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

Steve DelBianco, President and CEO
NetChoice
1401 K St NW, Suite 502
Washington, DC 20005
703-615-6206
www.netchoice.org

August 22, 2021

Chairman Trent Ashby
House Select Committee on Constitutional Rights & Remedies
Texas House of Representatives

RE: **Opposing HB 20- Relating to complaint procedures and disclosure requirements for, and to the censorship of users' expressions by, social media platforms**

Chairman Ashby and members of the select committee:

We respectfully ask that you **not** pass HB 20, primarily because it would be enjoined by federal courts for violating the First Amendment of the US Constitution. But if HB 20 were to somehow be enforceable, it would produce consequences its sponsors and conservatives would abhor:

- Expose social media platforms to lawsuits for removing harmful content.
- Make it more difficult for social media platforms to block SPAM messages.
- Violate conservative principles of limited government and free markets.

Below we explain why HB 20 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.

HB 20 violates the First Amendment of the US Constitution

The First Amendment states plainly that government may not regulate the speech of individuals or businesses.[1] This precludes 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 allow user-created comments or third-party advertisements promoting abortion on its social media page. Such a must-carry mandate would violate the First Amendment, and so would HB 20, since it would similarly force social media platforms to host content they otherwise would not allow.

Other than in limited exceptions, a law 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, HB 20 is unconstitutional and will fail when challenged in court.

Thankfully, we do not have to wonder about the constitutionality of HB 20, as a US District Court in Florida recently issued a preliminary injunction against a remarkably similar bill, specifically highlighting the First Amendment infirmities of its content moderation provisions.

To begin, the court made it clear that the First Amendment's restrictions on censorship only apply to the government, not private actors including social media platforms.

> "[T]he First Amendment does not restrict the rights of private entities not performing traditional, exclusive public functions" and that "whatever else may be said of the providers' actions, they do not violate the First Amendment."
>
> "[T]he State has asserted it is on the side of the First Amendment; the plaintiffs are not. It is perhaps a nice sound bite. But the assertion is wholly at odds with accepted constitutional principles."[3]

The court went on to find that the First Amendment does, however, fully protect the rights of social media platforms to exercise their editorial judgement in making content moderation decisions.

> "[T]he First Amendment applies to speech over the internet, just as it applies to more traditional forms of communication. See, e.g., Reno v. ACLU, 521 U.S. 844, 870 (1997)."

The court specifically held that social media platforms' editorial decisions are protected by the First Amendment, going out of its way to note that the decisions in *FAIR* and *Pruneyard* are not applicable, and that Florida's restrictions clearly cannot survive either strict or intermediate scrutiny under the First Amendment.

HB 20 will face similar scrutiny because it also intrudes on social media's editorial discretion. HB 20 provides that social media platforms may not "censor a user, a user's expression, or a user's ability to receive the expression of another person." For the same reasons, the court will likely find that HB 20's restrictions on content moderation will not survive under either strict or intermediate scrutiny.

Moreover, Texas' HB 20 is viewpoint-motivated, which was a major concern for the court in Florida.

> "This viewpoint-based motivation, without more, subjects the legislation to strict scrutiny, root and branch."[4]

In support of this, the court cited the comments made by the law's supporters - including Governor DeSantis - that show the law was driven by hostility for the large tech businesses based on the perception that they have a liberal viewpoint.

Similarly, Gov. Abbott specifically said that an earlier version of this bill – SB 12 – was meant to stop Texans from "being wrongfully censored on social media for voicing their political or religious viewpoints" and to combat "efforts to silence conservative viewpoints on social media." He argued that "Big tech's efforts to silence conservative viewpoints is un-American, un-Texan, and it is unacceptable, and pretty soon it's going to be against the law in the state of Texas." The bill's chief sponsor Sen. Bryan

---

[3] *NetChoice & CCIA v Moody*, Case No. 4:21-cv-00220 (N.D.F.L. June 30, 2021).
1
[4] *Id.*

Hughes echoed this motivation, stating they "want to enforce silence if you have a viewpoint different from theirs."

It is well established that content-based restrictions are subject to strict scrutiny, and Judge Hinkle found that Florida's restrictions "are about as content-based as it gets."

HB 20's restrictions are even more constitutionally suspect than Florida's law. HB 20 applies to all users and prohibit them not only from making decisions based on content, but specifically from making decisions based on the "viewpoint" expressed in the post.

HB 20 prohibits a platform from censoring a "user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state."

Viewpoint-based restrictions are even more suspect than content-based restrictions under the First Amendment. If Florida's content-based restrictions cannot survive even intermediate scrutiny, HB 20's viewpoint-based restrictions that apply to every user on a social media platform certainly cannot survive constitutional analysis.

These First Amendment conflicts cannot be avoided by declaring that social media platforms are "**common carriers.**" The social media companies have always limited whom they do business with and which content they will host. In fact, content moderation is a core component of the business model for Facebook, YouTube, and Twitter. Judge Hinkle declined to accept the state's argument that social media platforms are common carriers without First Amendment protections from government action.

