NetChoice *Promoting free speech & free enterprise on the net*

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March 15, 2021

Rep. Jay Trumbull, Chair
Appropriations Committee
Florida House of Representatives
Tallahassee, Florida

RE: **Opposing HB 7013 – technology transparency**

Chairman Trumbull and members of the committee:

We respectfully ask that you **not** advance HB 7013, because it:

- Violates the First Amendment of the U.S. Constitution;
- Would expose social media platforms to lawsuits *for removing harmful content*;
- Would make it far more difficult to block SPAM messages; and
- Violates conservative principles of limited government and free markets.

Below we explain why HB 7013 will likely be set aside for violating the First Amendment. Then, we describe unintended but likely consequences if the law were to survive constitutional challenges.

HB 7013 violates the First Amendment of the US Constitution

The First Amendment makes clear that government may not *regulate* the speech of private individuals or businesses.[1] This includes government action that compels speech by forcing a private social media platform to carry content that is against its policies or preferences.

Imagine if the government required a church to allow user-created comments or third-party advertisements promoting abortion on its social media page. Just as that would violate the First Amendment, so too does HB 7013 since it would similarly force social media platforms to host content they otherwise would not allow.

While there are limited, narrow exceptions, laws mandating private actors to host content are subject to a "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest and
- narrowly tailored to achieve that interest.[2]

[1] *See, Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Pacific Gas & Elec. v. PUC*, 475 U.S 1, 15-16 (1986).
[2] *Id.*

On at least the last prong of this test, HB 7013 is unconstitutional and will fail.

Legal analysis from DLA Piper (attached), the largest law firm in the world, looked at legislation similar to HB 7013 Sections 1 and 3, and concluded it would likely not withstand a First Amendment challenge:

> [T]hese types of provisions punishing content moderation would also be highly vulnerable on First Amendment grounds. There is no question that website operators' editorial judgments concerning which user-generated posts they will moderate (including potentially taking down) constitute speech subject to the full protections of the First Amendment. Moreover, given the centrality of online communications to the free and open marketplace of ideas, a court would be particularly wary of governmental efforts to police online moderation practices. As the Supreme Court has explained, "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, … and social media in particular."
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> Here, the restriction unquestionably impinges on website operators' editorial judgment protected by the First Amendment—and it does so based on the content of the user-generated postings. As a result, the provisions would be subject to "strict scrutiny"—the most searching form of constitutional scrutiny. Under this exacting standard, a statute "is invalid … unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." As the Supreme Court has instructed, "[t]he State must specifically identify an 'actual problem' in need of solving, … and the curtailment of free speech must be actually necessary to the solution." That is a very high standard. "'It is rare that a regulation restricting speech because of its content will ever be permissible.'"
>
> A reviewing court would very likely conclude that the type of bill provisions discussed above cannot survive strict-scrutiny review. Neither the legislative record nor any evidence supports the existence of a "compelling government interest" in second-guessing websites' editorial practices.

That same legal analysis from DLA Piper (attached) examined discriminatory carve-out language similar to HB 7013 section 4, and concluded:

> All of these content-based speech restrictions would also be subject to (and very likely fail) strict scrutiny on the independent ground that they burden the speech of a subset of companies (website operators) but not similarly situated speakers such as newspapers. Even in the context of taxes and other regulatory regimes, this sort of discriminatory treatment of speakers runs afoul of the First Amendment.

HB 7013 would expose social media platforms to lawsuits for removing harmful content

If Even if HB 7013 were to survive constitutional challenges described above, please consider some of the unintended consequences of penalizing social media platforms for removing harmful content.

The First Amendment protects a lot of content that we don't want our families to see on websites. That includes explicit material like pornography, extremist recruitment, and even protects bullying and other forms of verbal abuse.

At the same time, audiences and advertisers don't want to see this content on our social media pages. Today, online platforms try to remove harmful content from their sites. In just six months during

2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[3] This includes removal of 57 million instances of pornography, and 17 million pieces of content related to child safety.

