2021 HOUSE JUDICIARY

HB 1144

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1144
1/20/2021

An Act to permit civil actions against social media sites for censoring speech.

Chairman Klemin called the hearing to order at 2:00PM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- Amendment
- North Dakota claims
- Censorship
- Social media accountability

Rep. Kading: Introduced the bill. Testimony #1983 2:02

Dr. Gaylynn Backer, Bismarck residence: Testimony # 1734

Carol Two Eagles: Verbal Testimony-in favor.

Carl Szabo, NetChoice: Testimony #1483 2:35

Rose Feliciano, Internet Association: Testimony # 1948 2:54

Lacey Anderson, Midco: Testimony #1918

Carmon Sholty, The Heartland Institute: Testimony #1935 3:05

Chairman Klemin adjourned at 3:11

Additional Written Testimony: 1709,1766, 1792, 1793, 1794, 1795, 1796, 4469, 5005

DeLores D. Shimek
Committee Clerk

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 too 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. This standard is based on established case law out of the Rhode Island Supreme Court. The case effectively stated: 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. (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.

(Healy v. New England Newspapers, Inc., 555 A.2d 321 (R.I.), cert denied,
493 U.S. 814 (1989).

Sixty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1144

Introduced by

Representatives Kading, Bellew, Jones, B. Koppelman, Schatz, Toman

A BILL for an Act to permit civil actions against social media ~~sites~~platforms for censoring speech.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Social media ~~site~~platform censorship - Civil action.

1. As used in this section:

   a. ~~"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.~~

   ~~b.~~ "Social media ~~site~~platform" means ~~a website through which users are able to share and generate content and find and connect with other users of common interests.~~an internet-based service that allows individuals to do all of the following:

      (1) Construct a public or semipublic profile within a bounded system created by the service;

      (2) Create a list of other users with whom an individual shares a connection within the system; and

      (3) View and navigate a list of the individual's connections and the connections made by other individuals within the system.

   b. The term "social media platform" does not include electronic mail.

2. If ~~an interactive computer service provider~~a social media platform restricts, censors, or suppresses information that does not pertain to obscene, lewd, lascivious, filthy,

1 excessively violent, harassing, or otherwise objectionable subject matter, the
2 ~~interactive computer service provider~~social media platform is liable in a civil action for
3 damages to the person whose speech is restricted, censored, or suppressed, and to
4 any person who reasonably otherwise would have received the writing, speech, or
5 publication. This section only applies if the ~~interactive computer service provider~~social
6 media platform:
7 a. Is immune from civil liability under federal law;
8 b. Is not considered a publisher; and
9 c. Has over one million users~~; and~~
10 ~~d. Is a provider of a social media site.~~
11 3. A person whose writing, speech, or publication is restricted, censored, or suppressed
12 under this section, or a person that reasonably otherwise would have received the
13 writing, speech, or publication, is entitled to civil damages including treble damages for
14 compensatory, consequential, and incidental damages. The court also may award
15 punitive damages.
16 4. An action for civil damages under this section may be brought in the district court in
17 the county where the person being infringed, censored, or suppressed, or the person
18 who reasonably would have otherwise received the writing, speech, or publication,
19 resides.
20 5. The district court shall award attorney's fees to a prevailing plaintiff.
21 6. Immune from civil liability in subsection 2 means an action by ~~an interactive computer~~
22 ~~service provider~~a social media platform:
23 a. Taken voluntarily in good faith to restrict access to or availability of material that
24 the provider or user considers to be obscene, lewd, lascivious, filthy, excessively
25 violent, harassing, or otherwise objectionable, regardless whether the material is
26 constitutionally protected; or
27 b. Taken to enable or make available to information content providers or others the
28 technical means to restrict access to material described in subdivision a.
29 7. ~~An interactive computer service provider~~A social media platform may state
30 affirmatively in the provider's terms of service that the provider is a publisher. If the
31 statement is agreed upon by the person that is restricted, censored, or suppressed,

1 and any person who reasonably would have otherwise received the writing, speech, or
2 publication, subsection 2 does not apply.
3 8. Notwithstanding subsection 2, ~~an interactive computer service provider~~a social media
4 platform may limit content to subject matter expressly stated in the provider's terms of
5 service.

21.0594.01001
Title.

Prepared by the Legislative Council staff for
Representative Kading
January 19, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1144

Page 1, line 1, replace "sites" with "platforms"

Page 1, line 4, replace "**site**" with "**platform**"

Page 1, line 6, remove ""Interactive computer service" means any information service, system, or access"

Page 1, remove lines 7 through 10

Page 1, line 11, remove "b."

Page 1, line 11, replace "site" with "platform"

Page 1, line 11, remove "a website through which users are able to share and"

Page 1, replace line 12 with "an internet-based service that allows individuals to do all of the following:

(1) Construct a public or semipublic profile within a bounded system created by the service;

(2) Create a list of other users with whom an individual shares a connection within the system; and

(3) View and navigate a list of the individual's connections and the connections made by other individuals within the system.

b. The term "social media platform" does not include electronic mail."

Page 1, line 13, replace "an interactive computer service provider" with "a social media platform"

Page 1, line 15, remove "interactive computer"

Page 1, line 16, replace "service provider" with "social media platform"

Page 1, line 19, replace "interactive computer service provider" with "social media platform"

Page 1, line 21, after the underscored semicolon insert "and"

Page 1, line 22, remove "; and"

Page 1, line 23, remove "d. Is a provider of a social media site"

Page 2, line 11, remove "an interactive computer"

Page 2, line 12, replace "service provider" with "a social media platform"

Page 2, line 19, replace "An interactive computer service provider" with "A social media platform"

Page 2, line 24, replace "an interactive computer service provider" with "a social media platform"

Renumber accordingly

Senate Appropriations Committee

HB 1144

By Dr. Gaylynn Becker

January 20, 2021

==

Chairman Klemin and Members of the House Judiciary Committee:

I am Gaylynn Becker of Bismarck, ND. I'm testifying on my own. I am here to testify in support of House Bill 1144. I am one of the citizens who was banned from Facebook for 30 days without being informed of what specifically I posted to warrant a good faith blocking. I've written a "Letter to the Editor" which appeared in several North Dakota newspapers during the past week. It reads:

My first amendment right to Freedom of Speech was taken away by Facebook because of a law that Congress passed. Why did I get banned for 30 days? I'm not sure why. Facebook will not respond to my repeated requests. I think it was for apparently posting pictures of the "North Dakota Capital Prayer Rally." Not because of words I wrote.

It may have been due to pictures I posted of the Prayer Rally of people, flags, signs and a beautiful 10 foot cross that we signed and will be sent to Washington, D.C. I have reposted this page – to the best of my recollection - on a new "mewe.com" account I set up.

On Wednesday 1/6/2021 I posted on my Facebook page,

> **"I'm heading to the "North Dakota Capital Prayer Rally' at the capitol grounds today at noon! And I'm going there again at 5:00 P.M. for a candlelight Prayer vigil. 'These are rallies for praying - for our Nation, our State, and our communities. God be with us!'"**
>
> The First Amendment to the Constitution states, "Congress shall make no law…abridging the freedom of speech…" When Congress passed this legislation referred to as Section 230, Congress gave these corporations such as Facebook, Twitter, etc., immunity. Congresses' legislation gave them the right to restrict my freedom of speech! It also restricted the freedom of speech of thousands or millions of other U.S. citizens.

> One remedy is to remove Section 230 immunity. Thousands or perhaps millions of other U.S. citizens are being banned. I apologize to my 1200 Facebook friends that I have built up over several years. I had set up an account on Parler, but I wasn't able access this either. No due process, just this letter.
>
> God bless you!

I ask that you pass HB 1144. I also urge you to take HB 1144 one step further in sponsoring and passing legislation, or take some action which would challenge the constitutionality of the Section 230 immunity provisions of the Communications Decency Act (CDA) of 1996. Section 230 provides immunity from liability for providers and users of an "interactive computer service who publish information provided by third-party users as long as it is done in good faith. Well, I don't know about others, but **I don't believe when Facebook blocked me for 30 days for posting pictures of a "North Dakota Capitol Prayer Rally" in front of this building on January 6, 2021 that they did this in good faith. Due to this and what Facebook has done to thousands or millions of users, Facebook should lose its Section 230 immunity.**

Thank you,

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

NetChoice

Carl Szabo, Vice President and General Counsel
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Washington, DC 20005
202-420-7485
www.netchoice.org

January 20, 2021

Rep. Lawrence R. Klemin, Chair
Judiciary Committee
North Dakota Assembly
Bismarck, ND

RE: **Opposition to HB 1144 Regulating Free Speech on Social Networks**

Dear Chairman Klemin and members of the committee:

We respectfully ask that you **not** advance HB 1144, because it:

- Violates the first amendment of the US Constitution.
- Makes it illegal for service providers to block SPAM and punishes platforms for removing terrorist speech and pornography.
- Creates new and dangerous powers for government to regulate free speech
- Violates conservative principles of limited government and free markets

SB 2373 violates the First Amendment of the US Constitution

The First Amendment makes clear that government may not regulate the speech of private individuals or businesses. While there are exceptionally narrow exceptions, these are subject to what is called the "strict scrutiny" test the law must be:

- justified by a compelling governmental interest.
- narrowly tailored to achieve that goal or interest, and
- the law or policy must be the least restrictive means for achieving that interest.

On at least the last two prongs of this test, HB 1144 is unconstitutional and will fail.

Note that there are lower protections for "commercial speech." However, HB 1144 is not limited to regulation of commercial speech since it covers "a user's speech."

HB 1144 Makes it illegal for providers to block SPAM, and punishes platforms for removing terrorist speech and pornography

Today, platforms engage in robust content blocking of SPAM. But this blocking of not only unwanted but invasive content is illegal under HB 1144.

For decades, service providers have fought bad actors to keep our services usable. Through blocking of IP and email addresses along with removing content with harmful keywords, our services are more useful. But services couldn't do this blocking under HB 1144.[1]

At the same time, platforms could not remove terrorist content. Imagine the Taliban making posts that read, "Join us to help America." Blocking or removing this statement is illegal under HB 1144 unless those specific terms are addressed in the terms of service. Likewise, removal of pornography is also inhibited under HB 1144.

The de facto requirement to make decisions crystal clear in HB 1144 would make it easier for bad actors to circumvent protections and a duty to explain why SPAM content was blocked would contradict Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[2]

It is certain that HB 1144 will chill platforms from removing harmful or dangerous content.

HB 1144 creates new and dangerous powers for government to regulate free speech

HB 1144 empowers an administration to weaponize the law against would-be political opponents, since it fails to define key terms like "restrict." This leaves such terms subject to government interpretations.

This should concern lawmakers of both parties who recognize that control of the Governor's mansion by one political party is never certain or permanent.

HB 1144 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed the equivalent of HB 1144, the infamous "Fairness Doctrine," a law requiring equal treatment of political parties by broadcasters. In his repeal, President Reagan said:

"This type of content-based regulation by the federal government is … antagonistic to the freedom of expression guaranteed by the First Amendment.
In any other medium besides broadcasting, such federal policing … would be unthinkable."[3]
– President Ronald Reagan

We face similarly unthinkable restrictions in HB 1144 which forbid online platforms from moderating their services in ways that they see fit.

[1] *See, e.g. Holomaxx Technologies Corp. v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (That case involved an email marketer sued Microsoft, claiming that the SPAM blocking filtering technology Microsoft employed was tortious.)
[2] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).
[3] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), *available at* http://www.presidency.ucsb.edu/ws/?pid=34456 .

Today, conservative speech has never been stronger. No longer limited to a handful of newspapers or networks, conservative messages can now reach billions of people.

We've seen the rise of conservative voices without relying on a column from the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

All of this was enabled at effectively no cost to conservatives. Think about conservatives like Ben Shapiro and Mark Stein, whose shows are available to anyone with an internet connection and on whose websites conservatives can discuss and debate articles via the comments section.

Nonetheless, there are some who seek government engagement to regulate social networks' efforts to remove objectionable content. This forces us to return to an era under the "fairness doctrine" and create a new burden on conservative speech.

HB 1144 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting Online Platforms and Services,* which says:

> WHEREAS, online platforms are businesses that should be allowed to operate in ways that best serve their users — and the government should not interfere with these businesses in order to advance a particular belief or policy;
>
> WHEREAS, even if online platforms were to exhibit political bias in content display or moderation, the First Amendment protects this exercise of editorial discretion from government intervention;
>
> …
>
> THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that it is well settled that the First Amendment restricts the government from regulating speech or restricting the publishing rights of online platforms or services, including the right to curate content.

As President Ronald Reagan said, "Government is not the solution to our problem; government is the problem." Government regulation of free speech online would not safeguard the future of conservative speech. It would endanger it.

As NetChoice favors limited government and a free-market approach, we respectfully ask you to **oppose HB 1144**.

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President and General Counsel, NetChoice
NetChoice works to make the Internet safe for free enterprise and free expression. www.netchoice.org

RESOLUTION PROTECTING ONLINE PLATFORMS AND SERVICES

WHEREAS, the Internet has created millions of new American jobs and generated billions of dollars in revenue for American businesses;

WHEREAS, online platforms enabled users to generate, upload, and share their own content, and this capability has become a core component of the online experience;

WHEREAS, ALEC's principles of limited government and free markets suggest that the government should continue to take a light-touch approach to regulation online platforms and services;

WHEREAS, online platforms are businesses that should be allowed to operate in ways that best serve their users — and the government should not interfere with these businesses in order to advance a particular belief or policy;

WHEREAS, even if online platforms were to exhibit political bias in content display or moderation, the First Amendment protects this exercise of editorial discretion from government intervention;

WHEREAS, ALEC's principles of limited-government and free markets oppose the use of antitrust law for political purposes;

WHEREAS, even the threat of legal action can significantly affect the exercise of speech rights protected by the First Amendment, and thus also raises constitutional concerns;

WHEREAS, Section 230 of the Communications Decency Act of 1996 is a federal law limiting the liability of online platforms and services for content that they themselves did not share in creating and has been vital to the growth of user-generated content and free expression online;

WHEREAS, Section 230(c)(1) of the Communications Decency Act ensures that websites will not be held liable as publishers for how they arrange, promote, or prioritize content, unless they are responsible for creating it;

WHEREAS, Section 230(c)(2)(A) of the Communications Decency Act limits the liability of online platforms for "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";

WHEREAS, Section 230 limits the government's ability to prosecute social media companies in parallel with the First Amendment's protection of editorial discretion;

WHEREAS, Section 230 does not shield online platforms from liability for violations of federal criminal law or intellectual property law; and

WHEREAS, the sheer volume of user-generated content hosted by online platforms is so vast that, as Congress presciently recognized in enacting Section 230, imposing legal liability for content moderation decisions will significantly chill content moderation or simply cause online services to decline to host user-generated content;

THEREFORE LET IT BE RESOLVED, ALEC finds that any antitrust action against any online platform or service must not be initiated based on its viewpoint or the procedures it uses to moderate or display content. Any antitrust suit should be based solely on a bona fide violation of antitrust laws, which require proof of economic injury to consumers through a reduction in competition.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that it is well settled that the First Amendment restricts the government from regulating speech or restricting the publishing rights of online platforms or services, including the right to curate content.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that online platforms and services do not lose Section 230 protections solely by engaging in moderation of content created by other individuals, and, indeed, Section 230 was intended to encourage such moderation by limiting second-guessing of such decisions.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC opposes any amendment of Section 230 of the Communications Decency Act that would reduce protections for the rights to freely speak, publish or curate content online, as the law already enables prosecution of online platforms and services for violations of federal criminal law or intellectual property law.

Internet Association

TECHNET
THE VOICE OF THE
INNOVATION ECONOMY

NetChoice

January 20, 2021

Honorable, Lawrence Klemin, Chair
House Judiciary Committee
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Re: **Oppose HB 1144**, Permit Civil Actions Against Social Media Sites for Censoring Speech

Dear Chairman Klemin:

Our associations represent hundreds of the country's leading technology companies in high-tech manufacturing, computer networking, information technology, clean energy, life sciences, internet media, ecommerce, education, and the sharing economy sectors. Our member companies are committed to advancing public policies and private sector initiatives that make the United States the most innovative country in the world.

On behalf of our members, we want to express **opposition to HB 1144**, a bill that would subject an online service to civil liability if representing their site as viewpoint neutral, impartial, or non-biased and then blocks, bans, removes, or limits a user's speech.

Our members are committed to keeping their user's safe online while fostering diverse viewpoints and experiences for a variety of people. However, there is no standardized industry-wide approach for determining what constitutes potentially harmful or objectional content, as companies decide themselves what is appropriate and acceptable user content and what is objectional content they will not host.

