NetChoice Promoting Convenience, Choice, and Commerce on The Net

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NetChoice
Convenience
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Rep. Michele Hoitenga, Chair
House Communications and Technology
Michigan Legislature

September 16, 2019

RE: Opposition to HB 4801 – A Bill to amend 1976 PA 331

Dear Chair Hoitenga and members of the committee:

We write to oppose HB 4801 as the bill:

- is unconstitutional,
- follows in the failed footsteps of the Fairness Doctrine,
- injects government into the operation of private businesses, violating notions of free enterprise, and
- is unnecessary as the Michigan AG already has the power to take action against unfair or deceptive acts.

We further elaborate our concerns below.

HB 4801 violates the First Amendment of the US Constitution

The First Amendment of the US Constitution created a right to speak, not a right to be heard.[1] This means that while a platform may choose to allow a multitude of voices on it, the government cannot compel the platform to allow *all* voices on it. This is the fundamental tenet of the First Amendment.

Proponents of HB 4801 may say that the bill doesn't restrict speech. Despite HB 4801's efforts to cloak itself as a consumer protection bill, it is really a speech restriction.

One need only look at HB 4801's use of the term, "neutrality" to see that HB 4801 infringes on free speech. The term "neutrality" is not only vague but can change based on the mind of the speaker or audience. It is an impermissibly subjective standard that will chill free speech.[2] The US Supreme Court has clearly stated that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning."[3]

Consider the phrase, "our site is for civil and public discourse." This phrase could suggest neutrality. However, removal of hate speech could be interpreted by one judge to violate neutrality and interpreted by another judge to be in-line with the statement.

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[1] *CBS v. DNC*, 412 U.S. 94, 122-23 (1973) (finding that there is no individual right to access to the airwaves).
[2] *Connally v. General Construction Co.* 269 U.S. 385 (1926).
[3] *Id.*

In essence, terms like, HB 4801's "neutrality" are simply too subjective, and place constitutionally protected freedoms at the whim of unelected officials with absolutely no guidance or limiting principles save their own judgment.

Moreover, HB 4801 fails the "strict scrutiny test"[4] when deciding if a law should survive a First Amendment challenge. Under this test,

- a law must fulfill a compelling governmental interest,
- be narrowly tailored to achieve that interest, and
- be the least restrictive approach.

On all three requirements, HB 4801 fails.

While ensuring there is a wide array of opinions on online platforms is important, this is by no means a compelling governmental interest. Ensuring that every viewpoint from terrorist speech, to hate speech, to lude content exist on all platforms is not a compelling governmental interest.

This is just one example of the constitutional infirmities of HB 4801. Likewise, the law is not narrowly tailored (e.g. ambiguous terms like "neutrality") nor is this the least restrictive approach.

HB 4801 follows in the footsteps of the infamous Fairness Doctrine

The closest the government came to regulations like HB 4801 was the requirement that over-the-air television and radio host "equal time" for political speech. Of course, this limitation could only apply to television and radio spectrum as it is a finite resource.[5] The US Supreme court made clear that such a requirement would not apply to other mediums,[6] and certainly not the internet.

This prior restriction of speech was the infamous "Fairness Doctrine." This injection of government control over platforms suppressed conservative and liberal voices. In fact, the removal of the Fairness Doctrine has been credited for the rise of conservative voices like Fox News and Rush Limbaugh as well as liberal ones like MSNBC and Rachel Maddow.[7]

"This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment ... such federal policing of the editorial judgment of journalists would be unthinkable."
– President Ronald Reagan

The Fairness Doctrine also led to *less* political speech overall on broadcast television and radio.[8]

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[4] *United States v. Carolene Products Co.* (1938).
[5] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) ("A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others.... It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.")
[6] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) ("Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate."
[7] Kruse and Zelizer, *How policy decisions spawned today's hyperpolarized media*, Wash. Post. (Jan. 17, 2019).
[8] Thomas Hazlett, *Making the Fairness Doctrine Great Again*, Reason Magazine (Mar. 2018).

President Ronald Reagan's administration expunged the infamous Fairness Doctrine that mandated equal time for political speech. The Republican-controlled Federal Communications Commission unanimously said, "The intrusion by government into the content of programming occasioned by the enforcement of [the Fairness Doctrine] restricts the journalistic freedom of broadcasters ... [and] actually inhibits the presentation of controversial issues of public importance to the detriment of the public and the degradation of the editorial prerogative of broadcast journalists."[9]

And President Reagan described the Fairness Doctrine as, "This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment ... such federal policing of the editorial judgment of journalists would be unthinkable."[10]

HB 4801 would follow in the failed history of the Fairness Doctrine.

HB 4801 injects government into the operation of private businesses, violating notions of free enterprise

Simply, HB 4801 will inject more governmental control over how private businesses make their platforms appropriate for what their users and customers want. Users may not want to see depictions or discussions of graphic content. And businesses may not want their ads associated with controversial content and will pull advertising if platforms display it.[11] As a result, private online businesses may remove such content from their platforms.

However, HB 4801 has the government putting American business in the position of choosing what is best for their users or face litigation from the state or private interests.

It's hard to see how HB 4801 is anything but turning to government to shape the decisions of private businesses. As President Reagan said, "Government is not the solution to our problem, government is the problem."[12] For those following in values of free enterprise, HB 4801 is the wrong course of action.

Existing laws already address the concerns of HB 4801

Today, Michigan's Attorney General can address misrepresentations by all businesses, including online platforms.

Section 5 of the Federal Trade Commission ("FTC") Act, prohibits "unfair or deceptive trade practices."[13] This broad enforcement power enables the FTC to take action against online platforms that fail to honor their terms-of-service or privacy promises.

Moreover, Section 5 of the FTC Act is enforceable by the FTC and by every state Attorney General under the "little Section 5" authority – including Michigan's.

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[9] *In re Complaint of Syracuse Peach Council against Television Station WTVH Syracuse*, New York, 2 FCC Rcd 5043 (1987).
[10] Penny Pagano, *Reagan's Veto Kills Fairness Doctrine Bill*, LA Times (June 21, 1987).
[11] Carl Szabo, *Tech Giants Should Have The Freedom To Kick Conservatives Off Their Platforms*, Daily Caller (Apr. 23, 2019).
[12] Pres. Ronald Reagan, Inaugural Address, (Jan. 20, 1981).
[13] Federal Trade Commission Act, 15 USC §45 ("FTC Act"), "The Commission is hereby empowered and directed to prevent [use of] unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

This means that AG Nessel can bring an action against a platform for a misrepresentation under the FTC Act. This empowers Michigan to protect its citizens without raising the problems of HB 4801.

Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

The views of NetChoice do not necessarily represent the views of each of its members.