NetChoice *Promoting free speech & free enterprise on the net*

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Sen. Mike Thompson, Chair
Committee on Federal and State Affairs
Kansas State Senate

February 1, 2023

RE: **Opposition to SB 50 - Prohibiting social media terms of service that permit censorship of speech**

Chairman Thompson and members of the committee:

We respectfully ask that you **not** advance SB 50, because it:

- Violates the First Amendment of the US Constitution
- Would force social media platforms to host lawful but awful content
- Would make it far more difficult for interactive services to block SPAM messages
- Violates conservative principles of limited government and free markets.

Below we explain why SB 50 would be set aside for violating the First Amendment. Then, we describe the unintended but likely consequences if the law were to survive constitutional challenges.

SB 50 violates the First Amendment of the US Constitution

The First Amendment makes clear that the government may not regulate the speech of private individuals or businesses.[1] This includes 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 carry user-created comments or third-party advertisements promoting abortion on its social media page. Just as that must-carry mandate would violate the First Amendment, so too does SB 50, since it would similarly force social media platforms to host content they otherwise would not allow.

While there are limited, narrow exceptions, laws 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]

On this test, SB 50 is unconstitutional and will fail when challenged in court.

[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.*

"Speech does not lose First Amendment protection 'simply because its source is a corporation.'"[3] In fact, the First Amendment fully protects businesses, including their editorial right to moderate and curate content as they see fit.[4] And like all laws, election regulations may not infringe those rights.[5] Because SB 50 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,"[6] it "prohibits the government from telling people what they must say."[7] For that reason, the government may neither compel private parties to disseminate its own preferred message[8] nor compel one private speaker to disseminate the message of another.[9] 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.[10]

SB 50 compels speech in violation of the First Amendment. By requiring businesses to host and disseminate all viewpoints by all known candidates, SB 50 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.[11] 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.[12] Most recently, the 11th Circuit unanimously enjoined a similar "deplatforming" provision in Florida SB 7072.[13] The 11th Circuit held that the deplatforming provision "clearly restrict[s]

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[3] *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)).

[4] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

[5] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

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

[7] *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013).

[8] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[9] *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).

[10] *Id.*

[11] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

[12] *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

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

platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable."[14]

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."[15] 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."[16]

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,[17] it applies equally to "business corporations" and "ordinary people engaged in unsophisticated expression."[18] 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,[19] force a parade organizer to include groups whose values the organizer doesn't share,[20] or force social media platforms to host speech they'd otherwise remove or restrict.[21]

Along with protecting editorial rights and businesses from compelled speech, the First Amendment also protects the "dissemination of information."[22] 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.[23]

Like Florida SB 7072, SB 50 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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[14] *Id.*
[15] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1932 (2019).
[16] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
[17] *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.).
[18] *Hurley*, 515 U.S. at 574.
[19] *PG&E*, 475 U.S. at 20-21.
[20] *Hurley*, 515 U.S. at 574-76.
[21] *NetChoice & CCIA v. Moody*, No. 21-12355 (11th Cir. 2022).
[22] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).
[23] *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.[24]

Just like Florida's law, SB 50 substitutes the government's decisions for private companies' constitutionally protected "decisions about what speech to permit, disseminate, prohibit, and deprioritize."

SB 50 would force social media platforms to host lawful but awful content

Even if SB 50 were to survive the constitutional challenges described above, please 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, and even bullying and other forms of verbal abuse.

At the same time, 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 during 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[25] This includes removal of 57 million instances of pornography, and 17 million pieces of content related to child safety.

But SB 50 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 and harmful content, making the internet a much more objectionable place to be.

Consider what we would likely see more of under SB 50:

- Atheist or abortion advocacy posted to a church's Facebook or YouTube page
- SPAM messages in our email and social media apps

Moreover, consider material like the bullying of teenagers, grooming of children, and new unexpected health threats like the infamous Tide Pod Challenge. SB 50 creates lawsuit risks for removal of this type of content, since it doesn't fit within the limited list of objectionable material in the bill.

The end result is that websites and platforms will err on the side of leaving up extremist speech and harmful content, making the internet a much more objectionable place to be.

[24] *NetChoice v. Moody*, No. 21-12355 (11th Cir. 2022).
[25] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf

SB 50 would make it far more difficult for interactive 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 50, since blocking could be challenged by lawsuits authorized under the bill.[26]

SB 50 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."[27]

SB 50 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed an earlier incarnation of SB 50, the infamous "Fairness Doctrine," which required equal treatment of political views by broadcasters, saying:[28]

> *"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 50, 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, and MeWe.

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 50 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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> 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; …

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[26] *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.)
[27] *Id*. at 1105 (citing 47 U.S.C. § 230(b)(4)).
[28] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), http://www.presidency.ucsb.edu/ws/?pid=34456 .

> 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 approve SB 50.

Sincerely,

Carl Szabo
Vice President & General Counsel, NetChoice