NetChoice Promoting Convenience, Choice, and Commerce on The Net

Carl Szabo, Vice President & General Counsel
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7485
www.netchoice.org

May 24, 2020

RE: Opposition to HB 2458 – Amending Tennessee Code Annotated, Title 29, Chapter 1

We encourage you to oppose HB 2458 because the bill:

- follows in the failed footsteps of the Fairness Doctrine;
- injects government into the operation of private businesses, violating notions of free enterprise;
- discourages websites from blocking foreign interference; and
- is unconstitutional.

1. HB 2458 follows in the footsteps of the infamous Fairness Doctrine

The closest the government came to regulations like HB 2458 was the requirement that over-the-air television and radio host "equal time" for political speech. Of course, this limitation could apply only to television and radio spectrum as it is a finite resource.[1] The U.S. Supreme court made clear that such a requirement would not apply to other mediums,[2] and certainly not the internet.

This prior restriction of speech was the infamous "Fairness Doctrine." This injection of government control over platforms suppressed conservative and liberal voices. In fact, the removal of the Fairness Doctrine has been credited for the rise of conservative voices like Fox News and Rush Limbaugh as well as liberal ones like MSNBC and Rachel Maddow.[3]

The Fairness Doctrine also led to *less* political speech on broadcast television and radio overall.[4]

President Ronald Reagan's administration eliminated the Fairness Doctrine. The Republican-controlled Federal Communications Commission unanimously said, "The intrusion by government into the content of programming occasioned by the enforcement of [the Fairness Doctrine] restricts the journalistic freedom of broadcasters ... [and] actually inhibits the presentation of controversial issues of public

[1] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) ("A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others.... It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.")
[2] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) ("Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate."
[3] Kruse and Zelizer, *How policy decisions spawned today's hyperpolarized media*, Wash. Post. (Jan. 17, 2019).
[4] Thomas Hazlett, *Making the Fairness Doctrine Great Again*, Reason Magazine (Mar. 2018).

importance to the detriment of the public and the degradation of the editorial prerogative of broadcast journalists."[5]

> *"This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment … such federal policing of the editorial judgment of journalists would be unthinkable."*
> *– President Ronald Reagan*

And President Reagan described the Fairness Doctrine as, "This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment … such federal policing of the editorial judgment of journalists would be unthinkable."[6]

HB 2458 would follow in the failed history of the Fairness Doctrine.

2. HB 2458 injects government into the operation of private businesses, violating notions of free enterprise

Put simply, HB 2458 will inject more governmental control over how private businesses make their platforms appropriate for what their users and customers want. Users may not want to see depictions or discussions of graphic content. And businesses may not want their ads associated with controversial content and will pull advertising if platforms display it.[7] As a result, private online businesses may remove such content from their platforms.

But HB 2458 puts American businesses in an impossible position: either they choose what's best for their users or face litigation from the state or private actors.

Consider a website dedicated to discussion of only pets. Say the site prohibits any discussion not related to pets, including politics. HB 2458 would deny this website the right to continue protecting its users from non-pet related content.

It's hard to see how HB 2458 is anything but turning to government to shape the decisions of private businesses. As President Reagan said, "Government is not the solution to our problem, government is the problem."[8] For those following in values of free enterprise, HB 2458 is the wrong course of action.

3. HB 2458 discourages websites from blocking foreign interference

Under HB 2458, platforms may stop trying to block foreign interference with our elections or engaging in political disruptions. With statutory damages and a private right of action, websites are likely to err on the side of leaving up political content from foreign powers, rather than risk taking it down. That

---

[5] *In re Complaint of Syracuse Peach Council against Television Station WTVH Syracuse*, New York, 2 FCC Rcd 5043 (1987).
[6] Penny Pagano, *Reagan's Veto Kills Fairness Doctrine Bill*, LA Times (June 21, 1987).
[7] Carl Szabo, *Tech Giants Should Have The Freedom To Kick Conservatives Off Their Platforms*, Daily Caller (Apr. 23, 2019).
[8] Pres. Ronald Reagan, Inaugural Address (Jan. 20, 1981).

unintended consequence is but one example of what happens when the government tries to remedy an alleged problem with a broad brush.

4. HB 2458 violates the First Amendment of the U.S. Constitution

The First Amendment of the U.S. Constitution protects an individual's right to speak, not the right to be heard everywhere or anywhere.[9] This means that while a platform may choose to allow a multitude of voices on it, the government cannot compel the platform to allow *all* voices on it. This is the fundamental tenet of the First Amendment.

Indeed, the bill violates the First Amendment in three ways: First, it restricts private companies' First Amendment rights by requiring limiting which speech they can and cannot moderate. Second, it compels these private companies to carry speech they do not support. And third, its provisions are too vague and broad to give fair notice of what's legal and what's not.

Proponents of HB 2458 may say that the bill doesn't restrict speech. Despite HB 2458's efforts to cloak itself as a consumer protection bill, it is really a speech restriction.

Under HB 2458, platforms may stop trying to block foreign interference with our elections or engaging in political disruptions.

One need look only at HB 2458's use of the terms "disfavor or censure" to see that HB 2458 infringes on free speech. The terms "disfavor or censure" are not only vague but can change based on the mind of the speaker or audience. It is an impermissibly subjective standard that will chill free speech.[10] The Supreme Court has clearly stated that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning."[11]

Consider a website that does not allow *any* political content – preferring to be a place of political respite. This site would not be allowed to exist if it proactively removed political content in order to keep the politics free. Or consider an identified conservative doing a search on a site and the site returns conservative content above liberal content – note that this is based exclusively on the preferences of the user. One judge could find this legal under HB 2458; another could find it illegal.

Because terms like "disfavor" are simply too subjective, and place constitutionally protected freedoms at the whim of unelected officials with absolutely no guidance or limiting principles save their own judgment, the bill is unconstitutional.

Moreover, HB 2458 fails the "strict scrutiny test,"[12] which federal courts use when deciding if a law should survive a First Amendment challenge. Under this test,

- a law must fulfill a compelling governmental interest; and

---

[9] *CBS v. DNC*, 412 U.S. 94, 122-23 (1973) (finding that there is no individual right to access to the airwaves).
[10] *Connally v. General Construction Co.* 269 U.S. 385 (1926).
[11] *Id.*
[12] *United States v. Carolene Products Co*. (1938).

- be the least restrictive approach in achieving that interest.

HB 2458 flunks the test.

While ensuring there is a wide array of opinions on online platforms is important, this is by no means a compelling governmental interest. Nor is ensuring that every viewpoint from terrorist speech to hate speech exist on all platforms. And even if they were, the law is not narrowly tailored. It indiscriminately affects all online platforms, even those that are not related to political speech.

Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

The views of NetChoice do not necessarily represent the views of each of its members.