



May 21, 2018

The Honorable Robert Hertzberg  
California State Senate  
State Capitol, Room 4038  
Sacramento, CA 95814

**Re: SB 1001 (B.O.T. Act of 2018) – Oppose**

Dear Senator Hertzberg:

I write to you on behalf of the Electronic Frontier Foundation (EFF) to advise you of the serious First Amendment concerns raised by SB 1001. EFF urges you to withdraw the bill until these fundamental constitutional deficiencies are resolved.

EFF is a San Francisco-based, non-profit organization that works to protect civil liberties in the digital age. EFF represents more than 40,000 active donors and members, including thousands of supporters in California.

We are sympathetic to concerns over harmful and ill-intentioned bots, such as the Russian bots that interfered with the 2016 U.S. elections or spambots used for fraud or commercial gain. However, while SB 1001's across the board bot-labeling mandate may seem like an easy solution to deal with harmful bots, it will restrict and chill protected speech as well, and it will thus not withstand First Amendment scrutiny. Any law of this type, which restrains Internet speech, must be narrowly tailored to address proven harms; it is not appropriate to cast a wide net and sort it out later. SB 1001 fails in this regard.

### **SB 1001 Sweeps Up First Amendment Protected Speech**

Bots often represent the speech of natural persons, processed through a computer program. The human speech underlying bots is protected by the First Amendment. It is also long settled that the computer code, including the code behind art, poetry, or humor bots on social media, is a form of protected speech under the First Amendment.<sup>1</sup> Code consistently receives First Amendment protection because code, like a written musical score, “is an expressive means for the exchange of information and ideas.”<sup>2</sup>

SB 1001's across the board bot-labeling mandate would sweep up all bots—including not only harmful bots, but also bots used for First Amendment protected activities. This includes poetry,<sup>3</sup>

---

<sup>1</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001); *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000); *Bernstein v. DOJ*, 176 F.3d 1132, 1146 (9th Cir. 1999), vacated on other grounds, 192 F.3d 1308 (9th Cir. 1999).

<sup>2</sup> *Junger*, 209 F.3d at 484.

<sup>3</sup> [https://twitter.com/soft\\_focuses](https://twitter.com/soft_focuses) (tweets poetry, without identifying itself as a bot).

political speech,<sup>4</sup> and satire—such as poking fun at people who cannot resist arguing—even with bots.<sup>5</sup> By targeting all bots—instead of just the specific type of harmful bots driving the legislation—SB 1001 would chill the use of bots for such protected speech activities. The bill would, for example, restrict the speech of artists whose projects necessitate not disclosing that a bot is a bot.

### **SB 1001 Compels Speech—Including Speech That Would Hinder Speakers’ Ability to Communicate Their Desired Message**

SB 1001 would compel speech, by making it unlawful for any person to use a bot to communicate or interact with natural persons online without disclosing that the bot is not a natural person. The First Amendment requires courts to closely scrutinize laws, like this bill, that compel speech.<sup>6</sup> This is especially true when the compulsion hinders the speaker’s ability to communicate its desired message; courts recognize that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”<sup>7</sup>

### **SB 1001 Risks Unmasking Protected Anonymous Speech**

SB 1001’s bot-labeling mandates could be hard to enforce in practice without unmasking the anonymous human speakers behind the bots. This would reduce the ability of individuals to speak anonymously online. Anonymous speech is not only fully protected by the First Amendment,<sup>8</sup> but it constitutes an “honorable tradition of advocacy and of dissent.”<sup>9</sup> As the Supreme Court has recognized, “Anonymity is a shield from the tyranny of the majority.”<sup>10</sup> As a result, just as government mandates that one speak or publish, laws that infringe on the right to anonymity in “core political speech,” are subject to close judicial scrutiny.<sup>11</sup>

### **SB 1001 Would Not Pass Even Intermediate Scrutiny**

Courts would apply at least intermediate scrutiny to SB 1001. The bill cannot pass this test. Time, place, and manner restrictions on speech must be content-neutral, narrowly tailored to

---

<sup>4</sup> <https://fivethirtyeight.com/features/introducing-censusamericans-a-twitter-bot-for-america/>.