But HB 7013 would make it extremely risky for social media platforms to remove objectionable content that they now restrict. The threat of lawsuits authorized under this legislation would likely cause large platforms to stop deleting extremist speech and harmful content, making the internet a much more objectionable place to be.

Consider these examples of unintended consequences of HB 7013:

Section 1, regarding candidates for state office, could create these unthinkable consequences:

> **Example 1:** Florida's state committees for the Republican and Democrat parties could be required to host their opponents' content on the pages they manage on major social media platforms.
>
> **Example 2:** Social media platforms may understandably restrict posts from Ariel Rodriguez, who claimed that he is God and wants to heal and kill people.[4] But if Rodriguez were "seeking" public office, he could sue social media platforms for $100,000 for every restricted post.

Section 2, regarding antitrust offenders list, creates these unintended but extraordinary consequences for major Florida businesses

> **Example 3:** If any subsidiary or joint venture partner of Disney and Comcast-Universal were found to violate antitrust laws by any state, Disney or Comcast-Universal could lose all economic or tax incentives from Florida.
>
> **Example 4:** If Google, Apple, or Microsoft, are found in violation of any state's antitrust law, it could close-down existing operations with Florida's schools and municipal governments -- one reason that schools and local governments opposed a similar penalty in Iowa legislation.

Section 3, regarding private lawsuits with statutory damages, would empower unintended yet plausible and problematic lawsuits for content moderation by social media platforms:

> **Example 5:** If social media platforms remove *Al Jazeera* content celebrating acts of terrorism, they are liable to be sued by *Al Jazeera* for censoring content. And Al Jazeera can seek $100,000 for every Florida user who could *not* see the post, by claiming the social media platform was inconsistent in its moderation since it allows content celebrating heroic but violent acts by American soldiers and law enforcement.
>
> **Example 6:** A teacher could place an op-ed in *USA Today* demanding that public and private schools should close because children are dying from COVID. If a social media platform restricts user sharing of this op-ed because it runs contrary to CDC guidelines, *USA Today* could sue under Section 3 for censoring journalistic content.

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[3] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf

[4] 10 Tampa Bay, *Deputies: Missing Florida Man Thinks He's God and Wants to "Kill and Heal" People*, YouTube (Feb. 6, 2019), https://www.youtube.com/watch?v=lmU7w1c5jCE.

HB 7013 would make it far more difficult for interactive services to block SPAM messages

Today, social media platforms engage in robust content blocking of SPAM messages. But this blocking of not only unwanted but invasive content would be greatly impeded by HB 7013, since blocking could be challenged by lawsuits authorized under the bill.[5]

HB 7013 would enable bad actors to circumvent protections and contradict Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[6]

HB 7013 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed an earlier incarnation of HB 7013, the infamous "Fairness Doctrine," which required equal treatment of political views by broadcasters, saying:[7]

> *"This type of content-based regulation by the federal government is … antagonistic to the freedom of expression guaranteed by the First Amendment.*
> *In any other medium besides broadcasting, such federal policing … would be unthinkable."*

We face similarly unthinkable restrictions in HB 7013, which punishes platforms for moderating their services in ways that they see fit for their customer base and advertisers.

Today, conservative speech has never been stronger. No longer limited to a handful of newspapers or networks, conservative messages can now reach billions of people across multiple social media platforms, including Facebook, Twitter, YouTube, Gab, Parler, Rumble, and MeWe.

We've seen the rise of conservative voices without having to beg for an op-ed in the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

Nonetheless, some want government to regulate social networks' efforts to remove objectionable content. This returns us to the "fairness doctrine" and creates a new burden on conservative speech.

