

Print: testimony, Section 230 highlighted, Rhode Island case law,

Thank you chairman Klemin. My name is Tom Kading and I am a Representative in District 45. This bill today concerns online censorship.

JFK once said:

libraries should be open to all—except the censor. We must know all the facts and hear all the alternatives and listen to all the criticisms. Let us welcome controversial books and controversial authors.

Another infamous individual name Joseph Stalin once said:

Ideas are far more powerful than guns. We don't let our people have guns. Why should we let them have ideas?"

Now the bill in front of you today doesn't address government actors, but rather to what level of accountability big tech should be held. Now some of the obvious questions are going to be:

1. Doesn't federal law preempt?
2. Are we over regulating or applying the first amendment to private companies?
3. Is this simply a reaction solely related to how the presidential election has been handled?

I am going to address each of those questions. But first I am going to talk about why I introduced this bill.

Back in December I began to have this drafted as I was noticing more and more censorship and selective fact checking occurring. I was hearing reports of people getting censored or fact checked for

- Posting negative things about certain candidates
- Posting positive things about candidates (and I am not just talking Biden and Trump)
- People getting censored for posting the Lord's Prayer
- People getting fact checked for details so minuscule the appearance of the fact check was merely to discredit the political position of the poster

And now lately the actions to restrict people has increased, people are not just getting fact checked or censored, but actually kicked off platforms.

And it hasn't stopped at that, the big tech is actually appearing to collude together to censor other social media platforms out of existence.

Now the censorship that is occurring today is seemingly mainly politically, but I want it to be clear that the intent of this bill is to provide recourse for any type of censorship and is not meant to be partisan as I think this important for everyone in NorthDakota.

So what this bill does is relatively simple, if a large social media platform selectively censors, restricts, or edits content to create a certain narrative that may be defamatory, a breach of contract, or otherwise tortious; I believe they should be held liable.

In paragraph 1 two definitions are provided. Interactive Computer Service is the exact definition under 47 USC 230. The social media is taken from case law out of California. Paragraph 2 is the core of this bill. The 7 allowed forms of censorship are the 7 types of censorship allowed under section 230.

To be held liable under section 2 for censorship, the infringing party must be immune from under federal law, not considered the publisher, has over 1 million users, and is a social media site provider.

Paragraph 3 extends the damages to be potentially claimed by those who would have otherwise received the censored information. I would be willing to amend this paragraph off due to the fact that proving such would be difficult.

Paragraphs 4-6 provide definitions and procedural standards.

Paragraph 7 allows an interactive computer service provider to elect to be a publisher and therefore not under publisher immunity in section 230 or under section 230 immunity but subject to this law.

Paragraph 8 is important language that allows social media sites to establish terms of services that allow them to restrict content to specific subject matter. For example if a social media site said in their terms that they are only allowing business related content, they could censor anything outside that scope.

So taken in conjunction, under paragraph 2 a social media company may be held liable for certain types of censorship that is not covered in section 230 and not in their terms of service.

Now to answer the questions I stated:

1. Does federal law preempt? Yes and no
 1. It preempt the regulations specifically stated in the section
 2. The two liabilities it provides is
 1. They are not a publisher of content provided by another - therefore they are not held liable as the publisher. This bill does not declare social media sites to be publishers. All this bill effectively does is declare the censorship or manipulation of information can in effect be speech.^[1]This standard is based on established case law out of the Rhode Island Supreme Court. The case effectively stated:^[2]If a web site (1) selectively publishes true information, while suppressing exculpatory information, or (2) manipulates true information, in order to create a desired impression in readers, either (1) or (2) can amount to defamation by implication, which is sometimes called defamation by innuendo.^[3] Here is a textbook example. Directors of a YMCA held a meeting. A rally was held nearby, which objected to policies of the YMCA. A participant in the rally suffered a heart

attack and died. A newspaper reported that the family of the man was upset that he did not receive medical treatment quickly. The newspaper also stated that the president of the YMCA was a doctor present at the meeting. The court held that a reasonable reader could draw a defamatory interpretation from the newspaper's report. (Healy v. New England Newspapers, Inc., 555 A.2d 321 (R.I.), cert denied, 493 U.S. 814 (1989).

