SHAE SORTWELL

STATE REPRESENTATIVE • 2nd ASSEMBLY DISTRICT

Hearing Testimony
Assembly Committee on Judiciary
October 6, 2021
Assembly Bill 591

Thank you Chairman Tusler and members of the Assembly Committee on Judiciary for taking the time to hear testimony on Assembly Bill 591 – relating to creating a civil cause of action against the owner or operator of a social media Internet site that restricts religious or political speech.

Over the past couple of decades, the town square has moved beyond the corners of Main Street to the pages of Twitter, Facebook, and other media giants and parts of the internet occupying the role of the new public forum. However, Americans are increasingly finding that their speech is being blocked through the very public forums they most often use to communicate with their friends, families, and virtual neighbors in ways that do not clearly provide for a remedy against those actors.

Unfortunately, Big Tech has long been violating people's free speech rights through deleting, censoring, and shadow-banning because they disagree with what is posted or who is posting it. Political and religious speech are central to both the practice of one's moral convictions, as well as an individual's ability to dissent against the state. If people are unable to have the freedom to speak their opinion, regardless of whether it is popular or not or even rational or not, then we are no longer the Land of the Free. Remember, the 1st Amendment is not necessary to protect popular speech. The 1st Amendment was written to protect the minority opinion, the speech of the dissent, the beliefs that aren't popular.

This legislation provides a civil cause of action for any Wisconsin resident against a social media company who censors, shadowbans, or otherwise alters that user's speech on social media sites. This bill allows a local DA, our Attorney General, or a resident to file suit against corporations who violate of these prohibitions.

Let's join the fight to protect the First Amendment rights of Wisconsinites and all Americans.

I appreciate the committee's time and will answer any questions you may have.

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Rep.Sortwell@legis.wi.gov

27th of September, 2021

Michael Pierce
Superior, Wisconsin

RE SB583 & AB591:

The government's role is to protect its people.

Through censorship, Big Tech has shown their tremendous power to control the narrative in America.

This is not right.

All people in Wisconsin ought to be able to freely read and write without Big Tech's algorithmic distortion, shadow banning or favoritism.

Therefore, I support Wisconsin bills SB583 and AB591 which both aim to put the people of Wisconsin before Big Tech.

You may retort: "Well, they're private companies, they can do whatever they want."

To an extent, yes. But is it okay for Corporations to poison your family's water? Your own drinking water? This recently happened in Eau Claire, where this July they shut down their municipal wells due to the presence of 3M's toxic forever chemicals. Still think corporations should do whatever they want?

Is it okay for Big Tech to algorithmically poison your family's mind?

Additionally, don't forget, the government permits Corporations to operate. Legal entities such as Limited Liability Companies and C-Corporations exist only because the government allows them to.

Furthermore, Big Tech's protocols, pipelines, and infrastructure exist mostly thanks to the US taxpayer. The people funded DARPA, which created the first internet, ARPANET in the late 1960s.

So, as you can clearly see, it's completely within the rights of the people to ensure the Corporations - they allow to exist - are not acting against their best interests.

And its the role of their government to be the tip of the spear with enforcement. Vote "Yea" to pass Wisconsin bills SB583 and AB591.

All the best,
Michael Pierce

Charles Hagen
SV Star Catcher
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I want to imagine what it must be like for you live in a country where you get penalized for your opinion or yours exercise of free speech. The penalties are exacted by an authority that is beyond your control and does not have your best interests as a citizen as a priority. Instead This Authority seeks to gain money and power and wishes as well to force their ideological agenda on the people the rule over.

What I have just described to you is present-day Cuba.

What I have also just described to you is the current situation in the United States with tech Giants acting as publishers, impugning and restricting free speech on a platform originally founded by taxpayer dollars.

Why, today in America, do I need to go online with a fake identity? Why? Because Facebook has targeted me, eliminating two of my accounts with my name associated. In addition they have tried to coerce confidential and private information from me that they have no right to access. I'm not paying Facebook directly, for this access, I pay indirectly by watching the ads they post so it's not like they are a charity.

Facebook, as well as the pedophile Sanctuary, Twitter, are crushing individual rights of expression.

