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

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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."
>
> 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