TEXAS CIVIL JUSTICE LEAGUE

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November 18, 2024

The Honorable Giovanni Capriglione
Texas House of Representatives
POB 2910
Austin, TX 78768

Subject: TCJL Comments on Proposed AI Legislation

Dear Mr. Chairman:

On behalf of the members of the Texas Civil Justice League ("TCJL"), thank you for the opportunity to provide comments on the draft legislation regulating the development and use of certain artificial intelligence ("AI") systems. We appreciate being included in the discussions about the proposed legislation and look forward to working with you during the upcoming session on the right solution for Texas.

As you know, TCJL is the nation's oldest state civil justice reform organization. Formed in 1986, TCJL has played a part in every significant legislative initiative that implicates the civil justice system since that time. TCJL members include industry, trade, and professional associations, as well as individual businesses with substantial capital investments in Texas. Our members provide the critical infrastructure products and services necessary to fuel the Texas economy in the very sectors of the economy primarily addressed by this legislation.

We will discuss each of these areas in detail below, but here are our five key takeaways as you continue to develop this comprehensive AI legislation:

1. The legislation should make a distinction between the regulation of machine-only decision-making and decisions made with human intervention. Significant laws and regulations already exist for prohibited human behavior.
2. The legislation should distinguish between industries and businesses that are already regulated by federal, state, and local laws and should be revised only to cover entities that the government doesn't already highly regulate.
3. The bill should distinguish between businesses that develop and use artificial intelligence in their own operations and those whose actual business is developing, distributing, deploying or selling AI.
4. The proposed private right of action does nothing but encourage unnecessary litigation and should be eliminated from the legislation.
5. The definitions in the legislation should be tightened to specify the entities and activities the legislature seeks to regulate.

Conceptual Concerns

During the work of the select committee on this draft, we understood that a distinction was being made between an AI system that uses a discriminatory algorithm to make a consequential decision and a system that a natural person uses to assist that person in making a consequential decision. The legislation, however, does not make this distinction. It applies to AI systems regardless of whether the machine or the human does the decision-making, as long as the system is a “contributing factor” to the decision. Does the legislation intend this result? If it does, businesses that have long used AI tools in their operations to assist them in making critical decisions will now have the burden of a raft of new regulations and potential liability for systems that no one has ever complained about or that have made no decisions at all, consequential or otherwise. In other words, businesses will become subject to regulation of their AI use based on no evidentiary finding that demonstrates an abuse that warrants the regulation to begin with. While it is laudable to attempt to put guardrails on the development of increasingly “human-like” AI systems going forward, there doesn’t seem to be any rationale for forcing complicated, expensive, and burdensome compliance requirements on businesses that haven’t done anything wrong.

As currently proposed, this legislation will have retroactive effect, even though the effective date appears to be September 1, 2025. In other words, businesses that will become subject to the statute on that date will be responsible for the compliance of systems that may have been in place for years or even decades. Is this the intent of the legislation? This result could easily be avoided by applying the law only to AI systems developed or deployed on or after whatever date the Legislature chooses.

Regulated Industries

The vast majority of TCJL members represent industries that are heavily regulated at both the federal and state levels, including telecommunications, electricity, oil and gas, manufacturing, health care, financial services, insurance, housing, food, transportation, and water. They are thus accustomed to complying with statutory and regulatory mandates backed by agency rulemaking and administrative processes that balance the state’s interest in regulating certain business activities with the private sector’s need for the predictable application of transparent and precise rules. They are also accustomed to operating within a regime of administrative and civil penalties for statutory and regulatory violations, provided that the authorizing statute clearly identifies punishable conduct and provides robust due process protections in accordance with the Administrative Procedures Act (“APA”) and well-settled principles of administrative law. Our analysis of the proposed legislation proceeds based on this framework.

Given the immense scope and complexity of the legislation, we have been unable to conduct the comprehensive analysis that the legislation deserves within the time constraints you are facing in terms of the legislative calendar. Please bear with us in our initial identification of areas of concern, as we have not yet had time to receive and assimilate comments from all of our members who will be affected (and that is *all* of our members). Our initial comments, consequently, may be somewhat provisional at this point, pending receipt of more input and additional analysis as we go forward. In this letter, we will address both the legislation’s larger legal and policy issues and, to the extent to which we are capable at this time, some of its specific provisions that raise particular concerns.