Social media has become de facto the new town hall. I'm a disabled veteran, I find it difficult to even go to County Supervisor meetings or City Council meetings. My Town Hall, access to my Representatives, access to the people in my local area, all of that happens online via social media platforms. These social media platform has resided on something called the Internet which was founded with US taxpayer dollars.

I'm an administrator on a group that caters mostly to Wisconsin residents but anytime one of these residents post something about covid we get a group deletion warning from Facebook. Most of these posts are factual data. Some posts are not. But Facebook he's trying to manipulate the flow of information for an agenda that is not favorable to American citizens.

Twitter has become a pedophile sanctuary. An underage boy was coerced into posting indecent photographs of himself. The parents tried to get Twitter to remove this pedophile user and to get their son's photographs removed from Twitter. Jack Dorsey's platform said that these indecent photographs of a minor didn't violate Twitter's "Community Standards" policy. It took the Department of Justice to finally coerce Twitter into removing these law violating posts.

Why would there be a difference between posts being censored or removed on Facebook and what happened on Twitter? What happened on Twitter, the posting of indecent photographs of a minor, was a law violation. Child pornography is against the law in America, at least for now. Twitter is a sanctuary for child pornography. But if you're a conservative and post factual data you can get kicked off Twitter.

There are laws that protect citizens from people who threaten others or posts that violate pornography laws. Removal of law violating posts should be allowed.

However, removing posts because you don't agree with the opinion or you think the fact is in error violates 1st Amendment rights in the new town hall of social media. That makes companies like Facebook and Twitter and Google Publishers, because they coerce and edit content.

I have been kicked off Facebook before twice. I have been shadow-banned and still am. I no longer have our corporation on Twitter or Facebook and I avoid Google anyway I can. Yet my rights are still infringed

When I was in the military I knew my duty and my oath to the Constitution and took them seriously. It cost me dearly but the price was worth it

I knew whose side I was on. I was on the side of our Constitution and freedom.

This vote affects every American. The real question I have is whose side are you on? Are you on the side of personal power and partisan politics or are you on the side of the Constitution and American voters?

NetChoice *Promoting free speech & free enterprise on the internet*

Carl Szabo, Vice President and General Counsel
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October 5, 2021

Chairman Ron Tusler
Assembly Judiciary Committee
Wisconsin State Senate

RE: **Opposing AB 591-** Relating to: creating a civil cause of action against the owner or operator of a social media Internet site that restricts religious or political speech.

Chairman Tusler and members of the committee:

We respectfully ask that you **not** pass AB 591, primarily because it would be enjoined by federal courts for violating the First Amendment of the US Constitution. But if AB 591 were to somehow be enforceable, it would produce consequences its sponsors and conservatives would abhor:

- Expose social media platforms to lawsuits for removing harmful content.
- Make it more difficult for social media platforms to block SPAM messages.
- Violate conservative principles of limited government and free markets.

Below we explain why AB 591 would be set aside for violating the First Amendment. Then, we describe the unintended but likely consequences if the law were to survive constitutional challenges.

AB 591 violates the First Amendment of the US Constitution

The First Amendment states plainly that government may not regulate the speech of individuals or businesses.[1] This precludes government action that compels speech by forcing a private social media platform to carry content that is against its policies or preferences.

Imagine if the government required a church to allow user-created comments or third-party advertisements promoting abortion on its social media page. Such a must-carry mandate would violate the First Amendment, and so would AB 591, since it would similarly force social media platforms to host content they otherwise would not allow.

Other than in limited exceptions, a law mandating private actors host content are subject to a "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest and
- narrowly tailored to achieve that interest.[2]

[1] *See, Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Pacific Gas & Elec. v. PUC*, 475 U.S 1, 15-16 (1986).
[2] *Id.*

On this test, AB 591 is unconstitutional and will fail when challenged in court.

Thankfully, we do not have to wonder about the constitutionality of AB 591, as a US District Court in Florida recently issued a preliminary injunction against a remarkably similar bill, specifically highlighting the First Amendment infirmities of its content moderation provisions.

To begin, the court made it clear that the First Amendment's restrictions on censorship only apply to the government, not private actors including social media platforms.

