Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Ed Chau, Chair
AB 1316 (Gallagher) – As Amended April 12, 2019

SUBJECT: Internet: social media or search engine service: censorship

SUMMARY: This bill would prohibit social media internet website operators located in California, as defined, from removing or manipulating content from that site on the basis of the political affiliation or political viewpoint of that content, except as specified. Specifically, **this bill would**:

1) Provide that any person who operates a social media internet website located in California shall not remove or manipulate content from that internet website on the basis of the political affiliation or political viewpoint of that content, except as provided by the website in its terms and conditions of use.

2) Define for the above purposes, the following terms:

   - "Located in California" to mean, to the extent consistent with federal law, either the person operating the services described above maintains a business in California, or the user of that service is located in California.

   - "Social media" to mean an electronic service or account held open to the general public to post, in either a public or semi-public page dedicated to a particular user, electronic content or communication, including, but not limited to, videos, still photographs, or messages, intended to facilitate the sharing of information, ideas, personal messages, and other content. Social media does not include the public or semipublic page of a person, where any posted electronic content or communication may be reasonably attributed to the person to whom that page belongs or is assigned.

EXISTING LAW:

1) Provides, under the U.S. Constitution, that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (U.S. Const., 1st Amend., as applied to the states through the 14th Amendment's Due Process Clause; *see Gitlow v. New York* (1925) 268 U.S. 652.)

2) Provides under the California Constitution for the right of every person to freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. Existing law further provides that a law may not restrain or abridge liberty of speech or press. (Cal. Const., art. I, Sec. 2(a).)

3) Prohibits an employer from requiring or requesting that an employee or applicant disclose a username or password for the purpose of accessing personal social media; accessing personal social media in the presence of the employer; or divulging any personal social media, except as specified. Nothing in this law precludes an employer from requiring or requesting an

employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device. (Lab. Code Sec. 980(b), (d).)

4) Defines "social media" for the above proposes to mean an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations. (Lab. Code Sec. 980(a).)

FISCAL EFFECT: None. This bill has been keyed nonfiscal by the Legislative Counsel.

COMMENTS:

1) **Purpose of this bill**: This bill seeks to apply "free speech" to technology companies' privately-owned platforms, by prohibiting social media internet websites in California from removing or manipulating content based on a person's political affiliation or viewpoint, except as specified in their terms of use. This is an author-sponsored bill.

2) **Author's statement**: According to the author, "[t]here have been several stories in the media about YouTube and Google censoring and removing videos posted by conservative groups. We have also seen stories about Twitter and Facebook removing posts with conservative viewpoints. [Hyperlink omitted.] Additionally, a lawsuit was recently filed in California by a former Google employee claiming that Google and Twitter discriminate against conservatives. Users have been blocked or suspended for sharing a conservative viewpoint that do not violate any terms of use. Social media companies arbitrarily ban and censor users without a clear set of criteria. We understand that Social media platforms are private companies that can censor what people share on their pages but also [know] that the free speech in social media is controlled and limited by algorithms, which are not clearly explained to the audience. We believe that because California prides itself on being a leader when it comes to free speech, the state should urge social media companies to allow free speech to those who use their platforms, no matter their political views or affiliations. At the very least, companies should establish a clear set of criteria made available to users that show their process for censoring users."

3) **This bill appears narrower than a similar bill heard by this Committee last year**: This Committee heard a bill last year by the same author, AB 3169 (Gallagher), which was similar in concept but would have applied to both search engines and social media internet websites. This bill applies only to social media internet websites. AB 3169 also had a much broader definition of "social media" than this bill, which expressly excludes the public or semipublic page of a person, where any posted electronic content or communication may be reasonably attributed to the person to whom that page belongs or is assigned. Staff notes that both the narrowed scope and the narrowed definition in this bill are consistent with two amendments suggested in the Committee analysis for AB 3169.

