Christopher Marchese, Counsel
1401 K St NW, Ste 502
Washington, DC 20005
netchoice.org

NetChoice

MEMORANDUM

To: Chair Cowsert & Members of the Regulated Industries Committee

From: NetChoice

Date: February 11, 2022

Subject: SB 393 Constitutional Analysis

General First Amendment Principles for Social Media Businesses

Before jumping into SB 393's specific constitutional problems, it's worth briefly surveying First Amendment case law applicable to social media businesses. As the cases below make clear, social media businesses may be of recent vintage, but the First Amendment's expansive protections against government apply to them nevertheless.

From ***NetChoice v. Paxton*** (pp. 12-17):

> More than twenty years ago, the Supreme Court recognized that "content on the Internet is as diverse as human thought," allowing almost any person to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997). **The *Reno* Court concluded that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."** *Id.* **Disseminating information is "speech within the meaning of the First Amendment."** *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.")).
>
> **Social media platforms have a First Amendment right to moderate content disseminated on their platforms.** *See* *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019).
>
> The Supreme Court's holdings in *Tornillo*, *Hurley*, and *PG&E*, stand for the general proposition that **private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content.**

SB 393 is Unconstitutional—Here's Why

With those legal principles in mind, we can turn next to SB 393's specific constitutional problems. As mentioned, SB 393 is nearly an exact replica of Texas HB 20, which a federal court recently enjoined from enforcement because it is likely unconstitutional. The chart below provides a side-by-side comparison of HB 20's and SB 393's provisions and explains why they are unconstitutional, in the order they appear in the bill.

Reason 1: SB 393 Arbitrarily Targets Politically Disfavored Platforms for Special Burdens

[please note: I don't mean to cast shade on the sponsor's intentions. But since the bill is very similar to Texas's and Florida's laws, which were in fact ruled discriminatory against "Big Tech," I include it for background on how a *court* will likely view it.]

Texas: HB 20	Georgia: SB 393
"The State defines social media platforms as any website or app (1) with more than 50 million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other "for the primary purpose of posting information, comments, messages, or images." "HB 20 excludes certain companies like Internet service providers, email providers, and sites and apps that "consist[] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider" and user comments are "incidental to" the content."	"This chapter shall apply only to: [...] (2) A common carrier that: (A) Is open to the public or offers its services to the public; and (B) Functionally has more than 20 million active users in the United States in a calendar month; and (3) An expression that is shared or received in this state." 'Social media platform' means an internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images. Such term does not include an: (A) Internet service provider or provider of broadband services; or (B) Online service, application, or website: (i) That consists primarily of news, sports, entertainment, cultural, or artistic features; community information; or other features, information, or content that is not generated but rather is preselected by the provider; and (ii) For which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described in division (i) of this subparagraph."
Sparknotes: While it's common for legislatures to draw distinctions between businesses based on their size (e.g., exempting small businesses from onerous labor regulations), it's far more questionable when legislation is seemingly written to burden a particular subset of businesses in one particular industry. Here, SB 393's threshold is lower than Texas's, but it still exempts many "conservative" (reputationally) platforms like Parler (which has over 20 million users but only 1 million *active* users). Yesterday, I testified that this bill doesn't have a "Disney Exemption." **I was wrong, it has an even worse one: an <u>exemption for actual common carriers!</u>** The bill is also discriminatory because it **exempts ISPs**. This is curious. The	

bill's entire premise is that Big Tech platforms are "common carriers" and thus have an obligation to host and transmit speech on a nondiscriminatory basis. Yet at the same time the bill recognizes that these platforms aren't actually mere conduits of speech as the DC Circuit Court of Appeals and the FCC declared ISPs to be. Indeed, ISPs share far more in common with traditional common carriers like the telephone companies than do social media businesses.

