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State of Arizona
Senate Transportation and Technology Committee

February 4, 2023

Re: **Opposition to Arizona SB 1107**

Dear Chair Farnsworth, Vice-Chair Carroll, and Members of the Committee:

We respectfully ask that you **oppose** SB 1107 as it:

- decimates Arizona's operational activities;
- is a viewpoint-based restriction on speech that violates the First Amendment by allowing the government to take retaliatory action against online services whose speech the government disfavors; and
- by giving the power to nullify contracts with companies whose political views it disagrees with, SB 1106 impairs economic rights.

To uphold conservative principles of limited government, free markets, and constitutional fidelity, this committee should oppose SB 1107.

SB 1107 would decimate Arizona's operational activities

If SB 1107 is becama law, Arizona schools would lose the ability to use Chromebooks, Arizona governments couldn't use Microsoft's Office 365 suite, and governments couldn't use internet services provided by Verizon, ATT, Time Warner, or Comcast. That is because all these businesses are "Information Content Providers" (ICP) as defined by SB 1107 and all of them engage in "targeted censorship."

All of these services regularly block SPAM content like ads for "men's health" and other unwanted junk emails, and SPAM phone calls and SMS. Because of the overly broad definitions in SB 1107, all these services would be captured in the ban on government procurement, and would result in the decimation of many of the technologies that Arizona's government, schools, and other agencies use every day.

SB 1107 is a Viewpoint-Based Restriction That Violates the First Amendment

The Supreme Court has made it clear that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[1] Yet by "terminat[ing] any existing contract" between the Arizona government and online businesses whose speech expresses views Arizona disagrees with, SB 1107 does just that. When a private company "exercises editorial discretion in the selection and presentation" of user-generated content, "it engages in speech activity" protected by the First Amendment.[2] Indeed, "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of [First Amendment-protected] editorial control and judgment."[3] This editorial freedom extends to any private company that hosts and presents speech, including social media services.[4] SB 1107 seeks to deprive online businesses whose speech expresses a viewpoint the government disfavors from the benefit of their contract with Arizona, something the First Amendment proscribes.

Viewpoint discrimination—when the government treats speech differently based on the perspective it reflects—is particularly disfavored by courts: "It is rare that a regulation restricting speech because of its content will ever be permissible [under the First Amendment."[5] For this reason, courts require governments who pass viewpoint discriminatory laws like SB 1107 to show that the law is justified by a compelling governmental interest and is the least speech-restrictive means available to achieve that interest.[6] SB 1107 fails both prongs of this test.

First, as the Supreme Court has instructed, "[t]he State must specifically identify an 'actual problem' in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 799 (2007). Online services' First Amendment rights are not an "actual problem" in need of solving, and "the concept that government may restrict the speech of some elements of our society," here, the social media platforms' speech, "in order to enhance

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[1] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).
[2] *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *accord Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.) (the "editorial function itself is an aspect of 'speech'"); *see also id.* at 816 (Thomas, J., concurring in judgment in part and dissenting in part) (government cannot "force the editor of a collection of essays to print other essays on the same subject").
[3] *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974).
[4] *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) (finding that editorial freedom extends to parade organizers); *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 790 (2011) (noting that First Amendment protections "do not vary when a new and different medium for communication appears"); *See also NetChoice, LLC v. AG, Fla*., 34 F.4th 1196 (11th Cir. 2022) (finding the First Amendment protects social media platforms' editorial judgment over what user-generated content to host).
[5] *Police Dep't of Chicago v. Mosle*, 408 U.S. 92, 95 (1972).
[6] *See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018).

the relative voice of others is wholly foreign to the First Amendment."[7] Second, SB 1107's requirement that Arizona terminate any existing contract with an online service that ". . . delet[es] or plac[es] a disclaimer on any form of free speech that is unequally applied based on a particular belief that is expressed in any form" is impossibly vague and broad; the opposite of "narrowly drawn."[8]

SB 1107 Impairs Economic Rights

Strong, reliable contract rights which are impervious to the whims of politicians are a cornerstone of the American economy. SB 1107 seeks to sabotage this essential tradition: Instead of continuing to operate as a neutral guarantor of lawfully-executed contracts, SB 1107 will transform the government into an authoritarian body able to nullify contractual freedom on the basis of its own arbitrary preferences.

The importance of contract rights are reflected in the Constitution. Article I, Section 10, Clause 1 of the Constitution limits states' power to enact legislation that breaches its own contracts.[9] A state's regulation of contracts, whether involving public or private parties, must be reasonably designed, and appropriately tailored to achieve a legitimate public purpose.[10] As previously explained, retaliating against online services for exercising First Amendment-protected editorial discretion is not a legitimate public purpose. And co-opting private contracts to silence disfavored speech is far from "reasonably designed;" it is proscribed by the constitution.

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By giving the government power to punish private communications platforms whose speech it disagrees with, SB 1107 undermines conservative principles of limited government, free markets, and constitutional fidelity. For these reasons, we respectfully ask you to oppose SB 1107. 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,
Carl Szabo
Vice President & general Counsel, NetChoice
NetChoice is a trade association that works to protect free expression and promote free enterprise online.

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[7] *Buckley v. Valeo*, 424 U.S. 1, 49 (1976); *see also NetChoice, LLC v. Moody,* 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (noting that "balancing the exchange of ideas among private speakers is not a legitimate governmental interest").
[8] *See Matal v. Tam*, 137 S. Ct. 1744, 1749 (2016) (explaining that a government restriction on speech "that disparages *any person, group, or institution*, is not narrowly drawn.").
[9] U.S. Const. art. 1, §10, cl. 1
[10] *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 22 (1977) (explaining that legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and based on a reasonable purpose).