   As recently amended, this bill also reflects a final amendment that was considered by this Committee at its hearing on AB 3169. In the Committee analysis of AB 3169, a suggestion was originally made to include an amendment that would have recognized the ability of social media websites to remove or manipulate content on the basis that the content constitutes lesser protected speech, such as incitement, defamation, or obscenity. As heard in Committee, that same concept was, instead, captured within a different amendment that

would have simply allowed a social media website to regulate its own platform consistent with its terms and conditions of use. This recognizes that a company has the ability to inform its users that it will remove any content on the basis of obscenity or that it constitutes incitement, hate speech, bullying, or any other type of speech that the website considers impermissible on its platform. At the same time, it also effectively requires that the website apply those same rules consistently – not on the basis of the users' political affiliation or viewpoint. (*See* Comment 7 for more.)

4) **Lawsuits alleging discrimination against conservative voices by technology companies**: A January 2018 article in the Washington Post highlighted lawsuits against companies such as Google and Twitter alleging discrimination by individuals who identify as conservative on the political spectrum. One such individual identified by the article is James Damore, the former Google engineer who was fired after distributing a memo questioning the company's diversity policies, wherein he argued that men may simply be more suited to working in the tech industry than women because women are biologically less capable of or suited to engineering. (*See* Damore, *Google's Ideological Echo Chamber: How bias clouds our thinking about diversity and inclusion* (July 2017), published online, available at <https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf> [as of Apr. 12, 2019].) Damore filed a class-action lawsuit claiming that the technology giant discriminates against white men and conservatives. The other individual identified in the article, Charles Johnson, sued Twitter for banning him from its platform.

According to the Washington Post article:

> Damore's suit came on the same day that conservative publisher Charles C. Johnson sued Twitter for banning him from the platform in 2015. The cases are the latest signs of a broad effort by some conservatives to challenge technology companies on the grounds that they favor liberal or moderate voices, reflecting the prevailing political sensibilities in Silicon Valley. The technology industry's crackdown against users accused of 'hate speech' after August's 'Unite the Right' rally in Charlottesville has fueled allegations of political bias against companies that are playing a crucial role is disseminating speech worldwide.
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> The suit by Damore, filed in Santa Clara, Calif., alleges discrimination by Google against men, people of the "Caucasian race," and people with perceived conservative political views. The suit says that Google employees who expressed views deviating from the majority at Google on politics or on employment practices, including "diversity hiring policies, bias sensitivity, and social justice," were "singled out, mistreated, and systematically punished and terminated from Google," in violation of their legal rights. [...]
>
> Johnson sued Twitter for allegedly violating his right to free speech by permanently suspending his account after a tweet in which he sought to raise money for "taking out" a Black Lives Matter activist.
>
> Johnson filed the suit in state superior court in San Francisco, where Twitter is headquartered. He has long maintained that he was seeking not violence but an investigation that might damage the public standing of the activist, DeRay McKesson. Johnson asserted in the suit that Twitter's real motivation in banning him was to quash conservative voices online and that the company failed to follow its own "vague and

subjective rules" for suspending user accounts. [. . .] (Dwoskin and Timberg, Washington Post, *Google, Twitter face new lawsuits alleging discrimination against conservative voices* (Jan. 8, 2018) <https://www.washingtonpost.com/news/the-switch/wp/2018/01/08/google-faces-a-lawsuit-over-discriminating-against-white-men-and-conservatives/?utm_term=.50199ed3cc43> [as of Apr. 12, 2019].)

5) **"Free speech" protects speech regardless political affiliation or viewpoint, but does so against government censorship, not private**: The cases cited in Comment 4, above, provide examples of alleged political censorship by private companies that were of concern to the author when the author introduced AB 3169 on this same topic last year. That being said, at least in the case of Damore (who alleged discrimination on the basis of being white and being a male) they also illustrate the potential for existing California labor and anti-discrimination laws to address allegations of discrimination, because they prohibit discrimination on the basis of race and gender, among other things.

