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 Commerce and Tourism

BILL:	SB 1448
INTRODUCER:	Senator Gruters
SUBJECT:	Transparency in Social Media
DATE:	January 29, 2024
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McMillan	McKay	CM	**Favorable**
2.			ACJ	
3.			FP	

I. Summary:

SB 1448 creates the "Transparency in Social Media Act," to require each foreign-adversary-owned entity[1] operating a social media platform in Florida to publicly disclose the core functional elements of the social media platform's content curation and algorithms. The disclosures must identify the following:

- Factors that influence content ranking and visibility;
- Measures taken to address misinformation and harmful content; and
- The process of personalization and targeting of content.

The bill also requires each foreign-adversary-owned entity to make publicly available the source code of its algorithm through an open-source license, as well as implement a user verification system for each user and organization that purchased advertisements concerning social or political issues.

The Department of Legal Affairs is required to enforce the provisions of the bill.

The bill takes effect July 1, 2024.

II. Present Situation:

Internet and Social Media Platforms

There are many ways in which individuals access computer systems and interact with systems and other individuals on the Internet. Examples include:

[1] The United States Department of Commerce has identified China (including Hong Kong), Cuba, Iran, North Korea, Russia, and the Nicolás Maduro regime in Venezuela as foreign adversaries. *See* 15 CFR § 7.4.

- Social media sites, which are websites and applications that allow users to communicate informally with others, find people, and share similar interests;[2]
- Internet platforms, which are servers used by an Internet provider to support Internet access by their customers;[3]
- Internet search engines, which are computer software used to search data (such as text or a database) for specified information;[4] and
- Access software providers, which are providers of software (including client or server software) or enabling tools for content processing.[5]

Such platforms earn revenue through various modes and models. Examples include:

- Data monetization.[6] This uses data that is gathered and stored on the millions of users that spend time on free content sites, including specific user location, browsing habits, buying behavior, and unique interests. This data can be used to help e-commerce companies tailor their marketing campaigns to a specific set of online consumers. Platforms that use this model are typically free for users to use.[7]
- Subscription or membership fees. This model requires users pay for a particular or unlimited use of the platform infrastructure.[8]
- Transaction fees. This model allows platforms to benefit from every transaction that is enabled between two or more actors. An example is AirBnB, where users transacting on the site are charged a fee.[9]

Trade Secrets

Generally, trade secrets are intellectual property rights on confidential information that are used by a business and provide an economic advantage to that business.[10]

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[2] DelValle Institute Learning Center, *Social Media Platforms*, *available at* https://delvalle.bphc.org/mod/wiki/view.php?pageid=65 (last visited Jan. 29, 2024).
[3] IGI Global, *Internet Platform*, *available at* https://www.igi-global.com/dictionary/internet-platform/15441 (last visited Jan. 29, 2024).
[4] Merriam Webster, *Search Engine*, *available at* https://www.merriam-webster.com/dictionary/search%20engine (last visited Jan. 29, 2024).
[5] 47 U.S.C. § 230(f)(4) defining "access software provider to mean a provider of software (including client or server software), or enabling tools that do any one or more of the following: (i) filter, screen, allow, or disallow content; (ii) pick, choose, analyze, or digest content; or (iii) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.
[6] The Alexander von Humboldt Institute for Internet and Society, *How do digital platforms make their money?*, July 29, 2019, *available at* https://www.hiig.de/en/how-do-digital-platforms-make-their-money/ (last visited Jan. 29, 2024).
[7] Investopedia, *How Do Internet Companies Profit with Free Services?*, *available at* https://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-give-away-their-services-free.asp#:~:text=Profit%20Through%20Advertising,content%20is%20through%20advertising%20revenue.&text=Each%20of%20these%20users%20represents,and%20services%20via%20the%20Internet (last visited Jan. 29, 2024).
[8] HIIS, *supra* note 6.
[9] *Id.*
[10] *See* The Florida Bar, *Trade Secret* (Dec. 14, 2022) https://www.floridabar.org/practice-areas/trade-secrets/ (last visited Jan. 29, 2024).

