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

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Senator Bryan Hughes, Chairman
State Affairs Committee
Texas State Senate

RE: Opposing **SB 1158** - state investments in social media companies that censor political speech

Chairman Hughes and members of the committee:

We respectfully ask that you **not** advance SB 1158, because it:

- Violates the First Amendment of the US Constitution.
- Penalizes platforms for removing harmful content.
- Forbids government investment in platforms that block political SPAM.
- Violates conservative principles of limited government and free markets.

SB 1158 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 website or platform to allow content they don't want.

Legal analysis from DLA Piper, the largest law firm in the world, looked at legislation similar to SB 1158 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.

While government entities do have some leeway to condition government benefits like state investment on specific requirements, they still may not deny the benefit in a way that infringes on a constitutionally protected interest. That same legal analysis from DLA Piper found that:

> 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 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." This is true even if the individual has no right to the benefit in the first instance.

Imagine a private Church Chat site being required by the government to allow atheists' comments about the Bible to receive the same benefits everyone else receives. That would violate the First Amendment. But that is exactly what SB 1158 does for social media websites.

SB 1158 penalizes websites and platforms for removing harmful content

The First Amendment protects a lot of content that we don't want on 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 second half of 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.

Yet the removal of content related to extremist recruitment, explicit material, and child safety is penalized by SB 1158. This is because it forbids government investment in platforms that engage in content moderation of political speech.

Imagine an extremist group making posts that read, "Join us to help America." Blocking or removing this statement would result in the state taking away all of its investments in the platform under SB 1158.

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

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

SB 1158 forbids government investment in companies that block political SPAM

Today, platforms engage in robust content blocking of SPAM. But this blocking of not only unwanted but invasive content would result in the loss of government investments under SB 1158 if it could be argued to be political speech.

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 would be punished for doing this type of blocking in the context of political speech under SB 1158.[2]

Taking away platform's ability to remove SPAM content without jeopardizing their ability to receive government investment would contradict Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[3]

SB 1158 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed the equivalent of SB 1158, the infamous "Fairness Doctrine," a law requiring equal treatment of political parties by broadcasters. In his repeal, President Reagan said:

"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

We face similarly unthinkable restrictions in SB 1158, which conditions government investment on the requirement that online platforms refrain from moderating political speech 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 different websites and platforms.

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[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 that the SPAM blocking filtering technology Microsoft employed was tortious.)
[3] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).
[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 articles via the comments section.

Nonetheless, there are some who want government 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.

SB 1158 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;
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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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> …
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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.

NetChoice supports limited government, free markets, and adherence to the United States Constitution, so we respectfully oppose SB 1158.

Sincerely,

Steve DelBianco
President & CEO, NetChoice