FREEDOM OF SPEECH IN THE ERA OF SOCIAL MEDIA: A REVIEW OF SENATE BILL 7072, FLORIDA'S ANTI-CENSORSHIP BILL AIMED AT BIG TECH

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I. INTRODUCTION

Social media platforms have become one of the most prevalent forms of communication and will undoubtedly continue to be the preferred and most pervasive form of communication worldwide.[1] Social media is one of the fastest adopted technologies, with about 4.48 billion users today.[2] Approximately 56.8% of the world's population uses some form of social network, including 231.47 million people in the United States.[3] According to a Pew Research Center poll, Americans under fifty years old turn to digital devices for news.[4] In addition, social media serves as the primary news source for eighteen through twenty-nine-year-olds.[5] Today's leading social media companies are Twitter, Facebook, Google, TikTok, YouTube, and Instagram.[6] Collectively, they are commonly referred to as "Big Tech."[7]

The pervasiveness of information posted on these social media sites prompted the federal government, under former President Bill Clinton, to sign into law section 230 of the Communications Decency Act in 1996.[8] The Act served as a way for Big Tech to censor indecent material on the internet.[9] After several lawsuits challenging the law's constitutionality, section 230 was amended in 1998 and 2018.[10] Now, section 230 provides tech companies with legal protection from civil liability for hosting the content of others and from

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1. *See* discussion *infra* Part II; Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2021?*, BACKLINKO, http://backlinko.com/social-media-users (last updated Oct. 10, 2021).

2. Dean, *supra* note 1.

3. *Id.*

4. Elisa Shearer, *More Than Eight-in-Ten Americans Get News From Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), http://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/.

5. *See id.*

6. Dean, *supra* note 1; *see* discussion *infra* Section II.B.

7. *See* discussion *infra* Section II.B.

8. Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143; *see also* Adi Robertson, *Section 230 is 25 Years Old, and It's Never Been More Important*, VERGE (Feb. 8, 2021, 2:08 PM), http://www.theverge.com/22268421/cda-section-230-25th-anniversary-reform-stakes-big-tech-internet.

9. *See* discussion *infra* Section II.B; Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143 (1996); Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL'Y 553, 559 (2018).

10. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, § 4(a), 132 Stat. 1253, 1254 (2018); *see* discussion *infra* Section II.B; *see also* 47 U.S.C. § 230; Reno v. ACLU, 521 U.S. 844, 849 (1997) (challenging the constitutionality of provisions of the Communications Decency Act seeking to protect minors from indecent material posted on the internet).

restricting access to or availability of material they deem "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[11]

On May 24, 2021, Florida Governor Ron DeSantis signed into law Senate Bill 7072 ("SB 7072"), which is aimed at these Big Tech companies.[12] The law comes as a response to Big Tech's alleged bias and censorship of conservative views, especially at the height of the 2020 election.[13] Most notable was the removal of former President Donald J. Trump from Twitter.[14] According to Governor DeSantis, social media is allegedly responsible for censoring conservative views and prioritizing "Silicon Valley leftist narratives."[15] SB 7072 provides penalties of $250,000 a day for deplatforming a candidate for state office and $25,000 a day for deplatforming a local government candidate.[16] SB 7072 also requires social media companies to publish detailed standards on how it determines to *deplatform* and *shadow ban* their users and disclosure of post-prioritization algorithms on its users.[17]

This Bill is the first of its kind.[18] SB 7072 mirrors some of the language in section 230 of the Communications Decency Act; however, critics claim the law is not only preempted by the federal statute, but it goes too far.[19] Others argue that the law itself is unconstitutional.[20] Not even three days after

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11. 47 U.S.C. § 230(c)(2)(a).

12. S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021); Catherine Thorbecke, *Critics Slam Florida's Law Banning Big Tech 'De-Platforming' as 'Unconstitutional'*, ABC NEWS (May 25, 2021, 4:27 PM), http://abcnews.go.com/Technology/critics-slam-floridas-law-banning-big-tech-de/story?id=77891650.

13. Fla. S.B. 7072; *see* discussion *infra* Section II.C; Thorbecke, *supra* note 12.

14. *See* William L. Kovacs, *Section 230's Unconstitutional Delegation of Power to Big Tech*, HILL (Jan. 23, 2021, 6:00 PM), http://thehill.com/opinion/technology/535497-section-230s-unconstitutional-delegation-of-power-to-big-tech.

15. Fox10 News, *Governor Ron DeSantis Press Conference in Miami*, YOUTUBE (May 24, 2021), http://www.youtube.com/watch?v=O67BF-2IWiY [hereinafter *DeSantis Press Conference*].

16. Fla. S.B. 7072.FLA. STAT. § 106.072(3) (2021).

17. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(a) (2021); *see* discussion *infra* Section III.B.1.