Section 812.081, F.S., defines a "trade secret" as information[11] used in the operation of a business, which provides the business an advantage or an opportunity to obtain an advantage, over those who do not know or use it. The test provided for in statute, and adopted by Florida courts,[12] requires that a trade secret be actively protected from loss or public availability to any person not selected by the secret's owner to have access thereto, and be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.[13]

Penalties

Florida law criminalizes the disclosure or theft of trade secrets. For example:

- Section 815.04, F.S., makes it a third degree felony[14] for a person to willfully, knowingly, and without authorization disclose or take data, programs, or supporting documentation that are trade secrets that reside or exist internal or external to a computer, computer system, computer network, or electronic device.[15]
- Section 812.081, F.S., makes it a third degree felony for a person to steal, embezzle, or copy without authorization an article that represents a trade secret, when done with an intent to:
  - Deprive or withhold from the trade secret's owner the control of a trade secret, or
  - Appropriate a trade secret to his or her own use or to the use of another.

Florida Data Privacy Regulations

In 2023, the Florida Legislature passed SB 262, which created a unified scheme to allow Florida's consumers to control the digital flow of their personal information. SB 262 was signed by the Governor on June 6, 2023.[16] Among other things, SB 262 created ch. 501, part V, F.S., which takes effect on July 1, 2024, and gives Florida consumers the right to:

- Confirm and access their personal data;
- Delete, correct, or obtain a copy of that personal data;
- Opt out of the processing of personal data for the purposes of targeted advertising, the sale of personal data, or profiling in furtherance of a decision that produces a legal or similarly significant effect concerning a consumer;
- Opt out of the collection or processing of sensitive data, including precise geolocation data; and

[11] A trade secret may manifest as any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Section 812.081, F.S.
[12] See, e.g., *Sepro Corp. v. Dep't. of Envt'l. Prot.*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[13] Section 812.081(1)(c), F.S.
[14] A third degree felony is punishable by up to 5 years imprisonment and a $5,000 fine. *See* ss. 775.082 and 775.083, F.S.
[15] The offense is a second degree felony if committed for the purpose of creating or executing any scheme or artifice to defraud or to obtain property.
[16] *See* ch. 2023-201, Laws of Fla.

- Opt out of the collection of personal data collected through the operation of a voice recognition or facial recognition feature.

The data privacy provisions of ch. 501, part V, F.S., generally apply to "controllers," businesses that collect Florida consumers' personal data, make in excess of $1 billion in global gross annual revenues, and meet one of the following thresholds:

- Derives 50 percent or more if its global gross annual revenues from the online sale of advertisements, including from providing targeted advertising or the sale of ads online;
- Operates a consumer smart speaker and voice command component service with an integrated virtual assistant connected to a cloud computing service that uses hands-free verbal activation; or
- Operates an app store or digital distribution platform that offers at least 250,000 different software applications for consumers to download and install.

A controller who operates an online search engine is required to make available an up-to date plain language description of the main parameters that are most significant in determining ranking and the relative importance of those main parameters, including the prioritization or deprioritization of political partisanship or political ideology in search results. A controller must also conduct and document a data protection assessment of certain processing activities involving personal data. Additionally, a controller is required to provide consumers with a reasonably accessible and clear privacy notice, updated at least annually.

A violation of ch. 501, part V, F.S is an unfair and deceptive trade practice actionable under ch. 501, part II, F.S., to be enforced by the Department of Legal Affairs (DLA). The DLA may provide a right to cure a violation of ch. 501, part V, F.S., by providing written notice of the violation and then allowing a 45-day period to cure the alleged violation. The DLA is required to make a report publicly available by February 1 each year on the DLA's website that describes any actions it has undertaken to enforce ch. 501, part V, F.S.

SB 262 also created s. 112.23, F.S., which prohibits employees of a governmental entity from using their position or any state resources to communicate with a social media platform to request that it remove content or accounts. Additionally, a governmental entity cannot initiate or maintain any agreements with a social media platform for the purpose of content moderation. These prohibitions do not apply to routine account maintenance, attempts to remove accounts or content pertaining to the commission of a crime, or efforts to prevent imminent bodily harm, loss of life, or property damage.