HB 7013 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting Online Platforms and Services*:

> WHEREAS, online platforms are businesses that should be allowed to operate in ways that best serve their users — and the government should not interfere with these businesses in order to advance a particular belief or policy;
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> WHEREAS, even if online platforms were to exhibit political bias in content display or moderation, the First Amendment protects this exercise of editorial discretion from government intervention; …

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[5] *See, e.g. Holomaxx Technologies Corp. v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (email marketer sued Microsoft, claiming the SPAM blocking filtering technology Microsoft employed was tortious.)
[6] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).
[7] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), http://www.presidency.ucsb.edu/ws/?pid=34456 .

> THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that it is well settled that the First Amendment restricts the government from regulating speech or restricting the publishing rights of online platforms or services, including the right to curate content.

NetChoice supports limited government, free markets, and adherence to the United States Constitution, so we respectfully ask that you not approve HB 7013.

Sincerely,

Steve DelBianco
President & CEO, NetChoice

DLA PIPER

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

MEMORANDUM

TO: NetChoice

FROM: Peter Karanjia

DATE: March 5, 2021

RE: Litigation Risk Analysis of Bills Targeting Website Moderation

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This memo provides a litigation risk analysis of provisions in various state bills that would restrict common and widely accepted moderation practices that websites (including social media platforms) have long employed to enforce their community standards as platforms for open and civil discourse. Many of the core provisions common to these bills suffer from serious legal infirmities and very likely would be invalidated by a court based on the First Amendment, the express preemption provision in Section 230(e)(3) of the Communications Decency Act, and/or the federal Internet Tax Freedom Act.

A. Bills Denying Website Operators Government Benefits Based on Purported "Censorship" Violate the First Amendment

Bills that purport to deny public contracts[1] or tax benefits[2] to website operators who moderate user-generated comments are inconsistent with the First Amendment. There is no question that website operators' editorial judgments concerning which user-generated posts they

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[1] *See, e.g.,* 2021 AZ SB 1464 (requiring Arizona officials to "terminate" all contracts with website operators who engage in "targeted censorship"); 2021 IA SF 402, § 2 (similar).

[2] *See, e.g.*, 2021 AL HB 213, § 2 (prohibiting operators of a "website providing a forum for comments or posts which receives any tax abatement, credit, or incentive of any kind" from "censor[ing] any comment or post appearing on its website," subject to a narrow exception for comments or posts involving "incitement to violence"); 2021 OK SB 1019, § 1 (providing that "any entity operating under the protections of a platform" under Section 230 of the Communications Decency Act will be subject to a $10,000 fine and will be ineligible for "any tax break, subsidy, exemption or incentive" if it "engages in censorship activities consistent with the definition of a publisher or that removes content that is not prohibited by law").

will moderate (including potentially taking down) constitute speech subject to the full protections of the First Amendment.[3] Moreover, given the centrality of online communications to the free and open marketplace of ideas, a court would be particularly wary of governmental efforts to police online moderation practices. As the Supreme Court has explained, "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, … and social media in particular."[4]

Here, the bills under consideration unquestionably impinge on website operators' editorial judgment protected by the First Amendment—and they do so based on the content of the user-generated postings.[5] As a result, the provisions would be subject to "strict scrutiny"—the most searching form of constitutional scrutiny.[6] Under this exacting standard, a statute "is invalid …

[3] *See, e.g.*, *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974) (invalidating "right of reply" law requiring a newspaper to publish a response from political candidates, given that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment."); *Turner Broad. Syst., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (cable operators are speakers protected by the First Amendment because they "exercise[e] editorial discretion over which stations or programs to include in [their] repertoire") (citations and internal quotation marks omitted); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) ("Plaintiffs' efforts to hold Baidu accountable in a court of law for its editorial judgments about what political ideas to promote cannot be squared with the First Amendment.").

[4] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

[5] For example, the Alabama bill includes a flat ban on any content moderation (dubbed "censorship"), save for an amorphous exception for speech that incites violence. *See* 2021 AL HB 213, § 2. As a result, a website operator is prohibited from exercising its editorial discretion to remove any user-generated post or comment other than those deemed to incite violence—an undefined term that raises separate concerns of unconstitutional vagueness. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 807 (2011) (an imprecise law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech.") (citation omitted).

