September 13, 2022

The Honorable Gavin Newsom
Governor of California
1021 O Street, Suite 9000
Sacramento CA 95814

RE: Request for Veto: AB 587 - Social media companies: terms of service - & AB 2879 - Online content: cyberbullying

Dear Governor Newsom,

We respectfully urge you to **veto** both AB 587 and AB 2879.

While we strongly support protecting California's minors online, these misguided bills will subject popular and useful services to unconstitutional requirements and restrictions that will hamper innovation and hurt California consumers.

AB 587:

We ask that you veto AB 587. Although the bill's supporters describe it as a mere "transparency" bill, AB 587:

- Violates the First Amendment by infringing on editorial rights;
- Harms Californians while aiding criminals and wrongdoers; and
- Undermines small businesses, competition, and innovation.

Like Texas HB 20 & Florida SB 7072, California AB 587 Violates the First Amendment

AB 587 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,

[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)).

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]
AB 587 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 that do not implicate editorial rights—nutrition labels, for example—AB 587 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.

To be sure, the bill's supporters claim that we needn't worry about the government's role—that the bill doesn't grant additional enforcement powers. But that's not the full story: AB 587 allows the AG (and local DAs) to sue under California's existing consumer-protection laws. So, for example, if a platform's terms of service inform users that the platform will remove "hate speech" but the platform leaves up content that it believes isn't hate speech but the government believes is, the government may sue the platform for unfair or deceptive practices. On the flip side, the platform might remove a piece of content it believes is hate speech but a local DA doesn't. AB 587 also allows for carry-on lawsuits like breach of contract claims. It's the potential for these types of investigations and lawsuits that violates the First Amendment—it chills constitutionally protected speech.

Because AB 587 arms the State Government with supervisory power over platforms' editorial policies and practices, it will chill constitutionally protected speech. Consider the following example: Not long ago American teens—for reasons that still confound—began posting viral videos of themselves eating Tide Pods (laundry detergent). Because platforms had no reason to foresee the deadly trend, they had to respond instantly with new policies and practices—all to protect users and the broader public. Had AB 587 been in effect at the time, at least some platforms would have responded slower, checking first with their in-house counsel and external law firms about whether they could, consistent with AB 587, remove such videos without first implementing the policy change "in a manner reasonably designed to inform all users of the social media platform of the existence and contents" of its new policy. And because reasonable minds might disagree, some platforms might have overruled their own preferences and kept the videos up until time allowed for clearer compliance with AB 587—a classic example of chilled speech.

Second, AB 587 is intended to—and will—change how covered platforms exercise their First Amendment rights. Again, consider an example: while the government can investigate a publisher's tax compliance without investigating its editorial practices, AB 587 "necessarily requires regulatory scrutiny of editorial decisions."[4] That regulatory scrutiny will cause platforms to change their editorial practices—and not just in response to unforeseen problems like the Tide Pod Challenge. To the contrary, platforms will alter their day-to-day editorial policies and practices too. In fact, because AB 587 singles out five categories of constitutionally protected speech—(1) hate speech or racism; (2) extremism or radicalization; (3) disinformation or misinformation; (4) harassment; and (5)

[2] *Id.* (*quoting Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (alterations in original)).
[3] *Id.* at 1213.
[4] Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203, 1219 (2022), https://deliverypdf.ssrn.com/delivery.php

foreign political interference—for further regulatory review, the bill pressures platforms to concern themselves most with speech that might fall under those categories. And because the categories are broad and reasonable minds will disagree over cases on and off the margins (an everyday occurrence), platforms will try to please regulators by adapting to their preferences.

Last, AB 587 is unconstitutionally burdensome. Under the First Amendment, disclosure requirements are unconstitutional when they are "unjustified or unduly burdensome."[5] AB 587 is both unjustified—the government has not demonstrated a legitimate interest in infringing upon editorial rights—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]

But under AB 587, platforms will have to give "detailed description[s]" about (1) "policies intended to address the categories of content" cited above; (2) their use of automated and human moderators; (3) their responses to user reports of content violations; and (4) their response to content violations. AB 587 doubles-down on those impractical requirements with even more mandates for detailed breakdowns of platforms' editorial practices—for example, it requires platforms to report how many times users saw a piece of content falling under the Legislature's five content categories. Taken together, these burdensome requirements will—like Texas's HB 20—chill constitutionally protected editorial rights.

