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House Committee on Communications and Technology
Hon. Michele Hoitenga, Chair
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Dear Members of the Communications and Technology Committee,

Thank you for this opportunity to testify in support of my bill, House Bill 4801, which would amend Michigan's consumer protection law to include in the definition of unlawfully deceptive trade practices the act of a social network holding itself out as content-neutral and viewpoint-neutral when in fact discriminating against users based upon their expressed viewpoints.

I. Introduction

Social media companies have been the subject of increasing and ongoing scrutiny at the state level and especially the federal level. On July 23, 2019, the Justice Department announced an antitrust investigation into whether and how the largest online platforms achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers.[1] The next day, Facebook was fined $5 billion by the Federal Trade Commission as part of a settlement for violating their users' privacy and misusing their data.[2]

These issues stem from the very rapid growth of social media from novelty to an integral part of commerce. Even the term "social media" reflects a time when these platforms were seen as nothing more than a means for people to socialize online. Social media today affects every

[1]https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms
[2]https://www.usatoday.com/story/tech/news/2019/07/24/facebook-pay-record-5-billion-fine-u-s-privacy-violations/1812499001/

commercial sector in profound ways, yet consists primarily of just a few major companies (household names like YouTube, Facebook, and Twitter) that have existed largely free of oversight and accountability.

In addition to privacy and antitrust problems, social media companies maintain dominance over their users' content and censor them in ways that are often arbitrary, unfair, and provide little to no recourse for the user. Many of these users have major financial investments in their social media presence and face a real, ever-present concern that their business will be harmed by an unexpected and improper act of censorship.

To be sure, there is plenty of content any social media platform should rightly remove, such as what is defined in the Communications Decency Act (CDA) as "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[3]

It is another thing for a social media platform to hold itself out as content-neutral and viewpoint-neutral, as many of their top executives have in Congressional hearings, but then censor their users based upon their beliefs, opinions, and statements.

II. Content of House Bill 4801

HB 4801 would prohibit a social network from engaging in various forms of user censorship based upon the viewpoint expressed by the user– <u>if that- social network represents itself as viewpoint-neutral, impartial, or nonbiased.</u> This condition is easily overlooked.[4] It is essential, however, to establish that this is not a general prohibition, but rather a protection against fraud.

Because HB 4801 only requires that those social media networks holding themselves out as content-neutral not discriminate on the basis of content, it is therefore not a matter of the property rights, but of honoring a public commitment to customers and partners. It is a well-

[3]47 USC 230, attached as an appendix. HB 4801 comports with this definition in Sec. 3J(2) (HB 4801 page 10, line 10).

[4]See for example the description of HB4801at MichiganVotes.org. It titles the bill "Ban social media site viewpoint discrimination" and descibes the bill as: "to prohibit social media sites from engaging in viewpoint discrimination by limiting or restricting access or the services available to a particular user, except for 'good faith' restrictions on content that a service regards as harassment, or as lewd, obscene, etc." It omits the requirement that such a social network would have to hold itself out as neutral.

established tenet of contract law that a contract must be made in good faith. When a platform enters into a business agreement with a user, it must honor its representations to the user – including public statements made before Congress – on its censorship policy. Any social media company that censors its users could comply with the terms of the bill by simply dropping a pretense of neutrality and asserting an editorial policy.

Independent websites typically reserve their right to regulate user-submitted content and would therefore be unaffected by HB 4801. For example, Reddit.com, the 19th top website in the world, consists of fora where each forum may establish its own code of conduct for users.

But some of the largest online platforms have become an integral part of the modern public square, in part because they style themselves as outlets for free speech. Major social media platforms, including Twitter and Facebook, have testified before Congress that they do not censor their users based upon their viewpoints. Moreover, they assert that they are not a publisher, but simply a platform, and therefore not liable for the content posted by their users. They cite the Communications Decency Act, which states in relevant part: "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."

This unfortunate provision grants social networks immunity from liability as a publisher, while still allowing them to censor their content as a publisher would. This has created a double standard where social media companies can eat their cake and have it too: They enjoy both the legal immunity of being a neutral platform and the editorial control of a being publisher.[5]

III. Censorship Defined

[5]Facebook officials use either standard when it suits them. See for example: "Is Facebook a publisher? In public it says no, but in court it says yes," https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit "Facebook has long had the same public response when questioned about its disruption of the news industry: it is a tech platform, not a publisher or a media company. But in a small courtroom in California's Redwood City on Monday, attorneys for the social media company presented a different message from the one executives have made to Congress, in interviews and in speeches: Facebook, they repeatedly argued, is a publisher, and a company that makes editorial decisions, which are protected by the first amendment..."

