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

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March 23, 2021

Sen. Larry Alley, Chair
Committee on Federal and State Affairs
Kansas State Senate

RE: **Opposition to SB 187 - Prohibiting social media terms of service that permit censorship of speech**
(for hearing on March 24)

Chairman Alley and members of the committee:

We respectfully ask that you **not** advance SB 187, because it:

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

Below we explain why SB 187 would be set aside for violating the First Amendment. Then, we describe the unintended but likely consequences if the law were to survive constitutional challenges.

SB 187 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 carry user-created comments or third-party advertisements promoting abortion on its social media page. Just as that must-carry mandate would violate the First Amendment, so too does SB 187, 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 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 this test, SB 187 is unconstitutional and will likely fail when challenged in court.

Legal analysis from DLA Piper (attached), the largest law firm in the world, looked at legislation similar to SB 187 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 SB 187 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.

SB 187 would expose social media platforms to lawsuits for removing harmful content

Even if SB 187 were to survive the 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 every-day websites. That includes explicit material like pornography, extremist recruitment, and even bullying and other forms of verbal abuse.

At the same time, audiences and advertisers also don't want to see this content on our social media pages. Today, online platforms make efforts 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 SB 187 would make it extremely risky for social media platforms to remove or restrict sharing of objectionable content that they moderate today. 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 what we would likely see more of under SB 187:

- Atheist or abortion advocacy posted to a church's Facebook or YouTube page
- SPAM messages in our email and social media apps

Moreover, consider material like the bullying of teenagers, grooming of children, and new unexpected health threats like the infamous *Tide Pod Challenge*. SB 187 creates lawsuit risks for removal of this type of content, since it doesn't fit within the limited list of objectionable material in the bill.

The end result is that websites and platforms will err on the side of leaving up extremist speech and harmful content, making the internet a much more objectionable place to be.

SB 187 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 SB 187, since blocking could be challenged by lawsuits authorized under the bill.[4]

SB 187 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."[5]

SB 187 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed an earlier incarnation of SB 187, the infamous "Fairness Doctrine," which required equal treatment of political views by broadcasters, saying:[6]

> *"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 SB 187, which punishes platforms for moderating their services in ways that they see fit for their customer base and advertisers.

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[3] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf
[4] *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.)
[5] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).
[6] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), http://www.presidency.ucsb.edu/ws/?pid=34456 .

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.

SB 187 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;
>
> 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; …
>
> 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 SB 187.

Sincerely,

Steve DelBianco
President & CEO, NetChoice

DLA PIPER

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

MEMORANDUM

TO: NetChoice

FROM: Peter Karanjia

DATE: March 17, 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. Moreover, none of the arguments proposed in defense of these bills so far—that website operators are "common carriers," or quasi-public entities subjects to the First Amendment's constraints—are persuasive, or likely to succeed in court.

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

Bills that purport to deny public contracts,[1] withhold tax benefits,[2] or directly fine[3] website

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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 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").

[3] *See, e.g.,* 2021 FL HB 7013, § 1 (fining any operator who removes a candidate for political office from its platform); 2021 LA HB 14 (permitting state Attorney General to fine any operator that removes "content

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 will moderate (including potentially taking down) constitute speech subject to the full protections of the First Amendment.[4] 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."[5]

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.[6] As a result, the provisions would be subject to "strict scrutiny"—the most

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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").

[4] *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.").

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

[6] 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

searching form of constitutional scrutiny.[7] 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."[8] 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."[9] That is a very high standard. "'It is rare that a regulation restricting speech because of its content will ever be permissible.'"[10]

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.[11] The law is clear that a state may not compel an

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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).

[7] *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").

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

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

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

[11] *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

organization to deliver a political or religious message that it does not want to.[12] "Governments must not be allowed to force persons to express a message contrary to their deepest convictions."[13] 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. [14] Even in the context of taxes and other regulatory regimes, this sort of discriminatory treatment of speakers runs afoul of the First Amendment.[15]

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

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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 *infra*, note 29.

