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New Hampshire House Judiciary Committee | January 17, 2023

HB 320 Violates the First Amendment & Risks Hurting Granite Staters

Dear Chair Lynn and Members of the Judiciary Committee:

We ask that you **oppose** HB 320. First, HB 320 violates the U.S. Constitution. In fact, it is substantially the same as Texas's HB 20, which the U.S. Supreme Court has already held is likely unconstitutional and which the Court is likely to issue a final ruling against soon. And second, HB 320 risks transforming the internet into a content cesspool, allowing bad actors to evade detection and vile viewpoints to crowd out the average New Hampshian's voice.

In short, HB 320 will pose the same constitutional problems as Texas HB 20 and Florida SB 7072. And even if the Committee is not sold on defeating HB 320 outright now, it should hold consideration of the bill until the Supreme Court has ruled on the underlying constitutional issues presented in the lawsuits currently pending against those laws..

Like Texas HB 20 & Florida SB 7072, New Hampshire HB 320 Violates the First Amendment

HB 320 violates the First Amendment by, among other things, compelling speech and infringing editorial judgment. BecauseHB 320 is substantively the same as Texas HB 20, it will suffer from the same defects that a majority of the U.S. Supreme Court has indicated are likely fatal.

First, because the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all,"[1] it "prohibits the government from telling people what

[1] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

they must say."[2] For that reason, the government may neither compel private parties to disseminate its own preferred message[3] nor compel one private speaker to disseminate the message of another.[4] 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.[5]

Just like Texas HB 20 and Florida SB 7072, HB 320 compels speech in violation of the First Amendment. By banning "viewpoint discrimination," for example, HB 320 compels private businesses to either host *all* viewpoints or ban entire categories of speech to avoid liability for "viewpoint discrimination." Take one example: Educators often use YouTube to show students historical speeches and documentaries. For that reason, YouTube has an "educational exception" to its content-moderation policies—footage of Hitler used for educational purposes, for example, is allowed. But YouTube doesn't allow footage promoting genocide or denying the Holocaust. Under HB 320, however, YouTube would either have to allow vile viewpoints along with educational uses or eliminate the educational exception altogether. So, despite HB 320's interest in promoting free speech, it would either eliminate opportunities for speech or drown out the average Granite Stater's voice with vile viewpoints. Either way, free speech online will suffer.

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."[6] In *Tornillo*, for example, the Supreme Court held 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."[7]

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[2] *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013).
[3] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[4] *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).
[5] *Id.*
[6] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1932 (2019).
[7] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

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,[8] it applies equally to "business corporations" and "ordinary people engaged in unsophisticated expression."[9] 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,[10] force a parade organizer to include groups whose values the organizer doesn't share,[11] or force social media platforms to host speech they'd otherwise remove or restrict.[12]

Along with protecting editorial rights and businesses from compelled speech, the First Amendment also protects the "dissemination of information."[13] 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.[14]

Like Florida SB 7072, HB 320 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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> 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.[15]

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[8] *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.).
[9] *Hurley*, 515 U.S. at 574.
[10] *PG&E*, 475 U.S. at 20-21.
[11] *Hurley*, 515 U.S. at 574-76.
[12] *NetChoice v. Moody*, No. 21-12355 (11th Cir. 2022).
[13] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).
[14] *Id.*
[15] *NetChoice v. Moody*, No. 21-12355 (11th Cir. 2022).

Just like Florida's law, HB 320 substitutes the government's decisions for the constitutionally protected "decisions about what speech to permit, disseminate, prohibit, and deprioritize." It does so by forcing social media businesses to moderate as the government sees fit—for example, by requiring them to host *and* disseminate *all* viewpoints, even if those views conflict with the businesses' policies and values.

