



1212 New York Ave. NW
Suite 900
Washington, DC 20005
202.525.5717

Free Markets. Real Solutions.
www.rstreet.org

Testimony from:
Jeffrey Westling, Resident Fellow, Technology and Innovation, R Street Institute

In Opposition to SPB 7072

April 5, 2021

Chair and members of the committee:

The freedom of speech sits at the very core of American society, and any attempts to limit the ability for Americans to communicate and express their opinions face significant public backlash. It is unsurprising then that many Americans have expressed concerns about the moderation practices of social media companies, which they often view as forces of censorship.¹ However, in a rush to regulate, policymakers often ignore the First Amendment itself, attempting to have the government step in to take the place of private companies and their decisions regarding the type of content allowed on a given service. SPB 7072 makes this same mistake, and worse does so in a way that will actively harm Floridians and Americans across the country.

SPB 7072 is unconstitutional

The First Amendment prohibits government intrusions on the speech of the citizenry. Social media companies offer a service that allows users to post and share information, but these social media companies are private businesses, not government actors. They design the services in a way that maximizes the value for the users and this often means removing hateful or obscene material that could drive down engagement or usage of the service, as many users do not wish to see this type of material. Other times, this may mean analyzing the engagement of the user to suggest content that the individual would want to interact with.

Federal law makes clear that this type of behavior is not only acceptable but encouraged.² Section 230 of the Communications Decency Act strikes a very delicate balance that incentivizes private platforms to moderate content without fear that doing so could lead to liability for anything that a user posts. Without this strong protection, platforms would be left to either over-remove speech, the very thing that proponents of this bill worry about, or they would choose not to moderate at all as refusing to moderate would insulate them from liability due to a lack of knowledge.³



1212 New York Ave. NW
Suite 900
Washington, DC 20005
202.525.5717

Free Markets. Real Solutions.
www.rstreet.org

This bill sees the delicate balance as a problem *because* proponents dislike the way these private companies have chosen to moderate content. The Supreme Court has made clear that the First Amendment applies to digital media in the same way as it does to traditional media, and no amount of perceived monopoly power can overcome the First Amendment's protections.⁴ Despite this strong protection, proponents wish to usurp the autonomy of the platforms to force them to carry speech.

This clear violation of the First Amendment would allow the government to step in and regulate speech content, blatantly disregarding the numerous issues that this would pose. While sometimes the speech of others can be frustrating, it is critical that the government refrains from leveraging its power to control that speech.

SPB 7072 is actively harmful to Floridians

Even apart from the fact that this bill violates the First Amendment, it also presents a dangerous policy proposal that would lead to active harms for Floridians.

For example, in an attempt to force platforms to host content, the bill prohibits a social media platform taking "any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."⁵ Here, drafters envision the provision as a protection against censorship, but ignoring the blatant unconstitutionality, if it were enforceable the provision is insufficiently limited to the point that platforms will be required to host all kinds of bad content. The bill defines a journalistic enterprise to include any entity that publishes 100,000 words with 100,000 active users, or publishes 100 hours of audio or video available with 100 million viewers annually.⁶ However, there is no mention of the use of bots, whether the audience must be in Florida, or whether the content or source actually violates federal law.

Just imagine how that can be exploited. A group like ISIS could publish propaganda posts that get viewed by millions, and if they cannot reach the target numbers, they could inflate them with bots or artificial viewers. Then, social media platforms would be forced to host the content. Worse, because social media is inherently interstate, platforms would likely need to host such content everywhere.

This is obviously an extreme example, and likely would be resolved through the courts. But that itself highlights the more practical challenge that these companies face. The main driver of platform action is a fear of liability. If there is uncertainty whether a specific entity fits the definition of a journalistic enterprise, the platforms will likely err on the side of caution and host the content, shifting the blame for the content itself to the government for forcing them to host it.



1212 New York Ave. NW
Suite 900
Washington, DC 20005
202.525.5717

Free Markets. Real Solutions.
www.rstreet.org

The bill would also prevent platforms from changing policies more than once a month.⁷ Drafters likely included the provision because of a worry that changes in the terms of services or standards could be difficult to keep up with or changed per case, but again they should imagine the practical implications. For example, a platform may have no policy in place regarding the use of deep fake video, only to see a deep fake spread on the service a day after an unrelated change to the terms of service. This provision would effectively prohibit the platform from addressing the content for a month until it could change its policies.

These are just a few specific examples from the text, and there are countless more. In the bill's attempt to force platforms to host speech, Floridians could face significant harms online. The existing federal regime may not lead to perfect outcomes, but it maintains a very delicate balance between removing harmful content and promoting free speech and expression online. Derailing this regime in an attempt to circumvent the First Amendment will undoubtedly do much more harm than good.

R Street appreciates the concerns about free speech online. However, this bill takes a blatantly unconstitutional approach to attempt to force platforms to host content. In its application, the bill would lead to significant harms for Floridians. We urge you to oppose the bill.

Jeffrey Westling
Fellow, Technology and Innovation
R Street Institute
(602) 284-0553
jwestling@rstreet.org

¹ Alayna Treene, "Over 60 conservatives demand Big Tech End 'censorship'," *Axios*, May 1, 2018.
<https://www.axios.com/over-60-prominent-1525192042-ea02acde-389d-4d57-8a78-dacc708f9dbf.html>.

² "Online Activities Covered by Section 230," *Digital Media Law Project*, Jan. 22, 2021.
<http://www.dmlp.org/legal-guide/online-activities-covered-section-230>.



1212 New York Ave. NW
Suite 900
Washington, DC 20005
202.525.5717

Free Markets. Real Solutions.
www.rstreet.org

³ Jeffrey Westling and Canyon Brimhall, “Section 230,” *R Street Explainer*, March 2021.

<https://www.rstreet.org/wp-content/uploads/2021/03/explainer22-1.pdf>.

⁴ Corbin Barthold and Berin Szóka, “No, Florida Can’t Regulate Online Speech,” *Lawfare*, March 12, 2021.

<https://www.lawfareblog.com/no-florida-cant-regulate-online-speech>.

⁵ SPB 7072 §3 [§501.2041(2)(j)].

⁶ *Id.* [§501.2041(1)(d)]

⁷ *Id.* [§501.2041(2)(c)].