**NetChoice** *Promoting Convenience, Choice, and Commerce on The Net*

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Sen. Andrew Mathews, Chair
Civil Law and Data Practices Policy Committee
Minnesota Senate

RE: **Opposition to SF 1253 Impeding the ability to remove harmful and objectionable content**

Dear Chairman Mathews and members of the committee:

We respectfully ask that you **not** advance SF 1253, because it:

- Impedes the ability of platforms to remove objectionable content.
- Makes it illegal for service providers to block SPAM and punishes platforms for removing terrorist speech and pornography.
- Violates conservative principles of limited government and free markets.
- Violates the First Amendment of the US Constitution.

## SF 1253 Impedes the ability of websites and platforms to remove objectionable content

The First Amendment protects a lot of content that we don't want on our websites or for our children to see. The First Amendment protects pornography. The First Amendment protects extremist recruitment speech. The First Amendment protects bullying and other forms of verbal abuse.

Today, online websites and platforms take significant steps to remove this type of content from their sites. In just the six-months from July to December 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[1] This includes the removal of 57 million instances of pornography. 17 million instances of content related to child safety.

Imagine the Taliban making posts that read, "Join us to help America." Blocking or removing this statement would be illegal under SF 1253. This is "political speech" and is not exempted by Section 5. Or imagine an atheist harassing a Church's online group. If a Church removed this content it would be a violation of SF 1253.

At the same time, removal of content related to terrorist recruitment, pornography, and child safety would be greatly impeded by SF 1253. This is because it essentially penalizes platforms will seek to avoid costly legal fights, even if they know they can win. And the provisions like allowing removal of content

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

that is "pornographic or obscene" is of little help as such a defense requires a protracted trial as even our US Supreme Court cannot *expressly* define something like obscenity.[2]

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

## SF 1253 Makes it illegal for providers to block SPAM, and punishes platforms for removing terrorist speech and pornography

Today, platforms engage in robust content blocking of SPAM. But this blocking of not only unwanted but invasive content would be illegal under SF 1253.

For decades, service providers have fought bad actors to keep our services usable. Through blocking of IP and email addresses along with removing content with harmful keywords, our services are more useful and user friendly. But services couldn't engage in this type of blocking under SF 1253.[3]

How are they supposed to know if an email is related to political speech or are actually engaged in fraud.

It is certain that SF 1253 will chill platforms from removing harmful or even dangerous content.

## SF 1253 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed the equivalent of SF 1253, the infamous "Fairness Doctrine," a law requiring equal treatment of political parties by broadcasters. In his repeal, President Reagan said:

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*"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."*[4]

*– President Ronald Reagan*

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We face similarly unthinkable restrictions in SF 1253 which forbids online platforms from moderating their services in ways that they see fit for their customer base.

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 thousands of websites and platforms.

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[2] *See Miller v. California*, 413 U.S. 15 (1973).

[3] *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 that the SPAM blocking filtering technology Microsoft employed was tortious.)

[4] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), *available at* http://www.presidency.ucsb.edu/ws/?pid=34456 .

We've seen the rise of conservative voices without relying on a column from the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

All of this was enabled at effectively no cost to conservatives. Think about conservatives like Ben Shapiro and Mark Stein, whose shows are available to anyone with an internet connection and on whose websites conservatives can discuss and debate articles via the comments section.

Nonetheless, there are some who seek government engagement to regulate social networks' efforts to remove objectionable content. This forces us to return to an era under the "fairness doctrine" and create a new burden on conservative speech.

SF 1253 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting Online Platforms and Services,* which says:

> 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;
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> …
>
> 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.

As President Ronald Reagan said, "Government is not the solution to our problem; government is the problem." Government regulation of free speech online would not safeguard the future of conservative speech. It would endanger it.

## SF 1253 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 when the government essentially compels speech – i.e. forces a website or platform to allow content they don't want.

Imagine a private Church Chat site being required by the government to allow atheists' comments about the Bible. That would violate the First Amendment. But that is also what SF 1253 does.

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

- justified by a compelling governmental interest;
- 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, SF 1253 is unconstitutional and will fail.

Note that there are lower protections for "commercial speech." However, SF 1253 is not limited to regulation of commercial speech since it covers all of "a user's speech."

As NetChoice favors limited government, a free-market approach, and adherence to the United States' Constitution, we respectfully ask you to **oppose SF 1253**.

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President and General Counsel, NetChoice
*NetChoice works to make the Internet safe for free enterprise and free expression. www.netchoice.org*

ALEC American Legislative Exchange Council

LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

# RESOLUTION PROTECTING ONLINE PLATFORMS AND SERVICES

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WHEREAS, the Internet has created millions of new American jobs and generated billions of dollars in revenue for American businesses;

WHEREAS, online platforms enabled users to generate, upload, and share their own content, and this capability has become a core component of the online experience;

WHEREAS, ALEC's principles of limited government and free markets suggest that the government should continue to take a light-touch approach to regulation 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;

WHEREAS, ALEC's principles of limited-government and free markets oppose the use of antitrust law for political purposes;

WHEREAS, even the threat of legal action can significantly affect the exercise of speech rights protected by the First Amendment, and thus also raises constitutional concerns;

WHEREAS, Section 230 of the Communications Decency Act of 1996 is a federal law limiting the liability of online platforms and services for content that they themselves did not share in creating and has been vital to the growth of user-generated content and free expression online;

WHEREAS, Section 230(c)(1) of the Communications Decency Act ensures that websites will not be held liable as publishers for how they arrange, promote, or prioritize content, unless they are responsible for creating it;

WHEREAS, Section 230(c)(2)(A) of the Communications Decency Act limits the liability of online platforms for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable";

WHEREAS, Section 230 limits the government's ability to prosecute social media companies in parallel with the First Amendment's protection of editorial discretion;

WHEREAS, Section 230 does not shield online platforms from liability for violations of federal criminal law or intellectual property law; and

WHEREAS, the sheer volume of user-generated content hosted by online platforms is so vast that, as Congress presciently recognized in enacting Section 230, imposing legal liability for content moderation decisions will significantly chill content moderation or simply cause online services to decline to host user-generated content;

THEREFORE LET IT BE RESOLVED, ALEC finds that any antitrust action against any online platform or service must not be initiated based on its viewpoint or the procedures it uses to moderate or display content. Any antitrust suit should be based solely on a bona fide violation of antitrust laws, which require proof of economic injury to consumers through a reduction in competition.

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.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that online platforms and services do not lose Section 230 protections solely by engaging in moderation of content created by other individuals, and, indeed, Section 230 was intended to encourage such moderation by limiting second-guessing of such decisions.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC opposes any amendment of Section 230 of the Communications Decency Act that would reduce protections for the rights to freely speak, publish or curate content online, as the law already enables prosecution of online platforms and services for violations of federal criminal law or intellectual property law.