

Date of Hearing: May 1, 2019

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND  
INTERNET MEDIA

Kansen Chu, Chair

AB 1316 (Gallagher) – As Amended April 29, 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:**

- 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) Defines 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.

**EXISTING FEDERAL 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 in the Communications Decency Act at 47 U.S.C. §230(c), protection for “Good Samaritan” blocking and screening of offensive material, including:

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 above.

**EXISTING STATE LAW:**

- 1) 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).)
- 2) 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.
- 3) 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.

**FISCAL EFFECT:** None. This measure has been keyed non-fiscal by the Legislative Counsel.

**COMMENTS:**

- 1) *Author’s statement of need for legislation: Free speech should be protected, and where there are limits people should be informed.* According to the Author, “There 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. Additionally, a lawsuit was 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 publicly available criteria that show their process for censoring users.”
- 2) *Opposition: This measure creates an unnecessary and unclear mandate.* According to the Internet Association, “First, it is not clear what would have to be added to a company’s terms of service to comply with AB 1316. Second, the bill is based on a flawed premise—that moderation decisions are based on political viewpoint. Online platforms enforce their community standards which allows users to feel safe and secure, both online and off. This requires removing content that poses a threat of harm to public and personal safety, or content promoting hatred or violence against certain groups.... Internet companies have developed the most free and open platforms accepting of viewpoints and affiliations from

people all over the world. AB 1316 would add a confusing mandate that would lengthen terms of service and make content moderation more difficult without any benefit for users.”

- 3) *Genesis for legislation: Social media platforms’ reaction to 2016 election tampering by Russian trolls begat lawsuits alleging discrimination against conservatives.* According to the Author, the idea for this bill came from press reports of discrimination against conservative voices in social media. An idea that has reached as high as the President of the United States, who himself Tweeted, ‘It seems to be if they’re conservative, if they’re Republicans, if they’re in a certain group, there is discrimination and big discrimination,’ Trump said of the tech giants. ‘I see it absolutely on Twitter and Facebook.’ (AP supra). The article continues, explaining, “Social media companies have taken considerable criticism since the 2016 election, when they were played by Russian agents seeking to sow discord among U.S. voters. The technology giants have thrown millions of dollars, tens of thousands of people and what they say are their best technical efforts into fighting fake news, propaganda and hate speech that has proliferated on their digital platforms. Conservatives are complaining that those steps are disproportionately aimed at their side of the political spectrum. Associated Press, Freking, *Trump: Social media sites discriminate against conservatives*, March 19, 2019 (<https://apnews.com/5e761263c5324fe3b450b2cbb53d15c8>)

- a) *The social media providers clamp down following Russian’s abuse of their service.* A *Business Insider* article on the breadth of the social media distortion propagated by Russian operatives showed that the scope of the propaganda was much wider than many thought; “The use of social media to spread political disinformation (in the 2016 election cycle) has been widely acknowledged, but two new reports show that the Russian-linked influence campaign spread way beyond Facebook and Twitter. The two new reports, conducted for the Senate’s intelligence committee, detailed the widespread impact of online propaganda leading up to the 2016 presidential election. Researchers found that the Internet Research Agency, the Russian troll farm behind the disinformation campaign, left few social media platforms untouched.

“IRA-linked content was found heavily on popular platforms Instagram and YouTube, and also on smaller platforms like Pinterest, SoundCloud, Vine, and even Pokémon Go. ‘The breadth of the attack included games, browser extensions, and music apps created by the IRA and pushed to targeted groups,’ New Knowledge researchers wrote in their report. ‘It was designed to exploit societal fractures, blur the lines between reality and fiction, erode our trust in media entities and the information environment, in government, in each other, and in democracy itself. (Business Insider, Leskin, *Russia’s disinformation campaign wasn’t just on Facebook and Twitter. Here are all the social media platforms Russian trolls weaponized during the 2016 US elections* December 18, 2018. <https://www.businessinsider.com/all-social-apps-russian-trolls-used-spread-disinformation-2018-12>)

Included in the article were comments made by many of the social media providers, who have begun campaigns to weed out fraudulent accounts and tamp down inflammatory content. Examples include:

- A Facebook spokesperson issued the following statement to Business Insider: "As we've said all along, Congress and the intelligence community are best placed to use the information we and others provide to determine the political motivations of actors

like the Internet Research Agency. We continue to fully cooperate with officials investigating the IRA's activity on Facebook and Instagram around the 2016 election. We've provided thousands of ads and pieces of content to the Senate Select Committee on Intelligence for review and shared information with the public about what we found. Since then, we've made progress in helping prevent interference on our platforms during elections, strengthened our policies against voter suppression ahead of the 2018 midterms, and funded independent research on the impact of social media on democracy."