Florida Deceptive and Unfair Trade Practices Act

History and Purpose

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.[17] The FDUTPA is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or

[17] Ch. 73-124, Laws of Fla.; codified at part II of ch. 501, F.S.

commerce.[18] The FDUTPA is based on federal law, and s. 501.204(2), F.S., provides that it is the intent of the Legislature that due consideration and great weight must be given to the interpretations of the Federal Trade Commission and the federal courts relating to section 5 of the Federal Trade Commission Act.[19]

The State Attorney or the Department of Legal Affairs may bring actions when it is in the public interest on behalf of consumers or governmental entities.[20] The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction.[21] The Department of Legal Affairs has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.[22] Consumers may also file suit through private actions.[23]

Remedies under the FDUTPA

The Department of Legal Affairs and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments.
- Injunctive relief.
- Actual damages on behalf of consumers and businesses.
- Cease and desist orders.
- Civil penalties of up to $10,000 per willful violation.[24]

Remedies for private parties are limited to the following:

- A declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation.
- Actual damages, attorney fees, and court costs, where a person has suffered a loss due to a FDUTPA violation.[25]

[18] *See* s. 501.202, F.S. Trade or commerce means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. "Trade or commerce" shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity. *See* s. 501.203(8), F.S.
[19] *See* s 501.204(2), F.S.
[20] *See* ss. 501.203(2), 501.206, and 501.207, F.S.
[21] Section 501.203(2), F.S.
[22] *Id.*
[23] Section 501.211, F.S.
[24] Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Section 501.2075, F.S. Enforcing authorities may also request attorney fees and costs of investigation or litigation. Section 501.2105, F.S.
[25] Section 501.211(1) and (2), F.S.

Freedom of Speech and Internet Platforms

Section 230

The federal Communications Decency Act (CDA) was passed in 1996 "to protect children from sexually explicit Internet content."[26] 47 U.S. Code § 230 (Section 230) was added as an amendment to the CDA to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[27]

Congress stated in Section 230 that "[i]t is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[28]

Specifically, Section 230 states that no provider or user of an interactive computer service may be held liable on account of:[29]

- 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
- Any action 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.

Section 230 eased Congressional concern regarding the outcome of two inconsistent judicial decisions,[30] both of which applied traditional defamation law to internet providers.[31] The first decision held that an interactive computer service provider could not be liable for a third party's defamatory statement, however the second decision imposed liability where a service provider filtered content in an effort to block obscene material.[32] To provide clarity, Section 230 provides that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[33] In light of the

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[26] *See 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)).
[27] *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)).
[28] 47 U.S.C. § 230(b)(1)–(2).
[29] 47 U.S.C. § 230(c).
[30] *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[31] *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).
[32] *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173 (citing 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox))).
[33] 47 U.S.C. § 230(c)(1).

objectives of Congress, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.[34]

Section 230 specifically addresses how the federal law affects other laws. Section 230 prohibits all inconsistent causes of action and prohibits liability imposed under any state or local law.[35] Section 230 does not affect federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, or sex trafficking law.

There have been criticisms of the broad immunity provisions or liability shields which force individuals unhappy with third-party content to sue the user who posted it. While this 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.[36] Congressional and executive proposals to limit immunity for claims relating to platforms purposefully hosting content from those engaging in child exploitation, terrorism, and cyber-stalking have been introduced.[37] Bills have been filed that would require internet platforms to have clear content moderation policies, submit detailed transparency reports, and remove immunity for platforms that engage in certain behavioral advertising practices.[38] Proposals have also been offered to limit the liability shield for internet providers who restrict speech based on political viewpoints.[39]

Recently, the United States Supreme Court heard *Twitter, Inc. v. Taamneh* and *Gonzalez v. Google*; these cases alleged that Twitter and Google aided and abetted terrorists who posted content to their platforms, and a key issue in both cases was whether social media companies can be held liable for their targeted recommendation algorithms.[40] However, the court decided both cases on alternative grounds, which leaves the question unanswered.

