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

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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