Review of user content by member companies is done unbiasedly and is meant to identify and block harmful, obscene, violent, or other types of objectional content. Most content ultimately blocked, whether done so in an automated way or by humans, is done so as intended. However due to the sheer volume of user posts that may be reviewed daily, which could be up to hundreds of millions of posts per day, it is impossible for companies to be 100 percent accurate all the time.

Our member companies are transparent about this process, which is outlined in detail on their websites, typically in their terms of service. Users have the freedom to either accept a site's terms or choose to use an alternative site to share their content. Using a specific platform is an

option and those who disagree with the rules that guide enforcement decisions have the freedom to use a different service.

American free speech laws, including 47 U.S.C. Section 230(c), allow websites to block content they reasonably consider harmful. It does not require online companies to provide users with a neutral public forum. This federal law states that Congress finds "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."

It is difficult for laws to be crafted that determine what is objectively offensive content, which is why federal law leaves it up to social media platforms and their users to determine that. However, this bill would spawn excessive and endless litigation and would end up asking North Dakota courts to determine what content is obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.

While some larger companies may be in a better situation to manage the legal risks that this bill would expose them to, smaller companies and startups do not. As such, this bill could lower the influence of smaller tech companies online, force companies to either stop monitoring and blocking harmful user content at all or divert companies away from striving to be a neutral platform.

The result means abhorrent and illegal content likely would end up being the norm on social media and could increase real-world harm in communities in North Dakota and beyond. Our members warn that this bill will have the opposite effect that is intended: protecting people's rights. HB 1144 will create an unsafe world where online users will be exposed to harmful content that has the capacity to create increasingly negative impact on their lives.

For the reasons stated above, our associations **oppose HB 1144**. Please contact Tammy Cota at 802-279-3534 or tammy@theinternetcoalition.com if you have questions or would like to discuss this issue further.

Sincerely,

Internet Coalition
Internet Association
TechNet
NetChoice

cc: House Judiciary Committee members

#1918

January 20, 2021

House Judiciary Committee

<u>HB 1144 Testimony on behalf of Midco: Neutral with amendments</u>

Chairman Lawrence Klemin

Chairman Klemin and members of House Judiciary Committee-

On behalf of Midco, I submit this testimony as neutral on HB 1144 with Rep Kading's proposed amendments. Midco is opposed without amendments.

It appears the intent of this bill is to prevent social media platforms from censoring certain content. Midco is a regional cable provider, providing cable television, internet and telephone services. Midco is not a social media platform. The broad definitions used in this bill could sweep in companies such as Midco that simply provide broadband internet services or web hosting. Since this does not appear to be the intent or focus of this legislation, we would request that the definitions be limited to "social media platforms" and not "interactive computer services."

Please let me know if we can provide more on these definitions or answer additional questions.

Sincerely,

Justin Forde

THE HEARTLAND INSTITUTE
FREEDOM RISING

Testimony Before the North Dakota House Judiciary Committee on House Bill 1144 in Reference to Creating a Cause of Action for Censorship by Certain Technology Platforms

The Heartland Institute
January 20, 2021

Chairman Klemin and Members of the Committee:

Thank you for holding a hearing on House Bill 1144, legislation that provides North Dakotans a private cause of action in court when they have been censored or “de-platformed” on the various social media platforms that have become ubiquitous and integral to contemporary political speech and expression.

My name is Cameron Sholty, and I am the Director of Government Relations at The Heartland Institute. The Heartland Institute is a 37-year-old independent, national, nonprofit organization whose mission is to discover, develop, and promote free-market solutions to social and economic problems. Heartland is headquartered in Illinois and focuses on providing national, state, and local elected officials with reliable and timely research and analysis on important policy issues.

In less than a generation, emerging technologies and mediums promised democratization of free speech and political activism in a way never dreamed of by either its creators or users. Free speech and political activism, once the realm of partisans and professional pundits, was accessible such that people who were once spectators were now engaged, sharing their ideas and seeing their opinions manifest as public policy, and were challenging orthodoxies of a political class that seemed untouchable.

Yet that democratization gave way to the powers and pillars of technology in the blink of an eye. The consolidation of that power into the hands of a few titans in the sector has now effectively erased the empowerment of millions of Americans and their newfound voices.

Simply, these new technologies have been a blessing and a curse for our political discourse. On that, I think we can all agree.

Where it has empowered voices and people across the political spectrum, it has also empowered the voices that seek to divide us, misinform us, and manipulate us. I would like to tell you that the very platforms on which those messages are spread have been fair and impartial, yet the truth is that they haven’t been. In fact, their behavior in recent years certainly suggest it is not an indifferent actor on our national stage.

As partisans squabble and media apparatchiks chirp, the social media companies have ascended from mere stages where players perform to being the protagonists and villains rolled into one driving force of the storyline. The result has been near universal frustration with the behavior of what has become colloquially known as Big Tech.

As a free-market organization, The Heartland Institute continues to grapple with and delineate a comprehensive and deserving response to this ever-impinging force in our politics. Indeed, in a perfect world, I want to submit to you that legislation to rein in social media companies like Twitter or Facebook or technology giants like Amazon or Apple wouldn't be necessary. But that's not where we are today.

A consensus has yet to emerge on the best way to address Big Tech's censorship of voices on its platforms in a way that recognizes and reinforces America's treasured tradition of free speech - either ideologically or practically.

That is, though, ultimately, a generous and perhaps naive reading of the current landscape. Of course, you and I are free to use or not use the products offered by Facebook, Twitter, Amazon, or Apple and Google. Of that, there ought to be no question. However, to forego using products as ubiquitous and woven into the fabric of our modern daily life is to forego being engaged with family and friends or knowing in real time what our elected officials are doing (or not doing) on our behalf or to struggle to grow a small business and procure customers.

So here we are today, challenging the behavior of Big Tech, which has been less than transparent and lacks respect for the moral responsibilities that it has as a primary outlet for political discourse in our nation and the dissemination of information of public import.

Further, I remain skeptical that there is a single silver bullet and believe the solution likely lies in the congruence of federal legislation, state legislation, and judicial action.

House Bill 1144 is good, first-step legislation, which should also spur a state-based and national debate on the role of Big Tech in our civic conversations. It is perhaps the tool policymakers need to give to North Dakotans such that the message is clear that robust public debate is sacrosanct and any action or failure to act to ensure a robust debate will be met with hard questions, and if necessary, enabling policies.

Thank you for your time today.

For more information about The Heartland Institute's work, please visit our websites at www.heartland.org or http:/news.heartland.org, or call Cameron Sholty at 312/377-4000. You can reach Cameron Sholty by email at csholty@heartland.org.

Cheryl Riley
President, External Affairs
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January 20, 2021
House Judiciary Committee
Neutral HB 1144, if amended
Chairman Lawrence Klemin

Dear Chairman Klemin and Members of the House Judiciary Committee:

On behalf of AT&T, I want to help explain the important differences between what AT&T does as an Internet Service Provider (ISP) and social media platforms that are the actual focus of this House Bill 1144.

"Social media platform" means an internet-based service that allows individuals to do all the following:

- Construct a public or semipublic profile within a bounded system created by the service.
- Create a list of other users with whom an individual shares a connection within the system.
- View and navigate a list of the individual's connections and the connections made by other individuals within the system.
- "Social media platform" does not include electronic mail.

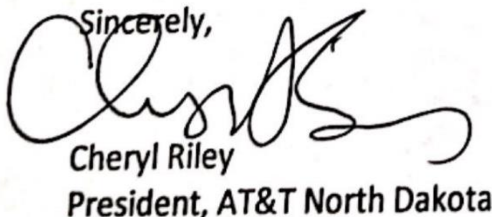
Simply put, social media platforms should be defined as websites or internet platforms whose primary purpose is to provide end users the ability to construct a public/semi-public profile and share and generate content and find and connect with other users of common or similar interests. At AT&T, we do not generally operate services that would be considered social media platforms. However, under federal law, specifically section 230 of the Communications Act, all internet service providers, including AT&T, are considered "interactive computer services" so we urge legislators to not re-use that term here and instead narrow the scope of House Bill 1144 to address only those entities targeted by the legislation.

Using the term "interactive computer services" could be easily misapplied and unintentionally impact broadband internet providers, non-social media applications, web hosts and others who are not the intended focus of the legislation.

AT&T will be neutral on HB 1144 if the bill is limited in its focus to "social media platforms" specifically, as opposed to the more general category of "interactive computer services."

Please let me know if we can provide more information on these definitions and help further clarify these terms and important distinctions. Thank you for your consideration.

Sincerely,



Cheryl Riley
President, AT&T North Dakota

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THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America Recording Industry Association of America

Memo in Opposition to North Dakota House Bill 1144

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we firmly believe that H.B. 1144 violates the protections for free speech and due process provided by the Constitution for numerous reasons. The trade associations and organizations that comprise Media Coalition have many members throughout the country, including North Dakota: authors, publishers, booksellers and librarians, producers and retailers of films, home video and video games. They have asked me to explain their concerns.

Summary of the bill:
H.B. 1144 creates a cause of action against a website if that site allows users to post content that it then "restricts, censors, or suppresses" The cause of action can be brought by the person who posted the content or any person who would have "reasonably" received the speech. However, the section only applies if the site is immune from civil liability under federal law; is not considered a publisher; has over a million users; and is a "provider of a social media site."

The plaintiff who wins in court is entitled to treble damages for compensatory, consequential and incidental damages and may be awarded punitive damages at the court's discretion.

The site is not liable if it made a good faith effort to restrict censor or suppress content that the provider or a user considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable subject matter." However, none of these terms is defined.

H.B.1144 attempts to limit the cause of action to editorial decisions that are not within the ambit of the protections of Section 230 of the Communication Decency Act. However, courts have read the term "otherwise objectionable subject matter in 47 U.S. Code §230 (c)(2)(A) very broadly so that almost any decision by a website to remove content would be covered by this safe harbor.

Even if H.B. 1144 is limited to editorial decisions not covered by §230, the cause of action is likely unconstitutional because the government cannot allow damages on websites for their editorial decisions. The First Amendment bars the state from interfering with decisions about what to print or not to print, including by websites and internet platforms. In Miami Herald Publ'g Co. v. Tornillo, the U.S. Supreme Court struck down a Florida law that required newspapers to provide candidates for elected office the opportunity to clarify or respond to reporting they believe to be critical of them. 418 U.S. 241 (1974). Chief Justice Burger, writing for the Court, made plain:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation

Executive Director: David Horowitz Chair: David Grogan, American Booksellers Association
Immediate Past Chair: James LaRue, Freedom to Read Foundation Treasurer: Steven Gottlieb, Recording Industry Association of America, Inc.
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

19 Fulton Street, Suite 407 | New York, NY 10038 | 212.587.4025 | mediacoalition.org

> of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

Id., at 258. See also, Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 653(1994) ("The First Amendment protects the editorial independence of the press.").

The bill is also likely unconstitutional as compelled speech. The state cannot force a publisher to deliver speech or face financial penalties. It cannot tell bookstores what books it must carry or tell publishers what books it must publish. Generally, "freedom of speech prohibits the government from telling people what they must say." Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61 (2006). The First Amendment allows individuals or companies not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," Wooley v. Maynard, 430 U.S. 705, 714 (1977). See also, Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists' inserts in its monthly bills).

H.B. 1144 may also be unconstitutional because it allows civil liability against publishers of some websites but not others. In this case, sites with more than a million users can be sued but smaller sites can keep or remove the same posting by a user without any consequences. The Supreme Court has condemned the selective imposition of a punishment on one medium but not others. Minneapolis Star v. Minnesota Commission of Revenue, 460 U.S. 575 (1983) (Singling out newspapers but not magazines for a special tax was unconstitutional). See also, Playboy v. Entertainment Group, 529 U.S. 803, 812 (striking down a regulation that targeted "adult" cable channels but permitted similar expression by other speakers); Turner Broad. Sys. v. FCC, 512 U.S. at 659 ("Regulations that discriminate among media … often present serious First Amendment concerns."); Arkansas Writers' Project, 481 U.S. 221, 228 (1983). ("Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State.").

Finally, the bill is likely unconstitutionally vague. "It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." Winters v. New York, 333 U.S. 507, 509 (1948) (citations omitted). H.B. 1144 does not does not define "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable subject matter." While "obscene" can be defined by reference to North Dakota code section 12.1-27.1-01 subsection 5, the other terms are not defined by reference in the North Dakota code. The dictionary definitions of these terms allow too much leeway for a jury to second guess the editorial decisions of a website. Sites have little guidance to determine what speech is subject to a lawsuit and must either risk treble damages and possible punitive based on speech they make available or remove for their users. See Baggett v. Bullitt, 370 U.S. 360 (1964). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting NAACP v. Button, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow

Memo in op. to N.D. H.B. 1144
January 19, 2021
Page 3

specificity.'"). This lack of clarity would likely be resolved through costly litigation which creates a financial burden on the editorial prerogatives of websites.

If you would like to discuss our concerns further, we would welcome the opportunity to do so. Please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025 x3 . We ask you to protect the First Amendment rights of all the people of North Dakota and amend or defeat H.B. 1144.

October 29, 2020 • Commentary

Leave Section 230 Alone

By **Matthew Feeney**

This article appeared on ***Newsweek*** on October 29, 2020.

IN 1996 CONGRESS PASSED THE COMMUNICATIONS DECENCY ACT, WHICH includes Section 230. The law provides interactive computer services with immunity from liability for almost all harms created by third-party users. It has promoted innovation and entrepreneurship, allowing start-ups to experiment with new ideas and products without having to employ a large team of lawyers tasked with policing forums, comment sections and event pages. Unfortunately, this widely misunderstood law is under bipartisan attack. Critics of "Big Tech" should proceed with caution when considering Section 230 reform.

At the core of Section 230 is personal responsibility. The law states that you—not the service you use to share content—are responsible for what you post. There are a few exceptions, but by and large Section 230 leaves the responsibility for online posts with the appropriate agent: the user.

The law embraces the freedom of speech and association. In the United States we are fortunate enough to enjoy a freedom of speech unmatched by any other country. "Hate speech" is not a legal category in the United States, and people have the freedom to express even the worst ideas. Racists are free to express their hatred through the expression of racist symbols and historical ignorance. Footage of animal cruelty is also protected, as is the shocking protesting of soldiers' funerals. As Americans, we are fortunate to enjoy both a broad freedom of speech and the ability to disassociate ourselves from awful but legal content.

Rabbis are free to eject white supremacists from their synagogues, and newspaper editors are free to reject an op-ed written by someone convinced that Trump is battling a powerful left-wing pedophile organization. The fact that speech is legal does not mean it can be forced on an unwilling audience or venue.

> Competition and innovation, not regulation and legislation, are the best ways for conservatives to address concerns about bias in Silicon Valley.

Today, many conservatives seem intent on undermining personal responsibility and the freedom of association, in large part because of an alleged systemic anti-conservative bias in Silicon Valley. Such bias has become an article of faith in the modern conservative movement—though I have found little evidence of it. Yes, some conservative content has been taken down in error. But the political Left has its own complaints on that score, indicating that the mistakes of Big Tech are more random and less systemic. But even if Big Tech harbors bias against conservatives, proposed reforms to Section 230 would be misguided.

Republican lawmakers have introduced a variety of bills to amend Section 230. Each suffers from fatal flaws. None of them would achieve the goal of increasing online conservative speech while passing constitutional muster. Take, for example, the Stopping Big Tech Censorship Act, sponsored by Georgia senator Kelly Loeffler. The bill would restrict Section 230 protections to interactive computer services that moderate content in a "viewpoint neutral manner." Sen. Loeffler perhaps believes that if her bill passed, Facebook and Twitter would rush to adopt the First Amendment as their content moderation policy.

Sen. Loeffler's bill makes a common mistake that is regularly on display in many Section 230 debates. Critics of Big Tech are keen to put Section 230 in their crosshairs, when the more likely target of their proposals would be the First Amendment itself.

Content moderation is protected by the First Amendment. Congress could not pass a constitutional bill requiring a newspaper to print an op-ed written by a Holocaust denier. Even if social media sites could be forced to host all legal speech, would that produce an internet that conservatives would welcome? Hardly. Beheading videos, spam, pornography, videos of murders and

other atrocities are all protected by the First Amendment. Anyone interested in such content can easily find it online. Facebook, Twitter, YouTube and many, many other services have taken the understandable decision to restrict such legal content. If Section 230's liability protections are made contingent on a "viewpoint neutral" content moderation policy, users can expect an internet that increasingly resembles 8chan and Pornhub.

Other Republican proposals would expand the scope of government at the expense of free association. Missouri senator Josh Hawley (R-MO) introduced the **Ending Support for Internet Censorship Act**. The bill would make large platforms' Section 230 protections contingent on certification of neutrality from the Federal Trade Commission (FTC), which would require a lack of political bias.

There was a time when giving an alphabet soup agency the power of life or death over private businesses for exercising their freedom of association would be considered anathema to Republican politics. It was the GOP that brought an end to the Fairness Doctrine. Yet today one of the party's rising stars embraces government control of business.