Constitutional Concerns

1. The Bill of Rights. We believe that the legislation may infringe First Amendment and Article I, § 8, Texas Constitution, especially when it purports to bar certain "techniques" that could be construed to involve protected speech. For example, the proposal bars the use of "subliminal" techniques "beyond a person's consciousness." *All* advertising, no matter the medium, makes use of "subliminal" techniques consisting of certain images, colors, and sound. We recognize that the proposal aims at AI making "consequential decisions," but several of those enumerated involve consumer goods and services that are widely advertised, such as food, insurance, health care, financial services, and legal services. While commercial speech can be regulated under the First Amendment, such speech, for example, must generally be deceptive or misleading or promote an illegal product or service. Texas law already regulates commercial speech under these circumstances, but this legislation goes much further in that it regulates certain categories of commercial speech simply by virtue of their existence.

2. Substantive due process. The question here is whether the legislation may have the effect of depriving a person of "life, liberty, or property" without due process of law in violation of the Fifth and Fourteenth Amendments, as well as of Article I, § 19, Texas Constitution. Unquestionably, the proposal will have pervasive economic effects on developers, distributors, deployers, internet service providers, and social media platforms. Because of its broad coverage and general provisions intended to apply across all business and industry, the legislation could in certain cases run afoul of the Texas Supreme Court's decision *Patel v. Tex. Dep't of Licensing*, 469 S.W.3d 69 (Tex. 2015). The Court held that while statutes "are presumed to be constitutional," the presumption may be overcome if "*the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement [] demonstrate[s] that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.*"

   We don't doubt that the legislation as a whole passes the "rational relation" test, but how it might fare in an "as-applied" challenge under the second part of the test is far less clear. The *Patel* case speaks to overregulation that is not targeted to a specific business or occupational activity or regulations whose provisions are so burdensome and unclear that, in some cases at least, a party can successfully argue that no rational basis exists for the application of the law to that party. In other words, if a statute, particularly a penal statute like this one, is very broadly written and not fine-grained enough to inform a party of how it applies to that party's individual case, it may well run afoul of *Patel* and the due process provisions of the federal and Texas constitutions. Consequently, in our view, it could deprive certain parties of their property without due process of law.

3. Procedural due process. From our perspective, the proposal may impair the due process protections of the Fifth and Fourteenth Amendments, as well as Article I, § 19, Texas Constitution, in its delegation of enforcement authority to the attorney general. While statutes frequently delegate enforcement powers to the executive branch agencies, this legislation confers broad civil investigative demand and punitive authority without a corresponding administrative process (including administrative "fines" without reference to an administrative process), the

procedural protections of the APA, or the right of a regulated entity to appeal based on a well-developed administrative record. Instead, it generally subjects potential violators to a prosecutorial action aimed to correct their behavior at the risk of substantial fines and penalties.

We are especially concerned about the legislation's grant of civil investigative demand (CID) authority, which would allow the attorney general to conduct pre-litigation discovery without the target of the investigation's knowledge. If the attorney general has reason to believe that an entity has violated the statute, why not simply authorize a cease-and-desist order followed by an investigation and, if warranted, an appropriate enforcement action? We recognize that the legislation provides a right to cure within 30 days, but it seems highly unlikely that an AI system that may have taken years to develop can be "cured" that quickly. In other words, the legislation creates an almost impossible "gotcha" for businesses. They can be subjected to an extensive, lengthy, and potentially secretive investigation in which they have been given no opportunity to participate, at the conclusion of which the attorney general may serve a 30-day pre-suit notice of violation. With no realistic opportunity to cure, the business will find itself facing penalties and fines of unknown magnitude without ever having had a reasonable chance voluntarily to comply with the statute. Again, we question whether this unpredictable risk can be adequately insured against. This scenario does not, in our view, comport with the spirit of the Constitution's due process guarantees. It also does nothing to promote the legislation's objective to establish reasonable compliance standards and to assist businesses in ensuring good faith compliance. As it is currently drafted, however, the legislation presents businesses with a trap designed to *punish* them even when a less punitive enforcement mechanism would accomplish the statute's goals.

The legislation also strips potential defendants of certain common-law defenses in a private right of action (this point is addressed further below), thus depriving a defendant of the ability of a full defense in the event of litigation. Whether this aspect of the legislation rises to the level of a violation of procedural due process we leave to people with more expertise in the subject, but in general legislation that deprives a party of a defense that the party would have in any other civil proceeding is very problematic.

