for prosecution. In a substantial amount of the cases we have investigated, social media was the means for making a drug sale. By allowing a person to seek a court order requiring a social media platforms to remove content pertaining to the sale of illegal drugs, SB 60 will help reduce the prevalence of this illicit and deadly commerce.

ARGUMENTS IN OPPOSITION: The Chamber of Progress argues that this bill will lead to removal of non-objectionable content:

Regulations that impose a notice-and-takedown scheme on Internet websites routinely result in the over removal of content. [...] However, websites that remove non-violating content simply risk removing access to a credible resource. Hence, notice-and-takedown statutes encourage websites to remove first and ask questions later; a result that is not always in the best interest of the websites' users.

REGISTERED SUPPORT / OPPOSITION:

Support

Orange County Sheriff's Department

Opposition

Chamber of Progress

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