Sens. Hawley and Loeffler are not alone. Senators John Kennedy (R-LA), **Lindsey Graham** (R-SC), Roger Wicker (R-MS), John Thune (R-SD,), John Cornyn (R-TX) and Marsha Blackburn (R-TN) have all written or cosponsored Section 230 bills in the last year, as have their Democratic colleagues Sens. Brian Schatz (D-HI), Joe Manchin. (D-WV), Richard Blumenthal (D-CT) and others. Never mind all of the members of the House of Representatives who have also introduced Section 230 bills. It seems that in 2020 barely a week passes before another lawmaker introduces a Section 230 bill.

Each proposed bill undermines the freedom of association, free enterprise, the First Amendment or security and privacy. In many instances, such as Republican attempts to address bias, they present a solution in search of a problem.

Even if there is political bias in Silicon Valley, Section 230 reform is not a necessary solution. There are alternatives to Big Tech. The internet is much larger than Google, Facebook and Twitter. One of the most puzzling features of the ongoing social media debate is that conservative activists have ignored the vast speech ecosystem that exists on the internet.

Parler, MeWe, Mastodon, Gab, Minds, BitChute, LBRY, the InterPlanetary File System and many others offer users the opportunity to connect with each other and share ideas. A handful of these companies, such as Parler, BitChute and Gab emerged in response to alleged anti-conservative bias. Some of these services use centralized content moderation policies akin to those pioneered by Facebook and Twitter, while others embrace decentralized content moderation policies.

Rhetoric that portrays Big Tech as having a stranglehold on online speech misrepresents the state of affairs and only offers unhelpful hyperbole. Comparing it **to the authoritarian Chinese government** and asserting that Twitter blocking links to a news story constitutes "election interference" only detracts from conservative claims. Twitter and Facebook cannot put you in jail or block you from using their competitors, and a private company blocking access to content embarrassing to a political figure is only "election interference" if every instance of TV channels, newspapers and magazines choosing to reject an article or news story is also "election interference." If that is the case, the term has lost any useful meaning.

Even if it is the case that Twitter, Facebook, Google and the rest of Silicon Valley are out to stifle conservative speech, conservatives should resist Section 230 reform. Such reform would change the internet for the worse. The internet is larger than Facebook, Twitter and Google. Some conservatives can and have launched their own social media sites. Competition and innovation, not regulation and legislation, are the best ways for conservatives to address concerns about bias in Silicon Valley.

MATTHEW FEENEY

Matthew Feeney is the director of Cato's Project on Emerging Technologies.

RELATED CONTENT

Social Media Critics Ignore Rest of Internet

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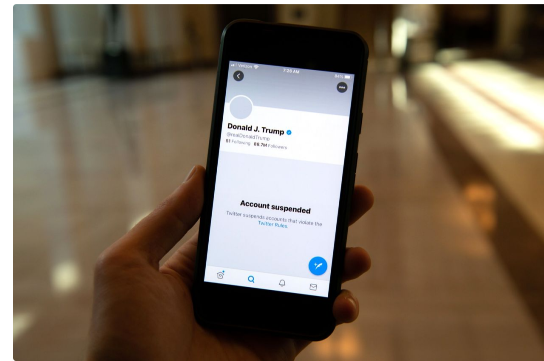
Why Repealing Section 230 Could Ruin the Internet

By Eric J. Savitz Updated January 18, 2021 / Original January 15, 2021



Graeme Sloan/Bloomberg

It's become popular at both ends of the political spectrum to beat up on Section 230, a provision of the 1996 Communications Decency Act that established the ground rules for the modern internet. Section 230 protects websites from liability for user generated content, while allowing them flexibility to moderate content. Demands in Washington to repeal the rule have reached a fever pitch, but it would be a very bad idea.

The key piece of Section 230 is just 26 words: "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."

Despite what some politicians seem to think, Section 230 is no social media conspiracy; the law was adopted years before Facebook (ticker: FB), Twitter (TWTR), or even Myspace existed.

The measure has bipartisan origins, drafted by Chris Cox, then a Republican congressman from California and later chairman of the Securities and Exchange Commission under President George W. Bush, and Sen. Ron Wyden, an Oregon Democrat then in the House.

Within a few years, 230 helped to usher in Web 2.0—enabling websites to rely on user generated content without risk of crippling litigation. Online travel sites like Booking.com, Expedia, and Tripadvisor depend on user recommendations. So do ride-sharing companies, food delivery services, and movie and book review sites. Killing 230 would put Nextdoor, Yelp, Wikipedia, Craigslist, and Reddit in significant peril.

I'm not defending the status quo. The last several years—and the last few weeks in particular—have revealed significant issues wrought by social media. But repealing Section 230 isn't the solution. In fact, it could make things worse.

Cox has noted that before Section 230 New York state courts developed the theory that internet platforms had no liability for illegal user content—unless they moderated the content. "Only if a platform made no effort to enforce rules of online behavior would it be excused from liability for its users' illegal content," Cox wrote in August.

"This created a perverse incentive. To avoid open-ended liability, internet platforms would need to adopt what the New York Supreme Court called the 'anything goes' model for user-created content."

Section 230 ultimately gave internet platforms the freedom to moderate that content. Twenty-five years later, it's unclear how courts would rule absent Section 230, but it's conceivable they would take a different approach—finding internet platforms liable regardless of whether they tried to moderate. In that scenario, repealing Section 230 would lead to heavy censorship, the opposite of what many 230 critics seem to want.

Eric Goldman, a law professor at Santa Clara University who focuses on internet regulation and Section 230, says he is "petrified" about a potential repeal, which would have serious and unpredictable consequences. Goldman sees risks for videoconferencing services like Zoom Video Communications (ZM), which could be liable for inappropriate content displayed on a call, forcing Zoom to monitor content.

Bobby Mollins, an analyst with investment firm Gordon Haskett, warned in a research note last week that voiding Section 230 would create serious risks for Airbnb (ABNB). The company could be sued for negative reviews about property listings on its apps. The company could also have legal exposure for listings out of compliance with local laws, likely requiring costly prelisting reviews.

"I see the train wreck coming," Goldman says. "For the last few years, the president has been dumping on Section 230 with a massive megaphone...most of the problems [President Trump] complains about have nothing to do with Section 230."

It's worth noting that President-elect Joe Biden has also expressed support for a 230 repeal.

Goldman thinks Section 230 needs a champion, but natural supporters have gone silent. I reached out to a half-dozen Internet companies on the issue, and no one would talk.

Facebook pointed me to CEO Mark Zuckerberg's testimony at the Senate Commerce Committee hearing in October. Zuckerberg told lawmakers that "thanks to Section 230, people have the freedom to use the internet to express themselves," but he also said that "Congress should update the law to make sure it's working as intended."

Facebook may be conflicted anyway. Goldman contends any rule change mandating more moderation plays to Facebook's strengths, since it already employs thousands of content moderators.

Jeff Kosseff, a lawyer and assistant professor in the cyber science department at the U.S. Naval Academy, is the author of *The Twenty-Six Words That Created The Internet*, a 300-page history of Section 230. "The modern internet ... is built on the foundation of Section 230," he writes toward the end of the book.

"To eliminate Section 230 would require radical changes to the internet. These changes could cause the internet to collapse on itself. The internet without 230 would

be an internet in which litigation threats could silence the truth."

The good news, Kosseff told me, is that "we're not anywhere close to consensus," and after the recent events in Washington, "both sides are more entrenched."

That makes Section 230 repeal a little less likely. For all of us, it would be better if it stays that way.

Write to Eric J. Savitz at eric.savitz@barrons.com

;

RealClear Markets

With Their Whining About 'Big Tech,' Republicans Sound Like Democrats

By John Tamny January 19, 2021

(AP Photo/Manuel Balce Ceneta)

It's a correct article of faith among conservatives that humans aren't static creatures. They constantly evolve, improve, and in particular they respond to incentives.

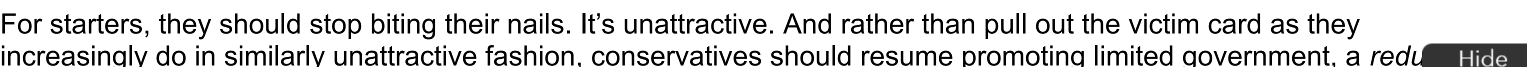
This has seemingly been forgotten by the Right amid its latest freakout over "Big Tech." Just as human beings aren't static, neither is commerce. It's changing all the time to our betterment. What's relevant and dominant today frequently isn't tomorrow in a dynamic economy like the U.S.'s. Conservatives used to understand this. Indeed, it's realistically defined their approach to policy since at least the late '70s. Reduce tax penalties levied on work and investment so that there's more investment in a future that will make the present appear primitive by comparison. Set people free from onerous taxation so that they can rush the future into the present. Amen to all of that.

The problem is that conservatives are no longer capable of practicing what they preach. They're captive to the present. "Big Tech" and its allegedly "unimaginable power" keeps them up at night, and they go against type in their calls for government to "do something" in response given their errant belief that tomorrow will resemble today. To offer up but one of many examples, a prominent conservative observed last week,

> "how nonexistent is the usual remedy to corporate excess: competition. The liberal response for years to any conservative griping about Twitter censorship: Don't like it? Start an alternative. Conservatives did, only to watch the tech giants shut down Parler. We live increasingly in an online world, which a few powerful gatekeepers control."

Crucial is that the author of the above passage is a very reasonable conservative. If readers are curious to understand how some of the more unreasonable conservatives are approaching "Big Tech," they need only Google "Victor Davis Hanson" and "Big Tech." Or watch cable TV. According to too many on the Right, "Big Tech" has a stranglehold on commerce and information. What should terrified conservatives do?

For starters, they should stop biting their nails. It's unattractive. And rather than pull out the victim card as they increasingly do in similarly unattractive fashion, conservatives should resume promoting limited government, a *redu*



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A better understanding of the history of commerce would also help members of the right who've offered up brain and column space rent-free to supposedly indomitable "Big Tech." If so, they might shift their focus from what exists ("Big Tech") toward what *will exist.* Simply stated, the vanquishers of a "few powerful gatekeepers" are likely not in plain sight. Entrepreneurs eager to disrupt the existing order almost never are. Think about it.

In the 1970s IBM was viewed as an unbeatable monopoly given its heft in big, multi-million dollar mainframe computers. Understand that in the 1970s the very notion of a personal, in-home computer, was haughtily dismissed by the "Big Tech" eminences of the time. Computers were massive in size, but also in price. Think millions. They *surely* weren't an everyman concept.

That was all well and good. Entrepreneurs, by their very name, envision a future that looks nothing like the present. Are you hearing this, conservatives? As a result, visionaries like Bill Gates, Steve Jobs, Michael Dell and others set to work on making formerly expensive computers and software accessible to the common man. Government and the pundit class focused on the seen, only for unseen entrepreneurs to erase the present with a much better future that looked nothing like the past.

Gates and Microsoft were the focus of the federal government's ire in the late 1990s due to Microsoft's power in the software and personal computer space, but the unseen was the internet itself. Microsoft was seen as all powerful, but the latter was a view rooted in a technology landscape that was anything but static. Microsoft was a bit slow to recognize the change, and in particular the future meaning of the internet, only for it to be caught unawares as unseen upstarts like Google, Amazon, and Facebook beat them to search, shopping and social media.

And just as a somewhat stodgy Microsoft found itself on trial for its power in the present, Steve Jobs returned to a near-bankrupt Apple. Microsoft helped save Apple with a crucial, $150 million investment. It's now the world's most valuable company. It seems what consumers really wanted all along was supercomputers in their pockets. Established players in the computer space like Microsoft and Dell didn't see this change coming. Neither did Blackberry.

In the early 2000s the federal government was focused on limiting the growing power of Blockbuster Video. Its ability to purchase competitors was subsequently hamstrung. Missed by Blockbuster and federal ankle-biters was the rise of Netflix from well outside the physical video rental space. Ever focused on making sure "competition" was regular among the existing home rental players, everyone missed the real threat.

That the real threat to established commercial players is nearly always unseen has plainly been forgotten by modern conservatives ever eager to play the victim. The symbol of their present victimhood is Parler. The bullies of "Big Tech" have pushed it offline, so government must "do something." Wake up, Right. It's most certainly the right of companies like Amazon, Apple and Google to choose whom they do business with or help to do business. This is something conservatives similarly used to understand.

Furthermore, their intense emotion is misplaced. Indeed, if commercial history continues to repeat or rhyme as it always has, Parler likely wasn't real competition for today's "Big Tech" to begin with. More realistically, the businesses set to render today's technology powers hopelessly dated are likely unseen. As they always are. Conservatives should recognize this. Instead, they've taken to whining about "big business." They sound like Democrats.

John Tamny is editor of RealClearMarkets, Vice President at FreedomWorks, and a senior

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Opini

Policy Guide for America's Frustrated Independent Thinkers, The End of Work, about the exciting growth of jobs more and more of us love, Who Needs the Fed? and Popular Economics. He can be reached at jtamny@realclearmarkets.com.

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STATEMENT OF PRINCIPLES ON ONLINE FREE SPEECH

Policy Status

Type: **Statement of Principle** Status: **Final** Date Introduced: **March 13, 2018** Date Finalized: **May 24, 2018**

Issues

- Innovation
- Privacy and Security

Task Forces

- Communications and Technology

Related Articles

Social Media Platforms and Content Moderation

6 MONTHS AGO

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Tags

- Competition
- Encryption
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- Section 230
- Social Media
- STFS 2018

Summary

The American Legislative Exchange Council recognizes that the Internet has transformed American life, and will continue to do so — and that the Digital Revolution has been overwhelmingly positive. American innovators and entrepreneurs have led the development of new products and services that have made life easier in countless ways and have kept the American economy dynamic, growing and strong. Perhaps the greatest benefit of the Internet has been empowering individuals to express themselves in ways that were simply unimaginable a generation ago. Even in 1996, Congress recognized that the Internet has "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). This is even more true today: keeping the Internet "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), has ensured that America is the undisputed leader in Internet services. With the notable exception of Chinese and Russian sites (which are protected, and heavily controlled, by their repressive governments), essentially all of the world's most popular online platforms that host user-generated content are American. The Internet is the greatest American success story of all time — and a triumph for First Amendment values. For all its benefits, the Digital Revolution has also created a host of difficult problems, especially regarding online speech. Congress also recognized this in 1996: Section 230 of the Communications Decency Act ensured that online platforms would not be held liable for content created by their users. Without this immunity, today's online platforms would never have gotten off the ground: it simply would not have been possible to filter user generated content on anything like the scale that exists today. The Internet would not have become the vibrant forum for free expression it is today. Section 230's immunity has never been absolute: websites lose it when they bear responsibility, even in part, for developing illegal content. Moreover, Congress never limited the enforcement of federal criminal law. In short, the Internet was not intended to be lawless, but Congress did recognize that making online intermediaries responsible for user content would both discourage innovation and "Good Samaritan" self-policing by responsible websites. The American Legislative Exchange Council recognizes that debates over online speech, and who should police it, have reached a new level of intensity. To guide state and federal policymakers in addressing such concerns, and especially in ensuring the effective enforcement of existing laws, ALEC has developed the following principles regarding online free speech consistent with American values of free expression and free enterprise.

STATEMENT OF PRINCIPLES ON ONLINE FREE SPEECH

Statement:

The American Legislative Exchange Council recognizes that the Internet has transformed American life, and will continue to do so — and that the Digital Revolution has been overwhelmingly positive. American innovators and entrepreneurs have led the development of new products and services that have made life easier in countless ways and have kept the American economy dynamic, growing and strong. Perhaps the greatest benefit of the Internet has been empowering individuals to express themselves in ways that were simply unimaginable a generation ago.

Even in 1996, Congress recognized that the Internet has "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). This is even more true today: keeping the Internet "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), has ensured that America is the undisputed leader in Internet services. The Internet is the greatest American success story of all time — and a triumph for First Amendment values.

For all its benefits, the Digital Revolution has also created a host of challenges, especially regarding online speech. Congress recognized this in 1996: Section 230 of the Communications Decency Act ensured that online platforms would not be held liable for content created by their users. Without this immunity, today's online platforms would never have gotten off the ground: it simply would not have been possible to filter user generated content on anything like the scale that exists today. The Internet would not have become the vibrant forum for free expression it is today.

Section 230's immunity has never been absolute: websites lose it when they bear responsibility, even in part, for developing content. Moreover, Congress never limited the enforcement of federal criminal or intellectual property law. In short, the Internet was not intended to be lawless, but Congress did recognize that making online intermediaries responsible for user content would both discourage innovation and "Good Samaritan" self-policing by responsible websites.