4. Separation of powers. The legislation bars a court from construing the statute to adversely affect rights and freedoms of a person, including the right of free speech. Under any construction of the federal and Texas constitutions, this provision breaches the fundamental separation of the legislative and judicial functions. By making the Legislature the sole judge of the constitutionality of the statute, the legislation contradicts basic constitutional doctrine, reduces an independent judiciary to subordinate and dependent status, and violates the right of every Texan to challenge the constitutionality of a statute that directly affects their lives and livelihoods.

5. Regulation by Litigation. We would argue further that the proposal violates separation of powers, at least in principle, because it delegates to the courts the task of regulating the development and use of a product that has a pervasive presence in our economy and society. We do not ask courts, for example, to grant or deny environmental permits, keep the power on, license or discipline health care providers, plug orphan wells, run elections, administer the tax system, police state roads and highways, manage state construction projects—the list goes on. We have existing regulatory agencies to do those things, and a big part of their job is to assure that businesses operate in compliance with the law and remediate the situation if they do not. The legislation, however, turns this job over to the attorney general in the first instance and to the courts in the second, because eventually the courts will have to decide whether a party has actually violated the statute and earned the hefty penalty the attorney general metes out. In short, the legislation

imposes a form of "regulation by litigation" that cannot but result in selective, inequitable, and patchwork enforcement. This problem could be avoided if the legislation assigned to each relevant state agency the authority to adopt rules, standards, and practices for high-risk AI in their respective sectors of the economy. Doing it this way will promote the development of a uniform law over time as it applies to a specific regulated entity. It would also make use of existing civil and administrative penalty authority without layering on yet another level of liability. As the legislation stands right now, the "law" will consist of one-off enforcement actions that do little to inform regulated entities of regulatory expectations and specific standards of conduct that can be complied with.

Civil Justice System Concerns

1. New Private Right of Action. The legislation authorizes a consumer to sue a developer or deployer for declaratory and injunctive relief, costs, and attorney's fees. It also gives a consumer the right to obtain from a deployer "clear and meaningful explanation" of the role of a high-risk system in a "decision-making procedure and the main elements of the decision taken." Whatever that might mean in practice, the "right to an explanation" imposes an expansive new duty on *employers* (and others) within the context of the private right of action. More generally, the proposal creates approximately *28* new statutory duties, the alleged violation of any one of which may create the basis for a private lawsuit.

2. Class/Mass Actions. Perhaps the most troubling aspect of the private right of action, however, is that it lays the groundwork for class action or mass litigation against businesses with so-called "deep pockets." Based on this aspect alone, the legislation will undoubtedly stifle innovation because it creates an uninsurable risk in terms of the private right of action *in addition to* the unpredictability of the public enforcement mechanism. There is no better way to deter an entity from doing business in Texas than to subject it to regulatory uncertainty and potentially ruinous liability for civil and administrative fines, as well as endless lawsuits with attorney's fees attached to them.

3. Unfair Procedural Advantages. The legislation further authorizes a consumer to bring suit regardless of whether another court has enjoined the attorney general from enforcing the statute or declared any part of it unconstitutional. As alluded to above, it also bars a defendant from raising the defenses of nonmutual issue preclusion and nonmutual claim preclusion but does not likewise prohibit a *plaintiff* from asserting offensive collateral estoppel. In other words, the legislation enables a plaintiff to point to other judicial decisions that favor its position, while depriving a defendant of the same privilege.

4. Duplicative litigation. By the same token, the legislation raises the possibility that the same defendant could be sued by different plaintiffs (perhaps nominal plaintiffs) in jurisdictions all over the state for precisely the same conduct. As the legislation is currently drafted, the defendant would be faced with defending each of those lawsuits without reference to any of the others. Perhaps the multidistrict litigation court (MDL) process could mitigate this effect somewhat, but the MDL process is only for pretrial matters, leaving a defendant with the prospect of defending multiple identical lawsuits in 254 counties, nonetheless.

5. Duplicative Fines and Penalties. We alluded to this issue in the "regulation by litigation" section of our comments, but it presents serious practical and due process concerns for our members, so it bears investigation in more detail. The following is a partial list of federal and state statutes that, depending on the specific conditions, may apply to our members' business activities with respect to discriminatory, as well as false and deceptive, conduct.