[6] *See, e.g., Barr v. Am. Ass'n of Political Consultants, Inc*., 140 S. Ct. 2335, 2347 (2020) (applying strict scrutiny to the Telephone Consumer Protection Act, and striking down a provision of the law that permitted the use of "robocalls" to collect government debt, but banned all other entities from "robocalling").

unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."[7] As the Supreme Court has instructed, "[t]he State must specifically identify an 'actual problem' in need of solving, ... and the curtailment of free speech must be actually necessary to the solution."[8] That is a very high standard. "'It is rare that a regulation restricting speech because of its content will ever be permissible.'"[9]

A reviewing court would very likely conclude that the type of bill provisions discussed above cannot survive strict-scrutiny review. Neither the legislative record nor any evidence supports the existence of a "compelling government interest" in second-guessing websites' editorial practices. And, in any event, the sweeping restrictions imposed by these provisions—for example, implicating all content-moderation activities except in the case of incitement to violence, thereby taxing or creating liability risk for content moderation designed to protect users from harassment, rape and death threats, false health claims and misinformation regarding Covid vaccines, and hate speech, to name just a few—are not remotely "narrowly drawn."

Those bills that specifically single out the moderation of "political" or "religious" speech raise even graver constitutional concerns.[10] The law is clear that a state may not compel an organization to deliver a political or religious message that it does not want to.[11] "Governments

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[7] *Brown*, 564 U.S. at 799 (citation omitted).

[8] *Id*. (citations omitted).

[9] *Id*. (citation omitted).

[10] *See, e.g.,* 2021 KY SB 111, § 2 (establishing private right of action against any website operator who "[d]eletes or censors the user's religious speech or political speech"; 2021 MO HB 482 (similar); 2021 LA HB 14 (permitting state Attorney General to fine any operator that removes "content based on race, gender, political ideology, or religious beliefs"). For more examples, *see* below, note 28.

[11] *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (striking down a California law that would have compelled pro-life pregnancies centers to inform their clients that free or low-cost contraceptive and abortion services were also available at state-funded clinics); *see also, e.g., Pacific Gas & Elec. Co. v. PUC*, 475 U.S 1, 15-16 (1986) (utility could not be forced to include in its billing envelopes

must not be allowed to force persons to express a message contrary to their deepest convictions."[12] For the same reason, states may not force a website operator to provide a platform for political or religious speech that runs counter to the operator's policies or values.

All of these content-based speech restrictions would also be subject to (and very likely fail) strict scrutiny on the independent ground that they burden the speech of a subset of companies (website operators) but not similarly situated speakers such as newspapers.[13] Even in the context of taxes and other regulatory regimes, this sort of discriminatory treatment of speakers runs afoul of the First Amendment.[14]

States cannot avoid these basic First Amendment principles simply by framing the law in question as one regulating "benefits." Under the Supreme Court's well-established precedents, a state may not condition the availability of a benefit on an individual or corporation's agreement to forgo the exercise of their constitutional rights. In other words, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[15] This is true even if the individual has no right to the benefit

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information from a citizen's group; "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say").

[12] *Becerra*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

[13] "[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Barr*, 140 S. Ct. at 2347.

[14] *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.,* 460 U.S. 575, 592–93 (1983) (invalidating Minnesota paper and ink tax that singled out a class of speakers); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (Arkansas statute violated First Amendment by taxing general interest magazines, but exempting newspapers and religious, professional, trade, and sports journals); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 641 (5th Cir. 2012) (applying strict scrutiny to franchising rules that targeted a small number of cable providers).