The American Legislative Exchange Council recognizes that debates over online speech, and who should police it, have reached a new level of intensity. To guide state and federal policymakers in addressing such concerns, and especially in ensuring the effective enforcement of existing laws, ALEC has developed the following principles regarding online free speech consistent with American values of free expression and free enterprise:

I. The private sector should continue to lead the way. Private companies have built the online platforms that empower individuals to express themselves. Gone are the days when three broadcast networks both controlled access to news and shaped public opinion. Technology has given every American the opportunity to express their own opinions and communicate directly with public officials, celebrities, and other citizens, and given them access to news from a variety of sources. The rights protected by the First Amendment — to free expression, free association and the free exercise of religion — have never been more accessible or meaningful.

II. Private companies make their own rules. Private companies have every right to set their own rules for their own services regarding permissible content. But these rules should be publicly available and easily understandable by the companies users. Even the most popular service is still voluntary. Of course, users need clear disclosure of the rules for each service, so they can decide which to use. At the same time, to remain effective, content moderation tactics cannot be fully disclosed, lest bad actors learn how to evade detection. Website operators must balance the need for a certain degree of opacity as to exact content moderation practices with clarity as to the general rules that users must follow.

III. No "Fairness Doctrine" for the Internet. For decades, the Federal government attempted to force broadcasters to be neutral in their coverage. In practice, the "Fairness Doctrine" stifled heterodox speech and enforced the bland orthodoxy of the political establishment. The vagueness of the Fairness Doctrine gave politicians broad discretion to punish broadcasters that dared to criticize them. Abolishing the Doctrine was one of the greatest accomplishments of the Reagan era.

IV. Deputizing online intermediaries generally backfires. Congress enacted Section 230 to encourage online platforms to experiment with ways to empower users to host content — and the law has succeeded spectacularly. Today's Internet simply would not exist if websites were liable for all user content they hosted. Congress also recognized that holding online intermediaries responsible for user speech would actually create a perverse incentive to do less self-policing, or none at all. Eroding Section 230's Good Samaritan immunity will backfire. Instead, policymakers should ensure the vigorous prosecution of individual bad actors as well as of websites that cross the line between being intermediaries and actually helping to develop unlawful content.

V. Competition and disruptive innovation are the best protectors of consumers. Concerns about the dominance of a single online platform are nothing new: since 1986, we have seen a series of platforms rise and fall. No one company has managed to preserve its dominance because no company can master disruptive innovation. This ongoing competition to stay on top, with new disruptors emerging seemingly every day, has protected consumers better than any government intervention ever could. No company or industry sector should be immune from the antitrust laws; and if a company's dominance, or a merger, can be shown to harm consumer welfare, existing antitrust law should be enforced. But there is no need to rewrite antitrust doctrine to protect online speech, and doing so will likely harm consumers.

VI. Anonymity is an essential aspect of free expression and online privacy. Transparency has both benefits and costs. Some users will not speak out freely if they are required to use their real names or post other identifying information because of fear of intimidation and harassment, both in the online and physical world. However, private platforms are free to decide the level of anonymity. They should also work to protect sensitive information of their users. It is simply not for the government to decide which approach is best. Undermining anonymity undermines free speech, as the courts have long recognized in protecting the right to speak, associate, and make charitable donations offline.

VII. The Internet's democratization of speech must be allowed to continue. The Internet has allowed for individuals, organizations, and businesses to reach millions with their message at a fraction of the cost of traditional media. This explosion in free speech has been an equalizing force in our democracy. Government regulations or private rules that would make it more difficult to spread a non-electioneering communication message should be avoided.

VIII. Encryption protects free expression. Technologies like encryption do not merely enhance privacy, they enable free expression, too. The more secure users feel that they can communicate privately, the more free they will be to express themselves. Restricting encryption tools will have a chilling effect on free speech online.

Approved by the ALEC Board of Directors May 24, 2018.

HB 1144 – Testimony by Dustin Gawrylow (Lobbyist #266) North Dakota Watchdog Network

This bill is a nothing but one big slippery slope, and it should be addressed at the federal not state level.

By definition, anything involving the internet is an Interstate Commerce Clause issue – so a state trying make separate rules would open up the state to lawsuits from that direction.

So long as Section 230 is still in play, the issue of Federal Supremacy also will open the state up to legal challenges.

Either the federal government is going to amend Section 230, and more than likely enact the kind of government controls that will stymie businesses involved online.

Or, the federal government will do nothing, and leave it to the market to figure out.

In either case, North Dakota should stay out of it – for not only fear of being sued – but also since such social media companies may just not let people from North Dakota on their sites.

21.0594.01002
Title.

Prepared by the Legislative Council staff for
Representative Jones
January 25, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1144

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to permit civil actions against social media sites for censoring speech; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Definitions.

As used in this chapter:

1. "Algorithm" means a set of instructions designed to perform a specific task.
2. "Harmful to minors" has the same meaning as in section 12.1-27.1-02.
3. "Hate speech" means a phrase concerning content an individual finds offensive based on his or her personal moral code.
4. "Obscene material" has the same meaning as in section 12.1-27.1-01.
5. "Political speech" means speech relating to the state, government, body politic, or public administration as it relates to governmental policy-making. The term includes speech by the government or candidates for office and any discussion of social issues.
6. "Religious speech" means a set of unproven answers, truth claims, faith-based assumptions, and naked assertions that attempt to explain greater questions such as how the world was created, what constitutes right and wrong actions by humans, and what happens after death.
7. "Shadowban" means the act of blocking or partially blocking a user or the user's content from an online community so it will not be readily apparent to the user that the user or the user's content have been banned. The term includes stealth banning, ghost banning, or comment ghosting.
8. "Social media website" means an internet website or application that enables users to communicate with each other by posting information, comments, messages, or images and that meets all the following requirements:
   a. Is open to the public;
   b. Has more than seventy-five million subscribers;
   c. From the website's inception has not been specifically affiliated with any one religion or political party; and

d. Provides a means for the website's users to report obscene materials and has in place procedures for evaluating those reports and removing obscene material.

Civil action to prohibit social media censorship - Deceptive trade practice - Exceptions.

1. A social media website owner or operator that contracts with a social media website user in this state is subject to a private right of action by the user if the social media website purposely:

   a. Deletes or censors the user's religious speech or political speech; and

   b. Uses an algorithm to disfavor, shadowban, or censure the user's religious speech or political speech.

2. A social media website user may be awarded all the following damages under this section:

   a. A minimum of seventy-five thousand dollars in statutory damages per purposeful deletion or censoring of the social media website user's speech;

   b. Actual damages;

   c. If aggravating factors are present, punitive damages; and

   d. Other forms of equitable relief.

3. The prevailing party in a cause of action under this section may be awarded costs and reasonable attorney's fees.

4. A social media website that restores from deletion or removes the censoring of a social media website user's speech in a reasonable amount of time may use that fact to mitigate any damages.

5. A social media website may not use the social media website user's alleged hate speech as a basis for justification or defense of the social media website's actions at trial.

6. The attorney general also may bring a civil cause of action under this section on behalf of a social media website user who resides in this state and whose religious speech or political speech has been censored by a social media website.

7. This section does not apply to:

   a. A social media website that deletes or censors a social media website user's speech or that uses an algorithm to disfavor or censure speech that:

      (1) Calls for immediate acts of violence;

      (2) Calls for a user to harm themselves;

      (3) Is obscene material or material harmful to minors;

      (4) Is the result of operational error;

(5) Is the result of a court order;

(6) Comes from an inauthentic source or involves false impersonation;

(7) Entices criminal conduct; or

(8) Involves minors bullying minors; or

b. A social media website user's censoring of another social media website user's speech.

8. Only users eighteen years of age or older have standing to seek enforcement of this section.

9. The venue for a civil action brought under this section is in this state."

Renumber accordingly

THE STOP SOCIAL MEDIA CENSORSHIP ACT TALKING POINTS

1. What is the best policy solution to the on-going problem of social media censorship - is it (1) an executive order from the President, (2) the efforts to repeal of Section 230 of the Communications Decency Act (CDA) by Sen. Hawley on the federal level, or (3) a state law solution? A state law solution in the form of the Stop Social Media Censorship Act that causes deceptive trade practice law to catch up to modern-day technology is the best solution to the on-going problem of social media censorship because once enacted the statute would fall squarely within the "state law" exemption that is already built into Section 230 of the Communications Decency Act.

2. What is Section 230 of the Communications Decency Act (CDA)? Section 230 of the CDA is a federal statute enacted in the 1990s that creates an immunity defense that shields "internet intermediaries" from the actions of third parties.

3. Why would it be a bad idea to repeal Section 230 of the CDA on the federal level?
A total repeal of section 230 would not be wise because section 230 is a good law in many situations and a total repeal would have secondary unintended adverse consequences. The best way to understand section 230 is through an example. For instance, if a person posts a defamatory comment on Youtube, the person who was defamed could sue the person who defamed them, but they could not successfully sue Youtube because Youtube could invoke a Section 230 immunity defense and have the case dismissed. Instead of repealing Section 230, the state legislature can enact the Stop Social Media Censorship Act that falls squarely within the "state law" exemption that is already built into Section 230. This means that in a civil lawsuit brought under the Stop Social Media Censorship Act against a social media website for wrong censorship, the social media website could not successfully invoke a section 230 immunity defense. The Stop Social Media Censorship Act pieces through the immunity defense in civil litigation and prevents it from being successfully raised as a shield.

4. How is Section 230 being abused by Social Media Websites that censor political speech?
Currently, the major social media websites are censoring users whose religious and political views offend the delicate sensibilities of the employees who work there in view of arbitrary shifting standards. To date, in cases where the social media websites are being sued for this kind of censorship, the social media website have been able to have the cases dismissed by invoking section 230 immunity defense, arguing that by deleting users speech, the social media website merely engaged in "editorializing" and was not acting as speaker or publisher. However, the Communications Decency Act was designed to protect " decent speech" - not "indecent deceptive trade practices." The state law exemption allows the state legislature to pass legislation, like the Stop Social Media Censorship Act, that cures abusive trade practices through the misuse of section 230 immunity defense.

5. What does the Stop Social Media Censorship Act say? The Stop Social Media Censorship Act creates a private right of action that allows citizens of this state to bring against the major social media website that have more than 75 million subscribers that were never affiliated with any religious or political group from their inception that censor the user for religious or political reasons, after having marketed themselves falsely as being free, fair, and open to the public from its inception. A censored person who sues under the Stop Socia Media Censorship Act can seek $75,000 in statutory damages,

attorneys fees, costs, and other forms of relief. Social media websites can still censor for all of the common-sense reasons. This act applies to social media websites like Facebook, Twitter, and Youtube.

6. What is the significance of allowing a censored party to seek $75,000 in statutory damages and attorney fees? It is important to include statutory damages in this bill because some times it can be difficult to determine actual damages. Also, $75,000 is a magic number in that it is the jurisdictional minimum that will permit a party to proceed in Federal District Court under "diversity jurisdiction." Presumably, the social media website will be headquartered in a different state than the one where the censored user resides. Additionally, by including in the bill that plaintiff can get attorney fees, it will incentivize local lawyers to represent clients for free knowing that if they prevail, they can recover attorney fees, getting around the problem known as the "American Rule."

7. Does the Stop Social Media Censorship Act violate the Commerce Clause - how does a state have jurisdiction to regulate this? The Stop Social Media Censorship Act does not violate the Commerce Clause and the state has jurisdiction to regulate this problem because when a person in this state signs up to use Facebook, Twitter, and Youtube, they are entering into a contract inside of this state. "Contract law" is a "state law issue." The states have paramount jurisdiction to regulate contracts and to place restrictions on them. When a social media website censors a user for religious or political reasons after it has marketed itself as being free, fair, and open to the public from its inception, it is engaging in an existing form of breach of contract, bad faith, unfair dealing, unjust enrichment, false advertising, and deceptive trade practices. The courts in this state have jurisdiction under the "long-arm statute" for breach of contract and deceptive trade practices. This bill merely causes existing consumer protection law to catch up to modern-day technology, making it a progressive bill.

8. Does the Stop Social Media Censorship Act violate the First Amendment in some general way? No. Dishonest lawyers with a self-serving agenda often float that the Stop Social Media Censorship Act violates the first amendment in some vague way as a scare tactic. When pressed, they cannot explain how the act violates the first amendment or cite any authority to back up their position. It is true that the first amendment applies to the state government through the fourteenth amendment, and not to social media websites, who are private non-government actors. Yet, the first amendment does not protect deceptive trade practice, fraud, false advertising because that kind of speech is harmful unprotected speech. Facebook, Twitter, and Youtube have engaged in the greatest bait and switch of all time by marketing themselves as free, fair, and open to the public to induce people to subscribe only to hit them with a "gotcha game." Such deceptive trade practices are not protected by the first amendment free speech clause, and the state has a compelling interest to protect its citizens from harmful speech.

9. What is the underlying Constitutional legal basis for the Stop Social Media Censorship Act? The underlying constitutional legal basis supporting the Stop Social Media Censorship Act is the free speech and free exercise clauses of the first amendment of the United States Constitution. The first amendment can be used to restrain the government from encroaching on free speech, and it can be used as a catalyst by which the government can promote protected forms of speech. The states have a narrowly tailored compelling interest pursuant to the free speech and free exercise clauses to ensure that their citizens are allowed to express their religious and political worldviews in the modern-day digital public

square that was built on the false promise by the tech enterprise that it would be a place that was free, fair, and open to all religious and political views.

10. Why is it problematic to suggest that if Republicans do not like Facebook, Youtube, and Twitters arbitrary censorship policies they should go out and form their own social media websites like Parler?

The idea that if a person does not like the censorship practices of Facebook, Twitter, and Youtube, they should go form their own Facebook, Twitter, and Youtube is a proposed solution that amounts to a shallow oversimplification. Facebook, Twitter, and Youtube have already reached critical mass, and they did so by fraud. To try to compete with them now is unrealistic. Furthermore, Parler attempted to form a new social media platform to compete with Facebook, Twitter, and Youtube, and they were shut down.

11. Should Social Media Websites be broken up?

Currently, it is not necessary to break up Facebook, Twitter, and Youtube if the Stop Social Media Censorship Act is enacted.

12. Why are Democrats prime sponsoring this bill in some states?

The Stop Social Media Censorship Act is a bipartisan measure. Some Democrats in deep blue states are prime sponsoring the bill because many Democrats are being censored for not being "woke enough" or for not being too progressive enough. Social media censorship is not a right or left issue. It is a right and wrong issue that is best addressed by the state legislature through the Stop Social Media Censorship Act.

13. Exceptions: There are some exceptions and exemptions. The social media website can censor certain speech like pornography, accounts that are falsely impersonating, or speech that calls for immediate acts of violence. It is ok for this section to be debated to determine if it should be left as it is or expanded.

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1144
2/16/2021

An Act to permit civil actions against social media sites for censoring speech

Vice Chairman Karls called the meeting to order at 3:50PM.

Present: Representatives Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Satrom, and Vetter. Absent: Klemin, Roers Jones; Rep. Paur

Discussion Topics:
- Hog house amendment
- Media platforms liability
- Section 230

Rep. T. Jones: Proposed amendment 21.0594.01006. Testimony # 6779

Rep. Vetter: Moved the amendment 21.0594.01006
Rep. Christensen: Seconded

Voice vote carried

Rep. Vetter: Do Pass as Amended
Rep. Christensen: Seconded

Roll Call Vote:

Representatives	Vote
Chairman Klemin	A
Vice Chairman Karls	N
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	A
Rep Roers Jones	A
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	N
Rep K. Hanson	N

8-3-3 Carrier: Rep. Jones

Stopped 4:35

DeLores D. Shimek
Committee Clerk

21.0594.01006
Title.02000

Prepared by the Legislative Council staff for
Representative Kading
February 16, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1144

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to protect free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Definitions.

As used in this chapter:

1. "Censor" means to block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against.
2. "Expression" means any words, music, sounds, still or moving images, numbers, or other perceivable communication.
3. "Free speech state" means any of the several states, or any territory, of the United States that protects expression from censorship, by social media platforms or interactive computer services, based on the viewpoint of users or of expression.
4. "Identifiable private information" means private information that, in the circumstances, reasonably may be expected to be associated with a user or could with reasonable effort be associated with a user.
5. "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. The term does not include an internet service provider.
6. "Private information" means information acquired by the interactive computer service or social media platform from any user who has not expressly given prior authorization for the release or disclosure of the specific information, including the information's specific content, specific form, and the persons to whom the information will be released or disclosed.
7. "Receive" means to read, hear, look at, access, gain access to, or otherwise receive.
8. "Share" means to speak, sing, publish, post, upload, transmit, communicate, or otherwise share.

DP 2/16/21
2 of 4

9. "Social media platform" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server and which allows a user to publish or share expression with persons other than the particular persons to whom the expression specifically is directed. The term does not include an internet service provider.