> "[T]he First Amendment does not restrict the rights of private entities not performing traditional, exclusive public functions" and that "whatever else may be said of the providers' actions, they do not violate the First Amendment."
>
> "[T]he State has asserted it is on the side of the First Amendment; the plaintiffs are not. It is perhaps a nice sound bite. But the assertion is wholly at odds with accepted constitutional principles."[3]

The court went on to find that the First Amendment does, however, fully protect the rights of social media platforms to exercise their editorial judgement in making content moderation decisions.

> "[T]he First Amendment applies to speech over the internet, just as it applies to more traditional forms of communication. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997)."

The court specifically held that social media platforms' editorial decisions are protected by the First Amendment, going out of its way to note that the decisions in *FAIR*[4] and *Pruneyard*[5] are not applicable, and that Florida's restrictions clearly cannot survive either strict or intermediate scrutiny under the First Amendment.

AB 591 will face similar scrutiny because it also intrudes on social media's editorial discretion. AB 591 provides that social media platforms may not "Delete[] or censor[] the user's religious speech or political speech on the social media Internet site." For the same reasons, the court will likely find that AB 591's restrictions on content moderation will not survive under either strict or intermediate scrutiny.

These First Amendment conflicts cannot be avoided by declaring that social media platforms are "**common carriers.**" The social media companies have always limited whom they do business with and which content they will host. In fact, content moderation is a core component of the business model for Facebook, YouTube, and Twitter. Judge Hinkle declined to accept the state's argument that social media platforms are common carriers without First Amendment protections from government action.

Hosting private speech does <u>not</u> make a platform a state actor subject to the First Amendment's restraints on government censorship, as noted by the US Supreme Court:

> "[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."

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[3] *NetChoice & CCIA v Moody*, Case No. 4:21-cv-00220 (N.D.F.L. June 30, 2021).
[4] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 US 47 (2006).
[5] *PruneYard Shopping Center v. Robins*, 447 US 74 (1980).

As for the argument that our First Amendment can be discarded because social media platforms are "**public forums**", the 9th Circuit affirmed last year that is not the case:[6]

> "Despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment."

The court emphasized:

> "*Expanding the state-action doctrine beyond its traditional boundaries would expand* governmental control while restricting individual liberty and private enterprise."

Wisconsin should take Florida's Preliminary Injunction decision as a warning: federal courts will not allow states to trample over the First Amendment—just to punish a few disfavored businesses.

Ironically, by enacting AB 591, Wisconsin could end up establishing legal precedent in the Seventh Circuit favorable to social media platforms, further emboldening their content moderation practices.

AB 591 would penalize social media platforms for removing harmful content

Even if AB 591 were to survive the constitutional challenges described above, consider some of the unintended consequences of penalizing social media platforms for removing harmful content.

The First Amendment protects a lot of content that we don't want our families to see on every-day websites. That includes explicit material like pornography, extremist recruitment, medical misinformation, foreign propaganda, and even bullying and other forms of verbal abuse.

Audiences and advertisers also don't want to see this content on our social media pages. Today, online platforms make efforts to remove harmful content from their sites. In just six months during 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts.[7] 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 extremism and child safety is impeded by AB 591. This is because it penalizes a platform that decides to remove content because of "user's religious speech or political speech on the social media Internet site." 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 "religious speech or political speech" of the user.

This means a social media platform could be violating AB 591 if it removed these types of user content:

- ISIS propaganda – since that denies political speech of those who hate America
- SPAM messages – so long as it includes a mention of politics since that denies the political speech of the spammer
- Atheist or abortion advocacy posted to a church's Facebook or YouTube page

But AB 591 would make it extremely risky for social media platforms to remove or restrict sharing of objectionable content that they moderate today. The threat of lawsuits authorized under this legislation would likely cause large platforms to stop deleting extremist speech, foreign propaganda,

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[6] *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).

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

conspiracy theories, and other forms of harmful content, making the internet a much more objectionable place to be.