[To be clear, NetChoice is committed to free-market principles and doesn't endorse common carriage regulations as a general matter. But since it's the judiciary's opinion that matters, it's worth noting the unusual nature of a common carriage bill that exempts actual common carriers who have, at least depending on whose nominees control the FCC, nondiscrimination obligations.]

This seems uncomfortably similar to the "Disney Exemption" in the Florida case.

Legal Reasons: "HB 20 applies only to social media platforms of a certain size: platforms with 50 million monthly active users in the United States. HB 20 excludes social media platforms such as Parler and sports and news websites. During the regular legislative session, a state senator unsuccessfully proposed lowering the threshold to 25 million monthly users in an effort to include sites like "Parler and Gab, which are popular among conservatives."

""**[D]iscrimination between speakers is often a tell for content discrimination.**" *NetChoice*, 2021 WL 2690876, at *10. **The discrimination between speakers has special significance in the context of media** because "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659 (1994). The record in this case confirms **that the Legislature intended to target large social media platforms perceived as being biased against conservative views and the State's disagreement with the social media platforms' editorial discretion over their platforms**. The evidence thus suggests that the State discriminated between social media platforms (or speakers) for reasons that do not stand up to scrutiny."

[**N.B. the court in Florida reached the same conclusion based on that state's law.**]

Reason 2: SB 393's Premised Entirely on Social Media Businesses Being "Common Carriers"—But They're Not & Can't Be Declared So At Will

Texas: HB 20	Georgia: SB 393
"Social media platforms and interactive computer services with the largest number of users are common carriers by virtue of their market dominance."	"Social media platforms with the largest number of users are common carriers by virtue of their market dominance."

Sparknotes: The doctrine of "common carriage" comes from the British common law and boils down to this: when transportation or distribution companies ***hold themselves out to the public as operating on a nondiscriminatory basis, it's proper to hold them to that promise***. Put another way, businesses that promise to move people or things from Point A to Point B on a nondiscriminatory basis (meaning, it doesn't matter who the person is or *what the thing is*), they should be held to that. This is especially true when scarce resources are at stake—we don't necessarily want 13 railroads crisscrossing a state so it makes sense to require the few that do operate to do so in a nondiscriminatory manner.

Tempting though it may be to see Big Tech that way, it just can't work. First, tech businesses have **never held themselves out as carrying *all* speech without question**. Indeed, from the beginning these businesses have had content-moderation policies. And all of them had user requirements from the start. For example, Facebook has

always required users to be 13 or older. That is "discrimination" that makes Facebook more like a media company (*e.g.*, Fox News doesn't have to host Rachel Maddow if it doesn't want to) than it does a railroad.

Second, legislatures can't simply declare businesses "common carriers." If they could, New York would've declared the Big Banks (headquartered in NYC) common carriers and forced them to issue loans to low-income New Yorkers on equal terms to high-income New Yorkers. Instead, lawmakers may enforce promises that private businesses themselves make or agree to. But since no tech platform has ever agreed to that (and that also applies to platforms like Parler, which has some content policies), it can't save this bill.

Third, even if they were common carriers, they still have First Amendment rights and this bill would still be unconstitutional.

Fourth, to reiterate: they're not common carriers because, as the bill itself recognizes, platforms engage in "curation," "moderation," and what it deems as "censorship." Not to mention all the other acts the bill wants platforms to disclose: their moderation policies (already disclosed publicly but worth noting that moderation policies is evidence of editorial discretion—a First Amendment right), how much content they remove (again, common carriers wouldn't be removing content), etc.

[**N.B.** Note too that SB 393 is nearly identical to Texas's provision, except it **exempts ISPs whereas Texas includes them**.]