[12] *See, e.g., 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); *Pacific Gas & Elec. Co. v. PUC*, 475 U.S 1, 15-16 (1986) (utility could not be forced to include in its billing envelopes 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").

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

[14] Some of the state bills make this disparate treatment explicit. *See, e.g.,* 2021 FL HB 7013, § 3 (exempting, under certain conditions "a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter" from the same liability the bill would impose on website operators).

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

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."[16] This is true even if the individual has no right to the benefit in the first instance.[17] 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[18]—was upheld.[19] 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

[16] *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 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).

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

[18] *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).

[19] *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).

where the service holds itself out as "neutral."[20] These bills necessarily imply 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.[21] Much like the long-repealed FCC "fairness doctrine,"[22] this is the sort of government intrusion into editorial judgment and core speech that is antithetical to the First Amendment.[23]

While the government can restrict false and misleading commercial speech (e.g., in the false advertising context),[24] questions about editorial "neutrality" are inherently subjective judgments protected by the First Amendment.[25] Thus, it is no business of the government to dictate

[20] *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").

[21] 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 4 & 12-13, *supra*.

[22] *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).

[23] "[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).

[24] *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.").

[25] "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 v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (non-falsifiable statements of opinion cannot form the basis for civil liability under the First Amendment).

which content-moderation policies are "neutral."[26] And that is why, as the Ninth Circuit recently recognized, Google cannot 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.'"[27] Google has 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]."[28]

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.[29]

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[26] "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.

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

[28] *Id*. at 1000.

[29] *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

Indeed, as noted in the quoted excerpts from these bills, the proposed legislation 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 ones.[30]

Moreover, given the First Amendment values that undergird Section 230,[31] 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.[32]

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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"); 2021 Fla. HB 7013, § 3 (creating a private right of action, also enforceable by the Attorney General, against any operator who removes a journalist from its platform). 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.

[30] 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). In an attempt to avoid this obstacle, some bills include "savings provisions." *See, e.g.,* 2021 FL HB 7013, § 1 ("This section may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3)."); 2021 TX HB 3105 (similar). But these provisions are unlikely to have their intended effect. Because Section 230 unambiguously bars the kind of civil liability that these bills seek to impose, a court may conclude that the savings provisions simply render the bills a nullity. *Cf. San Diego City Firefighters, Loc. 145 v. Bd. of Admin. of San Diego City Emp. Ret. Sys.,* 206 Cal. App. 4th 594, 614 (2012). Alternatively, if a savings provision were found not to have this effect, it would be insufficient to save the bill from preemption. And in either case, these savings provisions are too vague to avoid First Amendment concerns given their facial overbreadth and chilling effect on speech. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) ("[T]he present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here."); *see also Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir. 1994) ("Where a statute's overbreadth is substantial, its chilling effect is likely to be significant, and consequently the entire statute may be invalidated to protect First Amendment interests.").

[31] *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) (observing that Section 230 was added to the CDA, in part, "to further First Amendment and e-commerce interests on the Internet").

[32] *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 an intermediary not be treated as a publisher in defamation case).

D. Arguments in Defense of these State Bills Would Likely Be Rejected by Courts

Defenders of these state bills have proposed several creative theories in an attempt to evade the concerns presented above. Some of these theories assert that popular websites (including social media companies, in particular) perform functions similar to government entities and therefore should be bound by the same First Amendment limitations on their moderation practices that would apply to the government. As outlined below, one commentator seeks to leverage Section 230 to this end, effectively using it as a sword—rather than a shield—to undermine the speech rights of website operators. These arguments, however, turn the First Amendment on its head: *Private* website operators are not required to treat content posted on their platforms *as if* they were *public* entities.

