

LEGAL SERVICES

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MEMORANDUM

February 17, 2022

SUBJECT: Social media censorship bill: constitutional questions and drafting notes (Work Order No. 32-LS1577\A)

TO: Senator Lora Reinbold
Attn: Kelli Toth

FROM: Noah Klein 
Legislative Counsel

The bill draft you requested is attached. Please consider the following.

1. First Amendment issues. Please be aware that the draft bill raises significant issues under the United States Constitution's First Amendment and art. I, sec. 5, of the Alaska Constitution. Because social media websites are private entities and not government actors, they are entitled to freedom of speech protections. Government regulation of a social media website's speech is therefore held to the same standard as government regulation of a private individual's speech.

The draft bill seeks to compel speech and suppress fact-checking. The U.S. Supreme Court has stated that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."¹ The interplay of free speech protections and internet forums such as social media is an evolving area of law. Because the draft bill requires a social media website to disseminate content with which it disagrees, and prohibits a website from speaking through fact checking, a court may, however, find the provisions in the bill unconstitutional.

2. Damages. Your request provided an injured party with a minimum of \$75,000 in statutory damages, actual damages, punitive damages, and other forms of equitable relief. The draft bill uses the \$75,000 statutory damages but does not include punitive damages to conform to the structure of AS 09.68. Please advise if this is not what you intended.

3. Jurisdiction. Although the draft bill provides an individual with a cause of action against a social media website, it is not clear that an Alaska court would have personal jurisdiction over the social media website. As a result, an Alaska court may dismiss a

¹ *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 - 97 (1988).

Senator Lora Reinbold
February 17, 2022
Page 2

case brought under this statute for lack of personal jurisdiction.

4. Deceptive trade practice. Your request placed the prohibitions in AS 45.45, a chapter addressing trade practices. Because the draft regulates conduct of platforms and generally prohibits harassing behavior, and because the draft is imposing liability for conduct, I placed your request in AS 09.

5. Personal bill deadline. In order to deliver a draft before the personal bill deadline, we have expedited preparation of this bill draft. Please be aware that there may be additional legal issues raised by this draft that are not discussed in this memo.

Please call with any questions or concerns.

NIK:mjt
22-091.mjt

Attachment