HB 4801 would prohibit various forms of online censorship, *on the basis of the content or viewpoint expressed,* on platforms that claim to be viewpoint-neutral, impartial, or non-biased. These include:

1. Blocking a user's speech, i.e. disabling the publication of a post.
2. Censoring a user's speech, i.e. deleting a part of a post without the consent of the user. Note that this and other provisions do not apply to obscenity under the bill and the CDA.
3. Banning a user.
4. Removing a user's speech, i.e. removing a post.
5. Shadow banning a user. This is defined in the bill as to suppress the appearance of user-submitted content, wholly or in part, to other users of the service without notice to the author of the content.
6. Deplatforming a user. This is defined in the bill as to disable a user's account for 1 month or more, or permanently, or to prevent the user from creating an alternate account.
7. Deboosting a user. This is defined in the bill as prohibiting a user from using a generally available option to promote content; for example, Facebook typically allows users the options to "boost" their posts, i.e. cause them to display on other users' feeds, in exchange for money.
8. Demonetizing a user. This is defined in the bill as to exclude a user, in whole or in part, from a generally available advertising revenue-sharing agreement. For example, YouTube will "demonetize" a video or channel by deeming it "unfriendly to advertisers" and excluding it from ad revenue.

Under HB 4801 all of these means of censorship would still be available to a platform as long as it was not applying them based on the content or viewpoint expressed while also claiming to be impartial or viewpoint-neutral.

Some of these tools of censorship are truly insidious. Shadow banning, in particular, is fraudulent in its nature: it is censoring a user but deceiving the user into believing his or her content is being published and promoted as normal.[6]

IV. Social Media Is All Business

In drafting, this section was originally titled "Social Media Is Big Business." But truly, social media has become an integral component of nearly every type of business marketing for companies of every size. Brick-and-mortar companies as well as Web-based companies rely on social media to reach new customers as well as engage their current customers. A brewery in Oxford, for example, reported that the overwhelming majority of its marketing portfolio consists of social media engagement.

Not only do existing businesses use social media to grow their companies, but individual users have launched careers from their social media followings. Perhaps most famously, pop star Justin Bieber was first discovered on YouTube, having uploaded videos of himself singing at local talent shows. He was discovered on happenstance when YouTube recommended his video (in a typical "recommended for you" panel) to a user who happened to be a prominent talent agent that inadvertently click on the video.[7] Bieber has since become the first artist to surpass 10 billion total video views, and he now has over 45 million subscribers on YouTube and 100 million followers on Twitter. Another YouTuber with the pseudonym "PewdiePie" achieved 100 million subscribers on YouTube having started with zero, mostly by recording videos of himself playing video games with commentary. This format has since been adopted by thousands of other people, and in fact a major online platform, Twitch.tv, was created to specialize in video game broadcasting. The platform was purchased by Amazon and currently has over 15 million daily active users and over 1,000 employees.

The vast majority of people that monetize their social media content are not celebrities. With even a small following, they are able to leverage their audience to make profit in myriad ways:

1. They can promote products on their channels – their own or those of others.

[6]"Promoted" in this case means the organic promotion of content in search results and page feeds, not paid advertising.
[7]"Justin Bieber Is Living the Dream," New York Times, 12/31/2009. https://www.nytimes.com/2010/01/03/fashion/03bieber.html

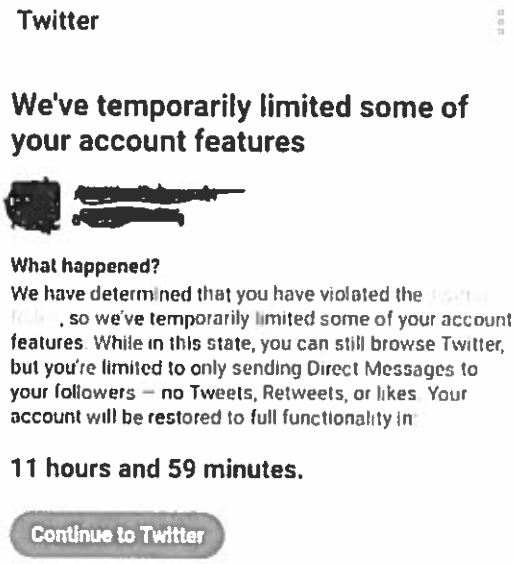
2. They can enter into revenue-sharing agreements for advertisements on their channels.
3. They can solicit donations on their channels and offer on-air recognition for contributors.
4. They can offer bonus content on other networks.
5. They can drive traffic toward their other networks and those of their partners.