18. Fla. S.B. 7072; *see DeSantis Press Conference*, *supra* note 15; Casey Feindt, *Gov. DeSantis Signs Bill Aimed at Holding 'Big Tech' Firms Accountable for Banning, Blocking Accounts*, FIRST COAST NEWS (May 24, 2021, 12:23 PM), http://www.firstcoastnews.com/article/news/regional/florida/watch-governor-ron-desantis-speaks-in-miami/77-f1bd0b1e-decf-4843-9e5b-d203752d1353.

19. Fla. S.B. 7072; *see* Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143 (1996); Complaint at 2, NetChoice, L.L.C. v. Moody, (No. 21-CV-220), 2021 WL 2690876, at 2 [hereinafter NetChoice Complaint]; 47 U.S.C. § 230(c)(2)(a).

20. Thorbecke, *supra* note 12.

Governor DeSantis signed the Bill into law, NetChoice and Computer and Communications Industry Association ("CCIA"), two large not-for-profit trade associations whose members include social-media providers, filed suit in federal court challenging the Bill's constitutionality and seeking to enjoin its enforcement.[21] SB 7072 was to take effect July 1, 2021; however, on June 30, 2021, a Federal Judge granted CCIA's preliminary injunction.[22] This Note will explore the constitutionality of SB 7072.[23] Part II will discuss the events that led to the drafting of the Bill, Part III will describe its contents, and Part IV will explore whether SB 7072 is constitutional.[24]

II. EVENTS THAT LED TO SENATE BILL 7072

A. *Marketplace for Ideas*

The First Amendment to the United States Constitution states, "[C]ongress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[25] The Supreme Court has classified certain types of speech, like political speech, as warranting more protection than others.[26] A regulation that directly infringes on political speech will only be upheld if the government meets the high burden of showing that the law is "narrowly tailored to [achieve] a compelling [government] interest."[27] Classifications of

21. Fla. S.B. 7072; *see* Jordan Kirkland, *DeSantis's "Big Tech" Crackdown Bill Slapped with Free Speech Lawsuit*, CAPITOLIST (May 28, 2021), http://thecapitolist.com/desantiss-big-tech-crackdown-bill-slapped-with-free-speech-lawsuit/.

22. Fla. S.B. 7072; *see* Renzo Downey, *Judge Blocks Florida Law Aimed at Punishing Social Media*, FLA. POL. (July 1, 2021), http://floridapolitics.com/archives/438675-judge-halts-big-tech-bill-hours-before-it-kicks-in/.

23. *See* discussion *infra* Part IV; Fla. S.B. 7072.

24. *See* discussion *infra* Parts II–V; Fla. S.B. 7072.

25. U.S. CONST. amend. I.

26. *See, e.g.*, W. Va. State Bd. Of Educ. V. Barnette, 319 U.S. 624, 642 (1943) (finding a school board resolution that required students to salute the American flag during activity programs in all public schools unconstitutional because it compelled involuntary speech).

27. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231–32 (2015) (striking down a town ordinance that restricted the postage of certain signs because the government's purpose for the regulation, which was aesthetic appeal and traffic management, was not a compelling reason and the ordinance was not narrowly tailored to achieve the government's purpose, thus failing the strict scrutiny standard applied).

speech such as obscenity,[28] fighting words,[29] true threats,[30] incitement to violence,[31] and defamation,[32] on the other hand, are considered low-value speech that does not receive the same heightened legal protection as political speech.[33] Laws that regulate these lower-level categories of speech will be upheld if they are rationally related to a legitimate interest,[34] or sometimes, upon a showing that the law is substantially related to an important state interest.[35]

The high protection of political speech evinces the Founding Fathers' aversion to tyrannical British regulations on expression, such as the licensing laws that plagued the sixteenth century.[36] These were followed by prosecutions for seditious libel in the late sixteenth and early seventeenth centuries.[37] With the advent of the printing press in the sixteenth century, licensing laws sought to punish those who published material criticizing the King.[38] Licensing in the colonies was considered inconsistent with freedom of expression and was interpreted as prior restraints on speech.[39] According to one commentator, "since licensing schemes had expired in England in 1695 and in the colonies by 1725, the Framers of the First Amendment intended to

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28. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973).

29. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Supreme Court found that the First Amendment does not protect "fighting words" — words that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574.

30. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003). "True threats" occur when the speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* Not to be confused with "political hyperbole." *Id.*

31. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

32. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring the showing of actual malice to prove the publication was defamatory against a public official). Depending on who the speech was intended for, like a public official, the Supreme Court requires different levels of intent to prove that the statement was defamatory. *Id.*

33. VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1–2 (2019).

34. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (upholding a village zoning ordinance under the rational basis standard that restricted land use to a family dwelling).

35. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994). This is the intermediate scrutiny standard, which the Court uses when a classification based on gender or legitimacy is involved. *Id.*

36. *See* RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT: CASES & THEORY 5–6 (3d ed. Wolters Kluwer 2017).

