

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: SB 6-C

INTRODUCER: Senator Bradley

SUBJECT: Social Media Platforms

DATE: April 19, 2022

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Ryon</u>	<u>Ryon</u>	<u>CA</u>	<u>Pre-meeting</u>

I. Summary:

SB 6-C amends the definition of “social media platform” as it pertains to the application of SB 7072, which was passed by the Legislature during the 2021 Regular Session. SB 7072, signed into law on May 24, 2021, addresses some concerns related to social media platforms, which among other things, requires social media platforms to apply uniform standards, notify censored or deplatformed users, allow users to make certain choices, ensure posts by or about candidates for office in Florida are not shadow banned, and ensure that journalistic enterprises are not censored or deplatformed.

SB 7072 defines “social media platform” as any information service, system, Internet search engine, or access software provider that provides or enables computer access by multiple users to a computer server, including an Internet platform and/or a social media site, operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity, does business in the state, and satisfies at least one of the following thresholds:

- Has annual gross revenues in excess of \$100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
- Has at least 100 million monthly individual platform participants globally.

However, the definition of “social media platform” excludes any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a specific type of theme park as defined in s. 509.013, F.S.

The bill removes the theme park exclusion from the definition of “social media platform.”

The bill takes effect upon becoming law.

II. Present Situation:

Section 230

The federal Communications Decency Act (CDA) was passed in 1996 “to protect children from sexually explicit Internet content.”¹ 47 U.S. Code § 230 (Section 230) was later added to the CDA “to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”² Section 230 states that no provider or user of an interactive computer service may be held liable on account of any action which is:³

- 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
- Taken to enable or make available to information content providers or others the technical means to restrict access to material from any person or entity that is responsible for the creation or development of information provided through any interactive computer service.

While Section 230 immunity has fostered the free flow of ideas on the Internet, critics have argued that Section 230 shields publishers from liability for allowing harmful content.⁴ Recently, there has also been criticism of the broad immunity provisions or liability shields, which allow individuals unhappy with third-party content to sue the user who posted harmful content but not the platform hosting it. Both sides of the political aisle have claimed that internet platforms engage in political censorship and unduly restrict viewpoints.⁵

SB 7072 (2021) – Social Media Platforms

During the 2021 Regular Session, the Legislature passed SB 7072 to address some concerns related to social media platforms and the limits of Section 230.⁶ The bill was signed into law on May 24, 2021. Among other things, the bill created s. 501.2041, F.S., which enumerates several

¹ *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (citing *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)).

² *Force*, 934 F.3d at 63 (quoting *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

³ 47 U.S.C. § 230(c).

⁴ Zoe Bedell and John Major, *What’s Next for Section 230? A Roundup of Proposals* Lawfare, (July 29, 2020) <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> (last visited Feb. 25, 2021).

⁵ For example, on May 28, 2020, an executive order was issued by President Trump suggesting that websites “should properly lose” their “limited liability shield” whenever they “remove or restrict access to content” not in good faith. Bedell, *supra* note 11; Exec. Order No.13925, 85 Fed. Reg. 34079 (May 28, 2020).

⁶ See Chapter 2021-32, Laws of Fla.

provisions with which social media platforms must comply. Specifically, the law requires social media platforms to to:⁷

- Publish standards it uses for determining how to censor,⁸ deplatform,⁹ and shadow ban¹⁰ users, and apply such standards in a consistent manner;
- Inform each user¹¹ about any changes to its user rules, terms, and agreements before implementing the changes and not make changes more than once every 30 days;
- Notify a user in a specified manner within 7 days of censoring or deplatforming the user;
- Allow a user who has been deplatformed to access or retrieve all of the user’s information, content, material, and data within a specified time period;
- Allow a user to request the number of other individuals who were shown the user's content or posts, and provide such information upon such request by the user;
- Provide users with an option to opt out of post-prioritization¹² and shadow banning algorithms¹³ to allow sequential or chronological posts and content;
- Ensure that posts by or about candidates for office in Florida are not shadow banned; and
- Ensure that journalistic enterprises¹⁴ are not censored, deplatformed, or shadow banned.

These provisions apply to “social media platform[s]” defined as any information service, system, Internet search engine, or access software provider that provides or enables computer access by multiple users to a computer server, including an Internet platform and/or a social media site, operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity, does business in the state, and satisfies at least one of the following thresholds:

- Has annual gross revenues in excess of \$100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
- Has at least 100 million monthly individual platform participants globally.¹⁵

⁷ Section 501.2041(2), F.S.

⁸ “Censor” includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform. Section 501.2041(1)(b), F.S.

⁹ “Deplatform” means the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days. Section 501.2041(1)(c), F.S.

