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MICHIGAN HOUSE OF REPRESENTATIVES
JOHN REILLY
STATE REPRESENTATIVE

COMMITTEES:
OVERSIGHT, VICE CHAIR
COMMERCE AND TOURISM
EDUCATION
NATURAL RESOURCES AND
OUTDOOR RECREATION

September 24, 2018

Dear Members of the House Communications and Technology Committee,

I write to respond to the written and verbal testimony made in committee last week by Carl Szabo, Vice President and General Counsel for "NetChoice."

Mr. Szabo's testimony is a ramshackle affair that misstates law, misstates the contents of House Bill 4801, and uses irrelevant comparisons and emotional appeals in a transparent attempt to manipulate the reader. This document will debunk each of his claims.

While Google and Facebook didn't deign to testify at the hearing, NetChoice, apparently a free market advocacy group, is actually a trade association whose largest members are Google, Facebook, and Yahoo. I will therefore reference the testimony as the GFY testimony. For your convenience, the GFY testimony is attached with errors noted in red.

Claim: House Bill 4801 violates the First Amendment of the US Constitution

The GFY statement begins with the irrelevant statement that the First Amendment created a right to speak, not to be heard, and argues that the government cannot compel a platform to allow all voices on it.

House Bill 4801 does not compel a platform to allow all voices on it, or any voice. House Bill 4801 does not compel a platform to allow any user be heard by any other user. House Bill 4801 only prohibits a network from making a material misrepresentation to its users about how their content is promoted or suppressed.

The GFY statement claims that HB4801 makes "efforts to cloak itself as a consumer protection bill." This is false. The effect of the bill is plainly read from its text: it would prohibit a particular act of deception in commerce and clearly is a genuine consumer protection. On the contrary, it is the GFY statement that attempts to make the bill out to be something it is not.

Sub-claim: [Viewpoint] neutrality is too vague

The GFY statement continues to argue that "one need only look at HB4801's use of the term 'neutrality'" which is "vague" and "impermissibly subjective," citing *Connally v. General Construction Co.*

This is both a misstatement of the bill and a misapplication of case law.

Crucially, GFY omits that HB 4801 applies when a social network represents itself as *viewpoint* neutral – not just "neutral", but "viewpoint neutral." This is not a vague term; it is a specific legal term for a type of speech discrimination heavily disfavored by courts.[1] By deliberately omitting the "viewpoint" qualifier, GFY attempts to bamboozle the reader by arguing against a bill of its own invention. HB 4801 deliberately used the term "viewpoint neutral" precisely because "viewpoint neutral" is a specific legal definition. GFY mangles the text of the bill in order to evade this fact.

The *Connally* citation is therefore inapplicable. In *Connally*, a criminal statute was overturned requiring that certain state employees receive "not less than the current rate of per diem wages in the locality where the work is performed" – a rate which constantly varies and leaves the delineation of what is lawful and unlawful ever-changing and subject to conjecture. HB 4801, in contrast, provides for a civil complaint in which a social network takes the specific action of holding itself out as viewpoint neutral and then the specific action of discriminating against users based on their expressed viewpoints.

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1 See for example *Viewpoint Discrimination*, First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/1028/viewpoint-discrimination

The GFY testimony continues the charade with an example: if a website says "our site is for civil and public discourse," this "could suggest" neutrality, speculating that one judge might hold it to that standard and another judge would not.

This is not how case law works, and legislators should be insulted that the GFY statement would assume lawmakers are ignorant as to how courts establish standards.

The GFY Statement goes on to further insult legislators by 1) once again using "neutrality" broken away from the "viewpoint-" antecedent to mislead the readers away from the First Amendment concept of viewpoint neutrality; 2) describing court decisions as "the whim of unelected officials";[2] 3) saying there is "absolutely no guidance or limiting principles," apparently assuming lawmakers are completely ignorant of case law.

Sub-claim: Prohibiting fraud would fail a strict scrutiny test

GFY assumes that a strict scrutiny test could even be applied to HB4801. This is dubious. A social network would first have to overcome the argument that fraud is not protected speech. The strict scrutiny test applies to *protected* speech, and fraud is not protected speech.