Freedom of Speech

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[41] "The First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well."[42] "Online speech is equally protected under the First Amendment as there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech."[43]

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[34] *Force*, 934 F.3d at 63 (quoting LeadClick, 838 F.3d at 173).
[35] 47 U.S.C. § 230(e).
[36] 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 Jan. 29, 2024).
[37] *Id*.
[38] Bedell, *supra* note 20; PACT Act, S.4066, 116th Cong. (2020); BAD ADS Act, S.4337, 116th Cong. (2020).
[39] Bedell, *supra* note 20; Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020).
[40] *See Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023) and *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023).
[41] *See De Jonge v. Oregon*, 299 U.S. 353, 364–65(1937)(incorporating right of assembly);(incorporating right of freedom of speech).
[42] *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).
[43] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

It is well established that a government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.[44] The government bears the burden of demonstrating the constitutionality of any such content-based regulation.[45]

The United States Supreme Court has recognized that First Amendment protection extends to corporations.[46] "This protection has been extended by explicit holdings to the context of political speech."[47] Under these precedents, it is well settled that political speech does not lose First Amendment protection "simply because its source is a corporation."[48] Generally, the government may not require a corporation to host another's speech absent a showing of a compelling state interest.[49]

Supremacy Clause, Commerce Clause, and Bills of Attainder

The U.S. Constitution's Supremacy Clause establishes that federal statutes, treaties, and the U.S. Constitution are the "supreme Law of the Land."[50]

Federal law may preempt state action that thwarts federal law in three ways:

- By an express statement of its intent to occupy a field. Express preemption need not be total, however—it can preempt all state laws or only certain state laws.
- With "a framework of regulation so pervasive that Congress left no room for the States to supplement it or where the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[51]
- Where state law conflicts, leaving an actor to choose whether to adhere to state or federal law.[52] The state law may also be subject to conflict preemption where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[53]

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[44] *Ashcroft v. Am. Civil Liberties Union,* 542 U.S. 656, 665-66 (2004).
[45] *Id.* at 660.
[46] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 342 (2010).
[47] *Id.* (citing *NAACP v. Button v.* 371 U.S.415, 428-429 (1963); *Grosjean v. American Press Co.,* 297 U.S. 233, 244 (1936)).
[48] *Id.* (citing *First Nat. Bank of Boston v. Bellotti,* 435 U.S. at 784 (1978); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting *Bellotti,* 435 U.S., at 783)).
[49] *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *First National Bank of Boston v. Belliotti*, 438 U.S. (1978); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).
[50] U.S. CONST., Art. VI, cl. 2.
[51] *Arizona v. U.S.*, 567 U.S. 387, 399 (2012).
[52] *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. at 372 (2000).
[53] *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731 (N.D. Ill. Feb. 23, 2007), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The federal government's authority to act in the realm of foreign affairs is vested by the U.S. Constitution.[54] State laws that intrude into this field of foreign affairs, even where not preempted by prior federal action, improperly impact foreign affairs and are therefore invalid.[55] Courts have generally held, however, that the state's intrusion must have more than an "incidental effect" on foreign affairs in order to be considered an encroachment onto the federal government's powers.[56]

Article I, section 8, clause 3 of the U.S. Constitution grants Congress the power to "regulate commerce with foreign nations ...." Conversely, this provision serves as a limitation on states' authority to encroach onto the realm of foreign commerce where such action creates a risk of conflicts with foreign governments or impedes the federal government's ability to speak with one voice in regulating industry affairs with foreign states.[57] The "dormant foreign commerce power"[58] voids state acts upon foreign commerce because of the Constitution's overriding concern for national uniformity in foreign commerce—even in instances when Congress has not affirmatively acted.[59] Courts also generally subject state action to a heightened scrutiny that assumes the supremacy of federal action in the realm of foreign relations.[60]

Additionally, Congress has the power to regulate commerce among the states.[61] Though phrased as a grant of regulatory power to Congress, the Commerce Clause has long been understood to have a negative or dormant aspect that denies the states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce.[62]

Article I, section 9, of the U.S. Constitution provides that Congress shall pass "No Bill of Attainder or ex post facto Law." Similarly, Article I, section 10, of the U.S. Constitution prohibits the states from enacting bills of attainder. The Supreme Court has described a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of judicial trial."[63]