Notably, Johnson's lawsuit against Twitter, Inc. falls outside any employment context and, rather, is a free speech claim based on being banned as a user from Twitter's platform because of his political viewpoint. Twitter, in contrast, argued that it, in exercise of its First Amendment rights, banned Johnson for violating its User Rules by posting a threatening tweet. The cases highlights a common misinterpretation of the First Amendment. Namely, private individuals frequently complain about their First Amendment rights being trampled upon by other individuals or companies. First, such complaints are misguided when, in fact, the Constitution says nothing about the ability of private actors to regulate the speech of other private actors. Second, those other individuals and companies, including Twitter and other social media websites like Twitter, are also protected by the First Amendment. Third, of relevance to this bill (which proposes a regulation of the speech activities of social media internet websites in favor or protecting the speech the website's users), speech regulations pose a constitutional problem when *government* attempts to regulate speech of private actors.[1]

Indeed, staff notes that since it heard AB 3169 last year, a California Superior Court has granted Twitter's anti-SLAPP motion[2] against Johnson, striking Johnson's lawsuit down on the basis that Twitter had exercised its own First Amendment right to exercise editorial control over the content of its platform in banning Johnson from the site for his threatening and harassing tweet, which called for his followers to donate to "taking out" a specific, high-profile civil rights activist. As stated in the court's tentative ruling, "[Twitter's] choice not to allow certain speech is a right protected by the First Amendment." Moreover, under the federal Communications Decency Act (CDA), "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune." (Citing *Fair Housing Council of San Fernando Valley v. Roommates.Com LLC* (9th Cir. 2008) 521 F.3d 1157, 1170-71.) Under the CDA, the court wrote, "a court must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's

[1] This applies to natural persons and corporations alike, since the 2010 U.S. Supreme Court ruling in *Citizens United v. FEC* (2010) 130 S.Ct. 876.

[2] Short for "strategic lawsuits against public participation," SLAPP lawsuits are commonly described as a tool for intimidating others from exercising their free speech. An "anti-SLAPP" motion is a remedy whereby the person sued can challenge a cause of action that they believe arises from protected activity – most often they seek to strike down a case because it involves speech on a matter of public concern.

status or conduct as a 'publisher or speaker." If it does, [47 U.S.C.] section 230(c)(1) precludes liability." (Citing *Cross v. Facebook* (2017) 14 Cal.App.5th 190, 207.) (*See* Comment 9 for more discussion on the CDA.)

Despite the fact that both parties had agreed that Twitter is: (1) a public forum for anti-SLAPP purposes; and, (2) Twitter's control of its platform, by allowing or refusing its users' "tweets," is an issue of public interest, the court did not accept Johnson's argument that social media is the equivalent of an old public square where parties should be able to freely exercise their views. While it invites the public to use its service, Twitter, being a private sector company, also limits this invitation by requiring users to agree to and abide by its User Rules, in an exercise of its First Amendment right. The court rejected the analogy to the *Pruneyard* decision (discussed further in Comment 8, below) which obligated shopping malls to tolerate protestors. First, the *Pruneyard* Court, it said, "specifically noted that 'by no means do we imply that those who wish to disseminate ideas have free rein.'" Second, it distinguished *Pruneyard* from the Twitter case, where the Johnson's tweet could reasonably be, and in fact was, interpreted as threatening and harassing. (*See* Tentative Ruling in *Johnson v. Twitter Inc*., Superior Court Case No. 18CECG00078 (Jun. 6, 2018) <https://assets.documentcloud.org/documents/4495616/06-06-18.pdf> [as of Apr. 14, 2019]; hereinafter "Tentative Ruling.")

This bill seeks to create protections for the speech of individuals when using social media websites, under the premise that those websites present modern public forums. Stated another way, the bill appears to reflect a viewpoint that social media websites provide platforms for speakers that are tantamount to a modern day public square – even though the public square is privately-owned. Again, however, the First Amendment does not protect the speech of a social media website user against regulations of the privately owned social media company; it protects those users from state and federal laws that attempt to curb their speech on those platforms. By proposing a law that would prohibit social media internet websites from removing or manipulating content on their privately-owned platforms on the basis of political affiliations or political viewpoints, this bill actually triggers a question as to whether the state would infringe upon platform operators' associational rights (or rather, the right not to be associated with certain speech of others) in violation of the U.S. and California constitutions. The Twitter case suggests that it would.