Even setting the bill's unconstitutional disclosure requirements aside, AB 587 is also a content-based violation of the First Amendment. A law is content-based when it "applies to particular speech because of the topic discussed or the idea or message expressed."[7] AB 587 is content-based because it singles out five categories of constitutionally protected speech for added government scrutiny. To survive constitutional review, then, AB 587 must pass "strict scrutiny"—it must be "the least restrictive means of achieving a compelling state interest."[8] The bill is not the least restrictive means of achieving any compelling interest California may have in requiring disclosure of editorial policies and practices. For example, the bill privileges some forms of constitutionally protected content like "hate speech," while ignoring other forms like "hazardous to teens' health." Even if people agree hate speech is worse

[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).
[7] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).
[8] *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (*quoting McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (internal quotation marks omitted)).

than other forms of speech, the First Amendment protects both equally. And because none of the categories are defined, platforms will need to take an over-inclusive approach to complying with AB 587.

But even had the Legislature tried to define such categories, those definitions would still fail under the First Amendment because speech is often in the eye of the beholder—what looks like "misinformation" one minute may turn out to be true; what some call "hate speech" others might understand to be reclamation of previously derogatory terminology. Whatever the case may be, the law is not the least restrictive means of platforms communicating their standards to the public, which they already do.

AB 587 Will Harm Internet Users, While Aiding Criminals & Wrongdoers

No matter AB 587's intended effect, the bill will harm Californians and aid lawbreakers, including child predators. When Florida and Texas passed similar "transparency" laws, for example, Stop Child Predators—a nonprofit dedicated to combatting the sexual exploitation of children—pointed out that "disclosure requirements give child predators a roadmap to escape detection."[9] When predators "know how algorithms and content moderation work in detail"—and AB 587 requires "detailed description[s]" of both—"they will have an even easier time preying on vulnerable children."[10] And because "predators continue to find a way around existing safeguards," which requires constant adaptation on the platforms' part, AB 587's transparency requirements risk not only providing predators a "roadmap" around rules meant to protect children, but also hamstringing platforms' ability to quickly adopt new practices to counter them.[11]

AB 587 Will Harm Small Businesses, Competition & Innovation

As noted throughout, AB 587 imposes significant burdens on covered platforms. These burdens will have three main effects: (1) encouraging excessive and meritless litigation by weaponizing disclosure requirements; (2) discouraging investment in the industry's next crop of online businesses; and (3) stifling innovation.

First, AB 587 will raise the cost of moderating online content. Indeed, with billions of moderation decisions hanging in the balance, AB 587's vague requirements ensure only that excessive litigation will follow. And while all industries must grapple with legal costs, the sheer volume of user-generated posts on the internet means the potential for lawsuit abuse is far higher. It also means that enforcers may weaponize the bill's requirements—the State's Attorney General may sue platforms when, in the AG's eyes, they fail to remove enough "hate speech" under their terms of service; a local district attorney might conclude otherwise and sue for the removal of content that, in her eyes, doesn't qualify as "hate speech." Weaponized disclosure requirements lead to legal uncertainty and an unstable body of law.

Second, because of that legal uncertainty and potential for costly litigation, investments in those platforms (and their potential competitors) will fall.12 While some might applaud the decline of social media, such a decline will

[9] *Rumenap* Decl., at 5, https://netchoice.org/wp-content/uploads/2021/06/27_Notice-of-Declaration-of-Rumenap.pdf.
[10] *Id.*
[11] *Id.* at 4

harm up-and-coming platforms the most. In fact, AB 587 will likely entrench existing entities at the expense of newcomers—while both sets will suffer, the latter will be especially disadvantaged.

Third, the bill will stifle innovation. As written, the bill enshrines in law a static understanding of social media and will discourage experimentation with new business models, new forms of content moderation, and other user-friendly updates. That is, in part, because the devil you know is better than the one you don't. And what common sense suggests, evidence confirms: When regulatory scope is unclear or subject to arbitrary enforcement, regulated entities are often discouraged from trying something new. Magnified across the industry, such hesitation will mean locking in social media platforms as they currently are and subjecting every innovation to costly litigation.

AB 2879:

We ask that you veto AB 2879 because it:

- Fails the teens and parents it is purported to help;
- Will negatively affect small competitors and legitimate speech; and
- Violates the First Amendment.

While the California legislature's concern about cyberbullying is important and well-intentioned, the unintended consequences of this bill could make things more difficult for young people, parents, and innovators.

AB 2879 Fails to Help Parents and Teens

Parents and young people face new challenges in the digital age and new versions of old problems like bullying. Unfortunately, AB 2879 fails to solve these challenges and instead has the government dictate how cyberbullying should be dealt with. In doing so, it could make it harder for bullying victims to seek help from trusted adults due to a false sense of security of what happens online.