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[54] *See, e.g.*, U.S. CONST., Art. I, s. 8 (power to declare war, maintain a military, and regulate foreign commerce); U.S. CONST., Art. II, s. 2 (power to enter into treaties); U.S. CONST., Art. III, s. 2 (power to hear case involving foreign states and citizens).
[55] *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass'n. v. Garamendi*, 539 U.S. 396 (2003) (finding that the President's powers in foreign policy were so great as to outweigh any need for a direct expression of preemption.)
[56] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
[57] *Japan Line v. County of Los Angeles*, 441 U.S. 434, 446 (1979).
[58] *See generally*, Stephen Mulligan, Congressional Research Service, *Constitutional Limits on States' Power over Foreign Affairs*, 3-4 (Aug. 15, 2022), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10808 (last visited Jan. 29, 2024).
[59] *United States v. Davila-Mendoza*, 972 F.3d 1264 (11th Cir. 2020).
[60] "The premise […] is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise […] must be rejected. When construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required." *Japan Line* at 446.
[61] U.S. CONST., Art. I, s. 8
[62] *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994).
[63] *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

The International Emergency Economic Powers Act (IEEPA)

The IEEPA gives the President of the United States regulatory authority over a variety of economic transactions in the event of a national emergency that constitutes an unusual and extraordinary threat.[64] As of September 1, 2023, Presidents had declared 69 national emergencies invoking IEEPA, 39 of which are ongoing.[65] Executive Orders 13,873[66] and 14,034 invoked IEEPA authority in response to concerns about foreign adversaries' access to American digital data.[67] Executive Order 13,873, references risks posed by foreign adversaries, which the order defines as any foreign government or foreign person "engaged in a long-term pattern or serious instances of conduct significantly adverse" to U.S. security or the safety of U.S. persons.[68] Subsequently, the Department of Commerce identified China (including Hong Kong), Cuba, Iran, North Korea, Russia, and the Nicolás Maduro regime in Venezuela as foreign adversaries.[69]

Florida SB 7072 (2021)

In 2021, the Florida Legislature passed SB 7072, which addressed concerns related to social media platforms. SB 7072 was signed by the Governor on May 24, 2021. Section 501.2041, F.S., was created, which provides that a social media platform must:

- Publish standards used for determining how to censor, deplatform, and shadow ban users, and apply such standards in a consistent manner;

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[64] *See* Congressional Research Service, *Montana's TikTok Ban, an Injunction, and Pending Legal Actions* (December 8, 2023), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10972#:~:text=Commerce%20Clause%3A%20The%20court%20found,concept%20Montana%20did%20not%20contest. (last visited Jan. 29, 2024). *See also* 50 U.S.C. § 1701.

[65] *See* Congressional Research Service, The International Emergency Economic Powers Act: Origins, Evolution, and Use (September 28, 2023), *available at* https://crsreports.congress.gov/product/pdf/R/R45618 (last visited Jan. 29, 2024).

[66] The Supply Chain Rule implements Executive Orders 13873 and 14034, titled Securing the Information and Communications Technology and Services Supply Chain (ICTS). Invoking National Emergencies Act (50 U.S.C. § 1601) and citing the International Emergency Economic Powers Act (50 U.S.C. §1701), then-President Trump declared a national emergency because of the threat of foreign adversaries exploiting vulnerabilities in ICTS. In response to this threat, Executive Order 13873 prohibits transactions involving foreign-owned ICTS that present (1) an undue risk of sabotage or subversion to ICTS in the United States, (2) an undue risk of catastrophic effects on the security or resiliency of critical infrastructure or the digital economy in the United States, or (3) an unacceptable risk to U.S. national security or the security and safety of U.S. persons. The order delegates implementation to the Department of Commerce. In June 2021, President Biden issued Executive Order 14034, which directed the Secretary of Commerce to evaluate the risks posed by connected software applications, commonly called "apps." The order identified additional criteria for Commerce to consider when evaluating transactions involving apps under the Supply Chain Rule. Factors include the app's capacity to enable espionage and the sensitivity of data collected. In June 2023, Commerce published a final rule (88 FR 39353), effective July 17, 2023, that expressly includes apps in the definition of ICTS and adds app-specific risk factors to the Supply Chain Rule. See Congressional Research Service, *The Information and Communications Technology and Services (ICTS) Rule and Review Process* (June 22, 2023), *available at* https://crsreports.congress.gov/product/pdf/IF/IF11760 (last visited Jan. 29, 2024).

