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HB 725 Violates the First Amendment, Unlawfully Commandeers Private Industry, & Abandons Conservative Principles

Dear Chair Bain:

While we support your goals to protect conservative principles, we respectfully ask that you **oppose** HB 725 because it violates the First Amendment, unlawfully commandeers private industry, and abandons conservative principles.

HB 725 Violates the First Amendment & Commandeers Private Industry

"Speech does not lose First Amendment protection 'simply because its source is a corporation.'"[1] In fact, the First Amendment fully protects businesses, including their editorial right to moderate and curate content as they see fit.[2] And like all laws, election regulations may not infringe those rights.[3] Because HB 725 compels social media businesses to host and disseminate speech they might otherwise remove and thus also infringes their editorial rights, the bill violates the First Amendment.

First, because the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all,"[4] it "prohibits the government from telling people what

[1] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342–43 (2010) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)); *see Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (quoting *Bellotti,* 435 U.S., at 783, 98 S.Ct. 1407)).
[2] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[3] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
[4] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

they must say."[5] For that reason, the government may neither compel private parties to disseminate its own preferred message[6] nor compel one private speaker to disseminate the message of another.[7] And because compelled speech is just as dangerous as silenced speech, the First Amendment protects individuals, businesses, and even monopolies from carrying messages they otherwise wouldn't.[8]

HB 725 compels speech in violation of the First Amendment. By requiring businesses to host and disseminate *all* viewpoints by *all* known candidates, HB 725 requires private businesses to carry their messages and disseminate them no matter how vile. In other words, the bill would not only reinstate the long-discredited "Fairness Doctrine," it would go a step further and commandeer private businesses to act as free wire services for Mississippi's candidates. That's akin to forcing the *Clarion-Ledger* or *Hattiesburg American* to publish every candidate's op-eds—an idea already tried by the government and repudiated by the Supreme Court.[9] Even worse, it invites absurdity—do we really want to force family-friendly social media businesses to carry vile speech from bad-faith candidates whose goal isn't actually to win elected office?

That practical absurdity underscores the bill's constitutional morbidity. Whenever the government has tried to compel businesses to carry political candidates' speech, the First Amendment has stood in its way.[10] Most recently, the 11th Circuit unanimously enjoined a similar "deplatforming" provision in Florida SB 7072.[11] The 11th Circuit held that the deplatforming provision "clearly restrict[s] platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable."[12]

Second, the First Amendment also prohibits the government from interfering with the right of private parties to exercise "editorial control over speech and speakers on their properties or platforms."[13] In *Tornillo*, for example, the Supreme Court held

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[5] *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013).
[6] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[7] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) ("PG&E"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[8] *Id.*
[9] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[10] *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[11] *NetChoice & CCIA v. Moody*, No. 21-12355 (11th Cir. 2022).
[12] *Id.*
[13] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1932 (2019).

unconstitutional a right-of-reply law that required newspapers to give political candidates space in their papers to respond to negative coverage about them. The Court held that although the law was ostensibly meant to encourage debate on public issues, its "intrusion into the function of editors"—including their "choice of material" and how to cover that material—still failed to "clear the barriers of the First Amendment."[14]

The First Amendment's protection of editorial rights extends beyond newspapers, too. Because "the editorial function itself is an aspect of 'speech'" protected by the First Amendment,[15] it applies equally to "business corporations" and "ordinary people engaged in unsophisticated expression."[16] Just as the government may not force a newspaper to carry a political candidate's reply, it also may not force a utility company to include third-party speech in its newsletters to customers,[17] force a parade organizer to include groups whose values the organizer doesn't share,[18] or force social media platforms to host speech they'd otherwise remove or restrict.[19]

Along with protecting editorial rights and businesses from compelled speech, the First Amendment also protects the "dissemination of information."[20] In *Sorrell*, for example, the Supreme Court struck down a law restricting the disclosure, sale, and use of pharmaceutical records revealing physicians' prescribing habits. The Court held that because facts "are the beginning point" for a lot of free speech and expression, the First Amendment protects not just substantive messages but how speech is disseminated as well.[21]

Like Florida SB 7072, HB 725 invades editorial and dissemination rights in violation of the First Amendment. As the 11th Circuit recently held in unanimously striking down Florida's attempt to regulate online speech:

> Social-media platforms exercise editorial judgment that is inherently expressive. When platforms choose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity.
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> …

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[14] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[15] *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.).
[16] *Hurley*, 515 U.S. at 574.
[17] *PG&E*, 475 U.S. at 20-21.
[18] *Hurley*, 515 U.S. at 574-76.
[19] *NetChoice & CCIA v. Moody*, No. 21-12355 (11th Cir. 2022).
[20] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).
[21] *Id.*

> All such decisions about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on platforms' own particular values and views—fit comfortably within the Supreme Court's editorial-judgment precedents.[22]

Just like Florida's law, HB 725 substitutes the government's decisions for private companies' constitutionally protected "decisions about what speech to permit, disseminate, prohibit, and deprioritize."

HB 725 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:

> *"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 725, which punishes private businesses 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 the government to regulate social networks' efforts to create and maintain speech marketplaces and communities their users like. This returns us to the

[22] *NetChoice v. Moody*, No. 21-12355 (11th Cir. 2022).

constitutional infirmities of the "fairness doctrine" and creates a new burden on conservative speech.

HB 725 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 725.

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For these reasons, we respectfully ask you **oppose** HB 725. As ever, we offer ourselves as a resource to discuss any of these issues with you in further detail, and we appreciate the opportunity to provide the committee with our thoughts on this important matter.

Sincerely,

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