Hosting private speech does not make a platform a state actor subject to the First Amendment's restraints on government censorship, as noted by the US Supreme Court:

> "[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."

As for the argument that our First Amendment can be discarded because social media platforms are "**public forums**", the 9th Circuit affirmed last year that is not the case:[5]

> "Despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment."

The court emphasized:

> "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."

Texas should take Florida's Preliminary Injunction decision as a warning: federal courts will not allow states to trample over the First Amendment—just to punish a few disfavored businesses.

Ironically, by enacting HB 20, Texas could end up establishing legal precedent in the Fifth Circuit favorable to social media platforms, further emboldening their content moderation practices.

---

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

Below is a chart of the similarities between Florida's content moderation law and HB 20 that show why it will be struck down by the courts as an unconstitutional violation of the First Amendment:

First Amendment Factors	**Florida Law (enjoined)**	**Texas HB 20**
Does the law apply to private businesses?	Yes	Yes
Does the legislative history suggest the State targeted those businesses because of their perceived views?	Yes	Yes
Does the law regulate or otherwise affect how those businesses moderate content?	Yes	Yes
Does the law infringe or otherwise limit those businesses's First Amendment right to exercise their editorial discretion?	Yes	Yes
Does the law regulate based on content or viewpoint?	Yes, so Strict Scrutiny Applies	Yes, so Strict Scrutiny Applies
Does the State have a compelling government interest (as recognized by the federal courts)?	No—Not Compelling to "Promote" Free Speech by Infringing It; Fight "Bias"; or "Level the Playing Field"	No—Not Compelling to "Promote" Free Speech by Infringing It; Fight "Bias"; or "Level the Playing Field"
Is the law narrowly tailored to achieve any legitimate government interest?	No	No
Can the law survive under intermediate scrutiny?	No	No
Does the law trigger equal protection analysis under the First Amendment (i.e., under- and over-inclusiveness)?	Yes—Arbitrary Distinctions Based on Size	Yes—Arbitrary Distinctions Based on Size
Does the law clearly define key terms and provisions?	No	No

HB 20 would penalize social media platforms for removing harmful content

Even if HB 20 were to survive the constitutional challenges described above, 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, medical misinformation, foreign propaganda, and even bullying and other forms of verbal abuse.

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.[6] 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 extremism and child safety is impeded by HB 20. This is because it penalizes a platform that decides to remove content because of "the viewpoint of the user or another person." While this may seem obvious, for anyone whose content is removed based on the substance of the content, it is a removal based on the "viewpoint" of the user.

This means a social media platform could be violating HB 20 if it removed these types of user content:

- ISIS propaganda – since that denies views of those who hate America
- SPAM messages – since that denies the viewpoint of the spammer
- Atheist or abortion advocacy posted to a church's Facebook or YouTube page
- Vaccine denial and other forms of medical misinformation
- Denial of the El Paso shooting, or claims that it was a false-flag operation by crisis actors

But HB 20 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, foreign propaganda, conspiracy theories, and other forms of harmful content, making the internet a much more objectionable place to be. For example, HB 20:

- Authorizes spreaders of medical misinformation to sue social media platforms for censoring their "viewpoint." In fact, supporters of HB 20 in the House hearing in April said they needed the law to force Facebook, YouTube and Twitter to carry their message against COVID vaccinations.

- Allows Texans who post anti-Semitic content to sue social media platforms to have that content restored. Recall that Texas legislative leaders recently demanded that the social media site Gab.com remove anti-Semitic speech posted by users.

- Prevents YouTube from restricting user-posted videos with violent, hateful, or racist content that is inappropriate for children -- even in homes where parents activate *Restricted Mode* specifically in order to protect their children.

- Enables *Al Jazeera* and *RussiaToday* to sue social media platforms for restricting posts celebrating terrorist acts or spreading foreign propaganda.

---

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

- Empowers conspiracy theorists by allowing them to sue social media platforms for restricting posts that, for example, deny the El Paso shooting or claim it was a false flag operation filled with "crisis actors" and forcing social media platforms to rehost their content in the event they are successful.

Not only would HB 20 incentivize social media platforms to engage in less moderation of harmful content by increasing the threat of lawsuits, it would also force them to rehost this content if the challenger is ultimately successful in court, regardless of how harmful or offensive the content may be.

HB 20 would make it legally risky for social media 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 HB 20, since blocking could be challenged by lawsuits authorized under the bill.[7]

HB 20 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."[8]

HB 20 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed an earlier incarnation of this bill, the infamous "Fairness Doctrine," which required equal treatment of political views by broadcasters, saying:[9]

> *"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 HB 20, which punishes platforms for moderating their services in ways that they see fit for their customer base and advertisers.

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, MeWe, and a new social media service announced by former president Trump.

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.

---

[7] *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.)

[8] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).

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

HB 20 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 support HB 20.

Sincerely,

Steve DelBianco
President & CEO, NetChoice