FIRE
Foundation for Individual Rights and Expression

October 8, 2025

Governor Gavin Newsom
Office of the Governor
1021 O Street, Suite 9000
Sacramento CA, 95814

Re: Veto Request – SB 771

Dear Governor Newsom:

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization that defends the rights of all Americans to free speech and free thought.

I write to express FIRE's grave concern about SB 771. This legislation would impose broad, vague liability on social media platforms for hosting and displaying user-generated content that is later alleged to have violated certain civil rights laws. SB 771 unconstitutionally chills protected speech by deliberately exposing social media platforms to uncertain liability for distributing disfavored content. Furthermore, because it imposes liability for content provided solely by third parties, SB 771 is preempted by Section 230 of the Communications Decency Act.[1]

We urge you to veto this unconstitutional legislation now and avoid the cost of litigation that is certain to result in a court invalidating SB 771 under the First Amendment and Section 230.

SB 771 would impose civil liability on social media platforms that, "through its algorithms that relay content to *users*," violates, aids and abets, acts in concert, or conspires in a violation of four enumerated civil rights laws. It prescribes a maximum penalty of $1,000,000 per "intentional, knowing, or willful" violation or $500,000 per "reckless" violation. And it establishes that in determining liability under its provisions, a social media platform is deemed to have actual knowledge of how its algorithms operate in every interaction with every user—

[1] 47 U.S.C. § 230.

including why any particular piece of content will or will not be displayed to them.

I. The Expansive Liability Created by SB 771 Chills Protected Expression and Violates the First Amendment

In defining penalties for "reckless violations," SB 771 enables a new type of aiding and abetting liability for social media platforms—one that does not require intent to facilitate particular unlawful acts but rather only recklessness, *i.e.*, conscious disregard for a high probability of serious harm to others.[2] Any doubt that the bill enables liability for reckless aiding and abetting is dispelled by the fact that SB 771 lacks meaningful practical application without such liability. This legislation would thus dramatically—and unconstitutionally—expand when social media may be held liable for aiding and abetting civil rights violations for hosting and distributing speech, and will be readily enjoined when challenged in court.

A. SB 771 Creates New "Reckless" Aiding and Abetting Liability

The Supreme Court recently highlighted the difficulty with imposing traditional aiding and abetting liability on social media platforms' distribution of speech, in an instructive decision that rejected claims seeking to impose liability similar to that which SB 771 would allow. In *Twitter v. Taamneh*, plaintiffs alleged social media platforms aided and abetted acts of international terrorism by serving ISIS content to users through the platforms' algorithmic content-recommendation systems.[3]

Holding that aiding and abetting requires conscious participation *with intent to facilitate the unlawful act*, the Court ruled that creating and utilizing content-recommendation algorithms, offered to all users equally, does not constitute "active assistance" simply because ISIS and its content may have benefitted from the algorithms' operation.[4] The Court further held the platforms' failure to

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[2] *Samantha B. v. Aurora Vista Del Mar, LLC*, 77 Cal. App. 5th 85, 99 (2022).

[3] 508 U.S. 471 (2023).

[4] *Id.* at 490–94, 499 ("The fact that these algorithms matched some ISIS content with some users … does not convert … passive assistance into active abetting" as "defendants at most allegedly stood back and watched; they are not alleged to have taken any further action with respect to ISIS.").

prevent ISIS from using their products, even once the platforms knew of the unlawful use, could not support aiding and abetting liability.[5]

California law similarly requires a conscious decision to participate in wrongdoing, and intent to facilitate it, for aiding and abetting liability to lie.[6] And, as the *Taamneh* Court noted, California law does not impose aiding and abetting liability on providers of communication services for failure to terminate customers whom they know to be using those services for unlawful activity.[7]

Nobody seriously alleges large social media platforms create content delivery algorithms with the *express intent* of facilitating civil rights violations—rendering liability for aiding and abetting civil rights violations through social media algorithms all but impossible under existing law.

As such, SB 771 *must* create new recklessness liability to give the bill meaningful effect. That the bill intends to enable this lower standard of culpability in actions against social media platforms is evinced by the Senate Judiciary Chair's bill analysis (Bill Analysis), which poses the following hypothetical regarding TikTok's "For You Page" (FYP):

> Take the example of a TikTok FYP—if, unprompted by the user, their FYP began serving up explicitly and exclusively violent white supremacist content encouraging the viewers to commit hate crimes, there could theoretically be a point at which TikTok's creation of the FYP could amount to aiding and abetting a hate crime committed by that user, or at least result in civil liability under one of the state's civil rights laws.

