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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Wiggam and Cutrona

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SUMMARY

- Prohibits an interactive computer service or a social media platform from censoring the expression of a user that resides in Ohio, does business in Ohio, or shares or receives expression in Ohio.
- Authorizes an interactive computer service or social media platform to censor the expression of a user that are unlawful or otherwise authorized to be censored under federal law.
- Provides that a contractual or other waiver of the protections provided under the bill is void and considered unlawful and against public policy.
- Permits a user to initiate a private cause of action against an interactive computer service or a social media platform that violates the bill's provisions in relation to the user.
- Clarifies how a court must interpret the bill's provisions if any part of the bill is declared unlawful or unenforceable.

DETAILED ANALYSIS

General overview

The bill prohibits an *interactive computer service* or a *social media platform* from censoring a user's *expression*. *Expression* means any word, music, sound, still or moving image, number, or other perceivable communication. The bill only applies to an interactive computer service or a social media platform that functionally has more than 50 million active users in the U.S. in a calendar month.¹ The bill provides exceptions, allowing censorship in certain

¹ R.C. 1355.01(B), 1355.02, and 1355.04(D).

circumstances. The bill also provides exclusive enforcement by a user's private right of action, allowing a user to initiate a civil action against an interactive computer service or social media platforms that violates the bill's provisions. Aside from the private right of action, the bill prohibits government enforcement of the bill's provisions. Only actions taken by the interactive computer service or social media platform on or after the bill's effective date are subject to the bill's censorship ban.

Under the bill, an ***interactive computer service*** means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. It does not include an internet service provider.² The bill applies only to an interactive computer service that offers its services to the public.³

A ***social media platform*** under the bill means an internet search engine, internet web site, 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 communicating with other users, including by posting information, comments, messages, images, or videos. The term does not include (1) an internet service provider, (2) email, or (3) an online service, application, or website that consists primarily of news, sports, entertainment, or other information or content that is not user-generated but is preselected by the provider and any of its associated chat, comments, or interactive functionality.⁴

Legislative findings

The bill makes the following legislative findings:

- Each person in Ohio has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information.
- The state of Ohio has a fundamental interest in protecting the free exchange of ideas and information in the state.
- Some interactive computer services and social media platforms function as common carriers, are affected with a public interest, are public accommodations, are central public forums for public debate, and have enjoyed governmental support in the U.S.
- Interactive computer services and social media platforms with the largest number of users are common carriers by virtue of their market dominance.⁵

For context, common carriers have been regulated under Ohio law. The Ohio Supreme Court has defined a "common carrier" as an entity that undertakes to transport persons or

² R.C. 1355.01(C) and 1355.02(A).

³ R.C. 1355.04(C).

⁴ R.C. 1355.01(E).

⁵ R.C. 1355.011.

property from place to place, for hire, and holds itself out to the public as ready and willing to serve the public indifferently.⁶ In addition, in *Biden v. Knight First Amendment Inst. at Columbia Univ.*, Justice Thomas noted that digital platforms that hold themselves out to the public bear some resemblance to both constitutionally protected public forums and traditional common carriers.⁷

Ban on censorship

More specifically, the bill prohibits an interactive computer service or a social media platform from censoring a user, a user's expression, or a user's ability to receive the expression of another person based on (1) the viewpoint of the user or another person, (2) the viewpoint represented in the user's expression or another person's expression, or (3) a user's geographic location in Ohio. It does not matter whether the viewpoint is expressed on the interactive computer service, social media platform, or elsewhere.⁸ The bill's protections only apply to a user that resides in Ohio, does business in Ohio, or shares or receives expression in Ohio.⁹

Censor under the bill means any action taken to edit, alter, block, ban, delete, remove, deplatform, 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. Censor also includes the action of deplatforming a person or an action taken to inhibit or restrict an interactive computer service or a social media platform user's ability to be viewed by or interact with another user of the platform.¹⁰

Exceptions

The bill does not prohibit an interactive computer service or a social media platform from censoring expression that is specifically authorized to be censored by federal law, nor does that bill prohibit censorship of unlawful expression, including expression that unlawfully harasses individuals, unlawfully incites violence, or is a civil tort. In addition, the bill does not prohibit or restrict an interactive computer service or a social media platform from authorizing or facilitating a user's ability to censor specific expression on the user's own page or platform at the request of that user.¹¹

Waivers

A contractual or other waiver of the bill's protections is void and considered unlawful and against public policy. The bill prohibits a court or arbitrator from enforcing or giving effect to such a waiver. The bill explicitly states that this waiver prohibition is a public-policy limitation

⁶ R.C. 1723.08; *Kinder Morgan Cochin L.L.C. v. Simonson*, 2016-Ohio-4647, ¶ 33.