[15] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also 44 Liquormart, Inc. v. Rhode Island* , 517 U.S. 484, 489 (1996) (striking down a state law that conditioned eligibility for commercial liquor licenses on businesses' agreement not to advertise liquor prices); *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 438 (5th Cir. 2014) (striking down a Texas law that conditioned receipt of state lottery proceeds on charities' agreement not to use those proceeds in political lobbying).

in the first instance.[16] The speech restriction here is a far cry from the limited situations where a reasonable condition on a government benefit—a condition that is rationally related to the benefit conferred[17]—was upheld.[18] Here, the blanket ineligibility for "benefits" (including tax exemptions or contracts) based on a website's exercise of its constitutional rights is completely untethered from, and in no way rationally related to, any legitimate government interest in the administration of a benefit. Indeed, the bills in question propose to strip website operator's eligibility for *all benefits* indiscriminately, solely because of their content moderation choices. It follows that a "government benefit" defense cannot salvage these bills from unconstitutionality.

B. Bills Prohibiting Content Moderation Where Website Describes its Neutrality Also Violate the First Amendment

Other bills that are ostensibly styled as consumer-protection legislation in the vein of false advertising laws raise even greater First Amendment concerns by prohibiting websites and other "interactive computer services" from, among other things, removing or blocking user content where the service holds itself out as "neutral."[19] These bills necessarily mean that it is for the state to determine the exercise of editorial discretion that is sufficiently "neutral" to permit (rather than prohibit) removal of user content in the website's discretion.[20] Much like the long-repealed

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[16] *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, 59 (2006).

[17] *See Bingham v. Holder*, 637 F.3d 1040, 1046 (9th Cir. 2011) ("[T]he government may condition the grant of a discretionary benefit on a waiver of rights if the condition is rationally related to the benefit conferred.") (internal quotation marks and citation removed).

[18] *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980) (permitting the CIA to condition employment on prospective employees' voluntary agreement not to disclose confidential information).

[19] *See, e.g.*, 2021 AK HB 7, § 1 (prohibiting "interactive computer services," broadly defined to include websites but not ISPs, from "removing" a user's content or "blocking" such content "based on the content or viewpoint expressed by a user of the service" if the service "represents itself as having neutral, impartial, or nonbiased").

[20] As noted above, there is no question that full First Amendment protections extend to governmental requirements to compel speech—here, to refrain from taking down, removing, or (in the tendentious terminology of the bills) "censoring" user-generated posts and comments. *See* notes 11 and 12, *supra*.

FCC "fairness doctrine,"[21] this is the sort of government intrusion into editorial judgment and core speech that is antithetical to the First Amendment.[22]

While the government can restrict false and misleading commercial speech (e.g., in the false advertising context),[23] questions about editorial "neutrality" are inherently subjective judgments protected by the First Amendment.[24] Thus, it is no business of the government to dictate which content-moderation policies are "neutral."[25] And that is why, in a unanimous opinion released last year (authored by Judge McKeown and joined in full by Judge Jay Bybee and Senior District Judge Fernando Gaitan), the Ninth Circuit held that Google could not be held liable for false advertising by describing itself as committed to freedom of speech while removing certain content posted by PragerU, an organization with a mission to "'provide conservative viewpoints and perspective on public issues that it believes are often overlooked.'"[26] Google has

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[21] *See, e.g.*, *Syracuse Peace Council v. FCC*, 867 F.2d 654, 677 n.5 (D.C. Cir. 1989) (observing that "the FCC has [recently] concluded that … the fairness doctrine violates the First Amendment," and therefore ceased enforcement).

[22] "[A]s a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted); *see also Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 534 (1980) ("The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.'") (citation omitted).

[23] *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980); *see also Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020) ("YouTube's statements concerning its content moderation policies do not constitute 'commercial advertising or promotion' as the Lanham Act requires.").

[24] "Opinion is absolutely protected under the First Amendment." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339 (1974) (First Amendment protections for allegedly defamatory speech); *see also Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990); *Virginia State Bd. of Pharmacy*, 425 U.S. 748, 771 (1976) (non-falsifiable statements of opinion cannot form the basis for civil liability under the First Amendment).