For example, AB 591:

- Authorizes spreaders of medical misinformation to sue social media platforms for censoring their "political speech."
- Allows people who post anti-Semitic content to sue social media platforms to have that content restored.
- Prevents YouTube from restricting user-posted videos with violent, hateful, or racist content that is inappropriate for children -- even in homes where parents activate *Restricted Mode* specifically to protect their children.
- Enables *Al Jazeera* and *RussiaToday* to sue social media platforms for restricting posts celebrating terrorist acts or spreading foreign propaganda.

Not only would AB 591 incentivize social media platforms to engage in less moderation of harmful content by increasing the threat of lawsuits, but it would also force them to rehost this content if the challenger is ultimately successful in court, regardless of how harmful or offensive the content may be.

AB 591 would make it legally risky for social media services to block SPAM messages

Today, social media platforms engage in robust content blocking of SPAM messages. But this blocking of not only unwanted but invasive content would be greatly impeded by AB 591, since blocking could be challenged by lawsuits authorized under the bill.[8]

AB 591 would enable bad actors to circumvent protections and contradict Congress's intent to "remove disincentives for the development and utilization of blocking and filtering technologies."[9]

AB 591 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed an earlier incarnation of this bill, the infamous "Fairness Doctrine," which required equal treatment of political views by broadcasters, saying:[10]

> *"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."*

We face similarly unthinkable restrictions in AB 591, which punishes platforms for moderating their services in ways that they see fit for their customer base and advertisers.

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

[9] *Id.* at 1105 (citing 47 U.S.C. § 230(b)(4)).

[10] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), http://www.presidency.ucsb.edu/ws/?pid=34456 .

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 across multiple social media platforms, including Facebook, Twitter, YouTube, Gab, Parler, Rumble, MeWe, and a new social media service announced by former president Trump.

We've seen the rise of conservative voices without having to beg for an op-ed in the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

Nonetheless, some want government to regulate social networks' efforts to remove objectionable content. This returns us to the "fairness doctrine" and creates a new burden on conservative speech.

AB 591 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting 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; …
>
> 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.

NetChoice supports limited government, free markets, and adherence to the United States Constitution, so we respectfully ask that you not support AB 591.

Sincerely,

Carl Szabo
Vice President & General Counsel, NetChoice

October 6, 2021

The Honorable Ron Tusler, Chairman
House Committee on Judiciary
Room 22 West
State Capitol
PO Box 8953
Madison, WI 53708

RE: AB 591 - Internet Association Opposes

Dear Chairman Tusler and Members of the House Committee on Judiciary:

Internet Association (IA) appreciates the opportunity to explain our opposition to AB 591 regarding online content moderation.

IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. Our mission is to foster innovation, promote economic growth, and empower people through the free and open internet. We believe the internet creates unprecedented benefits for society and the economy and, as the voice of the world's leading internet companies, IA works to ensure legislators, consumers, and other stakeholders understand these benefits.

IA explains, below, how Section 230's protections benefit consumers, but first it is important to note that your bill raises important constitutional concerns. As you know, Wisconsin's Constitution protects freedom of speech. It is well established that the companies covered by this bill have First Amendment rights in their content moderation decisions. Justice Kavanaugh wrote for the Supreme Court that such rights are an inherent part of their property rights. Thus, we believe that AB 591 is unlikely to survive scrutiny in the courts, but there are also important policy reasons why it should not move forward.

In 1996 the US Congress passed Section 230 of the Communications Decency Act (Section 230) with bipartisan support. The purpose was to ensure that online service providers could allow individuals to post content to their platforms and that the platform could moderate that content without being legally viewed as the "publisher." Without Section 230, the law could treat a provider who turns a blind eye to harmful content more favorably than a platform that takes action to try to protect consumers. *Congress made clear its intent that Section 230 should empower providers to engage in content moderation.*

The plain language of Section 230, and decades of case law, have allowed online platforms to make their services safe for users and delete harmful, dangerous, and illegal content. Internet companies work hard to do this consistently through the use of machine learning and human review, and these efforts will continue to improve as the technology does.

In order to realize the full benefits of online services, it is critical that service providers are able to set and enforce robust rules designed to protect the quality and integrity of their services. Today, providers regularly take action against spam, malware and viruses, child sexual abuse material, scams, threats and harassment, impersonation, non-consensusal intimate images, and other content that, regardless of whether illegal or legal, is harmful to the users of their services and the public at large. AB 591 would put the safety measures providers take on a daily basis at risk

by seeking to limit the scope of enforcement that can be undertaken without the threat of litigation. Consumers will not benefit from this.