Other arguments maintain that states can restrict content moderation practices without running afoul of the First Amendment by analogizing website operators to "common carriers," or arguing that precedent upholding the FCC's defunct "fairness doctrine" permits states to impinge on websites' editorial discretion. But these analogies are inapt, and no court has ever extended them to online speech. Nor is any court likely to do so.

a. Second 230 does not "privatize censorship"

Perhaps the best articulation of the theory that websites themselves should be subject to First Amendment-type restrictions comes from Professor Philip Hamburger, a respected scholar whose arguments warrant careful consideration. In a recent op-ed in the *Wall Street Journal*, he argues that, by protecting website operators from liability for their content moderation choices in Section 230, Congress effectively "privatized censorship," handing to website operators the power

to prohibit speech even where the First Amendment bars Congress itself from doing so.[33] But it is not "censorship" for a private website operator to take down content that violates its policies, any more than it is censorship for Fox News to choose not to give a platform to a pundit on one of its shows—or, indeed, for the *Wall Street Journal* to publish Prof. Hamburger's op-ed (as opposed to one opposing the bills discussed in this memo).[34]

Nor does that private decision become a governmental (or quasi-public) one if the operator is shielded from civil liability for its moderation policies. Far from constituting "congressionally emboldened censorship," Section 230 *promotes* the freedom of speech, as many courts have recognized.[35] Rhetoric aside, Prof. Hamburger ultimately acknowledges that all the websites subject to these state bills "are private," and that "the [First] [A]mendment prohibits only government censorship." He also concedes that his "concern doesn't extend to ordinary websites that moderate commentary and comments; such controls are their right not only under Section 230 but also probably under the First Amendment."[36] This is fatal to his argument.

b. Website operators do not perform a "traditional government function"

A related argument maintains that, if a private company performs a "traditional governmental function," it is subject to the same constitutional constraints as the government itself.[37] Thus, for instance, a privatized town may not bar the members of a given church from

[33] Philip Hamburger, Opinion, *The Constitution Can Crack Section 230*, WALL STREET J. (Jan 29, 2021). Prof. Hamburger alternatively describes Section 230 as "congressionally emboldened censorship," and an exercise of Congress's "commerce power to … regulat[e] … speech."

[34] *See* note 4, *supra* (citing, *inter alia*, *Tornillo,* 418 U.S. at 258)).

[35] *See* note 31, *supra.*

[36] Hamburger, *Section 230*.

[37] *See, e.g.*, Hamburger, *Section 230* (website operators "function as public forums" and are "carrying out government speech policy").

engaging in religious speech.[38] Under this theory, because websites constitute a "digital public square," they must moderate user content neutrally.[39] But as the Supreme Court explained recently, under "very few" circumstances will this state-action doctrine subject "a private actor to First Amendment constraints on its editorial discretion. … [A] private entity … who opens its property for speech by others is not transformed by that fact alone into a state actor."[40] Accordingly, courts have soundly rejected attempts to stretch the First Amendment, under the state-action doctrine, to cover websites.

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 emphatically held that YouTube was *not* a "digital business district" for First Amendment purposes.[41] Petitioners in that case argued that, since YouTube was a "public forum," third-party users' speech on the platform was protected by the First Amendment.[42] But as the court noted, "[t]o characterize YouTube as a public forum would be a paradigm shift":

> The relevant function performed by YouTube—hosting speech on a *private* platform—is hardly "an activity that only governmental entities have traditionally performed." … YouTube does not perform a public function by inviting public discourse on its property. "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." … Otherwise "every retail and service establishment in the country" would be bound by constitutional norms.[43]

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[38] *Marsh v. State of Alabama*, 326 U.S. 501, 504 (1946).

[39] As to the First Amendment's restrictions on *government action* restricting speech, *see* Section A and notes 4 and 12-13, *supra*.

[40] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929, 1926 (2019).

[41] *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).

[42] *Id*. at 999.