10. "Unlawful expression" means expression that is unlawful under the United States Constitution or federal law, or under the Constitution of North Dakota or laws of this state.

11. "User" means a person that shares or receives expression through an interactive computer service.

Racial, religious, and viewpoint discrimination prohibited.

1. A social media platform may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression from another person, based on:

   a. The race, religion, or viewpoint of any user or other person; or

   b. The viewpoint presented in any user's or other person's expression.

2. An interactive computer service may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression from another person, based on:

   a. The race, religion, or viewpoint of any user or other person; or

   b. The viewpoint presented in any user's or other person's expression.

3. This section applies whether the viewpoint is expressed on the social media platform, the interactive computer service, or elsewhere.

Geographic discrimination prohibited.

1. A social media platform may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression based on the user's residing in, doing business in, sharing expression, or receiving expression in this state or any part of the state.

2. An interactive computer service may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression based on the user's residing in, doing business in, sharing expression, or receiving expression in this state or any part of the state.

Application.

1. This chapter only protects:

   a. A user residing in, doing business in, sharing expression in, or receiving expression in this state;

   b. Expression, sharing expression, or receiving expression, to the extent the expression, sharing, or receiving occurs in this state;

c. Expression, sharing expression, or receiving expression, to the extent the expression is shared with, or received from, any other free speech state; and

d. Expression, sharing expression, or receiving expression, to the extent the expression is shared with, or received from, any other of the several states, or any other of the territories, of the United States.

2. This chapter only applies to:

a. A social media platform or interactive computer service that functionally has more than twenty million active users within any thirty-day period; and

b. A social media platform or interactive computer service that functionally has more than one hundred fifty million active users within a calendar month.

3. This chapter does not apply to:

a. A social media platform or interactive computer service that has been available to users for less than twelve months; or

b. A social media platform or interactive computer service that is engaged primarily in its own expression and which allows users to comment its expression, as long as such commentary or the ability to comment is merely incidental to its expression.

4. This chapter does not:

a. Subject a social media platform or interactive computer service to any remedy or cause of action from which the social media platform or interactive computer service is protected by federal law;

b. Prohibit a social media platform or interactive computer service from censoring any expression that it is specifically authorized to censor by federal law; or

c. Prohibit a social media platform or interactive computer service from censoring unlawful expression.

Civil action - Remedies.

A user residing in, doing business in, sharing expression in, or receiving expression in this state may bring a civil action in any court of this state against a social media platform or interactive computer service for a violation of this chapter against the user, and upon finding the defendant has violated or is violating the user's rights under this chapter, the court shall award:

1. Declaratory relief;

2. Injunctive relief;

3. Treble damages or, at the plaintiff's option, statutory damages of up to fifty thousand dollars; and

4. Costs and reasonable attorney's fees.

Aiding and abetting - Civil action - Remedies.

A user residing in, doing business in, sharing expression in, or receiving expression in this state may bring a civil action in any court of this state against any person who aids or abets a violation of this chapter committed by a social media platform or interactive computer service against that user, and upon finding the defendant has aided or abetted or is aiding or abetting a violation of that user's rights under this chapter, the court shall award:

1. Declaratory relief;
2. Injunctive relief;
3. Treble damages or, at the plaintiff's option, statutory damages of up to fifty thousand dollars; and
4. Costs and reasonable attorney's fees.

Jurisdiction - Right to jury - Compliance.

1. Notwithstanding any other provision of law, the courts of this state have personal jurisdiction over any defendant sued under this chapter to the maximum extent permitted by the Fourteenth Amendment to the United States Constitution.
2. The plaintiff in an action brought under this chapter has the right to a jury trial.
3. If a defendant in an action brought under this chapter fails to comply promptly with the court's order, the court shall hold the defendant in contempt and shall use all lawful measures to secure immediate compliance, including imposing daily penalties sufficient to secure immediate compliance.

Fiduciary duty.

Any loss, release, or distribution by a social media platform or interactive computer service of identifiable private information that has been collected by the social media platform or interactive computer service is a breach of fiduciary duty and is subject to the usual legal or equitable remedies for the breach; but for each intentional or reckless loss, release, or distribution of identifiable private information, the monetary recovery must be tripled or, at the plaintiff's option, any defendant social media platform or interactive computer service shall pay presumptive damages or restitution in the amount of up to one million dollars."

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1144: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 3 NAYS, 3 ABSENT AND NOT VOTING). HB 1144 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to protect free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Definitions.

As used in this chapter:

1. "Censor" means to block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against.

2. "Expression" means any words, music, sounds, still or moving images, numbers, or other perceivable communication.

3. "Free speech state" means any of the several states, or any territory, of the United States that protects expression from censorship, by social media platforms or interactive computer services, based on the viewpoint of users or of expression.

4. "Identifiable private information" means private information that, in the circumstances, reasonably may be expected to be associated with a user or could with reasonable effort be associated with a user.

5. "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. The term does not include an internet service provider.

6. "Private information" means information acquired by the interactive computer service or social media platform from any user who has not expressly given prior authorization for the release or disclosure of the specific information, including the information's specific content, specific form, and the persons to whom the information will be released or disclosed.

7. "Receive" means to read, hear, look at, access, gain access to, or otherwise receive.

8. "Share" means to speak, sing, publish, post, upload, transmit, communicate, or otherwise share.

9. "Social media platform" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server and which allows a user to publish or share expression with persons other than the particular persons to whom the expression specifically is directed. The term does not include an internet service provider.

10. "Unlawful expression" means expression that is unlawful under the United States Constitution or federal law, or under the Constitution of North Dakota or laws of this state.

11. "User" means a person that shares or receives expression through an interactive computer service.

Racial, religious, and viewpoint discrimination prohibited.

1. A social media platform may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression from another person, based on:

   a. The race, religion, or viewpoint of any user or other person; or

   b. The viewpoint presented in any user's or other person's expression.

2. An interactive computer service may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression from another person, based on:

   a. The race, religion, or viewpoint of any user or other person; or

   b. The viewpoint presented in any user's or other person's expression.

3. This section applies whether the viewpoint is expressed on the social media platform, the interactive computer service, or elsewhere.

Geographic discrimination prohibited.

1. A social media platform may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression based on the user's residing in, doing business in, sharing expression, or receiving expression in this state or any part of the state.

2. An interactive computer service may not censor a user, a user's expression, a user's sharing of expression, or a user's receiving of expression based on the user's residing in, doing business in, sharing expression, or receiving expression in this state or any part of the state.

Application.

1. This chapter only protects:

   a. A user residing in, doing business in, sharing expression in, or receiving expression in this state;

   b. Expression, sharing expression, or receiving expression, to the extent the expression, sharing, or receiving occurs in this state;

   c. Expression, sharing expression, or receiving expression, to the extent the expression is shared with, or received from, any other free speech state; and

   d. Expression, sharing expression, or receiving expression, to the extent the expression is shared with, or received from, any other of the several states, or any other of the territories, of the United States.

2. This chapter only applies to:

a. A social media platform or interactive computer service that functionally has more than twenty million active users within any thirty-day period; and

b. A social media platform or interactive computer service that functionally has more than one hundred fifty million active users within a calendar month.

3. This chapter does not apply to:

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4. This chapter does not:

a. Subject a social media platform or interactive computer service to any remedy or cause of action from which the social media platform or interactive computer service is protected by federal law;

b. Prohibit a social media platform or interactive computer service from censoring any expression that it is specifically authorized to censor by federal law; or

c. Prohibit a social media platform or interactive computer service from censoring unlawful expression.

Civil action - Remedies.

A user residing in, doing business in, sharing expression in, or receiving expression in this state may bring a civil action in any court of this state against a social media platform or interactive computer service for a violation of this chapter against the user, and upon finding the defendant has violated or is violating the user's rights under this chapter, the court shall award:

1. Declaratory relief;

2. Injunctive relief;

3. Treble damages or, at the plaintiff's option, statutory damages of up to fifty thousand dollars; and

4. Costs and reasonable attorney's fees.

Aiding and abetting - Civil action - Remedies.

A user residing in, doing business in, sharing expression in, or receiving expression in this state may bring a civil action in any court of this state against any person who aids or abets a violation of this chapter committed by a social media platform or interactive computer service against that user, and upon finding the defendant has aided or abetted or is aiding or abetting a violation of that user's rights under this chapter, the court shall award:

1. Declaratory relief;

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4. Costs and reasonable attorney's fees.

Jurisdiction - Right to jury - Compliance.

1. Notwithstanding any other provision of law, the courts of this state have personal jurisdiction over any defendant sued under this chapter to the maximum extent permitted by the Fourteenth Amendment to the United States Constitution.

2. The plaintiff in an action brought under this chapter has the right to a jury trial.

3. If a defendant in an action brought under this chapter fails to comply promptly with the court's order, the court shall hold the defendant in contempt and shall use all lawful measures to secure immediate compliance, including imposing daily penalties sufficient to secure immediate compliance.

Fiduciary duty.

Any loss, release, or distribution by a social media platform or interactive computer service of identifiable private information that has been collected by the social media platform or interactive computer service is a breach of fiduciary duty and is subject to the usual legal or equitable remedies for the breach; but for each intentional or reckless loss, release, or distribution of identifiable private information, the monetary recovery must be tripled or, at the plaintiff's option, any defendant social media platform or interactive computer service shall pay presumptive damages or restitution in the amount of up to one million dollars."

Renumber accordingly

21.0594.01006
Title.

Prepared by the Legislative Council staff for
Representative Kading
February 16, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1144

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to protect free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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4. "Identifiable private information" means private information that, in the circumstances, reasonably may be expected to be associated with a user or could with reasonable effort be associated with a user.
5. "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. The term does not include an internet service provider.
6. "Private information" means information acquired by the interactive computer service or social media platform from any user who has not expressly given prior authorization for the release or disclosure of the specific information, including the information's specific content, specific form, and the persons to whom the information will be released or disclosed.
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3. This section applies whether the viewpoint is expressed on the social media platform, the interactive computer service, or elsewhere.

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Renumber accordingly

2021 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1144

2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Fort Union Room, State Capitol

HB 1144
3/16/2021

A BILL for an Act to protect free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service

Chair Klein opened the hearing at 11:00 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

Discussion Topics:

- Exemptions to censorship
- First Amendment freedoms
- Computer services and platforms
- Dormant commerce clause
- Objectionable content on social media platforms

Representative Tom Kading introduced the bill and submitted testimony #9478 [11:00].

Philip Hamburger, Colombia Law Professor testified in favor and submitted testimony #9498 [11:15].

Carol TwoEagle testified in favor [11:20].

Representative Terry Jones testified in favor and submitted testimony #9516 [11:22].

Kent Blickensderfer, Tech Net testified in opposition and submitted testimony #9426 and 9427 [11:30].

Rose Feliciano, Internet Association testified in opposition and submitted testimony #9293 [11:35].

Carl Szabo, NetChoice testified in opposition and submitted testimony #9005 [11:43].

Cameron Sholty, Heartland Institute testified neutral and submitted testimony #9442 [11:50].

Additional written testimony: 8969, 9053, 9355, 9453, 9466, 9467, 9490, 9499, 9503, and 9561.

Chair Klein ended the hearing at 11:57 a.m.

Isabella Grotberg, Committee Clerk

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 too 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. This standard is based on established case law out of the Rhode Island Supreme Court. The case effectively stated: 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. (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.

(Healy v. New England Newspapers, Inc., 555 A.2d 321 (R.I.), cert denied,
493 U.S. 814 (1989).

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OPINION | COMMENTARY

The Constitution Can Crack Section 230

Tech companies think the statute allows them to censor with impunity. The law is seldom so simple.

By Philip Hamburger
Jan. 29, 2021 2:00 pm ET

Section numbers of federal statutes rarely stir the soul, but one of them, 230, stirs up much fear, for it has seemed to justify censorship. Relying on it, tech companies including Google and Twitter increasingly pull the plug on disfavored posts, websites and even people. Online moderation can be valuable, but this censorship is different. It harms Americans' livelihoods, muzzles them in the increasingly electronic public square, distorts political and cultural conversations, influences elections, and limits our freedom to sort out the truth for ourselves.

But does the 1996 Communications Decency Act really justify Big Tech censorship? The key language, Section 230(c)(2), provides: "No provider or user of an interactive computer service shall be held liable on account of . . . 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." The companies take this as a license to censor with impunity.

That understanding is questionable. Law is rarely as clear-cut as a binary switch. To be sure, courts emphasize the breadth of Section 230's immunity for website operators. But there is little if any federal appellate precedent upholding censorship by the big tech companies. The question therefore comes down to the statute itself. The answers should give pause to the companies and courage to those they've censored.

The fundamental problems are constitutional—the first concerning the Commerce Clause. Congress's authority to enact Section 230 may seem indisputable because the Supreme Court has, since the New Deal, adopted an almost open-ended view of Congress's power to regulate interstate commerce. Yet congressionally emboldened censorship poses unique questions.

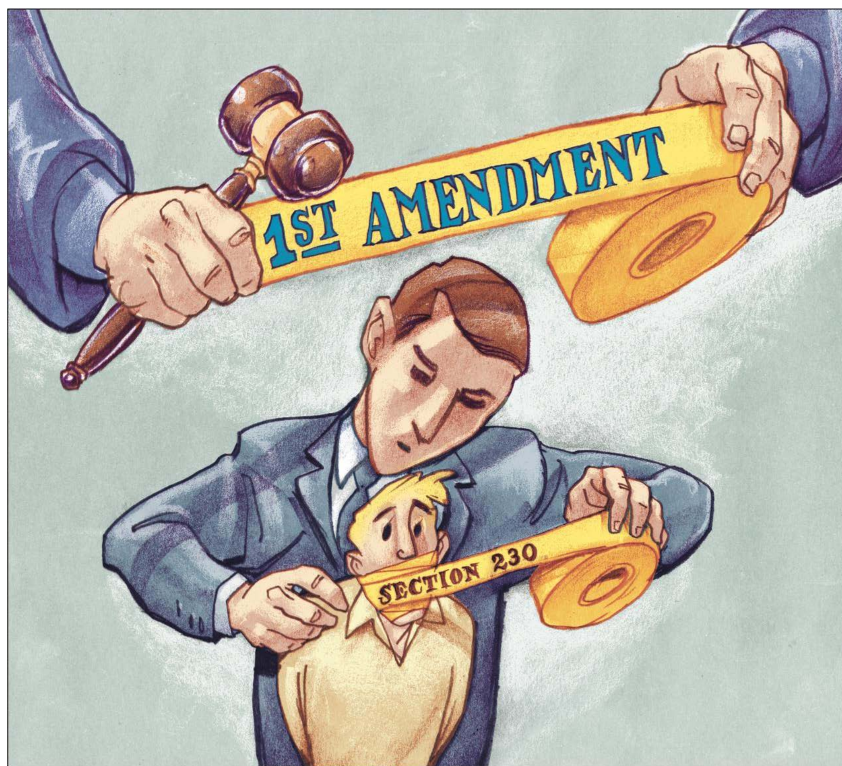

ILLUSTRATION: DAVID KLEIN

Originally, the Constitution's broadest protection for free expression lay in Congress's limited power. James Wilson reassured Americans in 1787—four years before the First Amendment's ratification—that "a power similar to that which has been granted for the regulation of commerce" was not "granted to regulate literary publications," and thus "the proposed system possesses no influence whatever upon the press."

The expansion of the commerce power to include regulation of speech is therefore worrisome. This is not to dispute whether communication and information are "commerce," but rather to recognize the constitutional reality of lost freedom. The expansion of the commerce power endangers Americans' liberty to speak and publish.

That doesn't necessarily mean Section 230 is unconstitutional. But when a statute regulating speech rests on the power to regulate commerce, there are constitutional dangers, and ambiguities in the statute should be read narrowly.

A second constitutional question arises from the First Amendment. The companies brush this aside because they are private and the amendment prohibits only government censorship. Yet one must worry that the government has privatized censorship. If that sounds too dramatic, read Section 230(c)(2) again. It protects tech companies from liability for restricting various material "whether or not such material is constitutionally protected." Congress makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them.

Seventeenth-century censorship, which the First Amendment clearly prohibited, was also imposed largely through private entities, such as universities and the Stationers' Company, England's printers

trade guild. Whereas privatized censorship then was often mandatory, the contemporary version is voluntary. But the tech companies are protected for restricting Congress's list of disfavored materials, and this means that the government still sets the censorship agenda.

Some of the material that can be restricted under Section 230 is clearly protected speech. Consider its enumeration of "objectionable" material. The vagueness of this term would be enough to make the restriction unconstitutional if Congress directly imposed it. That doesn't mean the companies are violating the First Amendment, but it does suggest that the government, in working through private companies, is abridging the freedom of speech.

