NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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Senator Jerry Klein, Chair
Industry, Business and Labor Committee
North Dakota Senate
Bismarck, ND

RE: **Opposition to HB 1144 Regulating Free Speech on Social Networks**

Dear Chairman Klein and members of the committee:

We respectfully ask that you **not** advance HB 1144, because it:

- Exposes social media platforms to lawsuits for removing harmful content.
- Makes it more difficult for social media platforms to block SPAM messages.
- Violates conservative principles of limited government and free markets.
- Violates the First Amendment of the US Constitution.

HB 1144 will penalize social media platforms for moderating harmful content, generating unintended consequences we describe below.

HB 1144 exposes websites and platforms to lawsuits for removing harmful content

The First Amendment protects a lot of content that we don't want our families to see on websites. The First Amendment protects explicit material, extremist recruitment speech, and even protects bullying and other forms of verbal abuse.

At the same time, audiences and advertisers don't want to see this content on our social media pages. But HB 1144 would make it nearly impossible for social media to remove objectionable content.

Today, online platforms try to remove harmful content from their sites. In just the six-months during 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[1] This includes removal of 57 million instances of pornography, and 17 million pieces of content related to child safety.

Yet the removal of content related to extremist recruitment and child safety is impeded by HB 1144. This is because it penalizes a platform that decides to remove content because of "the viewpoint of the

[1] *See Transparency Report*, at http://netchoice.org/wp-content/uploads/Transparency-Report.pdf

user or another person." While this may seem obvious, for anyone whose content is removed based on the substance of the content, it is a removal based on the "viewpoint" of the user.

This would mean a social media platform could be violating HB 1144 if it removed any of the following:

- Pornographic content – since that denies views of those who enjoy pornography
- ISIS recruitment – since that denies views of those who hate America
- SPAM messages – since that denies the viewpoint of the spammer
- Atheist or abortion advocacy posted to a church's Facebook or YouTube page

The threat of lawsuits authorized under this legislation will likely cause large platforms to stop deleting extremist speech and harmful content, making the internet a much more objectionable place to be.

Moreover, this bill is written in a way that enables nearly every North Dakota resident to be a plaintiff in a lawsuit when one piece of content is removed. If only half of the population is on the social media platform, just one post being removed would create statutory damages of billions.

In the case of a successful lawsuit, platforms would be forced to restore this harmful content online.

In addition, YouTube and Facebook allow page managers to remove content posted on their pages. This empowers content creators to curate their pages to suit their interest. However, platforms and websites might remove this capability, since it creates the threat of expensive litigation under HB 1144. A litigious plaintiff could argue that the empowerment of page owners to remove content is an "interactive computer services" censoring a user or their expression, subjecting the platforms to the threat of a lawsuit anytime a page manager removes inappropriate comments or images.

HB 1144 Makes it illegal for providers to block SPAM, and punishes platforms for removing terrorist speech and pornography

Today, platforms engage in robust content blocking of SPAM. But this blocking of not only unwanted but invasive content is illegal under HB 1144.

For decades, service providers have fought bad actors to keep our services usable. Through blocking of IP and email addresses along with removing content with harmful keywords, our services are more useful. But services couldn't do this blocking under HB 1144.[2]

At the same time, platforms could not remove terrorist content. Imagine the Taliban making posts that read, "Join us to help America." Blocking or removing this statement is illegal under HB 1144 unless those specific terms are addressed in the terms of service. Likewise, removal of pornography is also inhibited under HB 1144.

The de facto requirement to make decisions crystal clear in HB 1144 would make it easier for bad actors to circumvent protections and a duty to explain why SPAM content was blocked would contradict

[2] *See, e.g. Holomaxx Technologies Corp. v. Microsoft*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011) (That case involved an email marketer sued Microsoft, claiming that the SPAM blocking filtering technology Microsoft employed was tortious.)

Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[3]

It is certain that HB 1144 will chill platforms from removing harmful or dangerous content.

HB 1144 creates new and dangerous powers for government to regulate free speech

HB 1144 empowers an administration to weaponize the law against would-be political opponents, since it fails to define key terms like "restrict." This leaves such terms subject to government interpretations.

This should concern lawmakers of both parties who recognize that control of the Governor's mansion by one political party is never certain or permanent.

HB 1144 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed the equivalent of HB 1144, the infamous "Fairness Doctrine," a law requiring equal treatment of political parties by broadcasters. In his repeal, President Reagan said:

"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."[4]
– President Ronald Reagan

We face similarly unthinkable restrictions in HB 1144 which forbid online platforms from moderating their services in ways that they see fit.

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.

We've seen the rise of conservative voices without relying on a column from the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

All of this was enabled at effectively no cost to conservatives. Think about conservatives like Ben Shapiro and Mark Stein, whose shows are available to anyone with an internet connection and on whose websites conservatives can discuss and debate articles via the comments section.

Nonetheless, there are some who seek government engagement to regulate social networks' efforts to remove objectionable content. This forces us to return to an era under the "fairness doctrine" and create a new burden on conservative speech.