[67] See Congressional Research Service, *Montana's TikTok Ban, an Injunction, and Pending Legal Actions* (December 8, 2023), available at https://crsreports.congress.gov/product/pdf/LSB/LSB10972#:~:text=Commerce%20Clause%3A%20The%20court%20found,concept%20Montana%20did%20not%20contest (last visited Jan. 29, 2024).

[68] *Id*.

[69] 15 CFR § 7.4.

- Inform each user 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 censoring or deplatforming the user;
- 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-prioritization and shadow banning algorithms to allow sequential or chronological posts and content;
- Provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annual notice on the use of algorithms for post-prioritization and shadow banning;
- Ensure that posts by or about candidates for office in Florida are not shadow banned;
- Allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after the user receives the required notice; and
- Ensure that journalistic enterprises are not censored, deplatformed, or shadow banned.

In s. 501.2041, F.S., "Social media platform" is defined as any information service, system, Internet search engine, or access software 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 Florida; and
- Satisfies at least one of the following thresholds:
  - Annual gross revenues in excess of $100,000,000, as adjusted in January of each odd numbered year to reflect any increase in the Consumer Price Index; or
  - At least 100,000,000 monthly individual platform participants globally.

Section 501.2041, F.S., also provides for enforcement by permitting the Department of Legal Affairs to find a social media platform who fails to comply with the requirements stated above to be in violation of the Florida Deceptive and Unfair Trade Practices Act. Additionally, a user may bring a private cause of action against a social media platform for failing to consistently apply certain standards for censoring or deplatforming without proper notice.

Litigation History

Immediately after the bill was signed by the Governor, but prior to the bill's effective date of July 1, 2021, the plaintiff filed a complaint in the U.S. District Court for the Northern District of Florida challenging the constitutionality of many of the bill's provisions and exceptions, and immediately moved the Court for a preliminary injunction. The District Court granted the preliminary injunction on June 30, 2021.[70]

The filed complaint alleges the following:

[70] *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (NetChoice, LLC, and the Computer & Communications Industry Association are trade associations whose members include social media providers).

- Count 1 of the complaint alleges the Act "violates the First Amendment's free-speech clause by interfering with the providers' editorial judgment, compelling speech, and prohibiting speech."
- Count 2 alleges the Act "is vague in violation of the Fourteenth Amendment."
- Count 3 alleges the Act "violates the Fourteenth Amendment's equal protection clause by impermissibly discriminating between providers that are or are not under common ownership with a large theme park and by discriminating between providers that do or do not meet the Act's size requirements."
- Count 4 alleges the Act "violates the Constitution's dormant commerce clause."
- Count 5 alleges the Act "is preempted by 47 U.S.C. § 230(e)(3), which, together with § 230(c)(2)(A), expressly prohibits imposition of liability on an interactive computer service—this includes a social-media provider—for action taken in good faith to restrict access to material the service finds objectionable."[71]

The District Court indicated that the law was not clearly settled related to issues about First Amendment treatment of social-media providers: "The plaintiffs say, in effect, that they should be treated like any other speaker. The State says, in contrast, that social-media providers are more like common carriers, transporting information from one person to another much as a train transports people or products from one city to another. The truth is in the middle."[72]

The District Court determined that strict scrutiny applied as the standard to be used:

"Viewpoint- and content-based restrictions on speech are subject to strict scrutiny. A law restricting speech is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." Laws that are facially content-neutral, but that cannot be justified without reference to the content of the regulated speech, or that were adopted because of disagreement with the speaker's message, also must satisfy strict scrutiny."[73]

The District Court enjoined the State from enforcing any provision of s. 501.2041, F.S., on preemption and First Amendment grounds.

The State filed an appeal of the District Court's decision in the U.S. Court of Appeals for the Eleventh Circuit.

On May 23, 2022, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's preliminary injunction in part, and vacated and remanded it in part.[74]
The Eleventh Circuit found the following provisions of SB 7072, to likely violate the First Amendment:

- Section 106.072(2), F.S., which pertains to candidate deplatforming;

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[71] *NetChoice, LLC*, 546 F. Supp. 3d at 1085.
[72] *NetChoice, LLC*, 546 F. Supp. 3d at 1091.
[73] *NetChoice, LLC*, 546 F. Supp. 3d at 1093.
[74] *Moody v. NetChoice, LLC*, 34 F.4th 1196 (11th Cir. 2022).