Decisions regarding the removal of objectionable content are sometimes easy and uncontroversial, but other times these decisions are not black and white, they are tough calls, different shades of gray, where reasonable individuals can disagree with the results. Regardless, these decisions are made constantly and as consistently as possible as 100s of millions of pieces of new content are shared every single day across social media platforms. The companies aren't perfect, but they are doing their best to be a place where ideas can flourish while also enforcing these basic community standards.

AB 591, however, would put online companies in the position of defending these content moderation decisions in the court of law. Regardless of whether a platform was acting appropriately under the bill, individual users would still be empowered to sue and take the company to court to challenge content decisions. This would be an untenable situation, leading either to a more curated internet (where less diverse voices can be heard), or to an unbridled internet where harmful content overwhelms the healthy discourse and exchange of ideas that we all desire.

For those reasons, IA requests the House Committee on Judiciary not move AB 591 forward. If you have any questions please reach out to me at colleen@internetassociation.org or 773-425-8515.

Thank you for your consideration.

Sincerely,

Colleen Daley

Colleen Daley
Director, Midwest Region, State Government Affairs

TECHNET
THE VOICE OF THE
INNOVATION ECONOMY

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October 6, 2021

The Honorable Ron Tusler, Chair
Committee on Judiciary
Wisconsin State Capitol
Room 22 West
PO Box 8953
Madison, WI 53708

RE: Opposition to AB 591

Dear Chairman Tusler:

I write on behalf of TechNet respectfully **in opposition to AB 591,** which will subject Wisconsin residents to more abhorrent and illegal content on the internet by creating frivolous liability risks for social media companies that remove objectionable content from their platforms.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents more than three and a half million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

Our members are committed to keeping their users safe online, which is why social media companies review millions of pieces of content every day in order to remove harmful content that conflicts with their policies. Wisconsin should encourage these companies to have content policies, as they govern the removal of content showing the exploitation of children, child sexual abuse materials, bullying, harassment, gore, pornography, and spam. Instead, AB 591 perversely creates an incentive for companies to not prohibit and remove any objectionable content in order to avoid the frivolous lawsuits that this bill would create. The result would be the rapid spread of abhorrent and illegal content that will cause real-world harm in Wisconsin communities and beyond.

Social media companies understand that they have an obligation to remove objectionable content, otherwise their users will be subjected to dangers like images of child endangerment, financial scams, spam, and other nefarious links.

Companies take this responsibility seriously, removing harmful content in an unbiased manner while keeping their services open to a broad range of ideas. In the overwhelming number of cases, removal of offensive content is accomplished as intended. However, the sheer volume of content – hundreds of millions of posts per day – ensures that both artificial intelligence and human reviewers at companies cannot get it right 100 percent of the time. Billions of transactions, after all, will inevitably lead to errors. It would be fundamentally unfair to implement such a draconian penalty for instances where code misfired or a simple mistake was made. As written, the scope of this bill would affect many other businesses as well such as news sites, platforms for hosting reviews and comments, business to business services, and education and learning platforms.

Additionally, the bill runs counter to the American free speech law governing content liability on the internet, Section 230 of the federal Communications Decency Act. Since its enactment in 1996, Section 230's two key provisions have empowered online intermediaries to remove harmful content while providing them with the same "conduit immunity" that commonly exists in other real world offline contexts – for example, not holding a bookseller liable for libelous books, but rather the individual who committed the libel.

Due to Section 230, American companies have the right to curate information on their service to meet the needs and expectations of their customers. Section 230 has supported innovation across the internet while also encouraging companies to be "Good Samaritans" by allowing them to "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, whether or not such material is constitutionally protected."

For these reasons, TechNet opposes AB 591. We thank you in advance for your consideration, and please do not hesitate to reach out with any questions.

Sincerely,

Tyler Diers
Executive Director, Midwest
TechNet

Cc: Members of the Committee on Judiciary
Representative Wichgers