6) **Balancing social media users' ability to speak their minds on social media platforms against social media website operators' exercise of First Amendment rights in regulating their platforms**: As a matter of constitutional law, rights do not exist in a vacuum; in fact, they often clash with other rights, including those of other individuals. As such, public policy can often necessitate a balancing of those competing rights. For example, the right of an individual to speak does not mean that they can speak as loudly as they want, in any manner that they want, in any space that they want if it infringes on the First Amendment rights of the private property owner, or violates neutral time, place, and manner restrictions placed by the government in public spaces.

Moreover, while the language of the First Amendment appears to reflect an absolute prohibition in stating that Congress shall make "no law," the Supreme Court has never accepted the view that the First Amendment prohibits all government regulation of expression, and has in fact rejected the view that this right is an absolute right. (Chemerinksy, *Constitutional Law Principles and Policies* (2006) 3rd Edition, pp. 924-925;

hereinafter "Chemerinksy.") Where the line falls in what is protected and unprotected depends in large part on the type of regulation in which the government seeks to engage.

Certain regulations, such as prior restraints on speech, for example, are less likely to withstand challenge, than others. So, too, are restrictions on certain viewpoints or certain topics. AB 1316 does not appear to have created a "prior restraint" on speech (which bears a heavy presumption of unconstitutionality and is among the least tolerable and most serious infringements of First Amendment rights for attempting to stop speech in advance). Moreover, this bill, on its face, seeks to promote fair and open access to social media internet platforms to consumers of *all* political affiliations. In that sense, the bill arguably promotes a content-neutral framework that appears consistent with First Amendment principles. (*See* Comment 7, for more.) In those regards, the bill has seemingly avoided some of the traditional areas of heightened concern as matter of constitutional law. Nonetheless, there may be other potential constitutional issues, by proposing speech protections for some private actors (users of social media websites) by way of government regulation of other private actors (the companies running those social media website platforms). Such considerations are discussed further below.

7) **Content-neutral regulation versus content-based restrictions**: The U.S. Supreme Court has frequently made it clear that at the very core of the First Amendment is the principle that the government may not regulate speech based on its content, and that content-based restrictions are presumptively invalid. (*See RAV v. City of St. Paul* (1992) 505 U.S. 377, 382.) The concern with content-based restrictions is that government will target particular messages it does not agree with, and attempt to control thoughts on a particular topic by targeting particular messages and regulating speech. "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulator goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion." (*Turner Broadcast System v. Federal Communication Commission* (1994, 512 U.S. 622, 641.)

A law may be deemed content-based whether it is a subject matter regulation or viewpoint regulation. In other words, to be content-neutral, it must be neither of these things. A law regulating speech is content-neutral if it applies to all speech regardless of the message. A law that prohibits any speech about war would be content-based, as a subject matter regulation, whereas a law prohibiting anti-war protests would also be content-based, but as a viewpoint regulation. Similarly, a law making picketing illegal, except if it is labor picketing, would be content-based. In contrast, a law prohibiting the posting of all signs on public utility poles would be content-neutral.

