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

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RE: **Opposing H 5564 – Social Media Censorship Act**

Chairman Hughes and members of the committee:

We respectfully ask that you **not** advance H 5564, because it:

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

H 5564 will penalize social media platforms for moderating harmful content, generating unintended consequences we describe below.

## H 5564 exposes websites and platforms to lawsuits for removing harmful content

The First Amendment protects a lot of content that we don't want our families to see on websites. The First Amendment protects explicit material, extremist recruitment speech, 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. But H 5564 would make it nearly impossible for social media to remove objectionable content.

Today, online platforms try to remove harmful content from their sites. In just the six-months during 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[1] This includes removal of 57 million instances of pornography, and 17 million pieces of content related to child safety.

Yet the removal of content related to extremist recruitment and child safety is impeded by H 5564. This is because it penalizes a platform that decides to remove content because of "Delete or censor a social media website user's religious speech or political speech; or (2) Use an algorithm to suppress political speech or religious speech."

This would mean a social media platform could be violating H 5564 if it removed any of the following:

- ISIS recruitment – since that denies their political speech for those who hate America

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

- SPAM messages – since that denies the viewpoint of the spammer
- Speech from hate groups – as this removes *their* political speech
- Posts by White Supremacists to a Synagogue's Facebook or YouTube page

The threat of lawsuits authorized under this legislation will likely cause large platforms to stop deleting extremist speech and harmful content, making the internet a much more objectionable place to be.

Moreover, this bill is written in a way that enables nearly every Rhode Island resident to be a plaintiff in a lawsuit when one piece of content is removed. If only half of the population is on the social media platform, just one post being removed would create statutory damages of $37 billion.

In the case of a successful lawsuit, platforms would be forced to restore this harmful content online.

In addition, YouTube and Facebook allow page managers to remove content posted on their pages. This empowers content creators to curate their pages to suit their interest. However, platforms and websites might remove this capability, since it creates the threat of expensive litigation under H 5564. A litigious plaintiff could argue that the empowerment of page owners to remove content is an "interactive computer services" censoring a user or their expression, subjecting the platforms to the threat of a lawsuit anytime a page manager removes inappropriate comments or images.

## H 5564 makes 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 H 5564, since blocking could be challenged by complaints and lawsuits authorized under the bill.[2]

H 5564 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."[3]

## H 5564 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. This includes government action that essentially compels speech – i.e., forces a social media platform to allow content they don't want.

Imagine a church's social media page being required by the government to allow atheists' comments about the Bible. That would violate the First Amendment. But that is exactly what H 5564 does for internet platforms. It forces them to host content they otherwise wouldn't against their will.

While there are very limited, narrow exceptions, these types of restrictions are subject to what is called the "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest;

[2] *See, e.g. Holomaxx Technologies Corp. v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (That case involved an email marketer sued Microsoft, claiming the SPAM blocking filtering technology Microsoft employed was tortious.)
[3] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).

- narrowly tailored to achieve that goal or interest; and
- the law or policy must typically be the least restrictive means for achieving that interest.

On at least the last two prongs of this test, H 5564 is unconstitutional and will fail.

Legal analysis from DLA Piper, the largest law firm in the world, looked at legislation similar to H 5564 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.'"
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> 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.

NetChoice supports free markets and adherence to the United States Constitution, so we respectfully oppose H 5564.

Sincerely,

Carl Szabo
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NetChoice