Twitter Thread by Akiva Cohen

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Let's talk about this North Dakota attempt to legislate around Section 230 and create a civil right of action for users censored by social media sites. CC @mmasnick

Forget, for a moment, that this law, if it passed would immediately be deemed void as preempted by Section 230 (Federal law is supreme over state law where they conflict, and this would create an express conflict). This bill is a really good example of why this stuff is hard

Here's the key provision of the bill. The various highlighting on these versions shows areas we'll touch on

2. If an interactive computer service provider restricts, censors, or suppresses information that does not pertain to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable subject matter, the interactive computer service provider is liable in a civil action for damages to the person whose speech is restricted, censored, or suppressed, and to any person who reasonably otherwise would have received the writing, speech, or publication. This section only applies if the interactive computer service provider:
   a. Is immune from civil liability under federal law;
   b. Is not considered a publisher;
   c. Has over one million users; and
   d. Is a provider of a social media site.

First of all, let's look at the last of those images. There's no question that this would target conduct immune under federal law - and, in fact, if 230 were repealed nobody could ever be liable under this law (since it only reaches immune conduct). So it's incredibly stupid.

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But again, put that aside. Let's look at the substance.

First of all, who gets to decide whether content fits into these highlighted categories? Do they actually think that the government will get to decide what counts as "otherwise objectionable"?

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Folks, there's a pretty obvious First Amendment problem with the government saying "we'll protect you from being sued if you ban content we want you to ban, but not different substantive content we like"

That's the definition of a law regulating speech that turns on the substance of the speech in question, so there can't be any government standard for defining "otherwise objectionable"

Also, what's "excessively violent"? "Violent" has a potential objective meaning, but

"excessively violent" is a pure value judgment.

And, again, not one that the government gets to make for private citizens, under the First Amendment

So if the government can't be the entity determining what content is "otherwise objectionable" or "excessively violent", how will this statute be interpreted in order to render it constitutional? (because statutes are always interpreted to be constitutional if at all possible)

It will be interpreted as meaning the social media sites targeted get to define what is "excessively violent" or "otherwise objectionable"

In other words, this law would create liability only if social media sites banned users for content THE SITE ITSELF was fine with

Since *by definition* sites only ban users for content the site finds objectionable, this ends up being an effectively null set. Under this law, social media sites could ban users for any reason they want to, just like under the current law. This does nothing

Separately, lets look at the cause of action it creates: Not just liability to the banned user, but liability to the world at large - anyone who wanted to hear from them.

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To call this merely immensely stupid would be an insult to the immensely stupid. It's an unfathomably bad idea. If Twitter banned me, all 19K of my followers would have the ability to separately sue Twitter for damages for being deprived of my pearls of wisdom and gif game?

https://t.co/TiMVXafJqs



And how, exactly, would one go about calculating these supposed damages? How much do each of you pay for my tweets? Oh, right - nothing. So your damages from not having access to them, in a monetary sense, is best summed up by Mr. Wonka



(Note, if any of you are interested in paying me to tweet, let me know; there are charities I'll point you towards)

How about the speaker? I suppose they could find some way to value their lost following. But how do you apply that to a suspension, or a throttle? Good luck.

And by the way, this 1,000,000 user thing is wonderful. Apparently, up to 999,999 users, I can ban as many Nazis as I want to. But the second that millionth user signs up, my social media platform has to allow Heiling all over the place. This is definitely well thought out

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That's one paragraph of a badly thought out bill that, by definition, can have no legal impact anywhere, ever (because of that pesky supremacy clause and first amendment). Legislating around 230 at the state level is doomed