Carl Szabo
Vice President & General Counsel, NetChoice
Washington, DC 20005

NetChoice
Defending Free Speech and Free Enterprise Online

Iowa SB 1189 - Social Media Usage Modifications

OPPOSITION TESTIMONY

February 28, 2023

Iowa State Senate
Technology Subcommittee

Dear Chair Bousselot and members of the Subcommittee:

NetChoice respectfully asks you to **oppose** SB 1189 as it:

1. Violates the First Amendment;
2. Violates conservative principles of limited government and free markets; and
3. Would penalize social media platforms for removing lawful but awful content none of us want to see.

1. Violates the First Amendment of the U.S. Constitution.

The First Amendment states plainly that the government may not regulate the speech of individuals or businesses.[1] This precludes government action that compels speech by forcing a private social media platform to carry content that is against its policies or preferences.

Imagine if the government required a church to allow user-created comments or third-party advertisements promoting abortion on its social media page. Such a must-carry mandate would violate the First Amendment, and so would SB 1189, since it would similarly force social media platforms to host content they otherwise would not allow.

Other than in limited exceptions, a law mandating private actors host content are subject to a "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest; and
- narrowly tailored to achieve that interest.[2]

[1] *See, Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Pacific Gas & Elec. v. PUC*, 475 U.S 1, 15-16 (1986).
[2] *Id.*

On this test, SB 1189 is unconstitutional and will fail when challenged in court.

Thankfully, we do not have to wonder about the constitutionality of SB 1189, as a US District Court in Florida and one in Texas issued preliminary injunctions against remarkably similar bills, specifically highlighting the First Amendment infirmities of its content moderation provisions.

To begin, the Florida court made it clear that the First Amendment's restrictions on censorship only apply to the government, not private actors including social media platforms.

> "[T]he First Amendment does not restrict the rights of private entities not performing traditional, exclusive public functions" and that "whatever else may be said of the providers' actions, they do not violate the First Amendment."
>
> "[T]he State has asserted it is on the side of the First Amendment; the plaintiffs are not. It is perhaps a nice sound bite. But the assertion is wholly at odds with accepted constitutional principles."[3]

The Florida court went on to find that the First Amendment does, however, fully protect the rights of social media platforms to exercise their editorial judgment in making content moderation decisions.

> "[T]he First Amendment applies to speech over the internet, just as it applies to more traditional forms of communication. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997)."

The court specifically held that social media platforms' editorial decisions are protected by the First Amendment, going out of its way to note that the decisions in *FAIR*[4] and *Pruneyard*[5] are not applicable, and that Florida's restrictions clearly cannot survive either strict or intermediate scrutiny under the First Amendment.

SB 1189 will face similar scrutiny because it also intrudes on social media's editorial discretion:

> "A social media platform shall not censor a user, a user's expression, or a user's ability to receive the expression of another person based on any of the following:
>
> (1) The viewpoint of the user or another person;
>
> (2) The viewpoint represented in the user's expression or another person's expression."

So, the court will likely hold that SB 1189's restrictions on content moderation will not survive under either strict or intermediate scrutiny.

These First Amendment conflicts cannot be avoided by declaring that social media platforms are "**common carriers.**" The social media companies have always limited whom they do business with and which content they will host. In fact, content moderation is a core component of the business model for Facebook, YouTube, and Twitter. Judge Hinkle declined to accept the state's argument that social media platforms are common carriers without First Amendment protections from government action.

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[3] *NetChoice & CCIA v Moody*, Case No. 4:21-cv-00220 (N.D.F.L. June 30, 2021), and *NetChoice & CCIA v Paxton*, Case No. 1:21-cv-00840 (W.D.Tex. December 1, 2021) .
[4] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 US 47 (2006).
[5] *PruneYard Shopping Center v. Robins*, 447 US 74 (1980).

Hosting private speech does not make a platform a state actor subject to the First Amendment's restraints on government censorship, as noted by the US Supreme Court:

> "[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."