⁷ 141 S.Ct. 1220, 1222 – 1227 (2021).

⁸ R.C. 1355.02.

⁹ R.C. 1355.04(A) and (B).

¹⁰ R.C. 1355.01(A).

¹¹ R.C. 1355.01(F) and 1355.06(A) and (B).

of the highest importance and interest in Ohio, and the state is exercising and enforcing this limitation to the full extent permitted by the U.S. Constitution and the Ohio Constitution.¹²

Private cause of action

The bill provides exclusive enforcement by private cause of action initiated by a user. Aside from the civil action pursued by the user, government enforcement is not permitted under the bill. If the user proves that the interactive computer service or social media platform violated a provision of the bill on or after the bill's effective date with respect to the user (including the continuation of prior censorship), the user is entitled to recover declaratory relief, including costs and reasonable and necessary attorney's fees, and/or injunctive relief. The court may hold the interactive computer service or social media platform in contempt if it fails to comply with a court order under the private action and the bill specifies that the court must use all lawful measures to secure immediate compliance with the order, including daily penalties sufficient to secure immediate compliance.¹³

Severability

The bill includes detailed severability language, putting forth the intent of the General Assembly that every provision, section, division, sentence, clause, phrase, or word in the bill, and every application of the provisions in the bill, are severable from each other. If any application of any provision to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances must be severed and may not be affected. All constitutionally valid applications of the bill must be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the General Assembly's intent and priority that the valid applications be allowed to stand alone.

The bill prohibits courts from declining to enforce the severability requirements of the bill on the grounds that severance would rewrite the statute or involve the court in legislative or lawmaking activity. The bill provides that a court that declines to enforce or enjoins a state official from enforcing a statutory provision is never rewriting the statute, as the statute continues to contain the exact same words as it did before the court's decision. The bill specifies that a judicial injunction or declaration of unconstitutionality is:

1. Nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Ohio Constitution or the U.S. Constitution or laws of the U.S.;
2. Not a formal amendment of the language in a statute;

¹² R.C. 1355.03.

¹³ R.C. 1355.07, 1355.08, and 1355.10.

3. No more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.¹⁴

Interaction with federal and other laws

The bill specifies that it applies to the maximum extent permitted by the U.S. Constitution and laws of the U.S., but no further than the maximum extent permitted under those laws (see “**COMMENT**,” below).¹⁵ In addition, the bill does not subject an interactive computer service or a social media platform to damages or other legal remedies to the extent the interactive computer service or social media platform is protected from those remedies under federal law.¹⁶ Lastly, the bill specifies that it should not be construed to limit or expand intellectual property law.¹⁷

COMMENT

Under federal law, Section 230 of the Communications Act of 1934 (47 United States Code 230), enacted as part of the federal Communications Decency Act of 1996, provides limited federal immunity to providers and users of interactive computer services. Courts have interpreted Section 230 to foreclose a wide variety of lawsuits and to preempt laws that would make providers and users liable for third-party content.¹⁸ It is unclear how the bill’s provisions interact with this federal law.

HISTORY

Action	Date
Introduced	10-06-21

H0441-I-134/ks

¹⁴ R.C. 1355.09.

¹⁵ R.C. 1355.04(E).

¹⁶ R.C. 1355.05.

¹⁷ R.C. 1355.06(C).

¹⁸ See Congressional Research Service, Section 230: An Overview, April 7, 2021, <https://crsreports.congress.gov/product/pdf/R/R46751#:~:text=Section%20230%20of%20the%20Communications,users%20of%20interactive%20computer%20services.&text=Section%20230%20contains%20statutory%20exceptions>, accessed October 14, 2021.