

Arizona SB 1106

OPPOSITION TESTIMONY

March 30, 2023

State of Arizona
House Committee on Commerce

Arizona SB 1106

Chairman Wilmeth, Vice Chair Carbone and Members of the House Commerce Committee:

We respectfully ask that you oppose SB 1106. Though this bill was introduced to promote free discourse online, its means violate the well-established First Amendment right to editorial discretion and create thirty day cycles of censorship.

- SB 1106's must-carry requirements will flood online services with harmful content that will make social media platforms virtually unusable for most Arizonans.
- The Eleventh Circuit Court of Appeals ruled against Florida's almost identical law, SB 7072, for these reasons last year.¹
- SB 1106 undermines conservative principles of limited government, free markets, and constitutional fidelity by giving the government control over what speech appears online.

SB 1106's Must-Carry and Transparency Requirements Will Flood Platforms With Vile

Content

A platform where users cannot avoid disturbing content is not a platform where free speech flourishes. Yet that is what will happen if platforms are required to host and display virtually all lawful speech made by "registered political candidates" and "journalistic enterprises," which are loosely defined to include, for example, popular online content creators who operate far outside the news media. As one Republican state representative warned during floor debate on Florida's identical law, SB 7072, what "about potential candidates, about crazy people, Nazis and child molesters and pedophiles who realize they can say anything they want . . . if all they do is fill out those two pieces of paper [to register as a political

¹ See *Eleventh Circuit Strikes Down Florida Law Intended to Prohibit Social Media Platforms from Censoring Certain Speech on Grounds That Social Media Platforms Exercise First Amendment-Protected Editorial Judgment*, Cahill Gordon & Reindel, LLP, (July 27, 2022). Available at: <https://bit.ly/3X34Htl>.

candidate]?”² Indeed, the prospect of people registering as candidates just to be able to have carte blanche to share vile content online is not a wild hypothetical: to receive content moderation privilege under Arizona election laws, candidates need only submit a statement of interest, financial disclosure statements, and prove he/she has lived in Arizona for at least five years.³

Case studies from recent attempts to create “free speech” alternatives to Facebook and Twitter show that without content moderation, **vile material reliably proliferates**. Social media sites Parler and GETTR initially promised to only moderate speech that violated United States law.⁴ Both platforms were promptly overrun by obscene, violent, and racist content. The same happened with “free speech absolutist” website 8chan, which was eventually removed from the internet by its host for refusing to remove content that celebrated the 2019 El Paso shooting. Trivial requirements for political candidates and low thresholds for journalistic enterprises ensure that platforms subject to SB 1106 will follow a similar trajectory. Though some users like being able to post extremely offensive content, the vast majority will be put off by it, limiting the exercise of free speech on those platforms to a small minority.

Likewise, SB 1106’s transparency requirements **give malicious actors and spammers a blueprint to flood Arizonans’ feeds with offensive content**. Websites that host user-generated content of any kind face a constant battle against malicious actors, including spammers, scammers, political operatives seeking to spread propaganda, and users peddling vile content.⁵ Collectively, these bad actors make hundreds of thousands of attempts per year from thousands of accounts to post content including terrorist recruitment material, videos of mass shootings, or child sexual abuse material.

SB 1106 cripples a platform’s ability to identify and block this content with three mutually reinforcing provisions. First, the requirement to disclose “the standards, including detailed definitions” that platforms use to identify and remove objectionable content will give bad actors a blueprint to bypass platform security. Second, the thirty-day limitation on changes to platform content moderation rules will make it impossible to address breaches—caused by the disclosure requirement—in a timeframe appropriate to protect a platform’s users. Third, the private right of action awarding aggrieved users up to \$100,000 for

² David Rothschild, @DaveMicRot, Twitter, (May 24, 2021, 5:11 PM).

³ Keith A. Spencer, *Why unmoderated online forums always degenerate into fascism*, Salon (Aug. 5, 2019) (explaining that selection bias and online psychology always lead unmoderated or lightly moderated “free speech” sites to become overrun with vile content); Aristos Georgiou, *YouTube, TikTok Videos Showing Animals Tortured, Buried, Eaten Alive Viewed 5bn Times*, Newsweek (Aug. 25, 2021) (describing requests by animal rights groups for social media companies to develop more aggressive algorithmic moderation to prevent continuing dissemination of animal torture footage).

⁴ Mike Masnick, *Parler Speedruns The Content Moderation Learning Curve; Goes From ‘We Allow Everything’ To ‘We’re The Good Censors’ In Days*, Techdirt (July 1, 2020).

⁵ Mike Masnick, *Very, Very Little of ‘Content Moderation’ Has Anything To Do With Politics*, Techdirt (May 25, 2022) (explaining that the vast majority of content moderation is to combat spam, fake accounts, and pornography, not to “censor” political views).

each instance of “inconsistent” moderation will attract a gold rush of self-interested Arizonans attempting to breach platform security, inundating Arizona’s courts with frivolous claims.

SB 1106 Violates the First Amendment

The First Amendment explicitly prohibits the government from abridging private speech and media.⁶ The Supreme Court has long recognized that the First Amendment freedom of speech encompasses private actors’, like social media platforms’, freedom to select, edit, and present third-party speech. Indeed, almost 50 years ago the Court first explained that “[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.”⁷ This editorial freedom extends to any platform that hosts and presents speech, including social media services.⁸ As the Eleventh Circuit explained last year in NetChoice’s case against Florida’s nearly-identical law, SB 7072, the fact that this fundamental guarantee cannot be tossed aside for short-term, political ends “would be too obvious to mention if it weren’t so often lost or obscured in political rhetoric.”⁹ Yet by forcing online services to host any and all speech, however vile,¹⁰ from a favored class of users—“registered political candidates” and “journalistic enterprises”—SB 1106 **deprives platforms of their well-established editorial freedom.**

Further, SB 1106’s “consistency provision” actually functions as a ban on speech, the type of First Amendment infringement the Constitution proscribes most strictly.¹¹ Under Section 18-703(b) of this bill, platforms are forced to remove (or keep up) all content that is the same or similar to content they have previously taken down (or kept up). This provision works in conjunction with Section 18-703(c), which prohibits platforms from changing “user rules, terms, and agreements” more than once every 30 days. Taken together, these provisions create **30-day cycles of censorship**: Even if a platform wants to leave certain content up, it may not do so if within the past 30 days it has removed other content that a court might find to be similar to the content it wishes to leave up. Under the threat of draconian civil penalty (up

⁶ U.S. Const. amend. I

⁷ *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁸ 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 generally *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).

⁹ *NetChoice, LLC* 34 F.4th 1196 at 1204.

¹⁰ Russell Brandom, *Twitter bans Florida Republican for encouraging the killing of federal agents*, The Verge (Aug. 19, 2022) (explaining that Twitter banned a Florida state House candidate after he advocated murdering federal agents).

¹¹ Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. Free Speech L. 143 (2021) (explaining outright speech bans are the most strongly prohibited First Amendment injury).

to \$100,000 or up to \$250,000, depending on the cause of action), platforms will be forced to remove speech that they wish to publish.

By giving the government control over what speech appears on private communications platforms, SB 1106 undermines conservative principles of limited government, free markets, and constitutional fidelity. For these reasons, we respectfully ask you to oppose SB 1106. 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. Thank you again for the opportunity to testify.

Sincerely,

Amy Bos
Director of Federal and State Affairs
NetChoice

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