

March 19, 2021

Honorable Spencer Cox
Governor of Utah
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Governor Cox:

We write to urge you to veto Senate Bill 228, Electronic Free Speech Amendments. If enacted, this bill faces serious constitutional challenges, threatens the well-being of businesses, and ultimately undermines the protected speech of Utahns.

This legislation, as written, is unconstitutional. This is something that the Office of Legislative Research and General Counsel also flagged when asked to do a constitutional note on the bill. The legislation violates the First Amendment by undermining the moderation process through mandating consistent and “fair” application of moderation practices. However, content moderation is a form of editorial discretion and based upon the freedom of association — both things that have long been protected by the courts under the First Amendment.

Many of these platforms are being likened to a digital “public square” as a means of justifying the government’s need to intervene. However, this is an incorrect assessment as these platforms are not state actors. Cases as recent as *PragerU v. YouTube* reaffirm the notion that government cannot interfere in content moderation processes because social media platforms are not state actors. The First Amendment protects their right to decide what content they want to have on their platforms. That decision rested on the Supreme Court’s recent decision in *Manhattan Community Access Corp. v. Halleck* rejecting arguments that cable operators could be compelled to host the speech of public access channel programmers. Justice Kavanaugh, writing for all five conservative Supreme Court Justices, declared: “[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.”

Additionally, the bill will face constitutional challenges under the Dormant Commerce Clause. The legislation places an undue burden on businesses to deal with specific policy requests from Utah and fails to meet the criterion set out for laws that may affect interstate commerce. The proposed law is unduly burdensome, as there can be less restrictive means applied to dealing with the perceived conflict at hand.

Further, this type of legislation is preempted by federal law, particularly Section 230 of the Telecommunications Act of 1996. Section 230 explicitly preempts state action on this subject — by giving websites a procedural short-cut to vindicate their First Amendment right to refuse to carry content they find objectionable without the expense of litigating constitutional questions. While we can understand the Legislature’s frustrations with the status quo, that does not justify (nor legally authorize) this legislation. A resolution directed to Congress would have been a more appropriate course of action for the Legislature to pursue.

The stated purpose of this legislation, according to its proponents, is to ensure “fairness” and consistency in content moderation by social media platforms. Despite any concerns that may exist about viewpoint

discrimination, social media platforms have to review millions of pieces of content every day, and even with an army of tens of thousands of moderators and integrating artificial intelligence to sift through content, it is impossible to consistently and “fairly” apply the terms of use as the legislation seeks to compel social media corporations to do. These are inherently subjective questions, which the First Amendment reserves to the discretion of private media operators.

Additionally, Senate Bill 228 sends the wrong message to the business community as a whole. On one hand, the state likes to claim it is among the most business-friendly places in the country. On the other hand, it passes extremely aggressive legislation that targets the tech industry, one of the booming sectors of the state’s economy. And while big businesses can more easily accommodate the restrictions (and litigation) prompted by this bill, it is the smaller businesses and would-be startups that might fail to thrive because of such barriers.

While the purpose of the bill is to promote free speech, if enacted and enforced, it would result in an opposite outcome—less speech for Utahns. When companies are exposed to liability, they will take action to mitigate that risk by restricting the speech of their users, so as to avoid potential liability risk. Far from “freeing” speech, this bill would have the effect of reducing it.

Online speech is a privilege, not a right, to the extent that it involves using the services of a private party offering the platform it has built. Simply put, social media platforms retain the private property and free association rights to determine the conditions under which their users will be able to speak on these services. We may not like the outcomes of their decisions, but that does not justify Senate Bill 228.

Senate Bill 228 is unconstitutional, sets a dangerous precedent, and will result in a lawsuit costing Utah taxpayers millions of dollars to defend a clearly problematic law.

Accordingly, we request that you veto this bill and encourage the Legislature to explore other avenues to address their concerns. Thank you for your careful consideration of this important issue.

Sincerely,

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