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NetChoice

California Assembly Appropriations Committee

SB 1018 Violates the First Amendment & Risks Unintended Consequences

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Dear Chair Holden, Vice Chair Bigelow, and Members of the Appropriations Committee:

We ask that you **oppose** SB 1018. Although the bill's supporters describe it as a mere "transparency" bill, SB 1018 violates the First Amendment because it operates a backdoor for government infringement of protected editorial rights.

SB 1018 violates the First Amendment by chilling constitutionally protected speech. Under the First Amendment, "platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights."[1] So when they (and others like them) "'disclos[e],' 'publish[],' or 'disseminat[e]' information, they engage in 'speech within the meaning of the First Amendment.'"[2] Indeed, platforms' content-moderation policies and practices are a form of "editorial judgment that is inherently expressive" and thus protected by the First Amendment.[3]

While generally applicable disclosure requirements are often constitutional, SB 1018 crosses the constitutional line. To start, the bill requires disclosure about covered platforms' editorial policies and practices. That disclosure requirement may seem run-of-the-mill. But it is a wolf that comes in sheep's clothing. Unlike run-of-the-mill disclosure requirements—nutrition labels, for example—SB 1018 requires disclosure of constitutionally protected editorial practices. Even worse, it charges the State's Attorney General (and local district attorneys) with supervising platforms' policies and practices.

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[1] *NetChoice v. Moody*, 34 F.4th 1196, 1210 (11th Cir. 2022) (citing *First Nat'l Bank of Bos. v. Belloti*, 435 U.S. 765, 781-84 (1978)).

[2] *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (alterations in original)).

[3] *Id.* at 1213.

Because SB 1018 arms the State Government with supervisory power over platforms' editorial policies and practices, it will chill constitutionally protected speech. Consider an example: while the government can investigate a publisher's tax compliance without investigating its editorial practices, SB 1018 "necessarily requires regulatory scrutiny of editorial decisions."[4] Indeed, it's impossible to escape that conclusion when SB 1018 requires a platform to disclose "statistics regarding the extent to which, in the preceding 12-month period, items of content that the platform determined violated its policies were recommended or otherwise amplified by platform algorithms before and after those items were identified as in violation of the platform's policies, disaggregated by category of policy violated." How can the government gauge compliance without investigating the platform's constitutionally protected editorial decisions?

To be sure, SB 1018's disclosure requirements may seem reasonable—it's just about statistics, one might think. But mandating disclosure of those statistics raises at least two constitutional problems. First, they are burdensome to collect and aren't the least restrictive way for California to protect consumers. Second, they reveal much more than mere uncontroversial facts; they shine a light on how platforms develop, understand, and apply their own editorial policies. In particular, SB 1018 forces platforms to disclose *how* they use algorithms, *when* they use algorithms, and the *effect* of using algorithms. Again, these disclosure may seem reasonable on the surface, but they will operate as a government intrusion into protected First Amendment activity.

An example clinches the point that SB 1018 will infringe or chill editorial rights. Let's say a platform's report in 2023 reveals that its algorithms often promote political content from elected officials at higher rates than political content from casual users. That statistic could say a lot: To the public, it might look like favoritism shown to elected officials; to elected officials, it might look like the rules don't apply to them. Whatever the appearances, the media's reaction and the government's power to investigate may be enough to encourage the platform to moderate the former more or the latter less. Either

[4] Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203, 1219 (2022), https://deliverypdf.ssrn.com/delivery.php?ID=469027001114067021111120066069125018103005090054068023064124001110066081100068075124042114059014058028043068113116110086065070050058063013093101103031124117005001052093081000012090101108011125088106073003087025008116009125006009110075025072091017103&EXT=pdf&INDEX=TRUE.

way, it would amount to the government using disclosure laws to force platforms to exercise their editorial rights differently. It is, in other words, an indirect form of coercion.

SB 1018 is also unconstitutionally burdensome. Under the First Amendment, disclosure requirements are unconstitutional when they are "unjustified or unduly burdensome."[5] SB 1018 is both unjustified—the government has no legitimate interest in forcing the disclosure of these statistics about editorial practices—and unduly burdensome. The covered platforms have millions (even billions) of users across the world and must constantly make judgments about how to apply or update their policies.

In fact, when a federal district court enjoined—with the Supreme Court's blessing—similar provisions in a Texas law, the Court noted that:

- In *just three months* in 2021, Facebook removed over *43 million* pieces of bullying, harassment, organized hate, and hate-speech-related content;
- In *just three months* in 2021, YouTube removed over *1 billion* comments; and
- In *just six months* in 2018, Facebook, Google, and Twitter "took action on over *5 billion* accounts or user submissions—including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech."[6]

Under SB 1018, platforms will have to collect, analyze, and disclose statistics about those decisions. And it must further breakdown that data by discerning whether it was "recommended or otherwise amplified." Taken together, these burdensome requirements will chill constitutionally protected editorial rights.

[5] *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

[6] *NetChoice v. Paxton*, 573 F. Supp. 3d 1092, *36-37 (W.D. Tex., Dec. 1, 2021).

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For these reasons we respectfully ask you **oppose** SB 1018. As ever, we offer ourselves as a resource to discuss any of these issues with you in further detail and appreciate the opportunity to provide the committee with our thoughts on this important matter.

Sincerely,

Christopher Marchese
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NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.