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Florida House of Representatives

**Written comment for the record with respect to regulation of social media moderation as contemplated by Florida HB 7013.**

I write today on behalf of the National Taxpayers Union Foundation — a nonpartisan research and educational organization that shows Americans how taxes, government spending, and regulations affect them — in order to share our views on the legal climate governing social media content moderation.

As an organization engaged in public policy work from the center-right, we acknowledge and often share the concerns about how these private platforms' moderation choices affect public dialogue. However, we believe that onerous content moderation restrictions raise several policy and constitutional concerns. As you consider HB 7013, we write to share several points for your consideration.

**1. Imposing legal restrictions on how and when a private platform may display or remove third-party generated content violates their right to freedom of speech and association under the First Amendment.**

Courts have repeatedly upheld private companies' right to free association in moderating speech on their own publications or platforms against a variety of challenges.<sup>1</sup>

As the late Supreme Court Justice Antonin Scalia wrote in *Brown v. Entertainment Merchants Assn.*, “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary’ when a new and different medium for communication appears.”<sup>2</sup>

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<sup>1</sup> Congressional Research Service, “Free Speech and the Regulation of Social Media Content,” March 27, 2019. <https://fas.org/sgp/crs/misc/R45650.pdf> This report contains a litany of examples of the Supreme Court and lower courts striking down attempts to regulate speech and the editorial practices of private entities.

<sup>2</sup> *Brown, et al. v. Entertainment Merchants Assn. et al.*, 564 U.S. 786 (2011). Scalia is quoting from *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 503 (1952)

In contrast to those who object that somehow these large private forums are obliged to uphold a First Amendment standard of content moderation, courts have repeatedly confirmed that the First Amendment applies only to government restrictions on speech. Most recently, Justice Kavanaugh confirmed in 2019 that “By contrast, when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum. ... In short, merely 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.”<sup>3</sup>

Crucially, these constitutional protections regarding freedom of association on a private platform are not contingent upon their editorial decisions being neutral. This not only applies to what content is left up or deleted, but also to decisions about how content enters users’ feeds, such as post prioritization algorithms. Thus, forcing platforms to allow users to opt-out of their post prioritization algorithms could be held as compelled speech, and likely unconstitutional.

To quote Berin Szoka and Corbin Barthold of TechFreedom, “The government cannot force a speaker to explain how it decides what to say. The government can no more compel Twitter to explain or justify its decision-making about which content to carry than it could compel Fox News to explain why it books some guests and not others. These are forms of noncommercial speech that turn not on facts, but on opinions.”<sup>4</sup>

Both Sections 1 and 3 of HB 7013 are likely to be struck down under these clearly-established First Amendment prohibitions against compelled speech.

## **2. Enforcing neutrality of content moderation will result in users being more exposed to harmful content.**

Crucially, *less moderation is not necessarily good*. Social media platforms routinely take down all manner of speech that is perfectly legal but nonetheless objectionable to the vast majority of users, from the violent to the obscene.

The freedom of these platforms to quickly pull down genuinely offensive content is part of what makes them pleasant for most to use. On such massive platforms as Facebook or Twitter, for example, the initial step of content moderation must be done automatically, via algorithms, to be practically achievable. The parameters for what speech these algorithms take down are necessarily subjective and prone to error, but the trade-off is that a majority of the internet’s most unpleasant content never reaches a user’s feed.

Similarly, allowing users to flag subjectively harmful content such as bullying, extremist group recruitment, and spam content is an important part of maintaining a workable online community. Yet these moderating decisions, too, are necessarily context-dependent, subjective, and impossible to keep truly neutral. As much as private companies restricting political speech is a real concern, lawmakers should

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<sup>3</sup> *Manhattan Community Access Corp. v. Halleck*, 587 U.S. \_\_\_\_ (2019)

<sup>4</sup> Corbin Barthold and Berin Szoka, “No, Florida Can’t Regulate Online Speech,” *Lawfare Blog*, Mar. 12, 2021 <https://www.lawfareblog.com/no-florida-cant-regulate-online-speech>

understand that moderation serves an important purpose in filtering graphic violence, pornography, terrorist recruitment, and other kinds of content that could flourish absent effective tools to shield most users from them.

Section 3 of HB 7013, in particular, threatens to make some of this sort of helpful moderation difficult or painful companies by placing the burden of proof on the company to prove the neutrality of its moderating practices or else face a private right of action backed by potentially “Up to \$100,000 in statutory damages per proven claim,” and additional damages besides.

Although the bill exempts content taken down for obscenity, as defined by Florida state law, this would only allow the expedient removal of pornography and sexually explicit content and speech, which as discussed above is far from the limit on content that a reasonable user of these platforms might gladly agree that a platform ought to keep away from their feed.

### **3. A state-by-state approach to internet content regulation is fundamentally unworkable.**

State attempts to regulate social media, similarly to other state-by-state regulation of internet activity, threatens to create a patchwork of laws relating to a medium whose users interact without regard for lines on a map, which is likely to lead to undesired results.

What if some states mandate that social media platforms *increase* policing of “hate speech,” however that is defined, whereas others attempt to ban the removal of “political speech,” however that is defined, from platforms entirely? This is not merely a hypothetical; for example, in Colorado, Democratic legislators have proposed a bill<sup>5</sup> that would punish social media platforms for failing to aggressively take down, among other categories, “hate speech,” “conspiracy theories,” and “fake news.”

In the case of creating liability and private rights of action for content moderation, state policies are mostly superseded by federal law under 47 U.S. Code § 230 (as HB 7013 acknowledges in Section 4). However, if the federal law were not an obstacle, having to manage content moderation according to a melange of different state regulations would prove functionally impossible, particularly if the states’ guidelines are inconsistent or even competing.

### **Conclusion**

We share the concerns that many lawmakers have expressed about restrictions on political content, but state-level content moderation bills often propose a “solution” that would cause greater disruption and angst for constituents seeking enjoyable social media experiences than the status quo. Legislators should exercise caution and avoid overbearing regulation that could upend the legal foundations underpinning the internet.

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<sup>5</sup> Colorado State Senate Bill 21-132.

[https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a\\_132\\_01.pdf](https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_132_01.pdf)