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

NetChoice
Defending Free Speech and Free Enterprise Online

Request for Veto: SB 262 Relating to Data Privacy

VETO REQUEST

May 15, 2023

Dear Governor DeSantis:

We respectfully urge you to **veto** SB 262, the Technology Transparency Act. The bill contains numerous provisions which raise constitutional concerns under the Commerce Clause and the First And Fourth Amendments. Other states have enacted similar provisions and are already seeing legal challenges. While there are admirable aspects of this bill—particularly the anti-jawboning provision[1]—the bill would be enjoined by federal courts for violating the First Amendment. Even if the bill were to survive a constitutional challenge, the bill is far from a model of clarity. Not only do conflicting provisions threaten the advertising ability for small businesses and politicians, but SB 262 would fail to accomplish its primary goal: protecting Floridians' data online.

In sum, SB 262:

1. Violates the First Amendment's protection for editorial discretion;
2. Has the practical effect of regulating extra-territorial commerce;
3. Creates an intolerable risk that requests for data protection impact assessments will be abused;
4. Issues confusing demands about targeted advertising; and
5. Fails to protect Floridians' online data.

[1] Carl Szabo, *Musk's "Twitter Files" Underscore the Need to Prevent Government Jawboning*, NETCHOICE (Dec. 08, 2022), https://netchoice.org/musks-twitter-files-underscore-the-need-to-prevent-political-jawboning/.

SB 262 violates the First Amendment's protection for editorial discretion

The First Amendment prohibits the government from interfering it private speech, either by compelling speech[2] or restricting it.[3] The First Amendment's protection is robust and covers not just the expression of views, but also a publisher's decision to include or exclude certain content.[4] These protections have been clearly established in physical, traditional media and digital spaces.[5]

Editorial discretion lies at the heart of the First Amendment's protection. Yet, SB 262 runs afoul of this bedrock principle by requiring search engines to disclose the "main parameters" and their "relative importance" for the prioritization or deprioritization of content. While not all disclosure requirements violate the First Amendment, permissible disclosures are the exception, not the rule.

The Supreme Court has held that the First Amendment does not prohibit the government from imposing disclosures when they either: 1) clarify "inherently misleading" commercial advertisements, and 2) when the disclosure requires only the revelation of purely factual and uncontroversial information in advertising.[6] Neither of these exceptions apply to SB 262. Accordingly, the disclosure requirement is unconstitutional.

First, SB 262 does not pertain to commercial advertisements, let alone those which are "inherently misleading." The Court's decision in *Zauderer* provides the quintessential example of an inherently misleading ad. A lawyer claimed his representation came with "no fees" but failed to mention that a client would still be liable for "costs" associated with the suit was deceptive because an average person would assume that an advertisement for "no fees" meant that the representation would be undertaken at no cost to the client. The Court found that, in that situation, it was appropriate for the advertisement to disclose the client's liability for costs associated with the suit.[7]

There has been no showing that the "parameters" used by a search engine to generate results generate the sort of "inherently misleading" content at issue in *Zauderer*. Indeed, SB 262's disclosure

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[2] *West Virginia Board of Education v. Barnette,* 394 U.S. 614 (1943).
[3] *Brandenburg v. Ohio*, 394 U.S. 444 (1969).
[4] *Miami Herald v. Tornillo*, 418 U.S. 214 (1974); *Hurley v. Irish-American Gay*, 515 U.S. 557 (1995).
[5] *Packingham v. North Carolina*, 582 U.S. 98 (2017); *Wash. Post v. McManus*, 944 F.3d 506, 518-20 (4th Cir. 2019).
[6] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *see also NetChoice v. Moody*, 34 F.4th 1196, 1212 (11th Cir. 2022).
[7] *Zauderer* at 653.

requirement is so broad that it covers *non-advertising* results as well. By casting such a wide net, SB 262 clearly places itself outside the scope of *Zauderer*'s exception for misleading ads.

Second, the information SB 262 seeks to force search engines to disclose is not "purely factual and uncontroversial" information in advertising. The disclosure requirement applies to all search related prioritization and does not limit itself to advertisement. Further, the information SB 262 seeks to compel, is value-laden. This becomes readily apparent when we observe that SB 262 requires search engines to include how political partisanship or ideology play into prioritization of search results. By expressly requiring a search engine to speak about how it makes its decisions on issues which are not purely factual but pertain to issues of *judgment*, the law would impose a burden on the search engine's right of editorial discretion.

Because SB 262's disclosure requirement is not limited to advertisements, makes no limitation to inherently misleading content nor to purely factual and uncontroversial information, the disclosure requirement plainly violates the First Amendment. By requiring search engines to disclose their prioritization of search results, SB 262 would chill search engines' right to exercise discretion to moderate, prioritize, and deprioritize content as they see fit.[8] The public disclosure would act as pressure for those providers to moderate content in a way that the government deems more palatable. Such government interference is plainly unconstitutional.

The disclosure requirement also presents a vagueness issue. Search engines are not required to disclose information that could "enable deception to or harm of consumers through the manipulation of search results." Neither deception nor harm are defined in the statute. Absent a definition, search engines will be left in a Catch-22 of whether they are compelled to disclose information or permitted to withhold it. Similarly, the law is underinclusive because it excludes non-profits from its requirements. If consumer data and choice is its purpose, this exclusion directly undermines the argument that this law is necessary to achieve that interest.

