



Jan 18, 2023

House Judiciary Committee
Attn: Karen Karwocki
107 N Main St
Concord, NH 03301

Re: HB 320 - "Relative to free speech in interactive computer services." (Oppose)

Dear Chair Representative Bob Lynn and Members of the House Judiciary Committee:

On behalf of the Computer & Communications Industry Association (CCIA), I write to respectfully oppose HB 320.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.¹ Proposed regulations on the interstate provision of digital services therefore can have a significant impact on CCIA members. Recent sessions have seen an increasing volume of state legislation related to the regulation of what digital services host and how they host it. While recognizing that policymakers are appropriately interested in the digital services that make a growing contribution to the U.S. economy, these bills require study, as they may raise constitutional concerns,² conflict with federal law, and risk impeding digital services companies in their efforts to restrict inappropriate or harmful content on their platforms.

1. New Hampshire cannot and should not attempt to force private online businesses to carry dangerous or otherwise objectionable content.

HB 320 inaccurately asserts that some social media platforms are “common carriers”, which implies they are prohibited from restricting problematic but legal content. However, these companies operate very differently from traditional common carriers, such as public transit or telephone cable providers. Their services are not common, as they do not serve the entire public, and they do not publish all content equally. Most services explicitly refuse service to individuals and organizations specially designated by governments or intergovernmental

¹ For over 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.cciagnet.org/members>.

² Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203 (2022), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3985&context=hastings_law_journal.



organizations as criminals or terrorists. Others refuse service to minors; those who have violated their terms of use, for the safety of other users; and jurisdictions where meeting local regulatory requirements is not practicable.

Just as these services do not serve all users, they do not publish all content. In addition to prohibiting illegal content as required by relevant state and federal laws, many digital services remove content that is dangerous, though not inherently illegal. This includes, for example, content that exhorts users to self-harm or encourages young people to engage in dangerous or destructive behavior. Thus, while it is not explicitly illegal to engage in cyberbullying, or to evangelize the American Nazi Party, many digital services nevertheless act on such content to uphold commitments to their user communities to combat dangerous or abhorrent categories of content or behavior.

Thus, if social media services are compelled to treat all user-generated material with indifference as if they were common carriers, their platforms could become saturated with inappropriate and potentially dangerous content and behavior.³ Users would be exposed to foreign disinformation, communist propaganda, and anti-American extremism, all of which are not inherently unlawful, and would appear to constitute a “viewpoint” under HB 320.

Setting aside the matter of whether the Legislature should impose upon private companies the obligation to convey the viewpoints of foreign propagandists and anti-American extremists, courts have been clear that social media companies are not common carriers.⁴ The Legislature cannot circumvent the First Amendment by foisting upon an unwilling company a legal status it does not have.⁵

2. Businesses operating online depend on clear regulatory certainty across jurisdictions nationwide.

Existing U.S. federal law provides legal and regulatory certainty for websites and online businesses that they will not be held liable for the conduct of third parties. By limiting the liability of digital services for misconduct by third-party users, U.S. law has created a robust Internet ecosystem where commerce, innovation, and free expression thrive — while enabling providers to take creative and aggressive steps to fight online abuse.

³ Rob Arthur, *We Analyzed More than 1 Million Comments on 4chan. Hate Speech There Has Spiked by 40% since 2015.*, VICE, (July 10, 2019), <https://www.vice.com/en/article/d3nbzy/we-analyzed-more-than-1-million-comments-on-4chan-hate-speech-there-has-spiked-by-40-since-2015>.

⁴ See *NetChoice LLC & CCIA v. Paxton*, 573 F. Supp. 3d 1092, 1107 n.3 (W.D. Tex. 2021).

⁵ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (“certain private entities have rights to exercise editorial control over speech and speakers on their properties or platforms”). In any event, common carriers still retain First Amendment interests. See *PG&E v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 12, 20-21 (1986).



Survey research demonstrates that changing regulations to remove intermediary protections would have a negative effect on venture capital (VC) investment.⁶ Similarly, economic research found that VC investment in cloud computing firms increased significantly in the U.S. relative to the EU after a court decision involving intermediary liability.⁷ Creating a patchwork of state laws would undermine this legal certainty and harm competition.

3. The private right of action would result in the proliferation of frivolous lawsuits.

HB 320 permits users to bring legal action against companies that have been accused of violating new regulations. By creating a new private right of action, the measure would open the doors of New Hampshire's courthouses to plaintiffs advancing frivolous claims with little evidence of actual injury. As lawsuits prove extremely costly and time-intensive, it is foreseeable that these costs would be passed on to individual users and advertisers in New Hampshire, disproportionately impacting smaller businesses and startups across the state.⁸

We appreciate your consideration of these comments and stand ready to provide additional information as the Legislature considers proposals related to technology policy.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association

⁶ Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early Stage Investment: A Quantitative Study* (2011), <https://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>

⁷ Compare Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), <https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf>; with Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), <https://www.cciagnet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf>.

⁸ Trevor Wagener, *State Regulation of Content Moderation Would Create Enormous Legal Costs for Platforms*, Broadband Breakfast (Mar. 23, 2021), <https://broadbandbreakfast.com/2021/03/trevor-wagener-state-regulation-of-content-moderation-would-create-enormous-legal-costs-for-platforms/>.