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S0268 Violates the First Amendment & Undermines Conservative Value

Dear Members of the Committee on Labor, Commerce and Industry:

We ask that you **oppose** S0268. First, S0268 violates the U.S. Constitution. In fact, it is similar to 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 Florida SB 7072, which the 11th Circuit unanimously held is mostly unconstitutional. And second, S0268 undermines conservative values by reinstating the "Fairness Doctrine."

Like Texas HB 20 & Florida SB 7072, S0268 Violates the First Amendment

S0268 violates the First Amendment by, among other things, compelling speech and infringing editorial judgment. Because S0268 is like Texas HB 20 and Florida SB 7072, it suffers 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 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, S0268 compels speech in violation of the First Amendment. By banning covered entities from "delet[ing] or censor[ing] the user's religious or political speech," for example, S0268 compels private businesses to host *all* political and religious viewpoints. This extends even to speech that those private businesses would otherwise remove.

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

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]

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, S0268 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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[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).
[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.*

> …
>
> 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]

Just like Florida's law, S0268 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.

S0268 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 S0268, 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.

S0268 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;

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

> 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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> 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 S0268.

If supporters of S0268 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.SouthCarolina.gov**—where the First Amendment prohibits government from imposing any restrictions on what people say.

For these reasons, we respectfully ask you to **oppose** S0268. 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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Counsel
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NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.