AB 2879 has good intentions of making it easier to report cyberbullying and making online spaces safer for vulnerable populations; however, in doing so, it creates a false sense of security that the government has made these spaces safe. This could mean that parents and other trusted adults are less likely to have individual conversations with teenagers about what to do if they are getting bullied online because they will presume that the resources are already readily available. Furthermore, bullied teens may be more embarrassed that the mandated resources were not enough in their case, or worse, be dismissed by adults who assume everything is taken care of on a platform level.

Unfortunately, bullies will use almost any service to go after the individuals they choose to harass. AB 2879 presumes that the same processes would work for Peloton to deal with cyberbullying that work for Twitter or Facebook. It also presumes that bullies will not find the loopholes in policies that keep their vindictive and vile content outside of the terms of the law.

A better solution is to work on creating positive communities where young people feel supported by trusted adults like parents and teachers against cyberbullying and and can safely explore the beneficial portions of the internet that can create positive online communities around everything from religion or sexual orientation to video games or musicians. The internet can provide young people with a positive voice and positive experiences. Education and empowerment rather than government mandates are a better way to deal with cyberbullying.

AB 2879 Hurts Innovation and Makes It Harder for Small Companies and Positive Speech

While bills like AB 2879 may only be intended to deal with cyberbullying content, they will have far wider reaching impacts, especially on smaller players with fewer resources. Unfortunately, proposals like AB 2879 are blunt tools that do not take into account the complexity of content moderation and the difficulty in identifying and responding to bullying.

Mandatory disclosure of these policies can result in bad actors like bullies finding gray areas so they can continue their malicious behavior while also requiring more takedowns of non-malicious speech to insure compliance with these proposals. While transparency may be good in theory, the constant evolution of online culture can make it more problematic in practice particularly when dealing with what teenagers use to cyberbully each other.

As has been seen for specific content at a federal level, even when the underlying content is agreed to be bad, these carve-outs often impact more than just the problematic speech they were intended to target. Cyberbullying is not as easily defined as AB 2879 may make it seem. Teenagers can make almost any term derogatory, while other terms can be reclaimed by groups for the purpose of empowerment. Given the sheer amount of content, it can be difficult for content moderation to distinguish between the two.The stiff fines mean that a company is likely to take down content if there is any possibility it could fall under the terms of the law. While some of this content may be “lawful but awful,” other content could be legitimate and empowering for certain marginalized communities or about individuals exploring their own identity. Furthermore, even legitimate conversations about how to deal with and respond to bullying could be caught up in attempts to comply with the law out of an abundance of caution.

These burdens will be particularly felt by smaller platforms who may have fewer resources in terms of moderators or engineers to respond to the new requirements. Even if a company is seeking to create a positive space that is bullying-free, that can quickly go awry, and they will find themselves subject to substantial fines despite their best efforts. Additionally, even if they are later found to have been in compliance with the law, the company still must endure the legal and reputational costs associated with defending the case. The result is, rather than focusing on actually solving issues related to bullying, small companies will be using up their time and content moderation resources on complying with the law.

AB 2879 Violates the First Amendment

Perhaps most concerning, the law is unconstitutional under the First Amendment as a regulation of the distribution of speech.

While the government is entitled to take reasonable steps to protect minors from harmful content that might otherwise be constitutionally protected, it may not do so in a way that is so broad that it limits adults' access to legal content. In *Ashcroft v. ACLU*, the Supreme Court struck down a federal law that attempted to prevent the posting of content harmful to teenagers on the web due to such impact as well as the harm and chilling effect that the associated fines could have on legal protected speech. This bill will face similar challenges.

This proposal should be considered distinct from other proposals that require libraries and schools to have filters on computers or other connected devices through which children and teens access the internet. This is constitutional, in part, because the restrictions are based on receipt of federal and state funding.

However, AB 2879 enjoys no such protections as it is a mandate that a specific type of design must be used by onlines services to protect users from harmful content.

The disclosure requirements in AB 2879 are also unconstitutional. Unlike generally applicable disclosure requirements such as nutrition labels that are often constitutional, AB 2879 requires disclosure about covered platforms' editorial policies and practices. As a result, AB 2879 is requiring disclosure of constitutionally protected editorial practices.

The internet by its very nature is interstate, and state regulations such as the ones proposed in AB 2879 place a significant impact on interstate commerce and interactions well beyond the young people the law seeks to protect. This bill will only further contribute to an emerging patchwork of laws disrupting the advantages of the internet for consumers and burden small businesses, resulting in fewer opportunities and innovations while failing to protect children from bullying.

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Given the unconstitutionality and negative impacts on innovation, speech, parents, and young people themselves, we ask you to veto both AB 587 and AB 2879. 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,

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CHAMBER OF PROGRESS