The courts subject content-based restrictions to strict scrutiny (the highest level of scrutiny, requiring that the law be narrowly tailored to achieve a compelling governmental interest, where the government must have chosen the "least restrictive" means of achieving the compelling interest), whereas content-neutral regulations are subject to intermediate scrutiny (a less stringent analysis, requiring that the law serve a significant state interest; be narrowly tailored so as not to burden substantially more speech than is necessary to protect that interest; and it leave open ample alternative means of communication). This general rule, however, does not apply to certain categories of speech that are considered unprotected or less protected by the First Amendment, such as obscenity, defamation, or even incitement, despite being content-based restrictions.

a. This bill seemingly seeks to require social media websites to be viewpoint-neutral in their regulations of user content

Ignoring, momentarily, that the First Amendment generally does not restrict the actions of private actors, this bill can potentially be viewed in one of two ways, using the example of Twitter. First, the bill could be viewed as an effort to apply rules that have been applied only to government regulations in the private context, to Twitter. In that light, the government would be seeking to prohibit private actors, such as Twitter, from engaging in the type of content-regulation of their users that would be unconstitutional under the First Amendment if the State of California were to engage in that same activity against its residents, because such content-based regulations could be used to suppress unpopular ideas or information, or manipulate the public debate on a public internet platform. Stated another way, the proposed law would arguably prohibit Twitter from engaging in content-based regulations (and specifically, viewpoint-based regulations) of their users' speech on the Twitter platform.

Continuing that line of reasoning, where Twitter is in the same position of the government and restricted from regulating speech in a content-based manner due to a person's particular political affiliation or political viewpoint, this bill, as recently amended, allows Twitter to regulate unprotected or undesirable speech through their terms and conditions. Just as the government could potentially regulate against "obscenity, defamation, or incitement," this bill would allow Twitter, and other social media websites like it, to do the same. As long as the social media website notifies its users of the terms of use for their website, and the bases for content removal, and applies those rules in a neutral manner that is not based on a person's political viewpoint or affiliation, there would be no violation of this bill.

Of course, an important consideration under this bill is that one person's example of the removal of user content on the basis of political affiliation or viewpoint might very well be another person's example of the removal of user content on the basis of the content constituting incitement, defamation, or other types of lesser protected speech. Particularly because they are private actors and not public actors, social media companies should arguably be able to make these types of subjective determinations about the types of permissible or non-permissible content on their platforms, which ultimately may reflect upon their companies and shareholders, and be attributed to their own beliefs and values. They can do that under current law, and this bill appears to allow for them to continue to do so moving forward to a large degree. In the context of this bill, as long as they provide clear indication of how certain content may be restricted under their terms and conditions, and they apply them consistently regardless of the political viewpoint or affiliation of the user, they could do so. Admittedly, however, they may face claims that this new law was violated in the process.

That being said, when social media companies clearly state what their rules for content regulation are through their terms and conditions of use, they place users on fair notice, in advance, of where the line is drawn between permitted and unpermitted user speech on their platforms, and the circumstances in which user content may be removed or the user can be banned. Such rules could, for example, prohibit use of profanity or content that constitutes obscenity, harassment, incitement, bullying, and so forth. As recently amended, this bill encourages social media companies to make their rules known, and to apply them in a politically neutral fashion. One could argue that the recent amendments to add a terms and conditions exception to the bill acknowledges the strong public policy argument that social

media websites should be permitted to exercise their First Amendment rights to not allow certain speech on their platforms, while still seeking to reduce the likelihood that content regulation will be based on political ideology.

b. Social media websites are not bound by the First Amendment to be content-neutral in their speech regulations of users

Using the example from above, despite efforts to apply First Amendment concepts to a social media company such as Twitter, to protect the speech of users against regulations on its platform, Twitter and other social media platforms are simply *not* in the same position as the State of California and, as such, do not face the same restrictions that the State does when it comes to speech regulations. Again, the First Amendment regulates state action, not private action. Indeed, by proposing a new law that would subject a social media company (a private actor) to First Amendment standards that normally only restrict the ability of *government* to infringe upon the speech rights of private persons, the Committee is now faced with a government regulation that potentially infringes upon private actors' speech. Specifically, this bill represents a government regulation of the ability of private actors to choose the speech they wish to allow and potentially be associated with on their privately-owned and operated platforms.

