Comment Report

SSB 1189
A bill for an act relating to censorship of expression on online platforms, and providing penalties.(See SF 486.)

Subcommittee Members: Bousselot-CH, Dotzler, Webster

Date: 02/28/2023
Time: 09:30 AM
Location: Room 217 Conference Room

Name: Carl Szabo

Comment: Dear Chair Bousselot and members of the Subcommittee: NetChoice respectfully asks you to oppose SB 1189.1. Violates the First Amendment;2. Violates conservative principles of limited government and free markets;and3. Would penalize social media platforms for removing lawful but awfulcontent none of us want to see.We further outline our concerns in the attached testimony and welcome further discussion with you.Sincerely,Carl SzaboVice President & General Counsel, NetChoice

Carl Szabo
Vice President & General Counsel, NetChoice
Washington, DC 20005

NetChoice
Defending Free Speech and Free Enterprise Online

Iowa SB 1189 - Social Media Usage Modifications

OPPOSITION TESTIMONY

February 28, 2023

Iowa State Senate
Technology Subcommittee

Dear Chair Bousselot and members of the Subcommittee:

NetChoice respectfully asks you to **oppose** SB 1189 as it:

1. Violates the First Amendment;
2. Violates conservative principles of limited government and free markets; and
3. Would penalize social media platforms for removing lawful but awful content none of us want to see.

1. Violates the First Amendment of the U.S. Constitution.

The First Amendment states plainly that the 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 SB 1189, 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, SB 1189 is unconstitutional and will fail when challenged in court.

Thankfully, we do not have to wonder about the constitutionality of SB 1189, as a US District Court in Florida and one in Texas issued preliminary injunctions against remarkably similar bills, specifically highlighting the First Amendment infirmities of its content moderation provisions.

To begin, the Florida 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 Florida court went on to find that the First Amendment does, however, fully protect the rights of social media platforms to exercise their editorial judgment 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.

SB 1189 will face similar scrutiny because it also intrudes on social media's editorial discretion:

> "A social media platform shall not censor a user, a user's expression, or a user's ability to receive the expression of another person based on any of the following:
>
> (1) The viewpoint of the user or another person;
>
> (2) The viewpoint represented in the user's expression or another person's expression."

So, the court will likely hold that SB 1189'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.

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[3] *NetChoice & CCIA v Moody*, Case No. 4:21-cv-00220 (N.D.F.L. June 30, 2021), and *NetChoice & CCIA v Paxton*, Case No. 1:21-cv-00840 (W.D.Tex. December 1, 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).

Hosting private speech does not 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."

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."

And even if social media platforms were considered to be "common carriers," which they are clearly not, the US Supreme Court has made clear that even common carriers are entitled to First Amendment protections from compelled speech.[7] In *PG&E v. Public Utilities Comm'n* the Supreme Court even declared that public utilities like PG&E are entitled to First Amendment protections from government compelled speech.[8]

Iowa should consider the Florida and Texas Preliminary Injunction decisions a warning: *federal courts will not allow states to trample over the First Amendment—just to punish a few disfavored businesses.*

Ironically, by enacting SB 1189, Iowa could end up establishing legal precedent in the Sixth Circuit that is favorable to social media platforms, further emboldening their content moderation practices.

2. SB 1189 would penalize social media platforms for removing harmful content

Even if SB 1189 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, Facebook, Google,

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[6] *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).
[7] *See PG&E v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (recognizing that the public utitlty, PG&E is entitled to First Amendment protections and emphasizing that viewpoint based content requirements are subject to strict scrutiny, "The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers.").
[8] *Id.*

and Twitter took action on over 5 billion accounts and posts.[9] 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 SB 1189. This is because it penalizes a platform that decides to remove content because of "The viewpoint represented in the user's expression or another person's expression." 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 "viewpoint" of the user.

This means a social media platform could be violating SB 1189 if it removed these types of user content:

- ISIS propaganda – since that denies the political speech of those who hate America.
- Dangerous Content for Children – restricting user-posted videos with violent, hateful, or racist content as inappropriate for children.

