



**March 24, 2023**

Senate Business, Labor, and Economic Affairs  
Attn: Erin Sullivan, Committee Staff  
State Capitol  
1301 East 6th Avenue  
Room 422  
Helena, MT 59601

**RE: HB 770 - “AN ACT GENERALLY REVISING LAWS REGARDING REGULATION OF ELECTRONIC AND SOCIAL MEDIA COMMUNICATIONS” (Oppose)**

Dear Chair Small, Vice-Chair Curdy, Vice-Chair Nolan and Members of the Senate Business, Labor, and Economic Affairs:

On behalf of the Computer & Communications Industry Association (CCIA), I write to respectfully oppose HB 770.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.<sup>1</sup> Proposed regulations on the interstate provision of digital services therefore can have a significant impact on CCIA members. Recent sessions have seen an increasing volume of state legislation related to the regulation of what digital services host and how they host it. While recognizing that policymakers are appropriately interested in the digital services that make a growing contribution to the U.S. economy, these bills require study, as they may raise constitutional concerns,<sup>2</sup> conflict with federal law, and risk impeding digital services companies in their efforts to restrict inappropriate or harmful content on their platforms.

**1. Montana cannot and should not attempt to force private online businesses to publish dangerous or otherwise objectionable content.**

HB 770 inaccurately asserts that some social media platforms are “common carriers”, which implies they are prohibited from restricting problematic but legal content. However, these companies operate very differently from traditional common carriers, such as public transit or telephone cable providers. Their services are not common, as they do not serve the entire public, and they do not publish all content equally. Most services explicitly refuse service to individuals and organizations specially designated by governments or intergovernmental organizations as criminals or terrorists. Several other scenarios may prompt changes to user access, such as limits for users under 13 years of age, restricting those who have violated established community terms of use, and ceasing to provide service in certain jurisdictions where meeting local regulatory requirements is not practicable.

<sup>1</sup> For over 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.ccianet.org/members>.

<sup>2</sup> Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203 (2022), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3985&context=hastings\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3985&context=hastings_law_journal).



Just as these services do not serve all users, they do not publish all content. In addition to prohibiting illegal content as required by relevant state and federal laws, many digital services remove content that is dangerous, though not inherently illegal. This includes, for example, content that exhorts users to self-harm or encourages young people to engage in dangerous or destructive behavior. Thus, while it is not explicitly illegal to engage in cyberbullying, or to evangelize the Chinese Communist Party, many digital services nevertheless act on such content to uphold commitments to their user communities to combat dangerous or abhorrent categories of content or behavior.

Thus, if social media services are compelled to treat all user-generated material with indifference as if they were common carriers, their platforms could become saturated with inappropriate and potentially dangerous content and behavior.<sup>3</sup> Consumers would be exposed to foreign disinformation, communist propaganda, and anti-American extremism, all of which are not inherently unlawful, and would appear to constitute a “viewpoint” under HB 770.

Setting aside the matter of whether the Legislature should impose upon private companies the obligation to convey the viewpoints of foreign propagandists and anti-American extremists, courts have been clear that social media companies are not common carriers.<sup>4</sup> The Legislature cannot circumvent the First Amendment by foisting upon an unwilling company a legal status it does not have.<sup>5</sup>

## 2. New regulations would impose duplicative responsibilities on businesses with no tangible benefit to consumers.

HB 770 would require companies to compile and publish transparency reports containing information about content monitoring and removal practices. Many online platforms already voluntarily invest in generating such reports regularly and make them publicly available on their websites.<sup>6</sup> There is no need to generate additional bureaucracy to effectuate what the marketplace is already accomplishing.

Digital services invest significant resources into developing and carrying out content moderation practices that protect users from harmful or offensive material and need flexibility in order to address new challenges as they emerge. Instead, the proposed requirements in HB 770 would mandate that services disclose sensitive information, including content moderation practices, algorithms, and techniques that could be exploited by bad actors. Montana should not offer a roadmap to criminals and adversaries on how to defeat the measures the digital services employ to protect consumers from online threats.

In addition, the bill’s provisions related to acceptable use policies are overly prescriptive and rather than protecting consumers from specific categories of content, may actually lead to the proliferation of racism, extremism, disinformation, harassment, and foreign interference.

<sup>3</sup> Rob Arthur, *We Analyzed More than 1 Million Comments on 4chan. Hate Speech There Has Spiked by 40% since 2015.*, VICE, (July 10, 2019), <https://www.vice.com/en/article/d3nbzy/we-analyzed-more-than-1-million-comments-on-4chan-hate-speech-there-has-spiked-by-40-since-2015>.

<sup>4</sup> See *NetChoice LLC & CCIA v. Paxton*, 573 F. Supp. 3d 1092, 1107 n.3 (W.D. Tex. 2021).

<sup>5</sup> See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (“certain private entities have rights to exercise editorial control over speech and speakers on their properties or platforms”). In any event, common carriers still retain First Amendment interests. See *PG&E v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 12, 20-21 (1986).

<sup>6</sup> See, e.g., <https://transparencyreport.google.com/>; <https://transparency.fb.com/data/>; <https://transparency.twitter.com/>; <https://policy.pinterest.com/en/transparency-report>; <https://www.reddit.com/wiki/transparency>; <https://discord.com/tags/transparency-reports>.