However, even if this fact is disregarded, HB4801 could still pass such a test:

"A law must fulfill a compelling governmental interest": preventing consumer fraud is a compelling governmental interest. GFY avoids this obvious argument and instead argues that "ensuring a wide array of opinions on online platforms" and "ensuring that every viewpoint from terrorist speech, to hate speech, to lude [*sic*] content" is the intention of the bill. This is supported by neither the text of the bill nor my testimony.

"A law must be narrowly tailored to achieve that interest": HB4801 outlaws a specific acts of fraud. GFY does not even address this part of the test.

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2 Besides the obvious error that judges are typically elected, this statement truly showcases the contempt the author has for lawmakers. "The whim of unelected officials" is right-wing boilerplate inteded to trigger a knee-jerk emotional reaction, as if every conservative hates every judge.

"A law must be the least restrictive approach": As opposed to dictating any particular content policy for social networks, HB4801 merely prohibits them from committing a specific fraud. GFY does not even address this part of the test.

GFY closes this topic by saying "this is just one example of the constitutional infirmities of HB 4801" but then provides no others.

Claim: HB 4801 follows in the footsteps of the infamous Fairness Doctrine

This is a buffoonish effort to smear by association. HB4801 bears no resemblance whatsoever to the Fairness Doctrine.

The Fairness Doctrine mandated "equal time" for opposing viewpoints on individual networks. HB4801 does no such thing, and no further comment should even be necessary, other than to point out the desperate attempt to manipulate Republicans on the committee by quoting President Reagan.

Claim: HB 4801 injects government into the operations of private business, violating notions of free enterprise

Government is "injected" into private business when it imposes licensure, mandates, inspections, certification, and so on. HB 4801 does none of these things. Providing a cause of legal action for a party wronged by another party is not "injecting" government anywhere – it's providing a rememdy for a prior wrong. Indeed, as GFY goes on to argue in the next and final section, the government already has authority to litigate and prosecute fraud. HB 4801 merely enumerates a particular cause of action.

GFY begins by once again making the straw-man argument that social networks would be restricted from what they can allow or forbid on their websites, and once again, this is false. Every website is free to establish a content policy. HB4801 merely requires that they honor their own stated policy of viewpoint neutrality.

GFY then, once again, invokes Reagan in a transparent attempt to manipulate "those following in the values of free enterprise."

Claim: Existing laws already address the concerns of HB 4801

GFY argues that the Attorney General of Michigan can already bring a claim against a platform making false statements, so therefore no more law is necessary.

That's nice, but users harmed by these companies should not need to rely on our busy Attorney General to bring a cause of action when they should be able to do so themselves.

Even for the Attorney General, it is helpful to enumerate this particular type of fraud should it go to litigation.

Conclusion

Despite have billions of dollars in market capitalization and armies of lawyers, major social networks didn't bother to show up to the September 18th hearing and discuss their concerns forthrightly. Instead they sent a representative of a front group to pander to and mislead committee members with conservative adages and grandiose pronouncements about constitutional law, all of which prove inapplicable on even a first-glance review.

How embarrassing for them.

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Net
- Convenience
- Choice
- Commerce

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, - wrong
- follows in the failed footsteps of the Fairness Doctrine, - mentless smear
- injects government into the operation of private businesses, violating notions of free enterprise, and - totally false
- is unnecessary as the Michigan AG already has the power to take action against unfair or deceptive acts. - not necessarily

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. } irrelevant

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. unsupported

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] - totally distinguishable case

No only term is "viewpoint neutral"

No viewpoint neutrality is a specific legal term.

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. No.

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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] *Connolly v. General Construction Co.* 269 U.S. 385 (1926).
[3] *Id.*

* No legal argument is this simplistic

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 hyperpolorized 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]

Total smear. 4801 is nothing like Fairness Doctrine.

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.

this has nothing to do with 4801.

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.

pub-lezz

also, no

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.

against fraud

pandering

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).

Ah heh

[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."

quoting himself

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.

Citizens should be "empowered" to protect themselves.

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.