SB 1189 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, conspiracy theories, and other forms of harmful content, making the internet a much more objectionable place to be. For example, SB 1189:

- 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.
- Authorizes spreaders of medical disinformation to sue social media platforms for censoring their "viewpoint" about cures or dangers of vaccinations.
- Allows people who post anti-Semitic hate speech to sue social media platforms to have that content restored.
- Enables *Al Jazeera* and *RussiaToday* to sue social media platforms for restricting posts celebrating terrorist acts or spreading foreign propaganda.

Not only would SB 1189 push social media platforms to engage in less moderation of harmful content, but it would also force them to rehost this content if the challenger is successful in court, regardless of how harmful or offensive the content may be.

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

3. SB 1189 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 SB 1189, since blocking could be challenged by lawsuits authorized under the bill.[10]

SB 1189 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."[11]

4. SB 1189 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:[12]

> *"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 SB 1189, which punishes platforms for moderating their services in ways that they see fit for their customer base and advertisers.

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 the 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.

SB 1189 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;

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[10] *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.)

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

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

> 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 SB 1189.

If supporters of SB 1189 are so keen to create an "online public square" where Iowans could share any news and views that are protected by the First Amendment, there is a simpler way: have the state government stand-up a social media site—**PublicSquare.Iowa.gov**—where the first amendment prohibits government from imposing any restrictions on what people say.

While many conservatives are angry over how Donald Trump and some high-profile conservatives are treated on Facebook, Twitter, and YouTube, legislation like we've seen in Florida and Texas ***are exactly the wrong response***. **Those laws would be turned into weapons that progressives use against President Trump and his followers on new, conservative social media platforms.**

* * *

A far better response is for conservatives to leave laws in place that allow social media platforms to remove or restrict content that violates community standards that suit their audience and advertisers.

Thus, we respectfully ask you to **not** advance SB 1189.

Sincerely,
Carl Szabo
Vice President & General Counsel, NetChoice
NetChoice is a trade association that works to protect free expression and promote free enterprise online.

Name: Ruthie Barko

Comment: Good evening, please find attached TechNet's letter asking the Subcommittee to not advance SSB 1189. Please reach out with any questions.

TECHNET
THE VOICE OF THE
INNOVATION ECONOMY

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February 28, 2023

The Honorable Mike Bousselot
Chair, Subcommittee
Committee on Technology
Iowa State Senate
1007 E. Grand Avenue
Des Moines, IA 50319

The Honorable William Dotzler, Jr.
Subcommittee Member
Committee on Technology
Iowa State Senate
1007 E. Grand Avenue
Des Moines, IA 50319

The Honorable Scott Webster
Subcommittee Member
Committee on Technology
Iowa State Senate
1007 E. Grand Avenue
Des Moines, IA 50319

RE: SSB 1189, Relating to Censorship of Expression on Online Platforms and Providing Penalties, Subcommittee Hearing, TechNet Oppose

Dear Chair Bousselot, Sen. Dotzler and Sen. Webster:

I write on behalf of TechNet respectfully in opposition to SSB 1189, which will have the unintended effect of subjecting Iowa residents to more abhorrent and illegal content on the internet by creating 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 five 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. Iowa should encourage these companies to have content policies, which should govern the removal of content showing the exploitation of children, bullying, harassment, gore, pornography, and spam. Instead, SSB 1189 creates a perverse incentive for companies to not prohibit and remove any objectionable content in order to avoid burdensome fees imposed by the State of Iowa, to the detriment of its citizens. The result would be the rapid

spread of abhorrent and illegal content that will cause real-world harm in Iowa's 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 activity. 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.

Instead of allowing these companies to apply community standards that keep their users – your constituents – safe online, SSB 1189 seeks to impose the will of the state on private enterprise. The bill would force private companies to host speech that violates its standards or risk costly enforcement action by the State while Iowa residents are deluged with spam, racism, misinformation, violence, and other objectionable but otherwise legal content.

Bills in Florida and Texas seeking to address "censorship" were enjoined by the courts over concerns that the bills violate the First Amendment to the US Constitution. SSB 1189 also has fatal legal flaws and would likely face the same fate.

