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

Carl Szabo, Vice President and General Counsel
NetChoice
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7485
www.netchoice.org

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Chairman Ron Tusler
Assembly Judiciary Committee
Wisconsin State Senate

RE: **Opposing AB 591-** Relating to: creating a civil cause of action against the owner or operator of a social media Internet site that restricts religious or political speech.

Chairman Tusler and members of the committee:

We respectfully ask that you **not** pass AB 591, primarily because it would be enjoined by federal courts for violating the First Amendment of the US Constitution. But if AB 591 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 AB 591 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.

AB 591 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 AB 591, 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, AB 591 is unconstitutional and will fail when challenged in court.

Thankfully, we do not have to wonder about the constitutionality of AB 591, 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*[4] and *Pruneyard*[5] are not applicable, and that Florida's restrictions clearly cannot survive either strict or intermediate scrutiny under the First Amendment.

AB 591 will face similar scrutiny because it also intrudes on social media's editorial discretion. AB 591 provides that social media platforms may not "Delete[] or censor[] the user's religious speech or political speech on the social media Internet site." For the same reasons, the court will likely find that AB 591's restrictions on content moderation will not survive under either strict or intermediate scrutiny.

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 <u>not</u> 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."

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[3] *NetChoice & CCIA v Moody*, Case No. 4:21-cv-00220 (N.D.F.L. June 30, 2021).
[4] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 US 47 (2006).
[5] *PruneYard Shopping Center v. Robins*, 447 US 74 (1980).

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:[6]

> "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."

Wisconsin 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 AB 591, Wisconsin could end up establishing legal precedent in the Seventh Circuit favorable to social media platforms, further emboldening their content moderation practices.

AB 591 would penalize social media platforms for removing harmful content

Even if AB 591 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.[7] 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 AB 591. This is because it penalizes a platform that decides to remove content because of "user's religious speech or political speech on the social media Internet site." 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 "religious speech or political speech" of the user.

This means a social media platform could be violating AB 591 if it removed these types of user content:

- ISIS propaganda – since that denies political speech of those who hate America
- SPAM messages – so long as it includes a mention of politics since that denies the political speech of the spammer
- Atheist or abortion advocacy posted to a church's Facebook or YouTube page

But AB 591 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,

[6] *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).
[7] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf

conspiracy theories, and other forms of harmful content, making the internet a much more objectionable place to be.

For example, AB 591:

- Authorizes spreaders of medical misinformation to sue social media platforms for censoring their "political speech."
- Allows people who post anti-Semitic content to sue social media platforms to have that content restored.
- 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 to protect their children.
- Enables *Al Jazeera* and *RussiaToday* to sue social media platforms for restricting posts celebrating terrorist acts or spreading foreign propaganda.

Not only would AB 591 incentivize social media platforms to engage in less moderation of harmful content by increasing the threat of lawsuits, but 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.

AB 591 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 AB 591, since blocking could be challenged by lawsuits authorized under the bill.[8]

AB 591 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."[9]

AB 591 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:[10]

> *"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 AB 591, which punishes platforms for moderating their services in ways that they see fit for their customer base and advertisers.

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[8] *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.)

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

[10] 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, 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.

AB 591 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 AB 591.

Sincerely,

Carl Szabo
Vice President & General Counsel, NetChoice