    - Title VI of the Civil Rights Act of 1964 (42 USC § 2000d et seq.) (discrimination in programs/activities receiving federal assistance [includes subcontractors])
    - Age Discrimination Act of 1975 (42 USC § 6101)
    - Americans with Disabilities Act of 1990 (42 USC § 12101 et seq.)
    - Food and Nutrition Act of 2008 (7 USC 2011 et seq) (§ 6)
    - Title IX of Educational Amendments of 1972 (20 USC § 1681 et seq.) (sex discrimination in educational activities receiving federal assistance)
    - Civil Rights Restoration Act of 1987 (Pub. L. No. 100-259, 102 Stat. 28) (sex discrimination)
    - Ch. 106, TCPR (discrimination in licensing)
    - Texas Fair Housing Act (Ch. 301, Subch. B, Property Code) (housing discrimination)
    - Ch. 544, Insurance Code (insurance discrimination)
    - Texas Commission on Human Rights Act (Ch. 21, Labor Code) (employment discrimination)
    - The Equal Credit Opportunity Act (15 USC § 1691 et seq.)
    - Ch. 64, Utilities Code (discrimination by telecommunications providers)
    - Ch. 17, Utilities Code (discrimination by all utilities)
    - State Bar Act (Ch. 81, Subch. G, J, Government Code) (unauthorized practice of law; deceptive advertising)
    - Ch. 165, Subch. G, Occupations Code (criminal penalties for unauthorized practice of medicine)
    - 1 TAC ch. 395 (unlawful practices by HHSC vendors/contractors)
    - Deceptive Trade Practices Act (Ch. 17, Business & Commerce Code)
    - Uniform Fraudulent Transfer Act (Ch. 24, Business & Commerce Code)
    - Ch. 27, Business & Commerce Code (fraud in real estate and stock transactions)
    - Ch. 120, Business & Commerce Code (social media platforms)
    - Ch. 325, Business & Commerce Code (Internet fraud)
    - Ch. 501, Business & Commerce Code (driver's license and social security numbers)
    - Ch. 502, Business & Commerce Code (protection of identifying financial information)
    - Ch. 503, Business & Commerce Code (biometric identifiers)
    - Ch. 509, Business & Commerce Code (use of digital services by minors)
    - Ch. 521, Business & Commerce Code (unauthorized use of identifying information)
    - Ch. 541, Business & Commerce Code (consumer data protection)

    This legislation plainly overlaps existing statutes that seek to regulate the same or similar conduct (if performed by a "person") and impose similar civil and administrative penalties for violations. It is unclear to us why these existing laws are insufficient to guard against discriminatory and false and deceptive practices just because such practices are carried out by AI, with or without human assistance. The potential stacking of fines and penalties (along with attorney's fees and costs) seems not only unnecessarily punitive but counterproductive, if the goal is to *encourage* AI developers to place products in the marketplace that enhance efficiencies and reduce costs to businesses and consumers alike. We agree that additional legislation may be

necessary, for example, to protect minors or the integrity of elections. This legislation, however, covers every single business in Texas, unless excluded by the "small business exemption."

6. Discrimination Against "Large" Businesses. The legislation discriminates against any business that does not meet the definition of "small business" as determined by the U.S. Small Business Administration. Whether a business meets that definition depends on its NAICS industry description and the agency's determination of how "big," in terms of revenue or number of employees, a business can get before it is no longer "small." That definition is a moving target, so a business that is small today may be big tomorrow, and vice versa. Even more problematic, "small" businesses can still be plenty large enough to compete directly with businesses in the same sector of the economy but that exceed the revenue or employee count by $1 or 1 employee. It is simply unfair and discriminatory to use an arbitrary standard, such as the USSBA's definition, to determine whether a particular business must shoulder the very substantial compliance costs and potential liability imposed by this legislation. Moreover, a "small" business can produce a discriminatory algorithm that makes a consequential decision just as well as a "large" business can. The legislation may thus have an effect that contradicts its purpose: it incentivizes bad actors that are "small" while singling out "large" businesses for differential and, in some cases, punitive treatment.

Concerns with Specific Provisions

Again, legislation of this scope and complexity cannot easily be broken down section-by-section in a short timeframe. Nevertheless, we have attempted to identify particularly problematic provisions that, in our view, warrant further review and possible revision.

1. Negligence Standard. As noted above, the legislation creates at least 28 new statutory duties, many of which apply across-the-board to developers, distributors, and deployers. The primary duty is one of "reasonable care" to protect consumers from "known or reasonably foreseeable risks of algorithmic discrimination." In general, punitive statutes, including anti-discrimination statutes, require a showing that an alleged violator acted intentionally or knowingly before fines and penalties can attach. This legislation, by contrast, establishes a negligence standard. It may thus result in disparate application to individuals or entities who engage in the same conduct that would be actionable under this statute's standard but not under current antidiscrimination statutes.