- "Gab routinely flags suspicious activity, including bots and other automated spam behavior that is against our User Guidelines, and takes action against those accounts. Customarily Gab does not investigate the content of political viewpoints expressed on the site, including from these bot accounts, unless that content is found to not be protected under the first amendment of the U.S. Constitution..."
- A PayPal spokesperson issued the following statement to Business Insider: "PayPal works to combat and prevent the illicit use of our services. We devote significant resources to these efforts and, when necessary, work closely with law enforcement officials to identify, investigate and stop improper or potentially illegal activity. We continue to regularly assess activity against our Acceptable Use Policy and discontinue accounts that are found to violate our policies." (Business Insider, Id)

As mentioned above, conservatives complained that the steps taken by social media platforms in response to 2016 election tampering were disproportionately aimed at their side of the political spectrum.

- b) *The sense of uneven treatment of conservative ideas spawned lawsuits.* These complaints of social media bias have culminated in a few well publicized lawsuits, including those in a January 2018 article in the Washington Post that 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 <https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf>)

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 in disseminating speech worldwide.

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](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))

*Subsequently both plaintiffs have had difficulty moving their cases forward.* In a tentative ruling issued on June 6, 2018, the court laid out its rationale for why Johnson's case fails under both under CDA 230 and the First Amendment, as follows:

"Plaintiff further argues that Defendant is not entitled to the protection of the CDA because Defendant seeks to be treated both as a neutral content provider pursuant to the CDA, but at the same time asks for First Amendment protection for its editorial decision to terminate Plaintiff's accounts. But this is not the standard for immunity under the CDA. (See 47 U.S.C. §230.) Plaintiff cites to 47 U.S.C. §230(c)(2), which requires a showing of good faith in order to be protected from civil liability by the CDA. Defendant, however, relies on subdivision (c)(1), which provides 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." The heading of subdivision (c) is "Protection for 'Good Samaritan' blocking and screening of offensive material." (Italics added.) Plaintiff fails to establish that Defendant is not entitled to protection under the CDA, i.e., Plaintiff fails to show that his claims are not barred by the CDA.

"Plaintiff also fails to show that his claims can survive Defendant's (Twitter) challenge based on Defendant's First Amendment right. Defendant is a private sector company. Although it does invite the public to use its service, Defendant also limits this invitation by requiring users to agree to and abide by its User Rules, in an exercise of Defendant's

First Amendment right. The rules clearly state that users may not post threatening tweets, and also that Defendant may unilaterally, for any reason, terminate a user's account. The rules reflect Defendant's exercise of free speech. (See Hurley, supra, 515 U.S. at p. 574.) Plaintiff fails to show that his claims are not barred by Defendant's First Amendment right to exercise independent editorial control over the content of its platform. Defendant's choice to close Plaintiff's account on the ground that Plaintiff's tweet was threatening and harassing is an editorial decision regarding how to present content, i.e., an act in furtherance of Defendant's free speech right. Defendant's choice not to allow certain speech is a right protected by the First Amendment."

As for Mr. Damore, he lost his claim against Google filed with the National Labor Relations Board and has withdrawn from the class action which was subject of the Washington Post article, choosing instead to proceed with arbitration. (The Verge, Robertson, *James Damore is moving his lawsuit against Google out of court*, Oct 17, 2018. <https://www.theverge.com/2018/10/17/17989804/james-damore-google-conservative-white-male-discrimination-lawsuit-arbitration>)

- 4) *Constitutional Issues*. The traditional concepts of Free speech and the First Amendment generally apply when government acts upon the speech of persons, not between private actors. AB 1316 as drafted, is intended to allow private actors (social media internet websites) to make decisions regarding enforcement of their terms of service when engaging in business with other private persons who subscribe to or join their service. A full and well-crafted discussion of these issues is contained in the Committee on Privacy and Consumer Protection's analysis of AB 1316 prepared for their April 24, 2016 hearing.
- 5) *Double referral*. This measure was double referred and was heard in the Committee on Privacy and Consumer Protection on April 24, 2016, where it passed out on a 6-0-5 vote.
- 6) *Prior related legislation*. AB 3169 (Gallagher), Legislation of 2018, which was similar in concept to AB 1316 under consideration, but would have applied to both search engines and social media internet websites. Status: That bill died in Assembly Privacy and Consumer Protection Committee.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

There is no support on file.

### **Opposition**

The Internet Association

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