Again, absent a showing that TikTok designed the FYP *with the intent* to aid commission of a specific hate crime, creation and general offering of FYPs could *not* amount to aiding and abetting under California law—unless a lower

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[5] *Id.* at 500 ("[T]he claim here rests less on affirmative misconduct and more on an alleged failure to stop ISIS from using these platforms. … Again, plaintiffs point to no act of encouraging, soliciting, or advising the commission of the Reina attack that would normally support an aiding-and-abetting claim.").

[6] *George v. Ebay. Inc.*, 71 Cal. App. 5th 620, 642–43 (2019) (alleged aider and abettor must have acted with the intent of facilitating the commission of that tort).

[7] *Taamneh*, 598 U.S. at 510 (citing *People v. Brophy*, 29. Cal. App. 2d 14, 33–34 (1942)).

"recklessness" standard suffices. That is the only understanding of the bill that gives it practical effect, and it underscores its constitutional vulnerability.

B. The Recklessness Standard Combines with SB 771's Actual Knowledge Provision to Create an Unconstitutional Liability Regime

In addition to establishing that platforms can be liable for "recklessly" aiding and abetting civil rights violations by serving content algorithmically, Section (b)(2) of SB 771 provides that for the purpose of determining liability under its, a platform is "deemed to have actual knowledge of the operations of its own algorithms, including how and under what circumstances [they] deliver content to some users but not others."[8] In other words, social media platforms are presumed to know whether its content delivery algorithms will show each and every individual piece of content to each and every user—and why.

This imposition of actual knowledge all but conclusively establishes a key element of recklessness: awareness of a high probability of the risk of harm, leaving plaintiffs with only the requirement to prove that the social media platform consciously disregarded the risk.

Because the harm SB 771 contemplates is the relaying of content, virtually any delivery of allegedly unlawful content can incur liability: plaintiffs will claim that a platform's deployment of an algorithm at all, rather than designing it to be "safer," constitutes conscious disregard of the risk that the algorithm would relay offending content— regardless of whether the platform has any awareness of the content, the users who received it, or how it was likely to impact them.

Removing the need to prove a platform's awareness of the risk of harm makes such claims significantly easier and will lead to a flood of lawsuits designed to pressure platforms to remove content that plaintiffs or government enforcers merely dislike—regardless of whether it is actually unlawful.

Because this new liability can be imposed solely for the reckless deployment of an algorithm, a platform is not required to even be aware of offending content at all, let alone require any knowledge by the platform that the content is unlawful.

This runs headlong into the First Amendment's prohibition of liability for distributing expression without requiring the distributor to have

[8] SB 771 § (b)(2).

knowledge of the content's nature and character.[9] Otherwise, distributors would be forced by the threat of liability to distribute only expression they have first inspected, a requirement so limiting even for booksellers—to say nothing of the exponentially greater scale of social media—that "the State will have imposed a restriction upon the distribution" of not only unlawful content but the "constitutionally protected as well."[10]

SB 771 will cast this impermissible chill over online expression by subjecting platforms to massive penalties for user-generated content that ultimately contributes to a civil rights violation by a third party. The risk of such liability will force social media platforms to proactively suppress a vast array of content that, while some may find controversial, hateful, or noxious, is nevertheless constitutionally protected.

And platforms will necessarily cast that net widely, for obvious reasons. For example, platforms will often lack contextual and background insight that informs whether content is in fact unlawful, such as whether two users have a professional relationship necessary for Section 51.9's prohibition of sexual harassment. They may also do so because content that may not be unlawful in isolation could nonetheless contribute to an ongoing course of unlawful conduct unbeknownst to the platform. For example, because sexual harassment requires pervasiveness, platforms will reasonably fear liability for any post that might conceivably be part of a pattern of harassment. The result is inevitable: platforms will have every incentive to suppress any content that could conceivably contribute to a civil rights violation, no matter how outlandish the unknown facts would have to be.