[25] "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz,* 418 U.S. at 339-40.

[26] *Prager Univ.*, 951 F.3d at 995.

a First-Amendment right to moderate content on its platform as it chooses, and its claims "about its commitment to free speech constitute[] opinions that are not subject to [federal truth-in-advertising laws]."[27]

C. Bills Purporting to Strip Websites of Section 230 Immunity Are Preempted by Federal Law

Other bills, also labeled as "anti-censorship" measures, purport to create liability or a private right of action on behalf of users for social media platforms' content-moderation decisions—even where those decisions are protected by Section 230 of the Communications Decency Act.[28] Indeed, as noted in the quoted excerpts from these bills, the proposed legislation

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[27] *Id*. at 1000.

[28] *See, e.g*., 2021 MO HB 932, § A (providing that "[i]f an interactive computer service provider restricts, censors, or suppresses content that is protected by the Free Speech Clause of Amendment I of the Constitution 10 of the United States, the interactive computer service provider shall be liable in a civil action for damages to the person whose content is restricted, censored, or suppressed and to any person who reasonably otherwise would have received the content."). The bill explicitly adds that this provision "applies if" (among other things) the interactive computer service provider is a social media site and "[i]s immune from civil liability under federal law." *Id*. Thus, it appears to be a deliberate attempt to circumscribe federal immunity under Section 230 of the Communications Decency Act. Other bills are similar. *See, e.g*., 2021 KY HB 416, § 2 ("Any interactive computer service provider that restricts, censors, or suppresses information that does not pertain to obscene, lewd, lascivious, filthy, excessively violent, harassing, or similarly objectionable subject matter, shall be liable in a civil action for damages to any person who at the time of such restriction, censorship, or suppression is a resident of or domiciled in Kentucky, and whose speech is restricted, censored, or suppressed. This section shall only apply if the interactive computer service provider … [i]s immune from civil liability under federal law" and, among other things, is a social media platform); 2021 ND HB 1144, § 1 (similar); *see also* 2021 KY SB 111, § 2 (establishing private right of action where (1) a "social media Web site purposely … (a) Deletes or censors the user's religious speech or political speech; and (b) Uses an algorithm to disfavor, shadowban, or censor the user's religious speech or political speech" or (2) "the owner or operator of a social media Web site deletes, censors, or uses [such] an algorithm"). For similar measures in other states, *see* 2021 MO HB 932 (creating private right of action against companies that restrict or remove content that would otherwise be protected under the First Amendment); and 2021 MO HB 482 (creating private right of action against any website operator who "censors the political speech or religious speech of a user"). *See also* 2021 AZ SB 1428; 2021 IA HF 171; 2021 KY HB 416; 2021 KY SB 111; 2021 LA HB 14; 2021 MS HB 151; 2021 MS HB 544; 2021 MS SB 2617; 2021 ND HB 1144; 2021 NH HB 133; 2021 OK SB 383; 2021 SD HB 1223.

Some bills also contemplate direct civil fines against website operators based on their moderation policies. *See, e.g.,* 2021 LA HB 14 (permitting state Attorney General to fine any operator that removes

appears deliberately designed to undermine Section 230's protections for social media platforms, as well as other online services. This approach fails because Section 230 expressly preempts state laws and under the federal Supremacy Clause, state laws cannot override federal preemption.[29]

Making matters worse, given the First Amendment values that undergird Section 230,[30] this attempt to use state law to circumvent protections that Congress duly enacted—and only Congress can amend—implicate the same serious First Amendment concerns outlined above.[31]

D. Bills Denying Website Operators Tax Benefits Based on Purported "Censorship" Violate the Internet Tax Freedom Act

Finally, bills that purport to deny tax benefits to website operators on the basis of their moderation policies[32] would very likely be struck down as discriminatory taxes that violate the Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151 (note).[33]

Of particular relevance here, ITFA provides that no state may impose "[m]ultiple or discriminatory taxes on electronic commerce." ITFA, § 1101(a)(2). Electronic commerce

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"content based on race, gender, political ideology, or religious beliefs"); 2021 NE LB 621 (directing state Attorney General to fine a website operator $100,000 each time the operator removes content which, had the operator been a government actor, would have been protected by the First Amendment); 2021 OK SB 1019 (permitting state Attorney General to fine any operator that removes "content that is not prohibited by law"). By directly penalizing speech, these bills are even more clearly vulnerable to constitutional challenge than the bills discussed above.

