H. B. No. 441

Thank you, Chairman Hillyer, Representative Wiggam and the members of the Civil Justice Committee for the opportunity to speak to you today. My name is Adam Candeub. I am a law professor at Michigan State University and serve as a senior fellow at the Washington DC-based Center for Renewing America. I also served as Acting Assistant Secretary of Commerce for the National Telecommunications and Information Authority and Deputy Associate Attorney General at the Department of Justice. My experience in government, private practice—and my scholarly research—center on the law and regulation of electronic communications.

First, I must congratulate Chairman Hillyer, Representative Wiggam, and the other members of the committee for taking a stand on the vital issue of fairness and non-discrimination on online social media platforms. You are protecting the citizens of Ohio and their freedom to participate fully in our political and social discourse against some of the most powerful and wealthy companies in the world—who can marshal almost unimaginable resources to back their positions. Your constituents, indeed all Americans, should be grateful to your brave and bold commitment to principled public service.

No one doubts the essential role that social media plays in our society's political, economic, and family lives. They are the centralized communications mechanism that connect voters to politicians, consumers to businesses, and church and civil groups members to each other. The Supreme Court in the case *Packingham v. North Carolina* recently declared the internet is our "modern public square," and social media is the square's essential communications network, assuming the role that the telegraph and telephone played in earlier times.

Unfortunately, our public square is today not truly public. It is a slanted forum in which dominant internet companies and other elite groups censor and silence those with whom they disagree. These companies have ceased to be the profit maximizing organizations we learned about in our college economics classes. Rather, they have become political actors in their own right.

To mention just a few examples of this politicization

First, Twitter has deplatformed a sitting U.S. President.

Second, on the cusp of a Presidential election, the NY Post published a story about emails claiming Joe Biden's son, Hunter, secured favors from the then-vice president to benefit the Ukranian energy company Burisma, which paid Hunter $50,000 each month to sit on its Board. Emails came from the laptop that Hunter Biden left at a repair shop. As Glenn Greenwalt points out, Facebook intervened. Andy Stone, a Democratic Party operative who now works for Facebook — who previously worked for Democratic Sen. Barbara Boxer and the Democratic Congressional Campaign Committee—announced that Facebook was "reducing [the article's] distribution on our platform." In other words, it tinkered with its own algorithms to suppress the ability of users to discuss or share the news article. Twitter did not even allow people to tweet the NYPost story.

Third, social media platforms continue to censor claims about the Chinese lab origin of the COVID virus, a claim that many now accept. Journalists such Alex Berenson have been banned from Twitter, YouTube Florida Gov. Ron DeSantis and Senator Rand Paul all have been censored for questioning efficacy of masks or other aspects of the public health response to COVID. And, scientific censors will not fade with the COVID epidemic. Under new Facebook rules all who dare to disagree with the "climate change

consensus" will be censored—and some eminent climate scientists are being removed from public discourse.

The dominant platforms' censorship degrades the quality of our democratic deliberation. If the platforms had refrained from censorship, voters could have made more informed choices in the 2020 election, our response to COVID would have been more measured and intelligent, and, above all, the self-correcting mechanism of the Justice Oliver Wendell Holmes' free market place of ideas would have been permitted to work.

H.B. No. 441 responds to this problem. It prohibits the platforms from censoring based upon the viewpoint of the user, the viewpoint represented in the user's expression or another person's expression; or, a user's geographic location in this state or any part of this state. Those users who are wrongly thrown off may bring legal action to gain usage again. There is no provision for damages, exorbitant or otherwise. The bill, in a very simple way, imposes antidiscrimination requirements of the sort under which telephone companies, airlines, package delivery services routinely operate.

The bill prohibits an interactive computer service, a term which includes social media platforms with more the 50 million active users in the U.S. in a calendar month from censoring users on the basis of their viewpoint. Censor is defined broadly to include edit, alter, block, ban, delete, remove, de-platform, demonetize, de-boost, regulate, restrict, inhibit the publication or reproduction of, deny equal access or visibility to, suspend a right to post, or otherwise discriminate against expression.

The bill only protects user's viewpoint. It allows websites to continue to censor certain types of content, such obscenity, nudity, or excessive violence. Thus, a social media platform would be free to censor a user who posts naked pictures. But, a social media platform could not censor a user who post his or her support for naked pictures.

Aggrieved users may sue for injunctive relief, i.e., to get back on the platform. The statute has no provision for damages—let alone large damages tempting to trial lawyers.

Allow me to conclude with three legal points.

First, Ohio has the legal power to impose this law under its common carrier authority. For centuries, the law of common carriers has given states the power to ensure that basic economic, transportation, and communication channels are open and accessible to all of members of society. Under its common carrier power, Ohio has regulated, and in many cases still does regulate, railroads, ferries, telegraphs, telephones, and, on the federal level for a time, the internet.

The common carrier authority is broad. The Supreme Court of Ohio stated: "What is a common carrier? 'A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently .. . The telephone company then must serve, without discrimination, all who desire to be served and who conform to the reasonable rules of the company."

This definition applies to social media. Just like a telephone, anyone obtain access and start posting. Further, it doesn't matter that this technology is new and novel. As the Ohio Supreme Court declared a century ago when deciding that the telephone is a common carrier, "And it has come to be settled, as civilization develops, and as new inventions and devices take their place in society, that wherever the

public is concerned and the welfare of the people is in issue, technical constitutional invasions must give way." *Melina & Mercer Cty. Tel. Co. v. Union-Ctr. Mut. Tel. Ass'n*, 102 Ohio St. 487, 492 (1921)

Second, the First Amendment does not prohibit this law. Just as telephone companies must offer a communications platform to all—including those with whom they disagree, so social media companies can be subject to the same legal requirements. For well over a hundred years, courts have accepted the constitutionality of common carrier anti-discrimination requirements.

More broadly, outside the communications context, the Supreme Court has made clear that no First Amendment problems arise when government requires businesses simply to host third-party speech. That rule long has been uncontroversial for communications mediums, like social media.. The Supreme Court has extended the rule to non-communications media. And even hosting regulations that affect a platform's own rights may still pass constitutional muster. Turner Broad Sys. v. FCC, 512 U.S. 622, 657 (1994).

Last, section 230 does not preempt HB 441 as the Ohio Legislative Service Commission has suggested. Passed as part of the "Communications Decency Act," Section 230 grants the platforms immunity when they censor certain distinct content types. As is explained in a recent law review article authored by me and Eugene Volokh, the leading First Amendment scholar at UCLA—and editor of the eponymous Volokh Conspiracy blog, this content only includes non-family friendly content of the type Congress thought regulable in 1996, namely "obscene, lewd, lascivious, filthy, extremely violent, or harassing" content. Given narrow scope of the federal statutes on certain content—and H.B. 441's focus not on content, but on viewpoint, there is no conflict. To illustrate, Section 230 governs liability standards for a platform to carry obscene or violent content; H.B. 441 covers platforms attitudes towards those who have different viewpoints *about* obscene or violent content. Preemption is not, therefore, a concern.

Thank you for your time. I'd be delighted to answer any questions.