This constitutional concern doesn't extend to ordinary websites that moderate commentary and comments; such controls are their right not only under Section 230 but also probably under the First Amendment. Instead, the danger lies in the statutory protection for massive companies that are akin to common carriers and that function as public forums. The First Amendment protects Americans even in privately owned public forums, such as company towns, and the law ordinarily obliges common carriers to serve all customers on terms that are fair, reasonable and nondiscriminatory. Here, however, it is the reverse. Being unable to impose the full breadth of Section 230's censorship, Congress protects the companies so they can do it.

Some Southern sheriffs, long ago, used to assure Klansmen that they would face no repercussions for suppressing the speech of civil-rights marchers. Under the Constitution, government cannot immunize powerful private parties in the hope that they will voluntarily carry out unconstitutional policy.

Perhaps judges can avoid the constitutional problem, but this will be more difficult if they read Section 230(c)(2) broadly. The tech companies can't have it both ways. If the statute is constitutional, it can't be as broad as they claim, and if it is that broad, it can't be constitutional.

The statute itself also poses problems for Big Tech. The first question is what Section 230(c) means when it protects tech companies from being "held liable" for restricting various sorts of speech. This is widely assumed to mean they can't be sued. But the word "liable" has two meanings.

In a civil suit, a court must first consider whether the defendant has violated a legal duty or someone else's right and is therefore legally responsible. If the answer is yes, the court must decide on a remedy, which can include damages, injunctive relief and so forth. The term "held liable" as used in Section 230(c) can fall into either category. Thus, the protection of tech companies from being "held liable" may merely mean they can't be made to pay damages, not that they can't be held responsible and subjected to other remedies. The former interpretation seems more plausible, if only because a mere ambiguity seems a weak basis for barring a vast class of plaintiffs from recourse to the courts on

a matter as central as their speech.

After protecting tech companies from being held liable, the statute recites: "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." This clause, Section 230(e), may seem to vindicate the companies, but it distinguishes between a "cause of action" and "liability" and thereby clarifies the ambiguity. Evidently, when Section 230(c) protects tech companies from being held liable, it does not generally immunize them from causes of action. It merely protects them from "liability" in the sense of damages.

To be sure, when a company is sued for damages, Section 230(e) bars not only the imposition of such liability but also the underlying cause of action. But the statute apparently protects tech companies only from being sued for damages, not for other remedies.

Another question concerns the "material" that the companies can restrict without fear of being sued for damages. Section 230(c) protects them for "any action voluntarily taken in good faith to restrict access to or availability of material" of various sorts. Even before getting to the enumerated categories of material, it is important to recognize that the statute refers only to "material." It says nothing about restricting persons or websites.

To be sure, the statute protects the companies for "any action" restricting the relevant material, and if taken literally "any action" could include various nuclear options, such as barring persons and demonetizing or shutting down websites. But the term "any action" can't be taken to include actions that restrict not only the pertinent material but also other things. "Any action" has to be focused on such material.

The statute, moreover, requires that such action be taken "in good faith." At common law, that can mean not acting with the effect of destroying or injuring the rights of others and, more specifically, not acting disproportionately to terminate relations. The statute thus doesn't protect the companies when they take disproportionate action against material, let alone when they unnecessarily restrict other things, such as websites and persons.

What is in good faith for a website may be different from what is in good faith for a tech company that operates like a common carrier or public forum. But at least for such tech companies, the statute's focus on "material"—combined with the requirement of "good faith"—stands in the way of any categorical protection for suppressing websites, let alone demonetizing them or barring persons.

What does this mean in practice? Even if a company technically can't bar some material without taking down the entire website, it at least must give the operators an opportunity to remove the

objectionable material before suppressing the website altogether. As for demonetizing sites or barring persons, such actions will rarely if ever be necessary for restricting material.

Such is the statute's text. If you nonetheless want large common-carrier-like companies to go beyond "good faith" actions against "material," pause to consider a little history, if only as a reality check about the proportionality of your desires. Even the Inquisition gave heretics formal opportunities to recant. And even the Star Chamber required its private censors to bar offensive material, not authors.

The next question is viewpoint discrimination. Section 230(c) specifies protection for restricting "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively sviolent, harassing, or otherwise objectionable." The companies understand this to include nearly anything to which they object.

But Section 230(c) enumerates only categories of content, not viewpoints. The distinction between content and viewpoint is crucial in free-speech law: Government can't discriminate against disfavored viewpoints even when regulating unprotected speech such as "fighting words." It is therefore telling that the list focuses on content. One may protest that "otherwise objectionable" could include objectionable viewpoints. But it is obviously a catchall, and following a list of types of content, it would seem to refer only to additional objectionable content.

The tech companies could argue that the catchall is still ambiguous. But at stake is viewpoint discrimination by vast companies that are akin to common carriers, whose operations function as public forums, and that are carrying out government speech policy. Are we really to believe that a mere ambiguity should be interpreted to mean something so extraordinary?

Section 230's text offers the tech companies less shelter than they think. It protects them only from damage claims and not at all when they go beyond a constitutional reading of the statute.

The implications are far-reaching. As litigation comes before the courts, they will have to decide the limits of Section 230 and the lawfulness of privatized censorship. In the meantime, some state legislatures will probably adopt civil-rights statutes protecting freedom of speech from the tech companies. Recognizing that such legislation isn't barred by Section 230, lawmakers in several states are already contemplating it. One way or another, Section 230 does not, and will not, bar remedies for government privatization of censorship.

Mr. Hamburger is a professor at Columbia Law School and president of the New Civil Liberties Alliance.

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Six Principles for State Legislators Seeking to Protect Free Speech on Social Media Platforms

By James Taylor

Background

Political free speech in the United States is under attack. Tech media giants who own and control virtually all social media platforms available to Americans are working together to silence groups with whom they do not agree.

In just the past year, large, multi-billion-dollar, multinational corporations—including Apple, Amazon, Facebook, Google, and Twitter—prevented a sitting president from communicating directly with the American people. Members of Congress have been banned from communicating with their constituents. Newspapers were stopped from providing important reports about election topics. And perhaps worst of all, everyday Americans have regularly been blocked from sharing their own political views with friends and family on popular social media platforms.

> "Tech media giants who own and control virtually all social media platforms available to Americans are working together to silence groups with whom they do not agree."

Confronted with these assaults on speech, the founders of Parler listened to big-tech apologists who endlessly told conservatives, "If you don't like it, you can go build your own platform," and built their own social media business. But after experiencing monumental growth by promising to be a bastion for free speech, big-tech companies crushed Parler, shutting the entire platform down. As of this writing, it remains unclear whether Parler will return.

When Congress passed the Communications Decency Act (CDA) in 1996, which created the now infamous Section 230 statute that big-tech companies use as a justification to silence speech, America's powerful big-tech cartel did not exist. The internet was much more democratized than it is today.

At the time Congress passed CDA, it explicitly found that the internet played a crucial role in empowering people to share their views without censorship, including political views. Congress also made clear that it believed users should control for themselves the information they do and do not wish to receive and share. In fact, Congress explicitly stated that Section 230 was designed to *preserve* open political discourse and to encourage internet platforms to continue providing uncensored political speech—not to suppress it.

However, the rise of the present big-tech cartel has destroyed the internet as it existed in 1996. Even those who have long been defenders of giving companies great leeway in determining how they control their businesses and property, including

libertarian icon Ron Paul, are now warning against, in Paul's words, the "social media purges" conducted by large technology corporations.

Paul has rightfully said these "purges" are "shocking and chilling," and that a nefarious marriage between massive tech companies and government has formed that regularly restricts political speech and suppresses dissent.

"Those who continue to argue that the social media companies are purely private ventures acting independent of US government interests are ignoring reality," Paul said.

"The Heartland Institute believes in finding and promoting free-market solutions to societal problems."

Free speech is the central tenet of any representative form of government, and it is far too important to allow a cartel of multinational corporations to attack and restrict it while intellectuals discuss and debate how market forces might somehow, someday, some way find a strategy to penetrate the government-protected tech cartel that now operates in a system that is anything but a free market. The situation has been made even more difficult because government works hand-in-hand with the tech cartel, grants market-inhibiting advantages and protections through corporate law, and provides additional market-inhibiting protections through the misapplication of Section 230.

Currently, the internet is a ubiquitous and extremely powerful means of shaping and potentially repressing free speech, political discourse, individual rights, the outcomes of elections, and a host of other important political activities. Multinational tech giants currently block Americans from utilizing the internet to discuss many important topics, including irregularities in election vote-counting, COVID-19 medications that could save thousands of lives, and self-contradictory statements issued by the World Health Organization.

The Heartland Institute believes in finding and promoting free-market solutions to social and economic problems. That means that in the vast majority of cases, we believe the fewer regulations and restraints on businesses, the better. Everyone prospers in a truly free-market system. However, tech giants like Amazon, Facebook, and Google are not the products of a free market. They arose in large part because of market-corrupting government favoritism and legal protections, and they have exploited those advantages to suppress political free speech. When such a cartel of multinational corporations works in concert to suppress individual rights, champions of free speech and human rights must avail themselves of all means advisable and necessary to protect Americans' most basic liberties.

The Heartland Institute offers the following perspectives and principles for state legislators crafting political free-speech protections in their states:

PRINCIPLE #1

Big-tech companies operate and thrive in a government-corrupted market, exploit the corrupted market to their advantage, and often oppose free-market reforms. Therefore, this cartel is in no position to object to free-speech protections in the name of "free markets."

Objections to states stepping up to protect free speech based on appeals to the "free market" fail to recognize that large technology companies do not operate under free-market conditions now, and they only exist because of important special protections offered by government. Eliminating nearly all of those favoritisms and protections would be the ideal solution. But in the absence of such an ideal solution existing or appearing imminent, Americans' vital free-speech rights far outweigh the selfish interests of players in a corrupted market.

Parler attempted to play by free-market rules. The destruction of Parler illustrates that there simply is no free market when a few tech giants can work in concert to prevent a market from even forming, let alone competing.

PRINCIPLE #2

Shutting down an entire platform or blocking a particular user because of concerns about vague and amorphous "community standards" or anything other than sexually obscene, excessively violent, or indisputably criminal content is not in line with an originalist understanding of federal law. States must act to protect their residents' speech rights when the federal government fails to do so.

States should recognize that Congress' Section 230 protections apply narrowly to sexually obscene and excessively violent activity and communications. Internet and social media providers must not restrict content merely because the provider subjectively believes the content is erroneous, rude, incorrect, offensive, uncivil, or incendiary. Once a provider engages in content censorship beyond Section 230's protections regarding sexually obscene and excessively violent content, the provider opens itself up to regulation and civil liability as a "publisher" of content, rather than enjoying the status of a mere "platform" or open forum.

> "A small number of social media platforms control the venues through which tens of millions of everyday Americans communicate and express their political, religious, and cultural views."

PRINCIPLE #3

Free-speech rights should outweigh corrupt market protections.

Currently, a small number of social media platforms control the venues through which tens of millions of Americans communicate and express their political, religious, and cultural views.

Free speech is too vital for human dignity and for the preservation of representative government to be deemed subservient to the censorship desires of crony multinational tech companies, businesses that, again, would not exist if it were not for special arrangements created by government.

PRINCIPLE #4

Shutting down an entire platform because of concerns about criminal activity conducted by a small percentage of a platform's users is an overly intrusive, harmful, and unnecessary action.

States should welcome internet and social media platforms that do not censor individuals' nonviolent religious, political, or cultural speech. This position is in keeping with existing state laws governing other forums and services. For example, no one advocates for closing of cell phone companies because some people have been caught using their phones to commit crimes, including serious crimes like the attacks on the U.S. Capitol, state buildings, police precinct buildings, etc., that occurred over the past several months.

Thus, the argument that Parler and other platforms should be shut down because a small percentage of the application's users utilized Parler while conducting a criminal assault on the U.S. Capitol carries absolutely no weight, especially in light of the fact that numerous other social media and communication suppliers were also used by the attackers. Law enforcement can and should identify and arrest people who post such messages, of course, but shutting down a service provider because a miniscule number of its users engaged in criminal activity is an incredibly broad, unnecessary, and stifling act that limits free speech.

PRINCIPLE #5

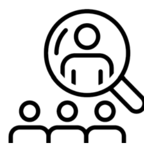
Section 230 does not protect internet social media platforms from blocking anything other than activity that falls under the narrow categories of sexually obscene, harassing, and/or excessively violent material.

States should recognize the validity and application of Section 230(c)(2)(A)'s legal protection for internet and social media platforms that block or remove material that falls under the category

of "obscene, lewd, lascivious, filthy, excessively violent, harassing." All of these examples comply with the Good Samaritan purpose and title of Section 230(c): "Protection for 'Good Samaritan' blocking and screening of offensive material." Within that appropriate context and title of Section 230(c), the protection within Section 230(c)(2)(A) for internet platforms blocking or removing material that is "otherwise objectionable" clearly relates to—and is restricted to—material that fits within the category of sexually obscene or excessively violent. The term "otherwise objectionable" applies clearly within that narrow context and was not intended to give tech companies a free hand to suppress political speech.

PRINCIPLE #6

Banning a particular user for anything other than repeatedly posting sexually obscene, harassing, or excessively violent material exceeds Section 230's protections and should be subject to legislative action and civil causes of action.



States should recognize that technology companies seeking to be classified as a "platform," rather than a publisher, should not be empowered to ban a user for anything other than repeated violations of Section 230's explicitly and narrowly defined categories of sexually obscene, harassing, and/or excessively violent material. Banning a person for posting material subjectively defined as callous, hateful, incendiary, etc., imposes impermissible restrictions on free speech.

ABOUT THE AUTHOR

James Taylor is president of The Heartland Institute, where he also serves as a senior fellow for environment and energy policy and as the director of Heartland's Arthur B. Robinson Center on Climate and Environmental Policy.

Taylor is the former managing editor (2001–2014) of *Environment & Climate News*, a national monthly publication devoted to sound science and free-market environmentalism.

Taylor has presented analyses about energy and environment issues on CNN, CNN Headline News, Fox News Channel, Fox Business Channel, MSNBC, *PBS News Hour*, *PBS Frontline*, *CBS Evening News*, *ABC World News*, and other TV and radio outlets across the country. He has been published in virtually every major newspaper in America.

Taylor has also been a featured presenter at conferences sponsored by the National Conference of State Legislatures, American Legislative Exchange Council, Council of State Governments, National Association of Counties, National Foundation of Women Legislators, State Policy Network, CPAC, Cato Institute, Heritage Foundation, and the European Institute for Climate and Energy.

Taylor received his bachelor's degree from Dartmouth College, where he studied atmospheric science and majored in government. He received his juris doctorate from Syracuse University.

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March 15, 2021

Honorable Chair Jerry Klein
North Dakota State Legislature
600 East Boulevard
Bismarck, ND 58505-0360

Re: TechNet Opposition to EHB 1144

Dear Chair Klein and Members of Senate Industry, Business, and Labor:

I write on behalf of TechNet respectfully **in opposition to Engrossed House Bill 1144,** which will subject North Dakota residents to more abhorrent and illegal content on the internet by creating frivolous liability risks for social media companies that remove objectionable content from their platforms.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents more than three and a half million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

Our members are committed to keeping their users safe online, which is why social media companies review millions of pieces of content every day in order to remove harmful content that conflicts with their policies. North Dakota should encourage these companies to have content policies, as they govern the removal of content showing the exploitation of children, bullying, harassment, gore, pornography, and spam. Instead, EHB 1144 perversely creates an incentive for companies to not prohibit and remove any objectionable content in order to avoid the frivolous lawsuits that this bill would create. The result would be the rapid spread of abhorrent and illegal content that will cause real-world harm in North Dakota communities and beyond.

Social media companies understand that they have an obligation to remove objectionable content, otherwise their users will be subjected to dangers like images of child endangerment, financial scams, spam, and other nefarious links. Companies take this responsibility seriously, removing harmful content in an unbiased manner while keeping their services open to a broad range of ideas. In the overwhelming number of cases, removal of offensive content is accomplished as intended. However, the sheer volume of content – hundreds of millions of posts per

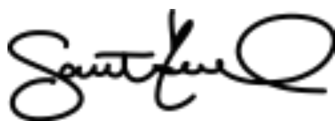
day – ensures that both artificial intelligence and human reviewers at companies cannot get it right 100 percent of the time. Billions of transactions, after all, will inevitably lead to errors. It would be fundamentally unfair to implement such a draconian penalty for instances where code misfired or a simple mistake was made.

Additionally, the bill runs counter to the American free speech law governing content liability on the internet, Section 230 of the federal Communications Decency Act. Since its enactment in 1996, Section 230's two key provisions have empowered online intermediaries to remove harmful content while providing them with the same "conduit immunity" that commonly exists in other real world offline contexts – for example, not holding a bookseller liable for libelous books, but rather the individual who committed the libel.

Due to Section 230, American companies have the right to curate information on their service to meet the needs and expectations of their customers. Section 230 has supported innovation across the internet while also encouraging companies to be "Good Samaritans" by allowing them to "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."