For these reasons, TechNet must respectfully oppose SSB 1189. TechNet wishes to continue to work with the Senate Committee on Technology to explore this issue and find common solutions that are in the best interest of Iowans. We thank you in advance for your consideration of our comments, please do not hesitate to reach out with any questions.

Best,

Ruthie Barko
Executive Director, Colorado & the Central U.S.
TechNet

Cc: Sen. Chris Cournoyer, Chair, Senate Committee on Technology

Name: Khara Boender

Comment: On behalf of the Computer & Communications Industry Association, I respectfully submit the attached comments urging the committee to not advance SSB 1189. We appreciate your consideration of these comments and stand ready to provide additional information as the legislature considers proposals related to technology policy.

Computer & Communications Industry Association
Open Markets. Open Systems. Open Networks.

25 Massachusetts Avenue NW
Suite 300C
Washington, DC 20001

February 28, 2023

Senate Subcommittee on Technology
1007 East Grand Avenue
Des Moines, Iowa 50319

Re: SSB 1189 – "A bill for an act relating to censorship of expression on online platforms, and providing penalties." (Oppose)

Dear Chair Cournoyer and Members of the Senate Technology Subcommittee:

On behalf of the Computer & Communications Industry Association (CCIA), I write to respectfully oppose SSB 1189.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.[1] Proposed regulations on the interstate provision of digital services 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. CCIA recognizes that policymakers are appropriately interested in the digital services that make a growing contribution to the U.S. economy. Bills focused on the content of Internet speech, however, require study, because they may raise constitutional concerns,[2] conflict with federal law, and risk impeding digital services companies in their efforts to restrict inappropriate or harmful content on their platforms.

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

SSB 1189 would require private online businesses to display all content, which would have serious deleterious effects on the user experience. Many digital services remove content that is dangerous, upsetting, and injurious, even though not inherently illegal. This content includes, for example, messages and images that exhort users to self-harm or encourage young people to engage in dangerous or destructive behavior. Thus, while it is not explicitly illegal to engage in cyberbullying, or to evangelize the American Nazi Party, many digital services nevertheless act on such content in order

[1] 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.
[2] 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.

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, their platforms would become saturated with inappropriate and potentially dangerous content and behavior.[3] Users would be exposed to foreign disinformation, communist propaganda, and anti-American extremism, all of which are not inherently unlawful, and would not be allowed to be taken down under the bill's definition of "deplatform."

2. Social media companies are not common carriers and should not be required to pay "platform fees" in order to create a user-friendly experience consistent with their brand.

To date, courts have indicated that social media companies are not common carriers[4], and therefore, not universal services. The Legislature cannot circumvent the First Amendment by foisting upon an unwilling company a legal status it does not have.[5]

In addition, the requirement that social media companies pay "platform fees" in order to create a user-friendly experience consistent with their brand amounts to a bizarre example of compelled speech contrary to the First Amendment. It would force digital services to pay the government to avoid being compelled to host and promote third parties' content and speech that would otherwise risk negative brand associations, diminished user experience, and reduced online safety for users. In effect, digital services would be penalized for attempting to keep users safe, and would provide a financial incentive to services that seek to promote other undesirable and harmful material such as Chinese Communist Party propaganda.

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

[3] 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.
[4] *See NetChoice LLC & CCIA v. Paxton*, 573 F. Supp. 3d 1092, 1107 n.3 (W.D. Tex. 2021).
[5] *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).

commerce, innovation, and free expression thrive — while enabling providers to take creative and aggressive steps to fight online abuse.

4. Further, 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."[6] 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.[7] 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.[8]

Investors in digital intermediaries and their business users could see significant losses, and such losses 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.[9] Thus a major reduction in the value of their 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.[10] Likewise, American pension plans are heavily

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[6] 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.

[7] 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

[8] *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.

[9] 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.

[10] 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.

invested in digital intermediaries: the average government employee pension plan has 4.3 of the 5 leading digital intermediaries in its top 10 holdings.[11]

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

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association

[11] 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/ .