Legal Reasons: "The parties dispute whether social media platforms are more akin to newspapers that engage in substantial editorial discretion—and therefore are entitled to a higher level of protection for their speech—or a common carrier that acts as a passive conduit for content posted by users—and therefore are entitled to a lower level of protection, if any. [...] **This Court is convinced that social media platforms, or at least those covered by HB 20, curate both users and content to convey a message about the type of community the platform seeks to foster and, as such, exercise editorial discretion over their platform's content.**

Indeed, **the text of HB 20 itself points to social media platforms doing more than transmitting communication**. In Section 2, HB 20 recognizes that social media platforms "(1) curate[] and target[] content to users, (2) place[] and promote[] content, services, and products, including its own content, services, and products, (3) moderate[] content, and (4) use[] search, ranking, or other algorithms or procedures that determine results on the platform."

"HB 20's pronouncement that social media platforms are common carriers **does not impact this Court's legal analysis**."

"**[T]his Court has found that the covered social media platforms are not common carriers. Even if they were, the State provides no convincing support for recognizing a governmental interest in the free and unobstructed use of common carriers' information conduits**."

Reason 3: SB 393 Discriminates on the Basis of Content and Viewpoint and Can't Survive "Strict Scrutiny"

Texas: HB 20	Georgia: SB 393
HB 20 prohibits large social media platforms from "censor[ing]" a user based on the user's "viewpoint." Specifically, Section 7 makes it unlawful for a "social media platform" to "censor 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 • (3) a user's geographic location in this state or any part of this state."	"A common carrier shall not censor or discriminate against 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; • (3) A user's geographic location in this state or any part of this state; or • (4) The actual or perceived race, color, ethnicity, religion, religious beliefs, political beliefs, political affiliation, national origin, sex, gender, sexual orientation, or disability of a user or another person or of a class of users or a class of other persons."
Sparknotes: When laws are based on the *content* or *viewpoint* of private speech, they must pass "strict scrutiny"—the highest standard of judicial review and one the government flunks roughly always. Content-based laws are those that draw distinctions between types of content (*e.g.*, SB's 393's protection of the categories listed in (4) above but lack of inclusion for other similarly situated groups like military vets; SB 393's exception for content that unlawfully incites violence but lack of an exception for racist speech). And viewpoint-based laws are those that treat different views on content differently. Think of it this way: If the School Board held a public meeting on masking in schools, it would need to treat all viewpoints equally—if pro-maskers get to testify, then so too must anti-maskers. Before boring you with the legal technicalities, I'll just point out the obvious: SB 393 explicitly uses the term "viewpoint" and explicitly spells out certain categories of speech that must get extra protection. That won't fly in court.	
Legal Reasons: "HB 20's prohibitions on "censorship" and constraints on how social media platforms disseminate content violate the First Amendment. The platforms have policies against content that express a viewpoint and disallowing them from applying their policies requires platforms to "alter the expressive content of their [message]." *Hurley*, 515 U.S. at 572–73. HB 20's restrictions on actions that "de-boost" and "deny equal access or visibility to or otherwise discriminate against expression" impede platforms' ability to place "post[s] in the proper feeds." Social media platforms "must determine how and where users see those different viewpoints, and some posts will necessarily have places of prominence." HB 20 compels social media platforms to significantly alter and distort their products. Moreover, "the targets of the statutes at issue are the editorial judgments themselves" and the "announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*, *Hurley*, and *PG&E*." *Id.* HB 20 also impermissibly burdens social media platforms' own speech. *Id.* at *9 ("[T]he statutes compel the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites.").	

Reason 4: SB 393 Triggers the Judicially Created Strict Scrutiny Test—And Flunks It

Texas: HB 20	Georgia: SB 393
"this state has a fundamental interest in protecting the free exchange of ideas and information in this state"	"The state has a fundamental interest in protecting the free exchange of ideas and information in this state to ensure a vibrant and inclusive political discourse"

Sparknotes: As alluded to earlier, SB 393 triggers strict scrutiny because it's content- and viewpoint-based. [And if the court were to find that the law was motivated in part to target certain businesses because of their perceived liberal biases, then it'll also be deemed speaker-based.] Strict Scrutiny requires the government to prove its law is (1) narrowly tailored to achieve (2) a compelling government interest. [**N.B.** While narrowly tailored is a demanding requirement in itself, the Supreme Court seems to now require the "least restrictive means," which almost guarantees the government will lose. In all honesty, it's just semantics: if there is a means less restrictive than the government's law, then it's inherently not narrowly tailored.]