And just like Texas HB 20, HB 320 compels private businesses to host and disseminate speech they'd otherwise remove. The following chart briefly lists just some of the many ways HB 320 mirrorsthe same constitutional problems as Texas HB 20:

Texas HB 20	**New Hampshire HB 320**
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 social-media platform shall no censor a user of the social-media platform, the expression of such a user, or the ability of such a user 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; or (3) A user's geographic location in this state or any part of this state."
"Social media platforms and interactive computer services with the largest number of users are common carriers by virtue of their market dominance."	"The interactive computer services social-media platforms with the very largest number of users are most clearly common carriers by virtue of their market dominance."
"[T]his state has a fundamental interest in protecting the free exchange of ideas and information in this state."	"This state has a fundamental interest in protecting civil rights, including the free exchange of ideas and information in this state."

As mentioned above, the First Amendment protects private individuals and businesses from hosting and disseminating messages they otherwise wouldn't. Like Texas

HB 20, HB 320 compels hosting and disseminating speech, including vile viewpoints. And like HB 20, HB 320 substitutes the government's editorial judgment for the constitutionally protected editorial decisions of private businesses.

Social media businesses are not—and cannot be declared—common carriers. As Texas's law does, this bill attempts to circumvent the First Amendment by "declaring" certain websites and services "common carriers." But the legislature cannot merely deem businesses "common carriers," especially when tech businesses are not even close to meeting the "qualifications" for being common carriers. 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) should be held to that. This is especially true when scarce resources are at stake—society doesn't necessarily need or want 13 railroads crisscrossing a state, so it makes sense to require the few that do operate to do so in a nondiscriminatory manner.

Tech businesses—even "Big Tech"—aren't common carriers. First, tech services have never held themselves out as carrying *all* speech without question. Indeed, from the beginning, these businesses have used content-moderation policies. All of them had user requirements from the start, too. 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, they're not common carriers because, as the bill itself recognizes, platforms engage in "curation," "moderation," and what it deems as "censorship." This is in addition to 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. But even if social media businesses were common carriers, they'd still have First Amendment rights.

Even setting all that aside, HB 320 triggers "strict scrutiny"—the Supreme Court's most demanding test for deciding a law's constitutionality—because it's content- and viewpoint-based. Strict Scrutiny requires the government to prove its law is (1) narrowly tailored to achieve (2) a compelling government interest. Like HB 20, HB 320 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 we 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.

Indeed, the Supreme Court has already repudiated the notion that the government has a compelling interest in promoting diverse viewpoints. In *Tornillo*, for example, Florida argued—and the Court rejected—that its right-of-access law was justified on the grounds that "the government has an obligation to ensure that a wide variety of views reach the public."[16] Instead, the Court held that Florida could not commandeer private companies to disseminate viewpoints, even when targeting "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."[17]

The same is true in the context of public-accommodation and nondiscrimination laws.[18] Although the government has a general interest in preventing and remedying discrimination, it may "balance" marketplaces of ideas, "level the playing field," or otherwise alter a speaker's message.[19]

Even under *PruneYard v. Robins*, HB 320 still violates the First Amendment. By default, private businesses—even monopolies—have a First Amendment right to exercise editorial control over speech they host, publish, or otherwise present to the public.[20] This is why, for example, three federal courts recently held that social media platforms have a First Amendment right to moderate content on their sites, and they held that *PruneYard* was inapplicable to social media businesses.

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[16] *Tornillo*, 418 U.S. at 247–48.
[17] *Id.* at 250, 254.
[18] *Hurley*, 515 U.S. at 578–79.
[19] *See, e.g.*, *Arizona Free Enter. Club v. Bennett*, 564 U.S. 721, 749-50 (2011).
[20] *See, e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-American Gay, Lesbian, Bisexual Group*, 515 U.S. 557 (1995).

But there is one narrow exception to this general right: In *PruneYard v. Robins* (1980), the Supreme Court held that the State of California could, through its State Constitution, augment the Federal Constitution's First Amendment protections. In other words, the Federal Constitution is a *floor*—not a ceiling—for protecting individual rights. From a bird's eye view, this holding suggests New Hampshire could, like California, amend its State Constitution to give individuals the right to disseminate their speech on a private business's property. But even if *PruneYard* is still good law—and recent cases cast doubt on that[21]—the Supreme Court underscored that state constitutions may protect rights above the Federal Constitution only if doing so doesn't conflict with the Federal Constitution. After all, federal law is supreme.