C. <u>The Chilling Effect of SB 771 Is Intentional</u>

There is also little doubt incentivizing and coercing suppression of protected speech is an *express purpose* of SB 771. The Bill Analysis describes its intent to target not just violations of civil rights laws, but also "hate speech" on social

[9] *Smith v. California*, 361 U.S. 147, 153 (1959); *see also Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 139–140 (S.D.N.Y. 1991) ("The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment ...."); *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 786 (D. Wyo. 1985) ("Courts have required a specific showing of scienter, knowledge of the defamatory material, before allowing mere distributors to be held liable.").

[10] *Smith*, 361 U.S. at 153.

media generally, stating: "This cause of action is intended to impose meaningful consequences on social media platforms that continue to push hate speech," and "to provide a meaningful incentive for social media platforms to pay more attention to hate speech … and to be more diligent about not serving such content[.]"[11]

But the law is well-established that speech does not lose First Amendment protection simply because it is hateful.[12] "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[13] **The fact that the liability imposed by SB 771 "would tend to restrict the public's access to [expression] the State could not constitutionally suppress directly"[14] renders it unconstitutional, and the fact that it was purposefully designed to do exactly that is unconscionable—and both urgently demand your veto of this legislation.**

II. SB 771 Is Preempted by Section 230

Section 230 prohibits California from statutorily imposing liability that would treat social media platforms as the publisher or speaker of user-generated content,[15] including any liability for "reviewing, editing, and deciding whether to publish or withdraw" such content.[16]

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[11] Senate Judiciary Committee, *Bill Analysis: SB 771 (Stern)* at 2, 14 (Apr. 25, 2025), https://sjud.senate.ca.gov/system/files/2025-04/sb-771-stern-sjud-analysis.pdf.

[12] *Matal v. Tam*, 582 U.S. 218, 246 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.") (cleaned up); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating ordinance prohibiting certain expression that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

[13] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

[14] *Smith*, 361 U.S. at 154.

[15] 47 U.S.C. § 230(c)(1), (e)(3). *See also Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) ("The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.") (cleaned up).

[16] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

But that is exactly what SB 771 does: it imposes liability on social media platforms for relaying and displaying content created entirely by a user if that content turns out to be part of a civil rights violation.

A. SB 771 Cannot Define Its Way Around Section 230

SB 771 attempts to evade Section 230 preemption by declaring that "deploying an algorithm that relays content to users may be considered to be an act of the platform independent from the message of the content relayed."[17]

But simply declaring the targeted activity something else does not, and cannot, alter the fact that the liability SB 771 would create hinges on the substance of the user-generated content itself.

That's because the act of "deploying an algorithm" alone causes no cognizable harm. It is only the relaying of specific user-generated content that potentially does so, and the algorithm's role in relaying the content does not create or contribute to the content's unlawful nature.[18] Rather, the only thing done by the algorithm—SB 771's target—is to arrange and publish user-generated content, *i.e.*, the core activity Section 230 insulates from liability.

B. SB 771's Breadth Conclusively Establishes Section 230's Applicability

SB 771 also does not define what an "algorithm" is other than by its function of "relay[ing] content to users."[19] But *all* content on social media—whether in a chronological, friend- or connection-based, or personalized recommendation feed—is relayed via algorithms, which are nothing more than sets of mathematical instructions and processes that rank and sort the universe of available content to display.[20]

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[17] SB 771 § (b)(1).

[18] An interactive computer service is considered to have "developed" content, rendering it ineligible for § 230(c)(1) protection, only if it "materially contributes" to the unlawfulness of the content. *Fair Hous. Counsil of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (en banc).

[19] SB 771 § (a), (b)(1).

[20] *See* Yury Molodtsov, *Why Algorithmic Feeds Can Be Good* (May 18, 2023), https://molodtsov.me/2023/05/why-algorithmic-feeds-can-be-good ("chronological feeds are based on an algorithm"); Martin Fowler, *Instead of restricting AI and algorithms, make them explainable* (July 30, 2024), https://martinfowler.com/articles/2024-restrict-algorithm.html

Thus, under Section (b)(1) of SB 771, *every* piece of content a social media platform displays to *every* user would constitute "an act of the platform independent from the message of the content relayed" subject to liability. Again, this *ipse dixit* cannot stave off Section 230 preemption.

California cannot avoid federal law by redefining the expressive activity that law protects as something else, and SB 771 will likely be invalidated in its entirety under Section 230's preemption clause as well.