As to whether this proposed government regulation of social media websites would be content-based, the bill appears to be both subject matter-neutral and viewpoint-neutral because the bill does not favor (or, inversely, target) certain speech with particular messages, viewpoints, or subject matters. This bill merely states that content is not to be removed or manipulated on the basis of political affiliation or political viewpoint – it does not elevate one political party or ideology over another. Again, however, the First Amendment analysis does not necessarily end with content-neutrality.

8) **Compelled speech or compelled use of private property for speech purposes**: Another context in which this bill implicates free speech rights, alluded to in Comment 7 above, is in the context of compelled expression. There is inherent in the right of free speech, the right not to speak. Thus, constitutional issues arise when the government seems to be forcing associational activities or when it forces people to use their property for speech by others. According to a treatise by one preeminent constitutional law scholar:

> The cases in this area are difficult to reconcile. In some instances, the Court has held that the First Amendment is violated if the government forces owners to make their property available for expressive purposes. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court unanimously invalidated a state law that required newspapers to provide space to political candidates who had been verbally attacked in print. The court emphasized that freedom of the press gave to the newspaper the right to decide what was included or excluded. [. . .]
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> In contrast, in *Pruneyard Shopping Center v. Robins*, shopping center owners argued that their First Amendment rights were violated by a California Supreme Court ruling that protestors had a right to use their property for speech under the state constitution. [. . .] The Supreme Court disagreed and found no violation of the First Amendment from a state constitutional rule that created a right of access to shopping centers for speech purposes [, explaining] that the shopping center is "not limited to the personal use of

> appellants, … (but) is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." Moreover, the Court said that "no specific message is dictated by the State to be displayed on appellants' property … (and) appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." (Chemerinsky, at pp. 974-975 (internal citations omitted).)

Following this line of reasoning, it is plausible that the higher courts could uphold a law such as that envisioned by this bill if they find that some websites, such as Twitter, function more like the *Pruneyard* shopping center/public forum model than the *Miami Herald*/newspaper model. Other websites, however, could be seen as functioning in the more traditional model of a newspaper, such as blogs, newspapers, and other social media sites. In those latter cases, viewpoints posted by readers or users could be attributed to those of the property owner and this bill could be seen as unlawfully compelling the use of private property for speech purposes in violation of the First Amendment. As discussed in Comment 4, however, at least one California court, in the case of *Johnson v. Twitter, Inc*. last year, has rejected the analogy of social media websites being the same as a shopping center, insofar as the website bans content or users based on certain threatening or harassing speech on its platform. While this cannot be equated to a binding decision from the Supreme Court in terms of precedential value, it is surely relevant.

Irrespective of the recent *Twitter* case, in comparison to AB 3169 from last year, AB 1316's definition of social media is drawn more narrowly in an attempt to apply to those platforms that more closely fit the *Pruneyard* shopping mall/public forum example, as opposed to the *Miami Herald*/newspaper example. As a practical matter, the definition in this bill should help avoid capturing a person's personal private, or semi-private Facebook page. This should ensure that a Facebook user could still remove an offensive comment of a family member or acquaintance whose viewpoints they do not wish to see on their own personal page in response to one of their own posts. Instead, the scope of the "social media" definition seeks to only capture social media websites that have open platforms that are distinguishable from blogs or news media or other forms of platforms where the information posted may reasonably be attributable to the viewpoints of the owner/operator of the site or the personal page of a user of the site. Whether the courts would deem the definition to be sufficiently narrow is an open question and, ultimately, federal law may prevent a barrier to this bill, as discussed further, below.

9) **Section 230 of the Communications Decency Act of 1996**: The CDA of 1996 was the first notable attempt by Congress to regulate certain material on the internet. While some aspects of the CDA have since been struck down by the U.S. Supreme Court as a violation of freedom of speech, Section 230 of the CDA is still valid and has been defended by various First Amendment groups as not just a valuable defense for internet intermediaries, but also as a protection for the culture of free speech on the internet. (*See e.g. Reno v. ACLU* (1997) 521 U.S. 844 invalidating two "anti-decency" provisions in Section 223 of the CDA, former 47 U.S.C. Sec. 223(a) and (d).)