For these reasons, TechNet opposes EHB 1144. We thank you in advance for your consideration, and please do not hesitate to reach out with any questions.

Sincerely,



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Executive Director, Northwest
TechNet
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360-791-6407

Testimony of Kent Blickensderfer, KPB Consulting, LLC
Before the Senate Industry Business and Labor Committee
Senator Jerry Klein, Chairman
March 16, 2021

Good morning Chairman Klein and committee members. My name is Kent Blickensderfer with KPB Consulting here in Bismarck. I'm here today representing TechNet in opposition to HB1144. TechNet is a national, bipartisan network of technology companies that promote the growth of the innovation economy nationwide.

TechNet's members are committed to keeping their users safe online. HB 1144 will subject residents to more abhorrent and illegal content on the internet by forcing private internet, communications and social media companies to keep objectionable material on their platforms. Our companies have an obligation to remove objectionable content to protect users from dangers like images of child endangerment, financial scams, spam, and other nefarious links. They take this responsibility seriously, removing harmful content in an unbiased manner while keeping their services open to a broad range of ideas.

This is not an uncommon practice. If an individual were yelling racist remarks or inciting violence in a restaurant, no one would dispute the fact that the restaurant has a right to remove that person from their establishment. Furthermore, Section 230 of the Federal Communications Decency Act grants companies the right to be able to draw boundaries and respond to market forces such as brand safety or consumer expectations. This bill runs counter to that federal policy. Also, by forcing private companies to house on their servers objectionable speech, inconsistent with terms of service and contrary to their brand, this bill will present significant legal challenges for the State of North Dakota

Despite the constant growth of these platforms, in the overwhelming number of cases, removal of offensive content is accomplished as intended. However, the sheer volume of content – hundreds of millions of posts per day – ensures that both artificial intelligence and human reviewers at companies can't get it right all the time. Billions of transactions eventually and inevitably lead to errors. It would be fundamentally unfair to implement a civil cause of action for instances where code misfired or a simple mistake was made.

HB1144 also violates the First Amendment of the US Constitution which makes clear the government may not regulate the speech of private individuals. Further it violates conservative principles of limited government and free markets. It also makes it more difficult for social media platforms to block SPAM and harmful and illicit content. Keep in mind that users agree to Terms of Service when they sign on to our platforms and the platforms have the right to enforce those terms.

For these reasons, we ask that you give HB1144 a DO NOT PASS recommendation. Thank you for your time and I will be happy to try to answer any questions you have.

Internet Association

The unified voice of the internet economy / www.internetassociation.org

March 16, 2021

The Honorable Jerry Klein, Chair
Senate Committee on Industry, Business & Labor
State Capitol
600 East Boulevard
Bismarck, North Dakota 58505-0360

RE: HB 1144 - Internet Association Opposition

Dear Chair Klein and Members of the Committee:

Internet Association (IA) appreciates the opportunity to explain our opposition to **HB 1144**, which would permit civil actions against social media companies for their content moderation decisions.

IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. Our mission is to foster innovation, promote economic growth, and empower people through the free and open internet. We believe the internet creates unprecedented benefits for society and the economy and, as the voice of the world's leading internet companies, IA works to ensure legislators, consumers, and other stakeholders understand these benefits.

IA explains, below, how Section 230's protections benefit consumers, but first it is important to note that your bill raises important constitutional concerns. As you know, North Dakota's Constitution, Article I, Section 4, protects freedom of speech as does the First Amendment of the U.S. Constitution. It is well established that the companies covered by this bill have First Amendment rights in their content moderation decisions. Justice Kavanaugh wrote for the Supreme Court that such rights are an inherent part of their property rights. Thus, we believe that HB 1144 under consideration is unlikely to survive scrutiny in the courts, but there are also important policy reasons why it should not move forward.

In 1996 the US Congress passed Section 230 of the Communications Decency Act (Section 230) with bipartisan support. The purpose was to ensure that online service providers could allow individuals to post content to their platforms and that the platform could moderate that content without being legally viewed as the "publisher." Without Section 230, the law could treat a provider who turns a blind eye to harmful content more favorably than a platform that takes action to try to protect consumers. *Congress made clear its intent that Section 230 should empower providers to engage in content moderation.* This has allowed online platforms to make their services safe for users and delete harmful, dangerous, and illegal content.

In order to realize the full benefits of online services, it is critical that service providers are able to set and enforce robust rules designed to protect the quality and integrity of their services. Today, providers regularly take action against spam, malware and viruses, child sexual abuse material, scams, threats and harassment, impersonation, non-consensual intimate images, and other content that, regardless of whether illegal or legal, is harmful to the users of their services and the public at large. This bill will put the safety measures providers take on a daily basis at risk by allowing civil suits to be filed challenging nearly every decision.. Consumers will not benefit from this.

The proposal before you would put online companies in the position of defending these content each and every moderation decision in court in response to a lawsuit. Regardless of whether a platform was acting appropriately under the bill, individual users would still be empowered to challenge each decision and require the provider to defend content decisions. This could easily lead to an unbridled internet where harmful content overwhelms the healthy discourse and exchange of ideas that we all desire.

As stated above, Congress enacted CDA 230 to encourage companies to engage in moderation to limit harmful content and it clearly preempts state bills which are inconsistent with its protections. Not only is this bill clearly inconsistent with CDA 230 by seeking to impose new limitations and new liability on content moderation decisions, the bill also seeks to prevent a private company from exercising its constitutional rights to refuse content from its platform.

The companies IA represents understand their success depends on attracting a broad user base regardless of party affiliation or political perspective. This is core to the principles of free enterprise and we should encourage it. While no company is perfect, IA members are doing their best to be a place where ideas flourish. Compared to any other form of communication, internet companies are still the most open and most accessible for all Americans.

For those reasons, IA requests the Committee on Industry, Business & Labor not move HB 1144 forward. If you have any questions reach out to me at rose@internetassociation.org or 205-326-0712.

Thank you for your consideration.

Sincerely,

Rose Feliciano
Director, Northwest Region, State Government Affairs

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

Carl Szabo, Vice President and General Counsel
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7485
www.netchoice.org

March 13, 2021

Senator Jerry Klein, Chair
Industry, Business and Labor Committee
North Dakota Senate
Bismarck, ND

RE: **Opposition to HB 1144 Regulating Free Speech on Social Networks**

Dear Chairman Klein and members of the committee:

We respectfully ask that you **not** advance HB 1144, because it:

- Exposes social media platforms to lawsuits for removing harmful content.
- Makes it more difficult for social media platforms to block SPAM messages.
- Violates conservative principles of limited government and free markets.
- Violates the First Amendment of the US Constitution.

HB 1144 will penalize social media platforms for moderating harmful content, generating unintended consequences we describe below.

HB 1144 exposes websites and platforms to lawsuits for removing harmful content

The First Amendment protects a lot of content that we don't want our families to see on websites. The First Amendment protects explicit material, extremist recruitment speech, and even protects bullying and other forms of verbal abuse.

At the same time, audiences and advertisers don't want to see this content on our social media pages. But HB 1144 would make it nearly impossible for social media to remove objectionable content.

Today, online platforms try to remove harmful content from their sites. In just the six-months during 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[1] This includes removal of 57 million instances of pornography, and 17 million pieces of content related to child safety.

Yet the removal of content related to extremist recruitment and child safety is impeded by HB 1144. This is because it penalizes a platform that decides to remove content because of "the viewpoint of the

[1] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf

user or another person." While this may seem obvious, for anyone whose content is removed based on the substance of the content, it is a removal based on the "viewpoint" of the user.

This would mean a social media platform could be violating HB 1144 if it removed any of the following:

- Pornographic content – since that denies views of those who enjoy pornography
- ISIS recruitment – since that denies views of those who hate America
- SPAM messages – since that denies the viewpoint of the spammer
- Atheist or abortion advocacy posted to a church's Facebook or YouTube page

The threat of lawsuits authorized under this legislation will likely cause large platforms to stop deleting extremist speech and harmful content, making the internet a much more objectionable place to be.

Moreover, this bill is written in a way that enables nearly every North Dakota resident to be a plaintiff in a lawsuit when one piece of content is removed. If only half of the population is on the social media platform, just one post being removed would create statutory damages of billions.

In the case of a successful lawsuit, platforms would be forced to restore this harmful content online.

In addition, YouTube and Facebook allow page managers to remove content posted on their pages. This empowers content creators to curate their pages to suit their interest. However, platforms and websites might remove this capability, since it creates the threat of expensive litigation under HB 1144. A litigious plaintiff could argue that the empowerment of page owners to remove content is an "interactive computer services" censoring a user or their expression, subjecting the platforms to the threat of a lawsuit anytime a page manager removes inappropriate comments or images.

HB 1144 Makes it illegal for providers to block SPAM, and punishes platforms for removing terrorist speech and pornography

Today, platforms engage in robust content blocking of SPAM. But this blocking of not only unwanted but invasive content is illegal under HB 1144.

For decades, service providers have fought bad actors to keep our services usable. Through blocking of IP and email addresses along with removing content with harmful keywords, our services are more useful. But services couldn't do this blocking under HB 1144.[2]

At the same time, platforms could not remove terrorist content. Imagine the Taliban making posts that read, "Join us to help America." Blocking or removing this statement is illegal under HB 1144 unless those specific terms are addressed in the terms of service. Likewise, removal of pornography is also inhibited under HB 1144.

The de facto requirement to make decisions crystal clear in HB 1144 would make it easier for bad actors to circumvent protections and a duty to explain why SPAM content was blocked would contradict

---

[2] *See, e.g. Holomaxx Technologies Corp. v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (That case involved an email marketer sued Microsoft, claiming that the SPAM blocking filtering technology Microsoft employed was tortious.)

Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[3]

It is certain that HB 1144 will chill platforms from removing harmful or dangerous content.

HB 1144 creates new and dangerous powers for government to regulate free speech

HB 1144 empowers an administration to weaponize the law against would-be political opponents, since it fails to define key terms like "restrict." This leaves such terms subject to government interpretations.

This should concern lawmakers of both parties who recognize that control of the Governor's mansion by one political party is never certain or permanent.

HB 1144 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed the equivalent of HB 1144, the infamous "Fairness Doctrine," a law requiring equal treatment of political parties by broadcasters. In his repeal, President Reagan said:

> *"This type of content-based regulation by the federal government is … antagonistic to the freedom of expression guaranteed by the First Amendment.*
> *In any other medium besides broadcasting, such federal policing … would be unthinkable."[4]*
> *– President Ronald Reagan*

We face similarly unthinkable restrictions in HB 1144 which forbid online platforms from moderating their services in ways that they see fit.

Today, conservative speech has never been stronger. No longer limited to a handful of newspapers or networks, conservative messages can now reach billions of people.

We've seen the rise of conservative voices without relying on a column from the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

All of this was enabled at effectively no cost to conservatives. Think about conservatives like Ben Shapiro and Mark Stein, whose shows are available to anyone with an internet connection and on whose websites conservatives can discuss and debate articles via the comments section.

Nonetheless, there are some who seek government engagement to regulate social networks' efforts to remove objectionable content. This forces us to return to an era under the "fairness doctrine" and create a new burden on conservative speech.

---

[3] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).
[4] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), *available at* http://www.presidency.ucsb.edu/ws/?pid=34456 .

HB 1144 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting Online Platforms and Services,* which says:

> WHEREAS, online platforms are businesses that should be allowed to operate in ways that best serve their users — and the government should not interfere with these businesses in order to advance a particular belief or policy;
>
> WHEREAS, even if online platforms were to exhibit political bias in content display or moderation, the First Amendment protects this exercise of editorial discretion from government intervention;
>
> …
>
> THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that it is well settled that the First Amendment restricts the government from regulating speech or restricting the publishing rights of online platforms or services, including the right to curate content.

As President Ronald Reagan said, "Government is not the solution to our problem; government is the problem." Government regulation of free speech online would not safeguard the future of conservative speech. It would endanger it.

HB 1144 violates the First Amendment of the US Constitution

The First Amendment makes clear that government may not *regulate* the speech of private individuals or businesses. This includes government action that essentially compels speech – i.e., forces a social media platform to allow content they don't want.

Imagine a church's social media page being required by the government to allow atheists' comments about the Bible. That would violate the First Amendment. But that is exactly what HB 1144 does for internet platforms. It forces them to host content they otherwise wouldn't against their will.

While there are very limited, narrow exceptions, these types of restrictions are subject to what is called the "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest;
- narrowly tailored to achieve that goal or interest; and
- the law or policy must typically be the least restrictive means for achieving that interest.

On at least the last two prongs of this test, HB 1144 is unconstitutional and will fail.

Legal analysis from DLA Piper, the largest law firm in the world, looked at legislation similar to HB 1144 and concluded it would likely not withstand a First Amendment challenge:

> [T]hese types of provisions punishing content moderation would also be highly vulnerable on First Amendment grounds. There is no question that website operators' editorial judgments concerning which user-generated posts they will moderate (including potentially taking down) constitute speech subject to the full protections of the First Amendment. Moreover, given the centrality of online communications to the free and open marketplace of ideas, a court would be particularly wary of governmental efforts to police online moderation practices. As the Supreme Court has explained, "[w]hile in the past there may have been difficulty in identifying

the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, … and social media in particular."

Here, the restriction unquestionably impinges on website operators' editorial judgment protected by the First Amendment—and it does so based on the content of the user-generated postings. As a result, the provisions would be subject to "strict scrutiny"—the most searching form of constitutional scrutiny. Under this exacting standard, a statute "is invalid … unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." As the Supreme Court has instructed, "[t]he State must specifically identify an 'actual problem' in need of solving, … and the curtailment of free speech must be actually necessary to the solution." That is a very high standard. "'It is rare that a regulation restricting speech because of its content will ever be permissible.'"

A reviewing court would very likely conclude that the type of bill provisions discussed above cannot survive strict-scrutiny review. Neither the legislative record nor any evidence supports the existence of a "compelling government interest" in second-guessing websites' editorial practices.

As NetChoice favors limited government and a free-market approach, we respectfully ask you to **oppose HB 1144**.

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President and General Counsel, NetChoice
NetChoice works to make the Internet safe for free enterprise and free expression. www.netchoice.org

RESOLUTION PROTECTING ONLINE PLATFORMS AND SERVICES

WHEREAS, the Internet has created millions of new American jobs and generated billions of dollars in revenue for American businesses;

WHEREAS, online platforms enabled users to generate, upload, and share their own content, and this capability has become a core component of the online experience;

WHEREAS, ALEC's principles of limited government and free markets suggest that the government should continue to take a light-touch approach to regulation online platforms and services;

WHEREAS, online platforms are businesses that should be allowed to operate in ways that best serve their users — and the government should not interfere with these businesses in order to advance a particular belief or policy;

WHEREAS, even if online platforms were to exhibit political bias in content display or moderation, the First Amendment protects this exercise of editorial discretion from government intervention;

WHEREAS, ALEC's principles of limited-government and free markets oppose the use of antitrust law for political purposes;

WHEREAS, even the threat of legal action can significantly affect the exercise of speech rights protected by the First Amendment, and thus also raises constitutional concerns;

WHEREAS, Section 230 of the Communications Decency Act of 1996 is a federal law limiting the liability of online platforms and services for content that they themselves did not share in creating and has been vital to the growth of user-generated content and free expression online;

WHEREAS, Section 230(c)(1) of the Communications Decency Act ensures that websites will not be held liable as publishers for how they arrange, promote, or prioritize content, unless they are responsible for creating it;

WHEREAS, Section 230(c)(2)(A) of the Communications Decency Act limits the liability of online platforms for "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";

WHEREAS, Section 230 limits the government's ability to prosecute social media companies in parallel with the First Amendment's protection of editorial discretion;

WHEREAS, Section 230 does not shield online platforms from liability for violations of federal criminal law or intellectual property law; and

WHEREAS, the sheer volume of user-generated content hosted by online platforms is so vast that, as Congress presciently recognized in enacting Section 230, imposing legal liability for content moderation decisions will significantly chill content moderation or simply cause online services to decline to host user-generated content;

THEREFORE LET IT BE RESOLVED, ALEC finds that any antitrust action against any online platform or service must not be initiated based on its viewpoint or the procedures it uses to moderate or display content. Any antitrust suit should be based solely on a bona fide violation of antitrust laws, which require proof of economic injury to consumers through a reduction in competition.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that it is well settled that the First Amendment restricts the government from regulating speech or restricting the publishing rights of online platforms or services, including the right to curate content.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that online platforms and services do not lose Section 230 protections solely by engaging in moderation of content created by other individuals, and, indeed, Section 230 was intended to encourage such moderation by limiting second-guessing of such decisions.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC opposes any amendment of Section 230 of the Communications Decency Act that would reduce protections for the rights to freely speak, publish or curate content online, as the law already enables prosecution of online platforms and services for violations of federal criminal law or intellectual property law.