   In a broader sense, the determination of a party's "negligence" involves an adjudicatory process with built-in procedural safeguards that ensure the proper application of the law to specific facts found by a judge or jury. That process also includes review by higher courts to make sure the trial court got it right. This legislation asks the attorney general to act as factfinder, judge, and enforcement mechanism all in one. In other words, the attorney general—not a jury of one's peers—will determine what "reasonable care" to protect against "known or reasonably foreseeable risks" actually means in each case. The attorney general will likewise be the sole judge of the weight and sufficiency of the evidence, as well as the credibility of the people who provided it. And he will do it without regard to the Texas Rules of Civil Procedure and Texas Rules of Evidence, among other safeguards of a litigant's rights. We have identified some of these concerns already in our discussion of due process, but the legislation's *liability standard*, when coupled with the very significant civil and administrative penalty authority that the legislation gives the attorney general, strips potential defendants of the civil justice framework

that enables them to defend themselves adequately against claims that do not meet evidentiary and legal sufficiency standards.

2. Definition of “artificial intelligence system.” The proposed definition uses terminology that requires further definition. First, we are not certain what “machine-based system” actually means, since pretty much every system necessary to operate a complex business at some level is “machine-based.” The qualifiers narrow the definition somewhat but are still vague and uncertain. What does it mean for a system to “perceive an environment through data acquisition and processing and interpreting derived information to take an action or to imitate intelligent behavior given a specific goal”? What “environment” exactly? Does the definition contemplate a system that “acquires,” “processes,” and “interprets” data on its own, through a human agent, or both? What does it mean for information to be “derived”? Put another way, where does “data” end and “information” begin? Isn’t “information” simply more “data”? And what does it mean for the system “to take an action”? Do systems really “act,” or do they just follow their programming? Even in an AI system that “learns” and, in that sense, builds its own understanding (of an “environment”?), isn’t the actual “actor” the designer or programmer that makes the system do what they want it to do? As to “imitating intelligent behavior,” what does “intelligent” mean? Does the definition contemplate the imitation of “human” intelligence? What makes a particular “behavior” intelligent? What if a designer builds a system that imitates “unintelligent” behavior, which might include, for example, an impulsive, automatic, or unthinking response on the part of the user? That system would look like “artificial intelligence,” but under this definition, it might not be.

3. Definition of “high-risk artificial intelligence system”. The proposed definition of “high-risk artificial intelligence system,” which incorporates enumerated areas defined as “consequential,” does not provide important clarity to potential developers, deployers or users of AI tools. This will likely result in decisions *not* to use AI due to the uncertainty the legislation would create regarding potential liability. The legislation is focused on as yet speculative projections of how AI tools could be used to discriminate but fails to contemplate complex use cases that *could* include features that *might* have the ability to discriminate. This is particularly true for advanced business use cases for AI technology, including in HR and employment contexts.

For example, suppose an employer uses an AI tool utilizing validation processes for employment and HR decision-making. The "validity" of a selection procedure refers to the extent to which there is empirical evidence or data from which accurate inferences can be based on the score for a particular employment selection purpose, including content validation, criterion-related validation, and construct validation. Evidence of the validity of a selection procedure by a content validity study consists of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which candidates are to be evaluated. Criterion-related validation of a selection procedure consists of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance (criteria). Construct validation of a selection procedure consists of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. There is no question that such a tool would at least “contribute to” the employer making a consequential decision regarding the employment of an applicant. If the proposed legislation becomes law, however, the use of this tool would run afoul of the statute. Is this really the problem that the legislation seeks to address?