2. The second liability protection is for the censorship of 7 categories. These 7 categories are exempted from the bill.
3. Further, under section 230(e)3, the federal law states quote, "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."
4. Given the two types of liability protection are not changed with this bill, it is consistent with section 230 and therefore not preempted.
2. Are we over regulating or applying the first amendment to private companies?
 1. This is a form of regulation on social media companies, but it keeps the enforcement mechanism in the hands of private individuals, not government. I would equate this approach more to establishing contractual guidelines allowed in this context.
 2. Secondly, this allows social media companies to censor certain subject matter consistent under the terms of services provided and agreed to by the consumer. This bill simply looks to add guidelines that restricts the interpretation of the terms of services such that social media can't selectively allow posts while selectively suppressing other posts in that subject matter. Without this interpretation, defamation by implication can occur with very little recourse for those being defamed.
3. Is this simply a reaction solely related to the recent presidential election?
 1. The simple answer is no, I had started to have this bill drafted in early December. In December I didn't know that social media censorship would grow into such an issue in January.
 2. My intent has always to bring forward a bill than can address the growing issue of censorship online and how social media terms of service should be interpreted. There are many issues with the growth and the boom of social media in recent years, this happens to be one of them.
 3. Further, this bill applies to those in North Dakota. Someone in Florida will not have a claim under this bill.

Censoring people does not create unity, it does not help the situation of division in our country, it does not deescalate tensions, and it only makes those being silenced dig in even deeper and just cause people to go to the back channel.

Laws surrounding social media right are confusing right now, and I believe we need to act as a state. Regardless of party the federal government has been a bit dysfunctional at regulating social media. I am not saying social media can't set their own terms of

service, rather I am trying to the average person a chance against the massive social media empires.

Whether this committee moves forward with the bill as is or decides it needs modifications, I am happy to make work with you. I would hope that we as legislators can step back and recognize this is a real issue. It is not an issue about scoring political points, it is not an issue about the presidential election, and it is not an issue about which party can benefit from the censorship. We need to look at this as to what is best for the future of our country and our state. I would hope that we could at least agree there is a problem with the shear amount of power social media has over our lives and the lack of recourse our citizens have when they are wronged by social media.

Thank you,

§230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States-

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer

hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of [section 223 or 231 of this title](#), [chapter 71](#) (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit-

(A) any claim in a civil action brought under [section 1595 of title 18](#), if the conduct underlying the claim constitutes a violation of [section 1591 of that title](#);

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 1591 of title 18](#); or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 2421A of title 18](#), and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, §230, as added Pub. L. 104–104, title V, §509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, §1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, §4(a), Apr. 11, 2018, 132 Stat. 1254.)

THE MAIN POINT: EXTENT OF SECTION 230:

Defamation lawsuits are governed by state tort law. Congress has no authority to modify state tort law. This is Constitutional Law 101. Each state controls its own tort law.

Here is an example of how a web site can face a defamation suit.

If a web site (1) selectively publishes true information, while suppressing exculpatory information, or (2) manipulates true information, in order to create a desired impression in readers, either (1) or (2) can amount to defamation by implication, which is sometimes called defamation by innuendo.

Here is a textbook example. Directors of a YMCA held a meeting. A rally was held nearby, which objected to policies of the YMCA. A participant in the rally suffered a heart attack and died. A newspaper reported that the family of the man was upset that he did not receive medical treatment quickly. The newspaper also stated that the president of the YMCA was a doctor present at the meeting.

The court held that a reasonable reader could draw a defamatory interpretation from the newspaper's report.

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