THE HEARTLAND INSTITUTE
FREEDOM RISING

Testimony Before the North Dakota Senate Committee on Industry, Business and Labor on House Bill 1144, Prohibiting Viewpoint Discrimination by Certain Social Media Companies

The Heartland Institute
March 16, 2021

Chairman Klein, Members of the Committee:

Thank you for holding a hearing on House Bill 1144, legislation that provides Roughrider Staters legal standing and recourse when they have been censored or “de-platformed” on the various social media platforms that have become ubiquitous and integral to contemporary political speech and expression.

My name is Cameron Sholty, and I am the Director of Government Relations at The Heartland Institute. The Heartland Institute is a 37-year-old independent, national, nonprofit organization whose mission is to discover, develop, and promote free-market solutions to social and economic problems. Heartland is headquartered in Illinois and focuses on providing national, state, and local elected officials with reliable and timely research and analysis on important policy issues.

In less than a generation, emerging technologies and mediums promised democratization of free speech and political activism in a way never dreamed of by either its creators or users. Free speech and political activism, once the realm of partisans and professional pundits, was accessible such that people who were once spectators were now engaged, sharing their ideas and seeing their opinions manifest as public policy, and were challenging orthodoxies of a political class that seemed untouchable.

Yet that democratization gave way to the powers and pillars of technology in the blink of an eye. The consolidation of that power into the hands of a few titans in the sector has now effectively erased the empowerment of millions of Americans and their newfound voices.

Simply, these new technologies have been a blessing and a curse for our political discourse. On that, I think we can all agree.

Where it has empowered voices and people across the political spectrum, it has also empowered the voices that seek to divide us, misinform us, and manipulate us. I would like to tell you that the very platforms on which those messages are spread have been fair and impartial, yet the truth is that they haven’t been. In fact, their behavior in recent years certainly suggest it is not an indifferent actor on our national stage.

As partisans squabble and media apparatchiks chirp, the social media companies have ascended from mere stages where players perform to being the protagonists and villains rolled into one driving force of the storyline. The result has been near universal frustration with the behavior of what has become colloquially known as Big Tech.

As a free-market organization, The Heartland Institute continues to grapple with and delineate a

comprehensive and deserving response to this ever-impinging force in our politics. Indeed, in a perfect world, I want to submit to you that legislation to rein in social media companies like Twitter or Facebook or technology giants like Amazon or Apple wouldn't be necessary. But that's not where we are today.

A consensus has yet to emerge on the best way to address Big Tech's censorship of voices on its platforms in a way that recognizes and reinforces America's treasured tradition of free speech - either ideologically or practically.

That is, though, ultimately, a generous and perhaps naive reading of the current landscape. Of course, you and I are free to use or not use the products offered by Facebook, Twitter, Amazon, or Apple and Google. Of that, there ought to be no question. However, to forego using products as ubiquitous and woven into the fabric of our modern daily life is to forego being engaged with family and friends or knowing in real time what our elected officials are doing (or not doing) on our behalf or to struggle to grow a small business and procure customers.

So here we are today, challenging the behavior of Big Tech, which has been less than transparent and lacks respect for the moral responsibilities that it has as a primary outlet for political discourse in our nation and the dissemination of information of public import.

Further, I remain skeptical that there is a single silver bullet and believe the solution likely lies in the congruence of federal legislation, state legislation, and judicial action.

However, doing nothing isn't an option. In politics and public policy, perception is reality and if North Dakotans are being censored and the response they hear from Bismarck is that the issue is too complicated or that Big Tech is adjusting its practices, their frustration with policymakers will be well-placed.

Industry opponents of this idea – of providing redress for censorship and suppression – enjoy a government sanctioned market where the dominant players are largely immune to competition by which our economy is underpinned. That Section 230 of the 1996 Telecommunications Decency Act exists is prima facie evidence of a corrupted market.

For Big Tech, the status quo is lucrative and rewards their own pious views while the users from which they profit are subject to their whims.

House Bill 1144 should spur a state-based and national debate on the role of Big Tech in our civic conversations. Beehive staters should be clear that robust public debate is sacrosanct and any action or failure to act to ensure a robust debate will be met with hard questions, and if necessary, enabling policies.

Thank you for your time today.

For more information about The Heartland Institute's work, please visit our websites at www.heartland.org or http:/news.heartland.org, or call Cameron Sholty at 312/377-4000. You can reach Cameron Sholty by email at csholty@heartland.org.

HB 1144

Senate Judiciary Committee

Testimony of Elizabeth McBeain, Student, University of Mary Social Work Program

Relating to protection from discrimination against racial, and religious viewpoint, and to provide a penalty.

March 16, 2021

Mr. Chairman and members of the committee,

I am submitting my testimony today in favor of HB 1144 relating to the protection of free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer system; and to provide a penalty. I am writing on behalf of myself and the effect that this bill has on so many in today's society.

The biggest issue with this bill is that of which this bill has had to be created. It is truly disheartening to know about the many men and women that fought so hard for the freedom of speech, race, religion, etc. and yet we are standing here today to gain this right back. I ask that you take the facts of past recent events of censorship regarding these specific topics into serious consideration. This censorship has affected our first amendment right, and by the pass of this bill it will then be regained.

One thing I hope you can take into careful consideration is the addition to this bill of censorship of pornography and spam content. As these are both huge aspects of social media platforms and interactive computer systems in today's society. This can then create a better censorship of content that can truly worsen the next generations of this country. Being that pornography, and spam/fraudulent ads are illegal these things should be censored. Rather than race, religious beliefs, and viewpoints.

I urge a “do pass” on HB 1144 regarding free speech and to give back our first amendment, but I also ask you take into consideration the censorship of the things against the law by which I have previously stated. I thank you for your time today and for your hard work to make this bill a reality.

#9053
Tammy Cota, Executive Director
1 Blanchard Court, Suite 101
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802-279-3534
tammy@theinternetcoalition.com
www.theinternetcoalition.com

March 15, 2021

Honorable, Jerry Klein, Chairman
Senate Industry, Business and Labor Committee
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Re: **Oppose HB 1144,** Permit Civil Actions Against Social Media Sites for Censoring Speech

Dear Chairman Klein:

By way of introduction, the Internet Coalition (IC) is a national trade association that represents members in state public policy discussions. The IC also serves as an informational resource, striving to protect and foster the Internet economy and the benefits it provides consumers.

The IC respectfully **opposes HB 1144**, a bill that would subject an online service to civil liability if representing their site as viewpoint neutral, impartial, or non-biased and then blocks, bans, removes, or limits a user's speech.

IC members are committed to keeping users safe online while encouraging diverse viewpoints and experiences for a variety of people. There is no standardized industry-wide approach for determining what constitutes potentially harmful or objectionable content as companies decide themselves what is appropriate and acceptable or objectionable content that they will or will not host. Review of user content is done in an unbiased manner which is meant to identify and block harmful, obscene, violent or other types of objectionable content. IC member companies are transparent about their content moderation processes which are detailed in website policies and/or terms of service. Users have the freedom to accept these terms and to use alternative sites.

American free speech laws, including 47 U.S.C. § 230(c), allow websites to block content they reasonably consider harmful. This federal law states that Congress finds "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." First Amendment protections also prevent state legislative bodies from passing laws that interfere with the rights of service providers to have the discretion to set and enforce rules about what content is and is not allowed on their service.

Attempting to punish platforms for attempting in good faith to remove harmful, dangerous or illegal content discourages them from striving to provide a neutral environment while encouraging them to stop monitoring and blocking harmful user content. The result would mean that HB 1144 would create an unsafe environment as harmful and illegal content would increase and users would be increasingly exposed to real-world harm in communities in North Dakota and beyond.

For the reasons explained above, **IC respectfully opposes HB 1144.** Please contact me if you have questions or would like to discuss this issue further.

Sincerely,

Tammy Cota

cc: Senate Industry, Business and Labor Committee members

Senator,

Please vote yes on HB 1144!

We cannot allow social media providers to silence free speech and promote their agenda for any reason much less for elections.

What took place in the last presidential election was criminal.

We were censored and blocked even when information was factual.

Thank you,

Mr. Mitchell S. Sanderson

HB1144 – Free Speech in North Dakota, as stated in the Bill of Rights

Testimony from Rena Rustad, District 4

Thank you for taking the time to read my testimony. I strongly urge a DO PASS on this bill.

Amen. God bless you. Can I pray for you? These three phrases can incite censorship on certain internet platforms now. I've seen friends thrown in to what is referred to as "Facebook jail" for using this type of language on their pages.

The facts are….., According to this study….., have caused my own posts to be taken down and 'warnings' issued. Where do we live? We are in America! The First Amendment states, "… the freedom of speech, or of the press;…." There is no cause for censorship in America. Do we all agree with what is being said? Of course not, but in America it is our freedom to do just that.

Please vote DO Pass!

#9466

3-16-2021

HB1144

Mr Chairman and members of the committee.,

I urge a “do pass” on HB 1144 regarding free speech and to give back our first amendment.

Shari Neigum
Bismarck, ND

HB 1144 – Testimony by Dustin Gawrylow (Lobbyist #266) North Dakota Watchdog Network

This bill is a nothing but one big slippery slope, and it should be addressed at the federal not state level.

By definition, anything involving the internet is an Interstate Commerce Clause issue – so a state trying make separate rules would open up the state to lawsuits from that direction.

So long as Section 230 is still in play, the issue of Federal Supremacy also will open the state up to legal challenges.

Either the federal government is going to amend Section 230, and more than likely enact the kind of government controls that will stymie businesses involved online.

Or, the federal government will do nothing, and leave it to the market to figure out.

In either case, North Dakota should stay out of it – for not only fear of being sued – but also since such social media companies may just not let people from North Dakota on their sites.

#9490

Thank you for your work on this bill! I support HB 1144. The censorship that has occurred in the past few months have destroyed my online facebook business. Please pass this bill!

Thank you!

I am writing this in support of HB 1144 protecting free speech from censorship by social media platforms. I, personally, have been censored. I have also reported people who have been guilty of more egregious violations of the same “community standards” policy, who were not censored, because they were espousing a liberal point of view.

This is dangerous to our republic, not to mention the danger to outspoken people who dare to try to reform our government and our media companies. Why do they want us silenced? We are dangerous, not because we are wrong, but because we are right and threaten their stranglehold on the free and open exchange of information, ie… power and control.

I am generally NOT for the heavy hand of government, but until the playing field is leveled, and free speech – even that which is offensive – is protected. “Truth” will be whatever Facebook, Google, Youtube, and the rest, say it is. And THAT is right out of 1984.

Committee and Chair,

I would like to support HB 1144, as I have been censored more than once. This is not even specially a political issue. It is a freedom of speech issue.

I have had ACTUAL RESEARCH pieces censored and removed.

I have had posts that contain DATA from research journals that had been "shadowbanned" and warnings placed on them, when media is allowed to continue to tell lies as long as it supports the Prescription Drug Cartel. These big social media sites are extremely pro Pharmaceutical company, and they let them get away with extortion.

They have censored colleagues for SHOWING people research. For speaking about the thousands of people being seriously harmed from the covid vaccine. From speaking about how to keep from becoming ill and about ways to support immune resilience.

There is no question Zuckerberg has a huge conflict of interest. His wife has a billion dollar vaccine Gene modification company disguised as philanthropy (this is what billionaires do—use these companies to make more money as government likes to give massive amounts of free money in the form of grants to help these companies create billion dollar products without liability or expense for that matter, considering all the payouts). https://chanzuckerberg.com/science/

I've seen any positive Christian sentiment being censored (even the Lord's Prayer) while Cardi b and her friends can be shown grinding away.

The Minneapolis videos of Micheal Floyd was spread like wildfire all over the internet for weeks without a warning or removal. Why? Because it fit an agenda. At the same time, harmless images are getting people shut down. Speaking about Freedom is BANNED.

People, this is what happens in Communist regimes. Truth is censored and lies are promoted.

I understand the hesitation of free market and private businesses being able to do as they choose. HOWEVER, these companies are paid by the federal government. They are too big to fail. They've lied in front of congress multiple times, claiming ignorance to how their own companies run. Extremists are allowed platforms, because they fit their narrative, while multiple people are "cleansed" to non-existence.

Thank you in advance for supporting this bill to help somewhat level the playing field that Big Pharma has already turned the table majorly into their own monopoly.

Dr. Steve Nagel

DC, CCWP, BSN

#9561

Cheryl Riley
President, External Affairs
Northern Plains States

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March 16, 2021
Senate Industry, Business and Labor Committee
Oppose HB 1144
Chairman Jerry Klein

Dear Chairman Klein and Members of the Senate Industry, Business and Labor Committee:

Thank you for the opportunity to provide this letter for your consideration concerning HB 1144. AT&T opposes HB1144.

HB1144 is a broad piece of legislation aimed at protecting free speech "from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service; ...." AT&T understands the intentions of the legislation, however, as drafted the bill employs very broad definitions that could have unintended consequences and sweep in entities, websites, services or platforms, that do not engage in the described censorship. It may also inhibit their ability to pursue lawful practices, such as the ability to remove content that is illegal, or content that violates or misappropriates copyright, trademark, or other intellectual property rights, including impersonation, threatens immediate or specific violence, or otherwise unlawful content.

While this bill highlights an area of public concern and this committee provides a legitimate venue for discussion and debate of these issues, ultimately reforms such as those proposed in HB1144 must be narrowly and carefully tailored to avoid unintended and potentially harmful consequences.

Thank you for your consideration of these concerns.

Respectfully submitted,

Cheryl Riley,
President – AT&T North Dakota

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2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Fort Union Room, State Capitol

HB 1144
3/22/2021

A BILL for an Act to permit civil actions against social media sites for censoring speech.

Chairman Klein called the meeting to order. Senators Vedaa, Burckhard, D. Larsen, Kreun, and Marcellais are present. [2:58]

Discussion Topics:
- Censorship

Committee work. [2:59]

Chairman Klein closed the meeting. [3:00]

Gail Stanek, Committee Clerk

2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Fort Union Room, State Capitol

HB 1144
3/23/2021

A BILL for an Act to protect free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service; and to provide a penalty.

Chair Klein opened the meeting at 2:57 p.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

Discussion Topics:
- Big Tech companies
- Free services
- Censorship
- Social Media platforms

Kent Blickensderfer, TechNet testified in opposition and submitted testimony #10583 [14:59].

Chair Klein closed the meeting at 3:09 p.m.

Isabella Grotberg, Committee Clerk

OPPOSE NORTH DAKOTA HB 1144

#10583

HB 1144 authorizes lawsuits demanding $50,000 in damages against social media sites that remove "viewpoints" posted by users—even if the post is offensive, abusive, or obscene.

Worse, HB 1144 authorizes $50,000 lawsuits against any North Dakotan who flags a viewpoint that is then removed from the social media page.

Examples of "viewpoints" that are protected from removal by HB 1144:

- ★ Under HB 1144, if the pastor at First Baptist Church flags an Atheist's hurtful comment on the Church's YouTube page, the Atheist can sue the pastor and the Church for $50,000 if the comment is removed.
- ★ If your constitutent flags Al Jazeera content celebrating acts of terrorism on a social media platform and the content is removed, Al Jazeera can sue your constituent for censoring their viewpoint, under HB 1144.
- ★ Say someone posts on the Fargo Public Schools Facebook page demanding that schools close because children are dying from COVID, and the school district removes the post because it is against CDC guidelines. HB 1144 authorizes the creator of that post to sue the school system for censoring their viewpoint, demanding $50,000.

  And a plaintiff's attorney could seek a class action for over a billion dollars, since HB 1144 says any North Dakotan who could have seen the post can be a plaintiff.
- ★ HB 1144 enables $50,000 lawsuits against North Dakota's state committees for the Republican and Democrat parties -- if they removed opposing viewpoints posted on the pages they manage on major social media platforms.

Oppose HB 1144 when it comes before the Senate,

so that social media platforms can continue to remove toxic user posts that are offensive, obscene, and abusive to North Dakotans.

2021 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Fort Union Room, State Capitol

HB 1144
3/30/2021

A BILL for an Act to protect free speech from racial, religious, and viewpoint discrimination by a social media platform or interactive computer service; and to provide a penalty.

Chair Klein opened the meeting at 9:01 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

Discussion Topics:

- Similar bills in other states
- Civil litigation
- Social media platforms

Senator Burckhard moved DO NOT PASS [9:06].
Senator Kreun seconded the motion [9:06].

[9:06]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	Y
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	Y
Senator Shawn Vedaa	Y

Motion passed: 6-0-0

Senator Kreun will carry the bill [9:07].

Chair Klein ended the meeting at 9:07 a.m.

Isabella Grotberg, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1144, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1144 was placed on the Fourteenth order on the calendar.