- Section 501.2041(2)(h), F.S., which pertains to the use of algorithms for the purpose of post-prioritization or shadow banning candidates;
- Section 501.2041(2)(j), F.S., which pertains to journalistic enterprises;
- Section 501.2041(2)(b), F.S., which pertains to the consistent application of censorship, deplatforming, and shadow banning standards;
- Section 501.2041(2)(c), F.S., which limits the number of changes that can be made to once every 30 days;
- Sections 501.2041(2)(f) and 501.2041(2)(g), F.S., which pertain to categorizing algorithms used for post-prioritization and shadow banning, as well as allowing for user opt-outs; and
- Section 501.2041(2)(d), F.S., which pertains to notifying a user when their content is censored or shadow banned.

However, the Eleventh Circuit found the following provisions of SB 7072, to likely not violate the First Amendment:
- Section 501.2041(2)(a), F.S., which pertains to the publication of standards used for determining how to censor, deplatform, and shadow ban;
- Section 501.2041(2)(c), F.S., which pertains to informing users to any changes to its user rules, terms, and agreements before implementing the changes;
- Section 501.2041(2)(e), F.S., which pertains to user view counts;
- Section 501.2041(2)(i), F.S., which pertains to user data access; and
- Section 106.072(4), F.S., which pertains to free advertising for a candidate.[75]

The United States Supreme Court is set to hear oral arguments on February 26, 2024.

Effect of Proposed Changes:

The bill creates s. 501.20411, F.S., to be cited as the "Transparency in Social Media Act." Additionally, the Legislature finds that:
- Social media platforms play a significant role in shaping public discourse and opinions;
- Algorithms used by social media platforms can influence user behavior and content visibility;
- Transparency in the functioning of such algorithms and in political and social advertising is vital for safeguarding democratic values and user privacy; and
- Ownership of social media platforms by foreign entities can raise concerns regarding foreign influence and data security.

The bill provides the following definitions:
- "Social media platform" means a public online service that allows users to create and share or participate in social networking; and
- "Social or political advertising" means any advertisement on a social media platform that discusses social or political issues or is intended to influence public opinion or electoral outcomes.

[75] *Moody* 34 F.4th 1196.

The bill requires each foreign-adversary owned entity operating a social media platform in Florida to publicly disclose the core functional elements of the social media platform's content curation and algorithms. The disclosures must identify the following:

- Factors that influence content ranking and visibility;
- Measures taken to address misinformation and harmful content; and
- The process of personalization and targeting of content.

The bill requires each foreign-adversary-owned entity operating a social media platform in Florida to make publicly available the source code of its algorithm through an open-source license.

The bill also requires each foreign-adversary-owned entity operating a social media platform to implement a user verification system for each user and organization that purchased advertisements concerning social or political issues. The system must verify key identifying information, including citizenship, residency, and age of the user or the individuals that own the organization, as applicable. Once verified, the identity of the purchaser of each social or political advertisement must be disclosed with the advertisement.

A foreign-adversary-owned entity operating a social media platform that violates the provisions of this bill is liable up to $10,000 for each discrete violation. The Department of Legal Affairs is given enforcement authority.

The bill takes effect July 1, 2024.

III. 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:

See the "Present Situation," in Section II of this bill analysis.

IV. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Foreign-adversary-owned entities will be required to implement the provisions in the bill, which includes disclosure requirements and a user verification system.

C. Government Sector Impact:

The Department of Legal Affairs will be required to enforce the provisions in the bill.

V. Technical Deficiencies:

None.

VI. Related Issues:

The definition provided in the bill for "social or political advertising," is potentially unclear and overbroad.

The bill defines "foreign-adversary-owned entity" as a social media company that is owned or substantially controlled by nationals, governments, or corporations domiciled, incorporated, or otherwise holding residence in a country designated as a foreign adversary under 15 C.F.R. s 7.4. It is unclear what amount or level of ownership is intended by use of "owner," or what "substantially controlled" means as used in the definition.

Lack of clarity in the definitions could lead to problems in compliance and enforcement.

VII. Statutes Affected:

This bill creates section 501.20411 of the Florida Statutes.

VIII. 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.