4. The legislation is focused on protecting consumers from “algorithmic discrimination” (relating to age, color, disability, ethnicity, and other protected classifications), due to use of AI to make or as a “contributing factor” in making “consequential decisions” (without human review) in certain identified areas – termed “high-risk AI systems”.
    a. Under **Sec. 551.001(4)**, these “consequential” areas include (among others):
        i. “Employment or an employment opportunity.” This is an area in which Texas employers will need to assess any potential AI use. Some clarification as to the definition of “employment” would be critical. For example, is this intended to cover the hiring process only, or could this cover performance assessment, compensation decisions, and other ongoing employment processes?
        ii. Other areas may also require clarification:
            1. “Financial service” – what does this cover? For example, does it include payment systems used by most businesses or internal ERP systems?
            2. “Electricity services” – What is the scope of this reference? Does it include a multifamily or commercial landlord that provides electricity to tenants with load balancing tools? How does it apply if an electric utility utilizes an AI system that can detect the weaknesses and imbalances in a distribution system, which the utility then uses to harden the system against both future severe weather events and load balance problems in times of peak usage? What if that system can shut down power at a critical time in order to protect the system? There is no doubt that such a decision is “consequential.” Can the utility proceed without significant risk of liability under this legislation?
            3. “Transportation service” –Is this directed to Uber, buses, trains, airlines, etc.? For example, when Uber uses an algorithm to price its services depending on time of day, destination, or other “supply and demand” factors, does this constitute “discrimination” because some people will have to pay more than others for the “same” service? And would this result constitute a “consequential decision,” because it raises the cost of a “transportation service” (could Uber consumers bring a class action challenging Uber’s use of an algorithm that effectively makes discriminatory decisions about the cost and conditions of service?).

5. <u>Prohibited Uses.</u> Subchapter B purports to outlaw the development and employment of certain AI systems. Are these systems prohibited *only* in the context of the high-risk AI use areas? Or are these blanket prohibitions that extend to *all* AI uses, including those outside the scope of other parts of this legislation?
    a. **Sec. 551.052** prohibits the use of AI for “the evaluation or classification of natural persons or groups of natural persons based on their social behavior or known, inferred, or predicted personal characteristics with the intent to determine a social score.” What is the scope of this section? “Social scores” have existed for millennia in a variety of contexts. Is this provision aimed at interdicting something like China’s “social credit score”? And since the provision appears to apply to *all* AI systems, would it ban systems that aggregate certain data about consumer preferences for purposes of marketing certain products and services? In other words, would this provision take Amazon off the air? YouTube?
    b. **Sec. 551.053** prohibits the use of AI to capture biometric identifiers from the Internet or other publicly available sources. Does this potentially impact any AI use for security systems designed to identify potential risky behaviors based on biometrics (including

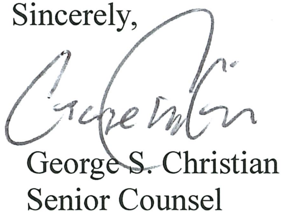
markers for suspicious behavior)? For example, a big box retailer located in a high-crime area deploys a sophisticated AI system to monitor customers and their behavior to detect potential thieves but also to identify customers who might pose a danger to both other customers and employees. Would this provision block the use of that technology, even if its sole purpose was crime detection and prevention?

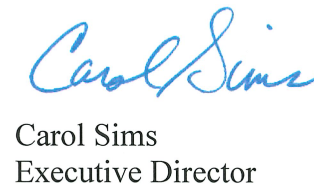
6. DSPs and Social Media Platforms. **Section 551.010** requires a digital service provider or social media platform to "make a commercially reasonable effort" to prevent advertisers from deploying non-compliant AI systems. Is meeting this regulatory standard even possible for these entities? How could they crack open the developer's "black box" and make such a determination? The legislation, however, seeks to hold these entities *independently* liable for the actions of developers, distributors, and deployers on a vague standard that leaves a DSP or platform fully exposed if the attorney general determines that one of its advertisers violated the statute by using an AI system that "could expose" users to algorithmic discrimination. As the statute is currently written, a DSP or social media platform will have to vet *all* of its advertisers' AI systems in order to attempt compliance with this section, but even if they go through this burdensome and expensive exercise, they can be held liable anyway based on a finding that a particular advertiser's system "could" or "might" expose a user. And we assume that in this event, the attorney general could levy the maximum fines and penalties for each time that advertisement appeared on the service or platform. We are left wondering if the only way a service or platform could absolutely protect itself would be to stop advertising altogether (which would, of course, collapse the business). Is this outcome intended by the statute?

As noted above, these comments have attempted to identify issues and concerns within the time constraints of a November 18 deadline for comments. Our members will undoubtedly advise us of other issues and concerns specific to their industries, which we will aggregate and provide to you as the process unfolds.

We appreciate the opportunity to provide comments. We stand ready and willing to help you work through these issues to provide Texas with a fair and balanced bill. Please do not hesitate to call on us.

Sincerely,





George S. Christian
Senior Counsel

Lisa O. Kaufman
General Counsel

Carol Sims
Executive Director