The brewing fight to keep abortion info online

Yesterday, the Supreme Court voted to uphold a Mississippi abortion ban and overturn *Roe v. Wade*, ending abortion access in some states and triggering impending bans in others. The decision won't end abortion in America, but in many places it will move the procedure underground and, based on recent history, online.

Understandably, abortion advocates have focused on surveillance issues in the immediate aftermath of the ruling, concerned about states using online records for criminal prosecutions. But there's also a fight brewing over how and where advocates will be able to share abortion information online. If a procedure is illegal, then states could claim content enabling that procedure is illegal too — raising thorny questions for platforms and activists alike.

Abortion bans in states like Texas already have provisions to penalize people seen as "aiding and abetting" the procedure, and some anti-abortion activists are pushing to define this as simply *describing* how to self-manage an abortion. As *The Appeal* noted earlier this week, the National Right to Life Committee (NRLC) has proposed model legislation that would prohibit offering "instructions over the telephone, the internet, or any other medium of communication" or "hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion."

Model legislation has proposed punishing sites that "encourage" self-managed abortion

The language seems aimed at sites like Plan C, which offers

detailed information about obtaining misoprostol and mifepristone for self-managed abortion. Many news outlets, including *Verge* sister site *The Cut*, have also published detailed information about the subject. Broad terms like "hosting" would even seemingly let states go after internet infrastructure providers that support sites like Plan C or social networks that they use to spread information.

Civil liberties advocates assert that this would be unconstitutional. "This kind of legislation raises serious First Amendment concerns," said Knight First Amendment Institute executive director Jameel Jaffer. "We intend to consider challenging any legislation that uses today's Supreme Court decision as a justification for new limitations on protected speech, or new forms of surveillance."

Motivated prosecutors may still try to punish outlets that share information, arguing that the material is specifically intended to help others break the law, and drag them into expensive and protracted legal cases even if they ultimately prevail. "Explaining what abortion is, where you can get one, advocating for a person's right or ability to get an abortion — all these things are general truthful information that cannot be prosecuted without violating the First Amendment," says ACLU counsel Jennifer Granick. "The risk is that prosecutors will take those private conversations where people are exchanging information and try to cast those as criminal encounters. And that will be something that we're going to probably end up having to fight."

Section 230 faces increasing challenges from both parties, but the end of Roe adds new stakes

Activists and health care providers have an incentive to fight these battles — but the digital platforms they use might not. Opponents of legal abortion could threaten any company involved in hosting speech with lawsuits if they allow abortion-related communications. Potential targets range from social networks like Facebook, where it's easy to connect with

people seeking abortions, to infrastructure providers like content delivery networks (CDNs), which provide critical logistical support for independent websites.

Right now, platforms have an easy answer to threats: Section 230 of the Communications Decency Act. Section 230 shields apps and websites from being considered the "publisher or speaker" of user-generated content, protecting them from liability over hosting it. Unlike a First Amendment defense, it doesn't require fighting over whether the content in question is illegal, reducing the legal burden of lawsuits. "The thing about Section 230 is you don't have to demonstrate that it's First Amendment protected speech, which can take a long, long time sometimes in litigation," says Granick. There's an exception for conduct that violates federal criminal law, but not violations of state laws like the current abortion bans.

Still, Section 230 has become increasingly unpopular among Republicans and Democrats alike. Federal bills like the EARN IT Act and the SAFE TECH Act have proposed chipping away at its protections, while Texas and Florida have passed laws on the premise that Section 230 shouldn't stop states from implementing their own content moderation laws. In 2018, then-President Donald Trump signed FOSTA-SESTA, which removed protections for material related to sex work, with support from both parties.

Critics of Section 230 have cited real cases of sites (usually not the typical "Big Tech" targets) using it to avoid responsibility for encouraging nonconsensual pornography or defamatory lies. Many proposals for fixing this, however, contain broad carveouts that could be exploited to make learning about abortion harder — even if that's not the goal.

"This is like Exhibit A in why we don't want to open up liability."
Research suggests FOSTA-SESTA led to a mass deplatforming of

sex workers online, whether or not they were directly posting illegal content, and the ripple effects made it harder to operate services like online sex education. Further weakening the law could have similar chilling effects on abortion information too, with sites deciding to err on the side of caution rather than risk legal liability.

“Sometimes people say, well, what’s the problem?” says Granick of Section 230 carveouts. For instance, “if we have an exception for federal crimes, why shouldn’t we also have an exception to allow liability for state crimes? And this is like Exhibit A in why we don’t want to open up liability to state criminal provisions.”

Fight for the Future director Evan Greer says the death of *Roe* adds dangerous side effects to current proposals. “Even well-intentioned changes to Section 230, like those proposed in the SAFE TECH Act or Justice Against Malicious Algorithms Act, could unleash a wave of lawsuits from anti-abortion activists (who are already lawyered up, litigious, and highly motivated to get content about abortion access scrubbed from the internet),” says Greer. Companies could respond by minimizing their risk, resulting in anything from crowdfunding sites banning abortion access funds to online social spaces shutting down people who try to arrange travel and logistics for cross-state abortions.

“Weakening Section 230 would be a disaster in a post-*Roe* environment,” Greer continues.

There are good reasons to be wary of organizing abortion access on major platforms, like leaving a data trail that could be used by police in prosecutions. But overzealous bans would just make finding health information harder. For lawmakers who have backed keeping abortion accessible, that’s a risk any future Section 230 reform will have to reckon with.

https://www.theverge.com/2022/6/25/23181689/online-abortion-in

formation-ban-roe-wade-section-230-first-amendment