[29] Under basic principles of conflict preemption, state law is preempted whenever it "prevent[s] or frustrate[s] the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873 (2000).

[30] *See, e.g., Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) ("First Amendment values … drive the CDA"); *Batzel v. Smith,* 333 F.3d 1018, 1027-29 (9th Cir. 2003) (Section 230 was added to the CDA, in part, "to further First Amendment and e-commerce interests on the Internet").

[31] *See, e.g.*, *Cubby v. CompuServe, Inc.,* 776 F. Supp. 135, 139 (S.D.N.Y 1991) (expressing concerns "deeply rooted in First Amendment" that intermediary not be treated as a publisher in defamation case).

[32] For examples, see *supra* note 2.

[33] Initially enacted in 1988 as a moratorium on certain state and local taxes, Congress has renewed ITFA no fewer than eight times and ultimately made the tax moratorium permanent in 2015. *See* Public Law 114-125, § 922.

is broadly defined to include, among other things, "*any transaction conducted over the Internet or through Internet access*, comprising the sale, lease, license, *offer*, or delivery *of property, goods, services*, or information, whether or not for consideration." *Id*., § 1105(3) (emphases added). And a state tax is impermissibly discriminatory under the ITFA if the state (a) imposes the tax on electronic commerce but (b) the tax "is not generally imposed ... on transactions involving similar property, goods, services, or information accomplished through other means." *Id*., § 1105(2)(A)(i).

A state tax that subjects website operators to taxes that are not imposed on similarly situated entities (because the websites are ineligible for exemptions available to the similarly situated entities) is facially discriminatory. Here, for example, the bills do not apply to traditional (non-digital) publishers, such as a newspaper that publishes "letters to the editor." Thus, reviewing court would likely conclude that this is precisely the type of discrimination that ITFA explicitly prohibits[34]—a prohibition that Congress has repeatedly reaffirmed.[35]

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[34] *See, e.g.*, *Performance Mktg. Ass'n, Inc. v. Hamer*, 998 N.E.2d 54, 59–60 (Sup. Ct. Ill. 2013) (concluding that Illinois statute imposing an online marketing tax was "expressly preempted" by ITFA and its provisions were "therefore void and unenforceable" where the statute singled out out-of-state retailers providing an internet service but did not apply the tax to newspapers and radio stations).

[35] Any effort to defend these provisions based on the theory that they do not actually "impose" any tax and instead merely involve the grant of tax benefits to specified entities should be unavailing. A statutory provision selectively exempting Party A from a tax that similarly situated Party B is not exempt from is functionally identical than a provision that directly imposes the tax on Party A but not Party B. Thus, properly viewed in conjunction with the related statutes establishing the taxes subject to potential exemptions, the bills result in discriminatory taxes prohibited by ITFA. *Cf. Southgate Master Fund, L.L.C. ex rel. Montgomery Capital Advisors, LLC v. United States*, 659 F.3d 466, 478–79 (5th Cir. 2011) (discussing the "cardinal principle" that "a transaction's tax consequences depend on its substance, not its form").

In sum, all the bills discussed above suffer from serious legal flaws and would be highly vulnerable to a challenge in court.[36]

[36] Other bills impose significant burdens on websites by requiring them to "explain" their moderation decisions. *See* 2021 FL SB 520; 2021 NE LB 621, § 1. *See also* 2021 MO HB 783 (requiring website operators to clearly delineate the bounds of permissible content in their terms of service).