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## One glaring problem with Ron DeSantis's plan to punish Big Tech censorship

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Big Tech bias and social media censorship is a serious concern. But Florida Gov. Ron DeSantis needs to realize that any conservative “solution” that violates the First Amendment is no solution at all.

The Republican governor just signed legislation aimed at prohibiting social media platforms such as Facebook and Twitter from banning political candidates. The bill does so by levying a hefty \$250,000 fine per day on any company that removes a statewide political candidate from its platform, with a \$25,000 daily fine for removing local candidates.

“This session, we took action to ensure that we the people, real Floridians across the Sunshine State, are guaranteed protection against the Silicon Valley elites,” DeSantis said. “Many in our state have experienced censorship and other tyrannical behavior firsthand in Cuba and Venezuela. If Big Tech censors enforce rules inconsistently to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable.”

DeSantis and his fellow Florida Republicans are likely motivated, at least in part, by the controversial mass de-platforming of former President Donald Trump on all mainstream social media websites.

The governor noted the seemingly hypocritical and selective decision-making of some of these companies, such as Twitter, which banned Trump but continues to allow members of the Iranian regime who openly foment antisemitism to use its platform.

“When you de-platform the president of the United States but you let Ayatollah Khomeini talk about killing Jews, that is wrong,” DeSantis added.

As far as his moral criticisms of Big Tech companies are concerned, DeSantis isn't necessarily wrong. But the government can't fix every problem, and legislation that is nullified by the courts helps no one. DeSantis's grand plan may be struck down as a violation of the First Amendment.

“The potential First Amendment issue is that if a social media platform is a publisher, then requiring it to host certain speakers, writers, and their messages is a form of compelled speech,” Ilya Shapiro, director of the Cato Institute's Robert A. Levy Center for Constitutional Studies, explained.

“The more a platform moderates or curates what people post on their site, however, the more it becomes responsible for those messages, the more it becomes a publisher,” Shapiro continued.

“Most of the tech companies shy away from calling themselves publishers, however, saying that they’re more akin to a bulletin board where people post things. But a bulletin board can be seen as a public forum of sorts, which could then lessen the tech companies’ First Amendment protections and subject them to requirements to serve all comers or at least treat them all on the same terms.”

So while much of this is new terrain, DeSantis’s law will face serious legal challenges — and opponents are extremely confident they will defeat it in court.

Corbin K. Barthold, internet policy council for TechFreedom, said he’s nearly certain that the new law won’t hold up to First Amendment scrutiny and will be struck down. In particular, he called the move to fine platforms for removing political candidates a “forlorn endeavor.”

“Just as a newspaper has editorial rights or a parade has autonomy over its speech, an internet website has autonomy over what speech it allows and does not allow,” Barthold said. “So this is a classic case of compelled speech based on the content and the speech and the identity of the speaker.”

Is it unconstitutional? Yes, Barthold said: “It’s pretty open and shut.”

“I actually think that if you talk to the people who made [DeSantis’s bill], at least the lawyers, in private, they would acknowledge the challenge they’re facing and that they are probably not going to overcome,” he added. “To overcome it, they’re going to need to hit some kind of legal bank shot. Under conventional First Amendment analysis, there’s no way it passes.”

For the law to survive, DeSantis and his allies would need to use a novel, outside-the-box legal argument. Thus far, they’re trying to argue that their law doesn’t crack down on speech but punishes “fraud.” The logic is that the platforms promise users to be neutral and open platforms but then violate that agreement by banning officials on one side of the spectrum.

However, Barthold explained that this argument relies on “revisionist history.” While they have often generally expressed support for open debate, the platforms have traditionally spelled out in their terms of service agreements what speech they do and don’t allow. They have never really promised to allow all speech or all voices, so the fraud and consumer protection angle doesn’t look like a promising Get Out of Jail Free card for DeSantis’s constitutionally suspect legislation.

Of course, DeSantis’s anti-Big Tech bill is great for him politically. The governor even got a standing ovation at his press conference defending it.

But good politics doesn’t always make for good policy — and a popular “solution” that relies on highly dubious legal authority may help no one.