[43] *Id.* at 998-999 (citing, *inter alia*, *Manhattan Community Access Corp*, 139 S. Ct. at 1930) (emphasis added).

The Ninth Circuit, moreover, specifically distinguished *Marsh v. Alabama*, a case cited by Prof. Hamburger. "That YouTube is ubiquitous does not alter our public function analysis.… Unlike [a] company town …, YouTube … does [not] operate a digital business district that has 'all the characteristics of any other American town.'"[44] Other courts would likely agree.

Nor may a state unilaterally convert a website operator into a government actor by legislative fiat. Under very different circumstances, in *Pruneyard Shopping Center v. Robbins*, the Supreme Court permitted California to require shopping centers to open their doors to political speech.[45] But "no court has expressly extended *Pruneyard* to the Internet," and none is likely to do so.[46] To the contrary, as a recent court cogently explained, "[t]he analogy between a shopping mall and the Internet is imperfect, and there are a host of potential 'slippery slope' problems that are likely to surface were *Pruneyard* to apply to the Internet."[47] Again, other courts would almost certainly agree—dooming any effort to sustain the state bills under a *Pruneyard* theory.

[44] *Id.* (quoting *Marsh*, 326 U.S. at 502).

[45] 447 U.S. 74 (1980).

[46] *hiQ Labs, Inc. v. LinkedIn Corp.,* 273 F. Supp. 3d 1099, 1116 (N.D. Cal. 2017), *aff'd and remanded*, 938 F.3d 985 (9th Cir. 2019).

[47] *See id*. ("Though certain spaces on the Internet share important characteristics of the traditional public square, ... [n]o court has had occasion to [extend *Pruneyard* to websites] or to consider the reach and potentially sweeping consequences of such a holding. For instance, would all publicly viewable websites on the Internet be subject to constitutional constraints regardless of size of the business? Does *Pruneyard*, which involves a single owner of the public forum (the shopping center), apply to a website which constitutes only a portion of the Internet and where there is no single controlling entity? Would the entire Internet or only a particular collection of websites constitute a public forum? If the Internet were a public forum governed by constitutional speech, would social network sites such as Facebook be prohibited from engaging in any content-based regulation of postings? The analogy between a shopping mall and the Internet is imperfect, and there are a host of potential "slippery slope" problems that are likely to surface were *Pruneyard* to apply to the Internet.").

c. Website operators are not "common carriers"

In another familiar argument, Prof. Hamburger suggests that certain popular websites should be viewed as "akin to" common carriers, like public utilities and telecommunications carriers.[48] At common law (and sometimes under relevant statutes), such entities have a basic duty of nondiscrimination towards all potential customers.[49]

Prof. Hamburger chooses his words carefully, and it is telling that he does not claim that any of these websites *are* common carriers—nor could he. "Common carrier" is a well-developed legal term of art, stretching back centuries. Websites (including social media platforms) unambiguously do not fit the bill. As courts have long held, "[t]o be a common carrier, a company [must] serve the public indiscriminately and not 'make individualized decisions, in particular cases, whether and on what terms to deal.'"[50] But websites do not hold themselves out as willing to host all speech and, to the contrary, explicitly reserve the right to moderate third-party content. Facebook, for example, is in no way akin to a telephone company that "indiscriminate[ly] offer[s]" to carry all parties' communications.[51] Indeed, by definition, a website that moderates content cannot be a common carrier.[52] Accordingly, any defense of these state bills on a "common

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[48] *See id.* (arguing that certain "massive companies" are "*akin to* common carriers," or "common-carrier-*like* companies") (emphasis added).

[49] *American Orient Express Railway Co, LLC v. Surface Transportation Board*, 484 F.3d 554, 557 (D.C. Cir. 2007).