Most up-and-coming content creators make little money with any of these techniques at first, and losing access to any can put them out of business. Social media is real money to real people.

Besides the real financial harm, censorship harms individual users in a personal manner. Casual users put a great deal of time and effort into maintaining a personal record of their lives, they express themselves to others, and they too suffer a loss when they are banned from a platform. Being banned from a platform is also insulting and humiliating.

V. User Agreements Give Users Virtually No Recourse for Censorship

Social network user agreements are "click-through" agreements – legal documents comprising thousands of words, but accepted by lay users automatically upon their use of the services.[8] These agreements stipulate that the social network may change the terms at will. Effectively all users are bound to the terms chosen by the social network. There is no distinction between casual users and business partners.



In the event of express censorship, users are not informed whether the decision was made by a human or by "the algorithm," nor whether the censorship was triggered by the actions of another user (e.g. by reporting abuse). Users may request a review for any

[8] YouTube's terms of service agreement is 3816 words. Facebook's terms of service agreement is over 4,000 words in addition to separate Community Standards, Commercial Terms, Advertising Policies, Self-Serve Ad Terms, Pages, Groups, and Events Policy, Platform Policy, Developer Payment Terms, Community Payment Terms, Commerce Policies, Brand Resources, and Music Guidelines documents.

sanctioned content, but the network's decision is final and the network typically provides little to no detail in the reasoning behind its decision.

With shadow banning, of course, a user may never even become aware that he or she is censored, and therefore recourse is impossible when the harmed party is unaware of the harm taking place.

VI. Social Networks' Policy Is Censorship

Some networks include content policies for demonetization so broad that almost all content discussing the issues of the day could be (and are) swept in. As of June 2019, YouTube demonetizes video for "sensitive events" and "controversial issues" such as "political conflicts," "terrorism or extremism," and "sexual abuse." YouTube also demonetizes videos labeled "hateful," including anything that "incites hatred against, promotes discrimination, disparages, or humiliates an individual or group of people."[9]

These terms are so broad they might be applied to almost anything. "Controversial issues" clearly includes the topics debated here at the Legislature and could be applied to any type of political discourse, which is precisely the type of speech most strongly protected by the First Amendment. Any expression of anything negative about anybody could be said to "humiliate an individual."

This policy is clearly intended to give YouTube the most leeway possible to censor at its discretion, but such a broad authority naturally sweeps in other innocuous types of speech. For example, a group of YouTube creators is currently suing the platform alleging improper censorship of LGBTQQIP2SAA content. They allege YouTube has discriminated against them by hiding their videos (shadow banning), removing subscribers, and denying advertising. They say the platform unfairly targets any video tagged with words like "gay," "transgender," or "bisexual," even when the videos have no mature content.[10] This comes two years after an announcement from YouTube in April 2017 that LGBTQQIP2SAA content would no longer

[9] https://support.google.com/youtube/answer/6162278?hl=en
[10] https://www.buzzfeednews.com/article/laurenstrapagiel/lgbtq-creators-youtube-lawsuit

automatically be placed in "restricted" mode which restricts them from being played in public places such as schools.[11]

VII. Censorship by Algorithm Is Still Censorship

When embarrassed in the media for improperly censoring content, social networks always claim that the censorship was the inadvertent result of a bug in "the algorithm."

"The algorithm" is the program that determines which posts to promote to which users and which posts to suppress.

The intent here is to portray the harm done to users as an accident of machine code that failed to anticipate some specific circumstance, as opposed to a human making a decision on the facts of any specific case.

Even if this is the truth, the algorithm is developed and maintained by humans, and its decisions are the result of their programming. "The algorithm" is intensively monitored and adjusted on an ongoing basis.

Whether or not an algorithm is neutral is a legal conclusion to be reached by a court. It cannot simply be asserted as a conclusion by the company, especially when the public has no ability to review the algorithm and verify.

VIII. Only a Court Can Properly Adjudicate Free Speech Questions

The First Amendment to the Constitution of the United States is one of the foundational principles that created the great country we have today, arguably the most important of all.

Controversy over the exact limitations on constitutional protections of speech go back to the Sedition Act, if not farther, and some aspects are still in controversy today. Courts have ruled extensively on speech issues over the years. It is a mature and complex body of case law. A

[11] https://www.lgbtqnation.com/2017/04/youtube-says-lgbtq-content-wont-restricted-anymore/

private entity like a social network with a policy interest in its decision is not capable of impartially and consistently applying First Amendment law. Universities have tried, and failed miserably.[12]

This is not to suggest that a platform could not have a free speech policy, only that it should not usurp the role of courts in the online space. We have courts for resolving disputes on issues of defamation, contract interference, hate crimes, and so on. In a "free speech" environment, the platform is not the referee. The platform is the public square, and traditional courts are the proper venue for dispute resolution.