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

HB 1144 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting Online Platforms and Services,* which says:

> 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;
>
> 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;
>
> …
>
> 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.

As President Ronald Reagan said, "Government is not the solution to our problem; government is the problem." Government regulation of free speech online would not safeguard the future of conservative speech. It would endanger it.

HB 1144 violates the First Amendment of the US Constitution

The First Amendment makes clear that government may not *regulate* the speech of private individuals or businesses. This includes government action that essentially compels speech – i.e., forces a social media platform to allow content they don't want.

Imagine a church's social media page being required by the government to allow atheists' comments about the Bible. That would violate the First Amendment. But that is exactly what HB 1144 does for internet platforms. It forces them to host content they otherwise wouldn't against their will.

While there are very limited, narrow exceptions, these types of restrictions are subject to what is called the "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest;
- narrowly tailored to achieve that goal or interest; and
- the law or policy must typically be the least restrictive means for achieving that interest.

On at least the last two prongs of this test, HB 1144 is unconstitutional and will fail.

Legal analysis from DLA Piper, the largest law firm in the world, looked at legislation similar to HB 1144 and concluded it would likely not withstand a First Amendment challenge:

> [T]hese types of provisions punishing content moderation would also be highly vulnerable on First Amendment grounds. There is no question that website operators' editorial judgments concerning which user-generated posts they will moderate (including potentially taking down) constitute speech subject to the full protections of the First Amendment. Moreover, given the centrality of online communications to the free and open marketplace of ideas, a court would be particularly wary of governmental efforts to police online moderation practices. As the Supreme Court has explained, "[w]hile in the past there may have been difficulty in identifying

> the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, … and social media in particular."
>
> Here, the restriction unquestionably impinges on website operators' editorial judgment protected by the First Amendment—and it does so based on the content of the user-generated postings. As a result, the provisions would be subject to "strict scrutiny"—the most searching form of constitutional scrutiny. Under this exacting standard, a statute "is invalid … unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." 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." That is a very high standard. "'It is rare that a regulation restricting speech because of its content will ever be permissible.'"
>
> A reviewing court would very likely conclude that the type of bill provisions discussed above cannot survive strict-scrutiny review. Neither the legislative record nor any evidence supports the existence of a "compelling government interest" in second-guessing websites' editorial practices.

As NetChoice favors limited government and a free-market approach, we respectfully ask you to **oppose HB 1144**.

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President and General Counsel, NetChoice
NetChoice works to make the Internet safe for free enterprise and free expression. www.netchoice.org

ALEC American Legislative Exchange Council

LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

RESOLUTION PROTECTING ONLINE PLATFORMS AND SERVICES

WHEREAS, the Internet has created millions of new American jobs and generated billions of dollars in revenue for American businesses;

WHEREAS, online platforms enabled users to generate, upload, and share their own content, and this capability has become a core component of the online experience;

WHEREAS, ALEC's principles of limited government and free markets suggest that the government should continue to take a light-touch approach to regulation 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;

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;

WHEREAS, ALEC's principles of limited-government and free markets oppose the use of antitrust law for political purposes;

WHEREAS, even the threat of legal action can significantly affect the exercise of speech rights protected by the First Amendment, and thus also raises constitutional concerns;

WHEREAS, Section 230 of the Communications Decency Act of 1996 is a federal law limiting the liability of online platforms and services for content that they themselves did not share in creating and has been vital to the growth of user-generated content and free expression online;

WHEREAS, Section 230(c)(1) of the Communications Decency Act ensures that websites will not be held liable as publishers for how they arrange, promote, or prioritize content, unless they are responsible for creating it;

WHEREAS, Section 230(c)(2)(A) of the Communications Decency Act limits the liability of online platforms for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable";

WHEREAS, Section 230 limits the government's ability to prosecute social media companies in parallel with the First Amendment's protection of editorial discretion;

WHEREAS, Section 230 does not shield online platforms from liability for violations of federal criminal law or intellectual property law; and

WHEREAS, the sheer volume of user-generated content hosted by online platforms is so vast that, as Congress presciently recognized in enacting Section 230, imposing legal liability for content moderation decisions will significantly chill content moderation or simply cause online services to decline to host user-generated content;

THEREFORE LET IT BE RESOLVED, ALEC finds that any antitrust action against any online platform or service must not be initiated based on its viewpoint or the procedures it uses to moderate or display content. Any antitrust suit should be based solely on a bona fide violation of antitrust laws, which require proof of economic injury to consumers through a reduction in competition.

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.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that online platforms and services do not lose Section 230 protections solely by engaging in moderation of content created by other individuals, and, indeed, Section 230 was intended to encourage such moderation by limiting second-guessing of such decisions.

THEREFORE LET IT BE FURTHER RESOLVED, ALEC opposes any amendment of Section 230 of the Communications Decency Act that would reduce protections for the rights to freely speak, publish or curate content online, as the law already enables prosecution of online platforms and services for violations of federal criminal law or intellectual property law.