TO: House Civil Justice Committee

FROM: Gary Daniels, Chief Lobbyist, ACLU of Ohio

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RE: House Bill 441 – Opponent testimony

ACLU
AMERICAN CIVIL LIBERTIES UNION
Ohio

4506 Chester Avenue
Cleveland, OH 44103
P: (614) 586-1959
F: (216) 472-2210

1108 City Park Avenue
Suite 203
Columbus, OH 43206
P: (614) 586-1959
F: (614) 586-1974

acluohio.org
contact@acluohio.org

Hasan Kwame Jeffries
President

J. Bennett Guess
Executive Director

To Chairman Hillyer, Vice Chair Grendell, Ranking Member Galonski, and members of the House Civil Justice Committee, thank you for this opportunity to provide the following opponent testimony for House Bill 441.

It is apparent HB 441 is born out of frustration with what often seems to be any combination of arbitrary, unfair, and nonsensical removals of speech and user accounts from the largest social media platforms. Currently, it is conservatives who are loudest about these actions but this problem is in no way limited to one ideology or side of the aisle. Others from Palestinian & Muslim scholars, to black activists, to transgender advocates, to so many others have, for years, had their speech removed and accounts suspended and banned for speech I suspect no one would label conservative. So, this is far from a new problem, despite what some may think or claim.

As previously mentioned in this committee, the largest of these social media companies now, in a sense, resemble traditional town squares where, many decades ago, people could and would gather for speeches and similar events. So it is troubling when popular social media platforms with giant, worldwide audiences limit or remove speech they do not like for reasons that appear confusing, unclear, or even random.

Where the ACLU of Ohio parts company with HB 441 supporters is the solution. We broadly do not believe it is government's role to dictate to private companies and entities what speech they must entertain, host, or tolerate. Indeed, our four specific concerns are these:

JURISDICTION ISSUES AND AUTHORITY

The very text of HB 441 begs the question how much speech this bill - protects in the unlikely event it survives court challenges. Lines #102-124, and more specifically Lines #107-108, reveal HB 441 "applies only to expression that is shared or received in this state."

Of course, this language is included because the Ohio General Assembly has no power or authority regarding what social media platforms do in other states or countries. You can only attempt to regulate what occurs within the state's borders.

Perhaps limiting what a company with nationwide and international reach may do in this respect also implicates the Commerce Clause of the US Constitution. That claim was made by plaintiffs in the Florida lawsuit. However, it was not addressed in the order enjoining that law, likely because Florida's law was so unconstitutional the court need not rely on or reach that specific argument.

SECTION 230

Section 230 of the federal Communications Decency Act (47 U.S.C. §230(c)) explains *no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*

Section 230 also establishes immunity from civil lawsuits for these providers when they in good faith restrict access to *material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.*

In other words, federal law gives explicit, statutory authority to social media companies, among others, to decide what speech it will permit or remove from its platforms. Related to the jurisdiction point previously raised, of course state legislatures cannot override or simply ignore federal law.

COMMON CARRIER STATUS

Some proponents of HB 441 recognize state legislatures are powerless to regulate speech beyond its borders and do not trump federal law, such as Section 230. So, they pivot to describing social media platforms as "common carriers" and demanding the government regulate them as such. This tactic is also their attempt to do an end around the First Amendment.

Except social media platforms do not act as common carriers, do not present themselves as common carriers, and trying to designate them as common carriers is a misapplication of the term and principle.

Historically and currently, common carriers are entities such as mail and package delivery services (like USPS, UPS and FedEx), phone companies and other utilities, and public transportation. That is, entities responsible for the transmission of goods and people with services open to the general public. The important point is they all operate with neutrality regarding their services and missions.

From a speech perspective, this is beneficial as it means the post office cannot legally refuse to deliver the NRA newsletter because the post office disagrees with the NRA's speech. Or the phone company cannot deny service to someone because they support Black Lives Matter but oppose them using phone services to call their friends and voice support for that organization.

However, social media platforms do not operate or advertise themselves as common carriers. They typically make this clear in their terms of service where they reserve the right to take certain actions, including those involving speech. As indicated by their user agreements and actions, these platforms obviously exercise control over speech inconsistent with being a common carrier. Indeed, they are private carriers by design and function.

FIRST AMENDMENT

Even if HB 441 supporters could find a way around the problems of jurisdictional issues, the Commerce Clause, Section 230, and the lack of common carrier status, the First Amendment remains the primary reason bills like these are doomed from a constitutional perspective.

Just like the First Amendment overwhelmingly prohibits government from restricting or banning our speech, it is also overwhelmingly prevents government requirements or demands that we deliver or accommodate others' speech and messages.

After all, a government allowed to do that could require organizations opposed to reproductive choice to include language on their websites about where to obtain an abortion. It could mandate a private event commemorating the Jewish Holocaust include a speaker who claims the Holocaust was a hoax. It could make everyone attending your Ohio State football watch party wear blue and yellow clothing. And, just like HB 441 would, it could make Facebook, YouTube and others allow and host speech from white supremacy to terrorist recruiting to hard core pornography when they wish to limit, restrict, or ban such speech.

Under the First Amendment, preventing the government from compelling speech is every bit as crucial and important as preventing the government from banning speech.

I will not belabor this point but there is a very long and robust history of free speech case law establishing the inability of the government to force speech. But HB 441 ignores it all in favor of a decidedly big government "solution."

HOUSE BILL 376

Finally, we cannot help but be confused as to the juxtaposition of HB 441 and HB 376 being considered simultaneously by the Ohio House. With HB 441, we have all witnessed sponsors, committee members, and proponents passionately complain about the actions and influence of large tech companies and corporations. At the same time, HB 376, dubbed the "Ohio Personal Privacy Act" and introduced by House Republicans, is a privacy nightmare. Despite the bill's name/title, HB 376 gives these same companies and corporations huge discretion and vast control regarding their collection, control of, and use of our personal data and information. We feel this irony is worth highlighting as both bills proceed.

Again, none of this is to minimize the concerns of those understandably worried about the ability of corporate America to decide what speech is worthy and that which is not. The ACLU of Ohio fully realizes this power is and will continue to be applied in harmful, unfair, puzzling, and inconsistent ways, just like when government wields it.

But, for the reasons stated and more, we do not believe government intervention is the answer or is constitutionally permissible. The ACLU of Ohio encourages this committee's rejection of House Bill 441.