

Testimony Before the Ohio House of Representatives Civil Justice Committee on HB 441

Chairman Hillyer and Members of the Committee:

My name is Matthew Feeney. I am the director of the Cato Institute’s Project on Emerging Technologies. My research is focused primarily on how new and emerging technologies affect civil liberties. Social media platforms have become essential to politics and culture. As such, legislation that would change how social media is regulated and governed warrants serious scrutiny. Absent considerations for civil liberties, such legislation could result in a worse environment for online speech. Given this risk, I appreciate the opportunity to share my thoughts on Ohio House Bill 441 (HB 441).

I believe that HB 441 raises significant constitutional concerns, includes definitions that would result in unintended consequences, and would make social media platforms unusable if implemented in its current form.

Constitutional Concerns

HB 441 would ban interactive computer services (such as social media platforms) from removing legal content uploaded by a user that lives in Ohio, does business in Ohio, or shares or receives expression in Ohio. This provision faces a significant legal hurdle: the First Amendment to the U.S. Constitution.

The First Amendment prohibits the government from interfering in editorial decisions made by private entities such as newspapers and social media platforms.¹ Two other states have passed legislation similar to HB 441 prohibiting social media platforms from removing lawful speech. Both laws have been challenged, and in both cases federal judges found the laws to violate the First Amendment.

Florida’s Senate Bill 7072 required large social media companies to host content uploaded by a political candidate they would otherwise remove.² United States Circuit Judge Robert Hinkle noted, “The legislation now at issue was an effort to rein in social-media providers deemed too large and too liberal. Balancing the exchange of ideas among private speakers is not a legitimate governmental interest.”³

In Texas, a judge found similar constitutional issues with HB 20, which prohibited large social media companies from removing legal content. Judge Robert Pitman cited three Supreme Court

¹ Berin Szóka and Ari Cohn, “The Wall Street Journal Misreads Section 230 and the First Amendment,” *Lawfare*, February 3, 2021, <https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment>.

² Social media deplatforming of political candidates, Fla. Stat. § 106.072 (2021), <https://casetext.com/statute/florida-statutes/title-ix-electors-and-elections/chapter-106-campaign-financing/section-106072-social-media-deplatforming-of-political-candidates>.

³ *NetChoice, LLC et al. v. Ashley Brooke Moody et al.*, No. 4:21cv220-RH-MAF (Fla. June 30, 2021), <https://netchoice.org/wp-content/uploads/2021/06/NetChoice-v.-Moody-PI-decision.pdf>.

cases concerning compelled speech (*Miami Herald Pub. Co. v. Tornillo*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group Of Boston*, and *Pacific Gas & Electric v. Public Utilities Commission of California*), summarizing them as “stand[ing] for the general proposition that private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content.”⁴

HB441 contains provisions similar to the Texas and Florida bills, and will face the same fate if it is passed as written. According to HB441, interactive computer services and social media platforms “shall not censor a user, a user's expression, or a user's ability to receive the expression of another person based on [...] The viewpoint of the user or another person.”⁵ Such provisions represent the kind of government interference in private editorial judgment the First Amendment was written to prevent. The provisions also highlight problems with the bill even if it were to survive constitutional challenge.

Definitions

Although the HB441 is targeted at a few prominent social media companies, its definitions are overinclusive. This is in part thanks to “social media” being a difficult term to define. HB441 includes the following definitions:

Social media platform: “an internet search engine, internet website, internet system, access software provider, or application that is open to the public and allows a user of the platform to create an account for the primary purpose of communication with another users, including by posting information, comments, messages, images, or videos.”⁶

The definition excludes email, ISPs, and any service that “consists primarily of news, sports, entertainment, or other information or content that is not user-generated but is preselected by the provider.”⁷

HB441’s definition of “user” is: “a person who posts, uploads, transmits, shares, or otherwise publishes or receives expression through an interactive computer service or social media platform.”⁸

HB441 is limited to applying only to interactive computer services or social media platforms with more than fifty million active users in the U.S. per month. Facebook, YouTube, and other social media platforms regularly criticized by conservative lawmakers and activists fit the definition of “social media platform” in HB441. But they are not alone.

⁴ NetChoice, LLC and the Computer & Communications Industry Association v. Ken Paxton, No. 1:21-CV-840-RP (Tex. December 1, 2021), <https://pacer-documents.s3.amazonaws.com/170/1147630/181127370662.pdf>.

⁵ See Sec. 1355.02. (A) and (B) of H.B. No. 441, 134th General Assembly (Ohio 2022), https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb441/IN/00/hb441_00_IN?format=pdf.

⁶ HB 441, Sec. 1355.01 (E).

⁷ Ibid.

⁸ HB 441, Sec. 1355.01 (G).

Wikipedia arguably fits into HB441's definition of "social media platform." It is likely that more than 50 million Americans use Wikipedia each month.⁹ Wikipedia certainly allows "a user of the platform to create an account for the primary purpose of communication with another users, including by posting information, comments, messages, images, or videos." Americans who visit Wikipedia also fit HB441's definition of "user," as they certainly "receive expression" through the platform.¹⁰ HB441's coverage of Wikipedia illustrates that the bill's broad definitions risk affecting more than prominent social media companies. But even if HB441 were able to survive constitutional challenge and narrow its definitions it would ultimately result in a social media environment the vast majority of users would find unworkable.

Social Media Without Content Moderation

Under HB441, large social media platforms would only be permitted to remove illegal content. Such a policy would require social media platforms such as Facebook and YouTube to host a wide range of speech that many Americans would consider "lawful but awful" such as videos of animals being crushed to death, lynching photos, messages of support for Islamist terror groups, pornography, and spam. This content is legal, but most private companies understandably take steps to limit its spread. While this content is still available in the seedier parts of the internet, HB441 would bring it rushing back onto mainstream platforms. Ohio should not expect parents and families to "go it alone" when it comes to keeping this content away from their children. HB441 does not prohibit social media platforms from allowing users to block content, but that is of limited reassurance given how easily spam can be automated and new accounts generated.

A social media platform where all legal speech is permitted would quickly descend into an unmanageable morass of spam and obscenity. Ohioans of all stripes would find such a platform unpleasant and difficult to use. Contrary to the intents of HB441's authors, the bill would result in less online speech and debate, not more.

I would welcome the opportunity to discuss this bill further with you or members of your staffs.

⁹ Wikipedia is the most popular website among American internet users, with more than 1 billion visit per month. Joshua Hardwick, "Top 100 Most Visited Websites by Search Traffic," *ahrefsblog*, January 1, 2021, <https://ahrefs.com/blog/most-visited-websites/>.

¹⁰ HB 441, Sec. 1355.01 (D): "'Receive,' with respect to an expression, means to read, hear, look at, access, or gain access to the expression."