In California's case, its State Constitution did not violate the First Amendment because, even though it allowed students to peacefully gather petitions in a private shopping center's parking lot—despite its owner's policy prohibiting all such expression—the protection (1) did not require the shopping center to espouse any views itself, (2) permitted the shopping center to "expressly disavow any connection with" any message shared on its property, and (3) "[t]he views expressed by members of the public" would "not likely be identified with those of the owner."[22] The Court also held that California's Constitution did not violate the First Amendment because, unlike in *Miami Herald*, the government did not intrude "into the function of editors."[23]

Because social media platforms have a First Amendment right to moderate content hosted on their websites, no state law or constitutional provision may infringe or otherwise conflict with that right. Because this bill would intrude on editorial functions, it is unconstitutional under the First Amendment *and* under *PruneYard*. In practical terms, that means the First Amendment prohibits New Hampshire (or any government) from compelling social media platforms to host a third party's speech or to moderate (or not) speech in a certain way.

But even if that weren't the case, *PruneYard* offers no help. First, the public routinely associates the speech hosted on social media platforms with the platforms themselves. For example, advertisers have held Facebook and YouTube accountable for user-generated content that the advertisers disapproved of and wished not to be associated

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[21] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1932 (2019).
[22] *PruneYard v. Robins*, 447 U.S. 74, at 87 (1980).
[23] *Id.* at 88.

with. Likewise, Americans of all stripes believe the content hosted on social media platforms is a reflection of those platforms' values. Put simply, who a platform accepts as a user and what content the platform tolerates from that user reflect on the platform's public image. So while Californians in the 1970s may not have associated the students protesting in a shopping center's parking lot or their messages with the shopping center's owner, the same is not true of the public and social media businesses today.

Second, whereas California's Constitution did not require the shopping center to publish or otherwise disseminate the students' messages, this bill is premised on the exact opposite: It would force private businesses to devote resources to hosting and disseminating messages that they themselves disagree with or find harmful to their users. That is compelled speech that cannot survive strict scrutiny.

And third, the Supreme Court held in *PruneYard* that even though California could constitutionally require the shopping center to allow "orderly" protesters to assemble in its parking lot, the shopping center was still free to impose "time, place, and manner regulations" so as to "minimize any interference with its commercial functions."[24] So even if New Hampshire could constitutionally require social media platforms to "accept" everyone as a user, it can't prohibit them from promulgating rules meant to preserve their curative services for other users.

HB 320 would flood the internet with vile viewpoints at the expense of law-abiding Granite Staters

Even if HB 320 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 everyday websites. That includes explicit material like pornography, extremist recruitment, medical misinformation, foreign propaganda, and even bullying and other forms of verbal abuse.

[24] *Id.* at 83-84.

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, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[25] This includes the removal of 57 million instances of pornograph, and 17 million pieces of content related to child safety.

Yet the removal of content related to extremism and child safety is impeded by HB 320. This is because it penalizes a platform that decides to remove content because of, "The viewpoint represented in the user's expression or another person's expression." HB 320 would thus make it extremely risky for social media businesses 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, conspiracy theories, and other forms of harmful content, making the internet a much more objectionable place to be. For example, HB 320:

- 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.
- Authorizes spreaders of medical disinformation to sue social media platforms for censoring their "viewpoint" about cures or dangers of vaccinations.
- Allows people who post anti-Semitic hate speech to sue social media platforms to have that content restored.
- Enables *Al Jazeera* and *RussiaToday* to sue social media platforms for restricting posts celebrating terrorist acts or spreading foreign propaganda.

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

[25] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf.

cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech."[26]

HB 320 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 320, 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 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.

HB 320 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;

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

> 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 320.

If supporters of HB 320 are so keen to create an "online public square" where Granite Staters can share any news and views that are protected by the First Amendment, there is a simpler way: have the state government stand-up a social media site—**PublicSquare.NewHampshire.gov**—where the First Amendment prohibits government from imposing any restrictions on what people say.

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For these reasons, we respectfully ask you **oppose** HB 320. 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,

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