<sup>5</sup> <https://www.sbs.com.au/comedy/article/2016/10/13/hilarious-genius-has-built-twitter-bot-tricks-idiots-arguing-it-hours>.

<sup>6</sup> The Supreme Court has repeatedly held that “it is . . . a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’” *Agency for Int’l Development v. Alliance for Open Society Int’l*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006)).

<sup>7</sup> *Riley v. Nat’l Federation of the Blind of N.C.*, 487 U.S. 781, 795 (1988) (“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.”).

<sup>8</sup> *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200 (1999).

<sup>9</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 334–35.

serve a significant government interest unrelated to the suppression of speech, and leave open ample alternative channels of communication.

First, while addressing consumer and/or political manipulation may be a significant government interest, SB 1001 is not narrowly tailored to address these interests. For example, a concern over consumer or political manipulation does not justify a requirement that artists tell us whether a person or a bot is behind their latest creation.<sup>12</sup>

Second, SB 1001 does not leave open ample alternative channels of communication. In the context of art bots, for example, “it seems unlikely that an algorithmic artist whose work hinges on the uncertainty of whether her account is human-run could effectively communicate her message through alternative channels of communication.”<sup>13</sup>

### **SB 1001 Would Result in the Censorship of Legitimate Speech**

SB 1001 also requires platforms to create a system whereby users can report suspected bots. Platforms must then “determine whether or not to disclose that the bot is not a natural person or remove the bot” in less than 72 hours. On its face, this may sound like a positive step in improving public discourse, but years of attempts at content moderation by large platforms show that things inevitably go wrong in a panoply of ways.<sup>14</sup>

With an inflexible requirement built upon such subtle and adversarial criteria, SB 1001 would predictably cause innocent users to have their accounts labeled as bots or deleted altogether. It is not always easy to determine whether an account is controlled by a bot, a human, or a “centaur” (*i.e.*, a human-machine team). Platforms can try to guess based on the account’s IP addresses, mouse pointer movement, or keystroke timing, but these techniques are imperfect and could sweep in individuals using VPNs or Tor for privacy or those with special accessibility needs who use speech to text input; their speech could be mislabeled by a mouse or keyboard heuristic. Platforms can also try to administer various sorts of Turing tests,<sup>15</sup> but those don’t work against centaurs, and bots themselves are getting quite good at tricking their way through Turing tests.<sup>16</sup>

SB 1001 would result in the takedown of legitimate speech not only as a result of mistakes, but also as a result of abuse of the system. Those seeking to censor legitimate speech have become

---

<sup>12</sup> See Madeline Lamo & Ryan Calo, Anonymous Robot Speech (early draft), at 2 (April 2018), <https://conferences.law.stanford.edu/werobot/wp-content/uploads/sites/47/2018/02/Anonymous-Robot-Speech-We-Robot-2018.pdf> (hereinafter “Anonymous Robot Speech”).

<sup>13</sup> See *supra*, Anonymous Robot Speech, at 18.

<sup>14</sup> <https://www.eff.org/deeplinks/2018/04/platform-censorship-wont-fix-internet>.

<sup>15</sup> Turing tests involve a human judge trying to tell the difference between a human and computer.

<sup>16</sup> <https://www.eff.org/ai/metrics#Conversation:-Chatbots-&-Conversational-Agents>.

May 21, 2018  
Page 4 of 4

experts at figuring out precisely how to use platforms' policies in order to silence or otherwise discredit their opponents on social media platforms.<sup>17</sup>

\*\*\*

As currently drafted, SB 1001 contains fundamental First Amendment deficiencies. We urge you to withdraw this bill until these deficiencies are addressed.

Thank you for the opportunity to highlight our concerns about SB 1001. If you have any questions, please feel free to contact me at either (415) 436-9333 x164 or jamie@eff.org.

Sincerely,



Jamie Williams  
Staff Attorney  
Electronic Frontier Foundation

cc: Members, Staff, and Consultants of the Senate Appropriations Committee

---

<sup>17</sup> See, e.g., "Facebook's reporting algorithm abused by antivaccinationists to silence pro-science advocates," <https://sciencebasedmedicine.org/facebooks-reporting-algorithm-abused-by-antivaccinationists-to-silence-pro-science-advocates/>.