Date of Hearing:

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA
Kansen Chu, Chair
SB 1424 (Pan) – As Amended May 25, 2018

SENATE VOTE: 25-11

SUBJECT: Internet: social media: advisory group.

SUMMARY: Would require the Attorney General, not later than April 1, 2019, to establish an advisory committee to study the problem of false information on Internet-based social media platforms and to make recommendations, as specified. Specifically, **this bill**:

1) Requires the Attorney General not later than April 1, 2019, to establish an advisory group consisting of at least one member of the Department of Justice, Internet-based social media providers, civil liberties advocates, and First Amendment scholars, to do both of the following:

    a) Study the problem of the spread of false information through Internet-based social media platforms.

    b) Draft a model strategic plan for Internet-based social media platforms to use to mitigate the spread of false information through their platforms.

2) Requires the Attorney General, not later than December 31, 2019, to present the results of the above-mentioned study and the model strategic plan to the Legislature, pursuant to Section 9795 of the Government Code, and to the Assembly and Senate Committees on Judiciary.

EXISTING LAW:

1) Prohibits government from enacting any law abridging freedom of speech and association. (U.S. Constitution Amendment I; applied to states through Amendment 14.)

2) Provides that all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. (California Constitution, Article I, Secton 2.)

3) Requires the operator of a commercial Website or online service that collects personally identifiable information through the Internet to post a privacy policy, as specified. (Business & Professions Code Section 225759.)

FISCAL EFFECT: Unknown. This measure has been keyed fiscal by the Legislative Counsel.

COMMENTS:

1) *Author's statement of need for legislation:* According to author, "the current climate of social media platforms being used as news sources consumers are constantly having information pushed towards them. It has been shown in some cases misinformation is likely to spread twice as fast as that of true information. Consumers have the right to know how this

information is being presented to them." Therefore, the author explains, "SB 1424 would convene a working group of stakeholders and experts to study and make recommendations regarding model strategic plans and possible legislation designed to mitigate the spread of false information through social media."

2) *Fake news has a long history, complicated by difficulty in discerning what is "true" from "false.*" This bill arises in an environment where "fake news" has been attributed with infecting our social and political discourse to the point of altering outcomes of elections. The recent focus on "fake news" and outcry against its dissemination has drawn many calls for reform – from Facebook self-policing, to this legislation; which faces a daunting foe. The problem of "fake news" has been around at least as long as the printing press. Publishers have produced "fake news," readers have believed "fake news," and, as a result, "fake news" has repeatedly altered the course of history. Nonetheless, the advent of social media brings renewed attention to the issue.

As Politico points out, "Fake news took off at the same time that news began to circulate widely, after Johannes Gutenberg invented the printing press in 1439. 'Real' news was hard to verify in that era. There were plenty of news sources—from official publications by political and religious authorities, to eyewitness accounts from sailors and merchants—but no concept of journalistic ethics or objectivity. … But as printing expanded, so flowed fake news, from spectacular stories of sea monsters and witches to claims that sinners were responsible for natural disasters. (See Soll, *The Long and Brutal History of Fake News* (Dec. 18, 2016) Politico, accessed at: https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535)

The antidote to fake news has traditionally been objective "real" news. However, the Pew Research Center's "State of the Media 2016" paints a grim picture for most serious news organizations, concluding, "Real news is not coming back in any tangible way on a competitive local level, or as a driver of opinion in a world where the majority of the population does not rely on professionally reported news sources and so much news is filtered via social media, and by governments. And as real news recedes, fake news will grow. We've seen the terrifying results this has had in the past—and our biggest challenge will be to find a new way to combat the rising tide." (Id)

Of note is the fact that even those who study the "truth" have a hard time agreeing on what is true. Epistemology, an entire subfield within the academic discipline of philosophy, grapples with the question of "how we know what we know" and what it means to say that a statement is true or false. More than two thousand years of study appear to have left the epistemologists greatly divided, pitting rationalists against empiricists, idealists against realists, objectivists against relativists. (*See e.g.* Goldman and McGrath, *Epistemology: A Contemporary Introduction,* Oxford U. Press, 2015.) The only consensus appears to be that there is little comfort for those who seek certitude. Like Justice Potter Stewart's view of obscenity, it may be that "we know it [fake news] when we see it," but most of us would be hard-pressed to articulate the specific criteria by which we evaluate information as "true" or "false."

3) *Potential Constitutional Issues raised in Judiciary Committee remain*: According to the analysis of this measure by the Assembly Judiciary Committee, "While this bill only authorizes the creation of an advisory group and the development of a 'model' plan, the requirement that the group reports its findings and plan to the Legislature suggests that the

study could lead to future legislation. Presumably, this legislation would either compel social media platforms to mitigate the spread of false information or disclose to users how, if at all, the platform evaluates the veracity of its content.

"(However) the First Amendment prevents content-based restrictions, even if the statements are admittedly false. To be sure, false statements may not be protected from a civil suit for defamation and the government certainly may prohibit false or misleading statements in commercial speech and advertising. Nonetheless, the U.S. Supreme Court has held that, outside of those contexts, false statements are an "inevitable" part of open and vigorous expression on public issues. Therefore, false statements are not beyond constitutional protection. (*U.S. v. Alvarez* (2012) 132 S. Ct. 2537; rejecting *Geertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 to the extent that it expressed a contrary view.) Indeed, courts have held that false statements contribute to public discourse because, in the "market place of ideas," false statements bring forth truthful rebuttals. [See e.g. *Whitney v. California* (1927) 274 U.S. at 375, 377 (Brandies, J. concurring); *U.S. v. Alvarez* at 2553 (Breyer, J., concurring)].

As Professor Erwin Chemerinsky has pointed out, even if we reject the 'market place of ideas' metaphor and do not believe that false statements will always (or even mostly) bring forth truth, "the alternative – government determination of truth and censorship of falsehoods – is worse." (Chemerinsky, *Constitutional Law: Principles and Policies,* pp. 927-928.) Moreover, in most cases, it will be difficult to determine whether information posted on a social media platform is 'fact' or 'opinion,' providing a further reason why governments should not be empowered to censor statements that a government body deems to be false. For example, in *Rickert v. Public Disclosure Commission,* the Washington State Supreme Court considered whether a political candidate who lied about her opponent could be fined under a state law prohibiting deliberately false statements in campaign literature. While the political opponent might have had grounds for a libel action, the Court ruled that the candidate could not be fined directly by the government under the statute. The Court opined that the state law 'naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech.' (*Rickert v. Public Disclosure Commission* (2007) 168 P.3d 826, 829-830.) This bill assumes – naively or otherwise – that government can determine, either directly by legislation or through dissemination of a 'model' plan, truth from falsehood and factual statements from opinions. Whether the advisory group will be able to devise a model plan or legislation that negotiates those thin lines in a constitutional and workable manner—or should even attempt to do so-- remain to be seen."

4) *Prior related Legislation:* AB 155 (Gomez, 2017) would have required the development and adoption of a media literacy curriculum in public schools with the goal, among other things, of training pupils to distinguish between "real news" and "fake news." Status: AB 155 died in the Assembly Committee on Appropriations.

REGISTERED SUPPORT / OPPOSITION:

Support

There is no support on file.

Opposition

There is no opposition on file.

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