Section 230 of the CDA expressly states that "[n]o 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." It further provides immunity to providers or users of

an interactive computer service for: (1) 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 (2) any action taken to enable or make available to information content providers or others the technical means to restrict access to material. (47 U.S.C. Sec. 230(c), "Protection for 'Good Samaritan' blocking and screening of offensive material.")

The immunity provided to websites by this federal law "means that Yelp can't be held legally responsible for a negative restaurant review written by one of its users. […] It means that Reddit could, and did, offer its users a thread tracking the manhunt for the Boston Marathon bombers in real time without censoring users' reports from the BPD scanner." (*See e.g.*, Rottman and Rowland, ACLU, *New Proposal Could Singlehandedly Cripple Free Speech Online* (Aug. 1, 2013), after various 47 state attorneys general sought a proposal to amend the section to remove criminal and civil immunity, so websites could be held liable for their users' violations of state criminal laws.) As described by the ACLU in 2013:

> Section 230 wasn't passed in order to provide a legal haven for sites hosting illegal behavior, but rather in response to legal claims that sites that remove offensive or illegal user-generated content then become legally responsible for that content. […]
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> Without Section 230's safe harbor to ensure that websites aren't legally on the hook for content created by their users, websites would be responsible for policing every user-submitted word for possible criminal violations — which simply isn't feasible. Avoiding legal risk would require even the smallest blog to hire an army of lawyers to compare user content against the mosaic of all 50 states' ever-changing criminal laws. More realistically, websites would do one of two things. They would draft their compliance policies to censor user-generated speech to match the most restrictive state law, or they would simply not host user-generated content. It's certainly what their lawyers would advise them to do. If Section 230 is stripped of its protections, it wouldn't take long for the vibrant culture of free speech to disappear from the web. That would be nothing short of a national tragedy. (*Id*.)

At the same time, as highlighted in the *Johnson v. Twitter* tentative ruling last year, the CDA's "Good Samaritan" immunity in Section 230 effectively enables a website to block and screen offensive material on its platform, and to be protected from civil liability for actions to restrict or enable the restriction of access to objectionable online material. "An 'important purpose' of the CDA was to encourage internet service providers 'to self-regulate the dissemination of offensive materials over their service.'" (Tentative Ruling, citations omitted.)

Of importance of this bill, Section 230 also preempts any state laws to the contrary. While it expressly states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section" it also states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (47 U.S.C. 230(e).) If, in prohibiting social media internet websites from regulating content on its website in a non-political viewpoint or political affiliation neutral manner the bill is interpreted to impose liability on the websites that violate this rule, AB 1316 could potentially conflict with Section 230 of the CDA and be preempted.

Currently, at a time when criticism is being lodged against companies for not taking enough social responsibility and action to regulate their platforms for the types of hate speech and incitement that have seemingly contributed to an environment that encourages, or is even connected with, acts of violence, many people believe that social media websites should be doing more – not less – particularly in light of their immunity to do so under the CDA. (*See e.g.* Tsikas, *Social Media Creates a Spectacle Society That Makes it Easier for Terrorists to Achieve Notoriety*, The Conversation (Mar. 18, 2019) <http://theconversation.com/social-media-create-a-spectacle-society-that-makes-it-easier-for-terrorists-to-achieve-notoriety-113715> [as of Apr. 12, 2019], commenting that "Platforms like Facebook, Instagram and YouTube are powered by a framework that encourages, rewards and creates performance. People who post cat videos cater to this appetite for entertainment, but so do criminals.") With that in mind, even if this bill would allow companies to regulate their social media platforms in a manner that is consistent with their terms of use, it could cause companies to hesitate to do so, out of fear of allegations they are violating state law – which again, would seemingly be contrary to the CDA.

10) **Prior Legislation**: AB 3169 (Gallagher) *See* Comments 3 and 8.

11) **Double-referral:** This bill is double-referred to the Arts, Entertainment, Sports, Tourism, & Internet Media Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Opposition

None on file

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