As for the argument that our First Amendment can be discarded because social media platforms are "**public forums**", the 9th Circuit affirmed last year that is not the case:[6]

> "Despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment."

The court emphasized:

> "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."

And even if social media platforms were considered to be "common carriers," which they are clearly not, the US Supreme Court has made clear that even common carriers are entitled to First Amendment protections from compelled speech.[7] In *PG&E v. Public Utilities Comm'n* the Supreme Court even declared that public utilities like PG&E are entitled to First Amendment protections from government compelled speech.[8]

Iowa should consider the Florida and Texas Preliminary Injunction decisions a warning: *federal courts will not allow states to trample over the First Amendment—just to punish a few disfavored businesses.*

Ironically, by enacting SB 1189, Iowa could end up establishing legal precedent in the Sixth Circuit that is favorable to social media platforms, further emboldening their content moderation practices.

2. SB 1189 would penalize social media platforms for removing harmful content

Even if SB 1189 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 every-day websites. That includes explicit material like pornography, extremist recruitment, medical misinformation, foreign propaganda, and even bullying and other forms of verbal abuse.

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,

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[6] *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).
[7] *See PG&E v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (recognizing that the public utitlty, PG&E is entitled to First Amendment protections and emphasizing that viewpoint based content requirements are subject to strict scrutiny, "The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers.").
[8] *Id.*

and Twitter took action on over 5 billion accounts and posts.[9] This includes removal of 57 million instances of pornography, and 17 million pieces of content related to child safety.

Yet the removal of content related to extremism and child safety is impeded by SB 1189. 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." While this may seem obvious, for anyone whose content is removed based on the substance of the content, it is a removal based on the "viewpoint" of the user.

This means a social media platform could be violating SB 1189 if it removed these types of user content:

- ISIS propaganda – since that denies the political speech of those who hate America.
- Dangerous Content for Children – restricting user-posted videos with violent, hateful, or racist content as inappropriate for children.

SB 1189 would make it extremely risky for social media platforms 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, SB 1189:

- 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.

Not only would SB 1189 push social media platforms to engage in less moderation of harmful content, but it would also force them to rehost this content if the challenger is successful in court, regardless of how harmful or offensive the content may be.

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

3. SB 1189 would make it legally risky for social media services to block SPAM messages

Today, social media platforms engage in robust content blocking of SPAM messages. But this blocking of not only unwanted but invasive content would be greatly impeded by SB 1189, since blocking could be challenged by lawsuits authorized under the bill.[10]

SB 1189 would enable bad actors to circumvent protections and contradict Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[11]

4. SB 1189 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:[12]

> *"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 SB 1189, which punishes platforms 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 remove objectionable content. This returns us to the "fairness doctrine" and creates a new burden on conservative speech.

SB 1189 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;

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[10] *See, e.g. Holomaxx Technologies Corp. v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (email marketer sued Microsoft, claiming the SPAM blocking filtering technology Microsoft employed was tortious.)

[11] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).

[12] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), http://www.presidency.ucsb.edu/ws/?pid=34456.

> 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 SB 1189.

If supporters of SB 1189 are so keen to create an "online public square" where Iowans could 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.Iowa.gov**—where the first amendment prohibits government from imposing any restrictions on what people say.

While many conservatives are angry over how Donald Trump and some high-profile conservatives are treated on Facebook, Twitter, and YouTube, legislation like we've seen in Florida and Texas ***are exactly the wrong response***. **Those laws would be turned into weapons that progressives use against President Trump and his followers on new, conservative social media platforms.**

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A far better response is for conservatives to leave laws in place that allow social media platforms to remove or restrict content that violates community standards that suit their audience and advertisers.

Thus, we respectfully ask you to **not** advance SB 1189.

Sincerely,
Carl Szabo
Vice President & General Counsel, NetChoice
NetChoice is a trade association that works to protect free expression and promote free enterprise online.