C. Social Media Platforms' First Amendment Rights Do Not Abrogate Section 230's Protections

Contrary to the Bill Analysis, the Supreme Court's decision in *NetChoice v. Moody* did *not* "suggest[] there is a point at which mere 'content moderation' morphs into more—an act of expression by the platform itself."[21] The distinction between "content moderation" and "an act of expression" is a false dichotomy and appears nowhere in *Moody*. The Court did, however, explicitly note that content moderation decisions—platforms' "choice of material" and "decisions made [as to] content"—*are* expressive choices the First Amendment protects.

Nor is there tension or inconsistency, as the Bill Analysis suggests, between a platform's First Amendment right to curate content and Section 230's protections.[22] Section 230 exists precisely to support the exercise of that First Amendment right—by shielding online platforms from liability they might otherwise face for hosting or removing third-party content. If platforms exercising their First Amendment right to curate third-party speech inherently constituted the type of first-party speech unprotected by Section 230, the First Amendment would swallow Section 230 entirely: A platform's "choice of material" receiving First Amendment protection under *Moody* is coextensive

("A regulation that says a social media company should forego its 'algorithm' for a reverse-chronological feed misses the fact that a reverse-chronological feed is itself an algorithm.").

[21] Senate Judiciary Committee, *Bill Analysis: SB 771 (Stern)* at 15 (Apr. 25, 2025), https://sjud.senate.ca.gov/system/files/2025-04/sb-771-stern-sjud-analysis.pdf (invoking 603 U.S. 707 (2024)).

[22] Senate Judiciary Committee, *Bill Analysis: SB 771 (Stern)* at 12, 15 (Apr. 25, 2025), https://sjud.senate.ca.gov/system/files/2025-04/sb-771-stern-sjud-analysis.pdf (implying that because *Moody* recognized that a platform's content decisions are expressive acts, that may necessarily transform them into first-party speech by the platform and therefore ineligible for protection under Section 230(c)(1)).

with the activities that Section 230 protects, namely "reviewing, editing, and deciding whether to publish or withdraw" content.

That Section 230 does not exclude exercises of a platform's First Amendment rights from protection is self-evident from its purpose. If parties protected by Section 230 were not engaged in publishing—a quintessential First Amendment activity that ordinarily carries a risk of liability—they would not *need* protection from being *treated as* a publisher.

The decision of Congress to protect certain activity for *liability purposes* does not (and could not) alter its status as expression for *First Amendment* purposes. Put simply: whether activity is protected by the First Amendment and whether that activity is immunized by Section 230 are entirely separate questions—and neither answer has an effect on the other.

To support its contention that a platform's constitutionally protected editorial decisions plausibly renders them ineligible for protection under Section 230, the Bill Analysis cites to *Anderson v. TikTok*.[23] In *Anderson*, Third Circuit held that because social media platforms have a First Amendment right to curate content, any such curation is *ipso facto* first-party speech unprotected by Section 230.[24] For the reasons explained above, the Third Circuit erroneously conflated the constitutional and statutory issues, and misapprehended the history and purpose of Section 230—reaching a conclusion with no legal, factual, or logical basis.

But *Anderson* is immaterial in any event, because the law in the Ninth Circuit is clear: so long as they treat all content the same, algorithms that recommend, sort, arrange, and display content fall squarely within the traditional editorial functions protected by Section 230.[25]

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[23] 116 F.4th 180 (2024).

[24] *Id.*

[25] *Dyroff v. Ultimate Software Group*, 934 F.3d 1093, 1097–98 (9th Cir. 2019). *See also Gonzalez v. Google*, 2 F.4th 871, 893–94 (9th Cir. 2021), *vacated and remanded on other grounds*, 598 U.S. 617 (2023) ("algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity"); *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (supplying neutral tools that sort and deliver content to users does not transform an interactive computer service into a content creator or developer for Section 230 purposes).

SB 771 imposes liability for speech in a manner far beyond what the First Amendment allows and expressly prohibited by Section 230. Worse yet, it does so for the express purpose of coercing social media platforms into suppressing lawful speech that California could not itself regulate. **FIRE strongly urges you to veto SB 771. Failure to do so will only waste valuable resources defending a statute that will ultimately be invalidated.**

If you have any questions or would like to discuss this matter further, I can be reached by email at ari.cohn@thefire.org, or by telephone at (215) 717-3473 x. 330.

Thank you for your attention to these important issues, and for your thoughtful consideration.

Respectfully,

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