Here, SB 393 justifies itself on the grounds that the state has a "fundamental interest" in (1) protecting free speech and (2) promoting a vibrant, politically diverse marketplaces of ideas. While I personally agree that governments should do both of those things, **the way to stop violations of the First Amendment is to stop violating the First Amendment**.

Legal Reasons: "The State offers two interests served by HB 20: (1) the "free and unobstructed use of public forums and of the information conduits provided by common carriers" and (2) "providing individual citizens effective protection against discriminatory practices, including discriminatory practices by common carriers." The **State's first interest fails** on several accounts.

First, social media platforms are privately owned platforms, not public forums. Second, this Court has found that the covered social media platforms are not common carriers. Even if they were, the State provides no convincing support for recognizing a governmental interest in the free and unobstructed use of common carriers' information conduits.5 Third, the Supreme Court rejected an identical government interest in Tornillo. In Tornillo, Florida argued that "government has an obligation to ensure that a wide variety of views reach the public." Tornillo, 418 U.S. at 247–48. After detailing the "problems related to government-enforced access," the Court held that the **state could not commandeer private companies to facilitate that access, even in the name of reducing the "abuses of bias and manipulative reportage [that] are . . . said to be the result of the vast accumulations of unreviewable power in the modern media empires."** Id. at 250, 254.

The State's second interest—**preventing "discrimination" by social media platforms—has been rejected by the Supreme Court. Even given a state's general interest in anti-discrimination laws, "forbidding acts of discrimination" is "a decidedly fatal objective" for the First Amendment's "free speech commands."** Hurley, 515 U.S. at 578–79.

Even if the State's purported interests were compelling and significant, HB 20 is **not narrowly tailored**. Sections 2 and 7 contain broad provisions with far-reaching, serious consequences. When reviewing the similar statute passed in Florida, the Northern District of Florida found that that statute was not narrowly tailored "like prior First Amendment restrictions." NetChoice, 2021 WL 2690876, at *11 (citing Reno, 521 U.S. at 882; Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989)). Rather, the court colorfully described it as **"an instance of burning the house to roast a pig." Id. This Court could not do better in describing HB 20."**

"The Florida court concluded that: **Balancing the exchange of ideas among private speakers is not a legitimate governmental interest.** And even aside from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny. It is also subject to strict scrutiny because it discriminates on its face among

otherwise-identical speakers: between social-media providers that do or do not meet the legislation's size requirements and are or are not under common ownership with a theme park. The legislation does not survive strict scrutiny. Parts also are expressly preempted by federal law."

From Florida: "First, **leveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest**. *See, e.g., Arizona Free Enter. Club v. Bennett*, 564 U.S. 721, 749-50 (2011)."

Reasons 5 ad infinitum: SB 393 Violates the Constitution in Many More Ways…

Since each of the reasons given above is sufficient to invalidate SB 393 on its own, I'll spare you detailed breakdowns on the additional reasons, which can be found in the Florida and Texas decisions. Here's a list of further problems:

- The **transparency requirements fail strict scrutiny** because they are unnecessarily burdensome and designed to chill constitutionally protected speech. Indeed, the disclosure requirements go so far as to require the sharing of trade secrets and competitively sensitive information with the entire world.
- Some provisions are **unconstitutionally vague or lacking due process**—for example, phrases that require subjective judgment like "other *perceivable* communication," "*readily* apparent," "*sufficient* to enable users to make *informed* choices," and **most dooming of all:** the definition of "censor." Because social media "is not a snapshot in time like a hard copy newspaper," it is impossible for platforms to comply with the law's requirements.