¹⁰ “Shadow ban” means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform. This term includes acts of shadow banning by a social media platform which are not readily apparent to a user. Section 501.2041(1)(f), F.S.

¹¹ “User” means a person who resides or is domiciled in this state and who has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform. Section 501.2041(1)(h), F.S.

¹² “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. The term does not include post-prioritization of content and material of a third party, including other users, based on payments by that third party, to the social media platform. Section 501.2041(1)(e), F.S.

¹³ “Algorithm” means a mathematical set of rules that specifies how a group of data behaves and that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material. Section 501.2041(1)(a), F.S.

¹⁴ “Journalistic enterprise” means an entity doing business in Florida that:

1. Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
2. Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
3. Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
4. Operates under a broadcast license issued by the Federal Communications Commission. Section 501.2041(1)(d), F.S.

¹⁵ Section 501.2041(1)(g), F.S.

The law specifically excludes from the definition of “social media platform” any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in s. 509.013, F.S.¹⁶

A social media platform that fails to comply with those specified provisions may be found in violation of the Florida Deceptive and Unfair Trade Practices Act by the Department of Legal Affairs.¹⁷ Additionally, a user may bring a private cause of action against a social media platform for failing to apply consistently certain standards and for censoring or deplatforming without proper notice.¹⁸

SB 7072 also:

- Prohibited social media platforms from deplatforming candidates for political office, and allows the Florida Elections Commission to fine a social media platform \$250,000 per day for deplatforming statewide candidates and \$25,000 per day for deplatforming all other candidates. If a social media platform knowingly provides free advertisements for a candidate, such ads are treated as an in-kind contribution and the candidate must be notified.
- Prohibited social media platforms convicted of or held civilly liable for state or federal antitrust violations from contracting with public entities, and allowed such entities to be placed on the Antitrust Violator Vendor List (list) by the Department of Management Services.

SB 7072 (2021) – Pending Litigation

On May 27, 2021, prior to the July 1, 2021, effective date of SB 7072, Netchoice, LLC and Computer & Communications Industry Association - trade associations of online businesses with members that operate social media platforms - filed a complaint before the United States District Court for the Northern District of Florida, for declaratory and injunctive relief against certain public officials¹⁹ in their official capacities, to enjoin the enforcement SB 7072. Plaintiffs argued that the bill infringed on the rights to freedom of speech, equal protection and due process protected by the First and Fourteenth Amendments to the U.S. Constitution. Additionally, Plaintiffs argued that the bill exceeds Florida’s authority under the Constitution’s Commerce Clause and is preempted by Section 230.²⁰

On June 30, 2021, the District Court granted a preliminary injunction finding that SB 7072 is likely unconstitutional and partly preempted.²¹ The court found the provisions regulating posts

¹⁶ *Id.* Section 509.013, F.S., defines “theme park or entertainment complex” as a complex comprised of at least 25 contiguous acres owned and controlled by the same business entity and which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually.

¹⁷ Section 501.2014(5), F.S.

¹⁸ Section 501.2014(6), F.S.

¹⁹ The Attorney General of Florida, the members of the Florida Elections Commission, and a Deputy Secretary of the Florida Department of Management Services (the Secretary’s position was vacant at the time of filing).

²⁰ Article VI, Paragraph 2 of the United States Constitution, commonly referred to as the Supremacy Clause, establishes that the federal constitution, and federal law generally, take precedence over state laws and constitutions. The Supremacy Clause also prohibits states from interfering with the federal government’s exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect. See Cornell Law School, Legal Information Institute, *Supremacy Clause*, https://www.law.cornell.edu/wex/supremacy_clause (last visited April 19, 2022).

²¹ *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1086 (N.D. Fla. 2021).

“by or about” a candidate and material posted by a “journalistic enterprise” could not be applied without regard to the content of the regulated speech.²² Additionally, the judge found that statements by Florida officials, together with the bill’s theme park carveout, manifested “viewpoint-based motivation” and discrimination among speakers, both requiring strict court review which would likely find the law unconstitutional.²³

Defendants timely appealed the order granting plaintiffs’ motion for a preliminary injunction to the United States Court of Appeals for the Eleventh Circuit. Briefs have been filed an oral argument is scheduled for Thursday, April 28, 2022.

III. Effect of Proposed Changes:

The bill amends s. 501.2041, F.S., to remove the theme park exclusion from the definition of “social media platform.”

The bill reenacts sections of Florida Statutes to incorporate changes made to s. 501.2041, F.S.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²² *Id.* At 1094-95.

²³ *Id.*

B. Private Sector Impact:

Amending the definition of “social media platforms” may have an economic impact on certain entities as it pertains to the application of SB 7072 (2021).

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 501.2041 of the Florida Statutes.

The bill reenacts sections 106.072(1)(c) and 287.137(1)(f) of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.