



Florida Social Media Bill Overshadows Tech Week | Cato at Liberty Blog – Cato Institute

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Floridian state and local governments worked at cross purposes in early May when, while Miami Mayor Francis Suarez wooed Silicon Valley at Tech Week, the Florida legislature sent a punitive social media bill to Governor DeSantis' desk. Florida **Senate Bill 7072** is intended to prevent supposedly biased content moderation and punish monopolistic firms, but it is unworkable and unconstitutional. If Gov. DeSantis signs SB 7072, it will invite costly legal challenges and kneecap Miami's overtures to the tech industry.

The bill is comprised of two main sections. The first section establishes a state "antitrust violator vendor list" of disfavored firms. The second enumerates a host of new prohibitions and mandates planned to produce fairness in content moderation. Many are fairly technical; platforms must offer accurate view count tools, "provide a user with the number of other individual platform participants who were provided or shown content or posts," give written explanations of all content moderation decisions, and store all data from banned accounts for free for 60 days. Platforms are prohibited from moderating journalists' speech. These requirements may be enforced via private suit or administrative action under the Florida Deceptive and Unfair Trade Practices Act. Private suits utilizing the new causes of action are likely precluded by Section 230 of the Communications Decency Act, which give platform broad leeway to moderate, and stipulates that;

"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."

While Section 230 wouldn't prevent administrative enforcement of the new requirements, the First Amendment would. The bill makes a "deceptive act or practice" of platform operators' exercise of their basic First Amendment rights to speak or refrain from speaking. As Berin Szoka and Corbin Barthold **explain**, courts have repeatedly held that onerous regulation, even regulation intended to promote speech, raises First Amendment concerns if it makes carrying speech more costly or difficult.

The bill's "antitrust violator vendor list" provision is likely legal but foolish. Persons added to the list would be denied government contracts and certain state financial incentives. Criteria for inclusion or exclusion from the list is convoluted in the extreme. The list would initially include anyone convicted of an antitrust offense federally, or by other states, effectively outsourcing

Florida's judgement. However, another layer of review would have administrative judges conduct balancing tests between various public interests in order to add or remove names from the list. Bidders not selected for state contracts would have a new mechanism for contesting and dragging out the process. Competing states would be granted a potent tool for dissuading firms from moving to Florida. Introducing a source of continuing uncertainty into Florida's state vendor selection process is unlikely to be good for Floridians.

Although perhaps unintended, the bill's pursuit of unattainable neutrality will have the effect of requiring platforms to suppress political speech relative to discussions of other subjects. Section 4(2)(h) of the bill prohibits both "shadow banning," defined as specific algorithmic deprioritization, or "post-prioritization" of speech from or about candidates for public office.

(h) A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate as defined in s. 106.011(3)(e)

"Post-prioritization" means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results"

Intended to prevent platforms from putting a thumb on the scale by prioritizing some candidates' speech over others, this stipulation ignores both websites' rights to arrange content as they wish, and how most "post-prioritization" is responsive to user inputs.

During the 2016 and 2020 elections, Twitter's algorithms often highlighted Donald Trump's tweets because many people engaged with them, either positively or negatively. Tweets from Joe Biden and Hillary Clinton generally inspired less engagement, and were therefore less likely to be displayed in users' feeds. This did not amount to an in-kind contribution to Donald Trump because the algorithm processed their content neutrally, without placing particular weight on their identities or ideas. Just as some politicians are better speakers than others, some will be more adept at using particular social media platforms.

However, in banning all unpaid post-prioritization of electoral speech, the bill ensures that such speech will receive less prioritization than non-electoral speech unencumbered by such restrictions. During gubernatorial elections, platforms would be prohibited from allowing Governor DeSantis's speech, or even speech about Governor DeSantis, to go viral the way celebrity gossip or footage of an alligator in a restaurant might. In their pursuit of platform neutrality, Florida would impermissibly relegate political speech to the internet's slow lane. Indeed, as the bill is currently drafted, it is hard to see how search engines could rank political content at all.

These requirements are unduly burdensome, and will make it difficult to operate any sort of internet platform. SB 7072's supporters seem to recognize this, because they amended the bill to exempt any platform that "that owns and operates a theme park or entertainment complex," creating a specific carveout for the Walt Disney Company. Without such an exemption, Disney's Disney+ streaming service and ShopDisney merchandise site would be subject to the bill's requirements. Absurd favoritism aside, the need for such an exemption illustrates how economically painful SB 7072 would be.

Florida Politics **reports** that the Disney exemption amendment's sponsor "argued it would only allow Disney to moderate its review section." Disney is far from the only operator of a website or platform with a review section. If the bill's supporters recognize that SB 7072 would make an ungovernable mess of review and comments sections, why would they foist it on everyone else? In this case, what's bad for the mouse will be bad for everyone.

While Governor DeSantis may see political advantage in bloodying Big Tech's nose, he should not compromise Florida's elections and state contracting process in an effort to do so. Silicon Valley emigrants value Florida's mild climate, but hope to leave Californian governance behind. Unconstitutionally politicizing technology regulation would be a step in the wrong direction.

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