### 3. Businesses operating online depend on clear regulatory certainty across jurisdictions nationwide.

Existing U.S. federal law provides legal and regulatory certainty for websites and online businesses that they will not be held liable for the conduct of third parties. By limiting the liability of digital services for misconduct by third-party users, U.S. law has created a robust internet ecosystem where commerce, innovation, and free expression thrive — while enabling providers to take creative and aggressive steps to fight online abuse.

Survey research demonstrates that changing regulations to remove intermediary protections would have a negative effect on venture capital investment.<sup>7</sup> Similarly, economic research found that venture capital investment in cloud computing firms increased significantly in the U.S. relative to the European Union after a court decision involving intermediary liability.<sup>8</sup> Creating a patchwork of state laws would undermine this legal certainty and harm competition.

### 4. Research suggests that removing such regulatory certainty could have significant economic impacts.

The Bureau of Economic Analysis of the U.S. Commerce Department estimated that the digital economy built on this regulatory certainty “accounted for \$3.70 trillion of gross output, \$2.41 trillion of value added (translating to 10.3 percent of U.S. gross domestic product (GDP)), \$1.24 trillion of compensation, and 8.0 million jobs.”<sup>9</sup> Introducing a state patchwork of differing and potentially conflicting regulatory requirements would result in legal uncertainty, create unprecedented economic distortions, and jeopardize the tools used by the vast majority of Americans to speak and express themselves online.

Survey research also demonstrates that changing regulations to remove intermediary protections would have a negative effect on venture capital investment.<sup>10</sup> Similarly, economic research found that such investment in cloud computing firms increased significantly in the U.S. relative to the European Union after a court decision involving intermediary liability.<sup>11</sup>

Investors in digital intermediaries and their business users could see significant losses, which would be felt widely across the American population. Digital intermediaries account for at least one-fifth, and potentially more than a quarter, of the S&P 500 by index weighting.<sup>12</sup> Thus a major reduction in the value of their

<sup>7</sup> Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early Stage Investment: A Quantitative Study* (2011), <https://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

<sup>8</sup> Compare Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), <https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf>; with Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), <https://www.ccianet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf>.

<sup>9</sup> Tina Highfill & Christopher Surfield, *New and Revised Statistics of the U.S. Digital Economy, 2005–2021*, Bureau of Economic Analysis of the U.S. Department of Commerce, <https://www.bea.gov/system/files/2022-11/new-and-revised-statistics-of-the-us-digital-economy-2005-2021.pdf>.

<sup>10</sup> Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early Stage Investment: A Quantitative Study* (2011), <https://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>

<sup>11</sup> Compare Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), <https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf>; with Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), <https://www.ccianet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf>.

<sup>12</sup> Nathan Reiff, *The Top 25 Stocks in the S&P 500*, Investopedia (Oct. 11, 2022), <https://www.investopedia.com/ask/answers/08/find-stocks-in-sp500.asp>.



securities would significantly harm passive investors’ low-cost index funds that track the S&P 500 Index, commonly a top investment in 401(k) plans and personal investments for ordinary Americans. According to Morningstar, retail investors held \$8.53 trillion in index funds that seek to replicate market indicators like the S&P 500 Index or related measures with similarly large digital intermediary representation.<sup>13</sup> Likewise, American pension plans are heavily invested in digital intermediaries: the average government employee pension plan has 4.3 of the 5 leading digital intermediaries in its top 10 holdings.<sup>14</sup>

**5. Investing enforcement authority solely with the state attorney general and providing a cure period would be beneficial to consumers and businesses alike.**

HB 770 permits consumers to bring legal action against businesses that have been accused of violating new regulations. By creating a new private right of action, the measure would open the doors of Montana’s courthouses to plaintiffs advancing frivolous claims with little evidence of actual injury. Lawsuits also prove extremely costly and time-intensive – it is foreseeable that these costs would be passed on to individual consumers in Montana, disproportionately impacting smaller businesses and startups across the state. Further, investing enforcement authority solely with the state attorney general allows for the leveraging of technical expertise concerning enforcement authority, placing public interest at the forefront.

CCIA recommends that the legislation include a cure period of at least 30 days. This would allow for actors operating in good faith to correct an unknowing or technical violation, reserving formal lawsuits and violation penalties for the bad actors that the bill intends to address. This would also focus the government’s limited resources on enforcing the law’s provisions for those that persist in violations despite being made aware of such alleged violations. Such notice allows consumers to receive injunctive relief, but without the time and expense of bringing a formal suit.

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We appreciate the Committee’s consideration of these comments and stand ready to provide additional information as the legislature considers proposals related to technology policy.

Sincerely,

Jordan Rodell  
State Policy Manager  
Computer & Communications Industry Association

<sup>13</sup> Allan Sloan, ‘The democratization of investing’: Index funds officially overtake active managers, Yahoo! Finance (May 22, 2022), <https://finance.yahoo.com/news/index-fund-assets-exceed-active-fund-assets-120639243.html>.

<sup>14</sup> Trevor Wagener, *The Cost of Tech Regulatory Bills to State and Local Pension Plans – State By State Aggregates*, CCIA Research Center (May 20, 2022), <https://research.ccianet.org/stats/cost-of-tech-regulation-bills-state-map/>.