IX. HB 4801 Is Extremely Narrow In Scope

As much as House Bill 4801 attempts to tackle a serious problem in our public discourse, it is important to note that it is very narrow in what it proscribes. This must be considered against claims that the bill would have severe consequences.

First, it only applies to social networks that hold themselves out as viewpoint-neutral, impartial, or nonbiased. Any platform can evade the terms of the bill by simply not doing so. Some major platforms would have to modify prior statements, but that is not difficult.

Second, it only applies to censorship that occurs on the basis of the content or viewpoint expressed. It would be the burden of the user bringing suit against the social network to demonstrate that the censorship was based on content or viewpoint.

These two conditions set a high bar for egregiousness of content censorship – but they provide an avenue for discovery of such censorship.

X. Compliance with Federal Law

HB 4801 was crafted to comply with federal law, particularly 47 USC 230, commonly known as the Communications Decency Act. The CDA states that "Nothing in this section shall be

[12]See the hearings on HB4436 in the House Oversight Committee earlier this year.

construed to prevent any State from enforcing any State law that is consistent with this section," thereby *affirming* the right of the States to protect its' citizens interests on the Internet so long as they do so consistently with the provisions of the CDA.

There is only one applicable provision of the CDA, subsection (c)(2), which prohibits States from holding a platform liable for blocking or screen offensive material. Because of this provision applying to the States, Sec. 3J (2) of HB 4801 uses its exact language to assert a defense to liability to have acted in compliance with the Communications Decency Act.[13]

[13]The Communications Decency Act is attached as Appendix B.

Appendix A: Responses to Anticipated Objections to HB 4801

Objection: HB 4801 infringes on the property rights of social networks to maintain order, quality of content, etc.
Reply: Social networks would still have this right in full. What they would not have is the right to do the opposite of what they claim to do for their customers: to claim they treat all content equally, neutral with respect to viewpoint, and then in fact censor content specifically because of the viewpoint expressed.

Objection: HB4801 violates federal law.
Reply: This is addressed above, but opponents are expected to make this objection anyway. HB 4801 follows federal law to the letter, by providing a defense under the word-for-word identical language as used in the Communications Decency Act.

Objection: HB4801 would burden the courts by requiring they police social media.
Reply: Courts would have no more burden than they have reaching conclusions of law and fact in any other civil action, and this objection misinterprets the role of the court. The court would review a set of facts provided in the proceedings of a civil action and make a finding of law and fact to determine whether or not a social network falsely held itself out as viewpoint- and content-neutral.

Objection: HB4801 could/would lead to a lot of frivolous lawsuits.
Reply: As with all other aspects of consumer protection law, most people realize that lawsuits are extremely time-consuming, expensive, and risky. It is unlikely that every user who feels wronged by a social media platform would sue them. Michigan courts have the ability to award attorney fees and costs for parties that file frivolous lawsuits.[14] It is a social network's own fault if large numbers of meritorious lawsuits are the consequence of their large-scale censorship of users.

[14]MCL 600.2591(1): "Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney."

Objection: The defense to liability under 47 USC 230 will severely limit the enforceability of HB4801.

Reply: 47 USC 230 is a severely flawed federal law that regrettably infringes upon the States' ability to protect the interests of their citizens. It allows social networks to apply a subjective standard (i.e. whatever they like) to determine what is obscene. In doing so, it creates a loophole for social networks to claim to be content-neutral while sanctioning disagreeable opinions as "obscene." This is a setback to HB4801 that cannot be resolved at the state level (due to the feds asserting their supremacy on this issue). Nevertheless, social networks *also* censor users in ways that could not plausibly be construed to be obscene, harassing, or excessively violent under 47 USC 230. (For example, a pro-life advertisement that does not depict abortion.) Furthermore, Michigan should not shirk its responsbility to its citizens just because the federal government has erred here.

Appendix B: 47 USC 230, the Communications Decency Act

Retrieved at https://www.law.cornell.edu/uscode/text/47/230

(a) Findings. The Congress finds the following: [non-binding blah blah blah]

(b) Policy. It is the policy of the United States... [non-binding blah blah blah]

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of 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; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law. Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A)any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B)any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C)any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, §☐230, as added Pub. L. 104–104, title V, §☐509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, §☐1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, §☐4(a), Apr. 11, 2018, 132 Stat. 1254.)