Because SB 262 violates the First Amendment's protection of editorial discretion, we urge you to **veto this bill.**

[8] *Moody* at 1230.

SB 262 has the practical effect of regulating interstate commerce in violation of the Dormant Commerce Clause

The Internet operates at a global scale. Regulators, therefore, must be mindful of the Constitution's delegation of regulating interstate commerce to Congress. SB 262 violates the Commerce Clause[9] because the law seeks to impose an unreasonable and undue burden on interstate commerce that is clearly excessive in relation to any local benefit conferred and is likely to subject businesses to inconsistent state regulations.

Although SB 262 purports to limit its data restrictions to only "Florida children," it will have the practical effect of imposing restrictions on offerings in other states because children travel. They travel for school trips, vacations, to visit family, and a host of other reasons. When those travels necessitate crossing state borders, SB 262 would still apply because the traveler would still be a "Florida child" for purposes of the law. Accordingly, the bill would burden interstate commerce by disincentivizing business practices or offerings in other states and subjecting those offerings to Florida restrictions.

NetChoice is currently suing the State of California over a similar restriction in its AB 2273. We caution Florida to wait until that litigation concludes before passing such legislation.

SB 262 creates an intolerable risk of Fourth Amendment violations

SB 262 violates the Fourth Amendment by requiring controllers to generate and provide Data Protection Assessments to the Attorney General on demand without any opportunity for pre-compliance review by a neutral decision maker. None of the controllers regulated by this bill operate in a "closely regulated" industry that would fall outside the ambit of the Fourth Amendment's protections against unrestricted administrative searches.[10]

Because SB 262 does not provide any opportunity for precompliance review of the Attorney General's demands by a neutral decision maker, it "creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass."[11]

Given the Fourth Amendment concerns, SB 262 would be enjoined by the courts. Indeed, NetChoice has already challenged a similar provision in California's AB 2273. We recommend that Florida refrain from taking action on this issue until that litigation is resolved.

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[9] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).
[10] *City of Los Angeles v. Patel*, 576 U.S. 409, 424-25 (2015).
[11] *Id*. at 421.

SB 262 issues confusing and contradictory commands for opt-in/opt-out

When SB 262 was introduced, small businesses were understandably concerned by the law's opt-in requirement for targeted advertising. Small businesses, especially new market entrants, rely on cost-effective measures to increase their reach and get in front of relevant audiences. Targeted advertising is a key factor in this strategy.

Accordingly, it was gratifying to see the legislators take these concerns seriously and amend the bill's targeted advertising provisions from "opt-in" to "opt-out." Opt out provisions provide an appropriate balance by furthering the needs of new businesses while also respecting the preferences of that small portion of users who would rather not receive targeted ads.

Although we praise the opt-out provisions, some of the subsequent amendments to SB 262 conflict with these provisions and would create an opt-in framework. Particularly, the controller duties under 501.71 prohibit the processing of personal data for "purposes not reasonably necessary nor compatible with the purpose for which it was collected without obtaining consent." Similarly, "sensitive data" may not be processed without consent. Personal data and sensitive data, however, are often key indicators aspects of targeted advertisements. Politicians often use sensitive data, which the bill defines as race, ethnicity, religious beliefs, sexual orientation, and citizenship status, for purposes of targeting relevant voting groups.

By requiring affirmative consent from users for these purposes, SB 262 would effectively gut the good work done earlier in the legislative process to safeguard the effectiveness of Florida businesses and politicians to reach their intended audiences and, ultimately, hurt those consumers or voters who would not otherwise hear those messages. Given the conflicting and confusing provisions in this bill, it would be better to veto rather than enact a measure which would lead to confusion and harm Florida's vibrant business community.

SB 262 fails to protect Floridians' online data

Given the dearth of congressional movement on comprehensive data privacy, it is understandable that states are stepping in to protect their citizens' online data, particularly as more and more people are doing more online. However, even if SB 262 were to survive a constitutional challenge, the data protection provisions contain so many carve outs and exceptions that little—if any—meaningful protection would be offered under this bill.

SB 262 offers a rudimentary patchwork that would only cover a handful of businesses. Yet, as the digital marketplace continues to evolve, and Floridians continue to entrust more of their data to online service providers, a comprehensive privacy framework is crucial to actually achieving privacy protection and data security. Rather than target only large players, Florida should adopt a comprehensive approach that protects Floridians across today's digital landscape and in the years to come. We recommend looking at the comprehensive data privacy laws in Texas, Utah, and Virginia as the model. Florida would be well-served by adopting such robust protection.

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In conclusion, NetChoice shares lawmakers' desire to protect against government jawboning and ensure Floridians' data is secure and protected. To that end, we believe there are better, more effective ways to achieve these goals. Given SB 262's clear First Amendment problems, we ask you to **veto** this bill and adopt measures capable of achieving both outcomes without violating the Constitution.

As always, we offer ourselves as a resource to discuss these issues in further detail. We appreciate your attention to this matter.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

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