[50] *American Orient Exp. Ry. Co.v. Surface Transp. Bd.*, 484 F.3d 554, 557 (D.C. Cir. 2007) (quoting *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.1976)); *see also Cellco P'ship v. FCC*, 700 F.3d 534, 546 (D.C. Cir. 2012) ("[T]he indiscriminate offering of service on generally applicable terms … is the traditional mark of common carrier service.") (citation and internal quotation marks omitted).

[51] "From the earliest days, common carriers have had a duty to carry all goods offered for transportation." *Am. Trucking Associations v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 406 (1967).

[52] *See Arista Records LLC v. Usenet.com, Inc.,* 633 F. Supp. 2d 124, 148-49 (S.D.N.Y. 2009) (recognizing that a website operator was not a "common carrier," since its owners took "active steps, including both

carrier" theory would almost certainly be rejected in the courts. Furthermore, the argument proves too much. If websites were common carriers, they would be obliged not merely to moderate impartially, but to refrain from moderation at all—a perverse outcome that Prof. Hamburger and other defenders of the bills do not advocate for.

d. Website operators may not be treated as broadcasters under Red Lion

In the *Red Lion* case of 1969,[53] the Supreme Court rejected a constitutional challenge to the "fairness doctrine," requiring broadcast television and radio stations to give equal airtime to opposing points of view.[54] While this case is sometimes cited in defense of the state bills described above, *Red Lion* is a red herring. As the Supreme Court has explained, even at the time it was decided, *Red Lion* was an exceptional case. The public radio waves used to carry broadcast television and radio signals are a limited resource that must be managed under a public licensing regime; otherwise, there would be too many broadcasters and a cacophony of interfering radio signals.[55] Therefore, owing to this resource scarcity and the role of broadcasting at the time, the *Red Lion* Court reasoned that the government may condition the grant of a broadcast license on the recipient's agreement to air opposing views. But the internet, of course, is an *unlimited* resource, and the very idea of the government licensing websites is antithetical to the First Amendment.[56] Thus, the logic of *Red Lion* is entirely inapplicable to the conditions of the modern

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automated filtering and human review, to remove access to certain categories of content, and to block certain users, [and because] they have control over which newsgroups their servers accept and store and which they reject, and … routinely exercised that control").

[53] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[54] As noted above (*see* note 22), the FCC has since repealed the fairness doctrine, citing First Amendment concerns.

[55] *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 637 (1994).

[56] This highlights why Prof. Hamburger's analogy of website operators to the seventeenth-century "Stationers company, England's printers trade guild" is inapt. Hamburger, *Section 230*. The Stationers

internet. As the Supreme Court has made explicitly clear, *Red Lion's* relaxed standards of First Amendment scrutiny apply *only* to broadcasters,[57] *not* to online speech.[58] Thus, states may not constitutionally extend *Red Lion's* framework to speech on the internet.

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

Aside from these constitutional and preemption arguments, bills that purport to deny tax benefits to website operators on the basis of their moderation policies[59] would very likely be struck down as discriminatory taxes that violate the Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151 (note).[60] 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 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*., §

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company enjoyed a state-sanctioned monopoly on speech: the government prohibited printers from publishing works that had not been licensed by government officials or agents, who could censor portions of the work or block publication altogether. Any such prior-restraint regime would be entirely repugnant to the First Amendment today.

[57] Even in the broadcast context, *Red Lion* has been criticized. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530-33 (2009) (Thomas, J., concurring) (arguing that *Red Lion* was "unconvincing when [it was] issued, and the passage of time has only increased doubt regarding [its] continued validity").

[58] *Reno v. ACLU*, 521 U.S. at 867-68 (full First Amendment protections apply to online speech).

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

[60] 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.

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, a reviewing court would likely conclude that this is precisely the type of discrimination that ITFA explicitly prohibits[61]—a prohibition that Congress has repeatedly reaffirmed.[62]

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In sum, all the bills discussed above suffer from serious legal flaws and would be highly vulnerable to a challenge in court.[63]

[61] *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).

[62] 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, LLC 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").

[63] 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).