37. *Id.* at 6–7. These prosecutions were much like those involving libel of private persons. *Id.* at 7.

38. *Id.* at 5–6.

39. *See id.* at 9.

do more than simply prohibit prior restraints."[40] Colonial defenders of free expression, like Thomas Jefferson, argued that free debate would lead to truth.[41] The learned John Stuart Mill knew the value of truth and the importance of expressing one's views in an open marketplace for ideas:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.[42]

Essentially, the free marketplace fosters debate and the exchange of ideas in pursuit of the truth.[43] According to Thomas Jefferson, "[t]ruth . . . will prevail if left to herself. . . . [S]he is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument, and debate."[44] Today's marketplace for ideas has changed from the public square to virtual platforms.[45] These virtual platforms provide avenues for historically

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40. KROTOSZYNSKI, JR. ET AL., *supra* note 36, at 9.

41. *Id.* at 13–14; 2 THE PAPERS OF THOMAS JEFFERSON 546 (Julian P. Boyd ed., 1950).

42. JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

43. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes J., dissenting).

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophesy based upon imperfect knowledge.

Id.

44. KROTOSZYNSKI, JR. ET AL., *supra* note 36, at 13–14.

45. *See* Mason C. Shefa, *First Amendment 2.0: Revisiting* Marsh *and the Quasi-Public Forum in the Age of Social Media*, 41 U. HAW. L. REV. 159, 161–62 (2018).

unprecedented amounts of speech.[46] Never has material traveled so quickly and reached so many people.[47] Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.[48]

B. *Section 230 of the Communications Decency Act*

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[49] the plaintiff sued Prodigy, an interactive computer service, for defamatory comments made by an unidentified third party on one of Prodigy's bulletin boards.[50] The New York court held Prodigy strictly liable for the defamatory post because Prodigy acted more like an original publisher than a distributor.[51] Original publishers of defamatory statements are held strictly liable for any defamatory information they publish.[52] On the other hand, distributors like book stores and libraries are held to a lower *knowledge* standard, in which liability is imposed on the distributor of defamatory statements if it is proven that the distributor *knew* of the statement's defamatory nature.[53] The *Stratton Oakmont* court found that Prodigy was acting more akin to a publisher because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.[54]

Congress enacted section 230 of the Communications Decency Act to remove the disincentives to self-regulate created by the *Stratton Oakmont* decision.[55] Under the court's decision, interactive computer services would be opening themselves to liability for regulating the material posted on their platforms because such regulation casts the service provider in the role of a publisher.[56] Congress, recognizing the importance of the Internet's continued growth and the need to regulate indecent online material, drafted section 230 of the Communications Decency Act codified in Title V of the

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46. *See id.* at 164. ("[A]s early as 2001, courts have treated computers and Internet access as 'virtually indispensable in the modern world of communications and information gathering.'") (quoting United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001) (per curiam)).

47. *See id.* at 165.

48. *See id.* at 161–62.

49. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

50. *Id.* at *1–*2.

51. *Id.* at *4.

52. *See id.* at *3.

53. *Id.*; *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

54. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.

55. *See* 47 U.S.C. § 230; John A. LoNigro, Comment, *Deplatformed: Social Network Censorship, the First Amendment, and the Argument to Amend Section 230 of the Communications Decency Act*, 37 TOURO L. REV. 427, 459–60 (2021); *Zeran*, 129 F.3d at 331.

56. *Zeran*, 129 F.3d at 331.

Telecommunications Act of 1996.[57] Nebraska Senator James Exon and Washington State Senator Slade Gorton introduced section 230 to the Senate Committee of Commerce, Science, and Transportation in 1995.[58] According to Senator Exon, the Act's purpose was to "provide much needed protection for children" from indecent material posted on the Internet.[59] The Act prohibits the knowing dissemination of obscene material to children and empowers "interactive computer service[s]" to remove such content from their platforms without risk of liability.[60] "'Interactive computer service' [is defined as] any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[61] This definition includes social media networks.[62] Thus, Twitter, Instagram, Google, YouTube, and Facebook are all covered under section 230.[63]

1. Policy Goals

The Act's policy is explicitly outlined in the text, and provides that it 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; (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; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of

57. Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143 (1996); Leary, *supra* note 9, at 558–59.

58. *Senator J. James Exon*, CONGRESS.GOV, http://www.congress.gov/member/john-exon/E000284?r=2&q=%7B%22bill-status%22%3A%22introduced%22%7D (last visited Jan. 10, 2022); S.314, 104th Cong. (1st Sess. 1995).

59. *See* Leary, *supra* note 9, at 559 n.19 (quoting Senator Exon, author of the CDA) ("The fundamental purpose of the Communications Decency Act is to provide much needed protection for children.").

60. *See* 47 U.S.C. § 230(c).

61. *Id.* § 230(f)(2).

62. *See* LoNigro, *supra* note 55, at 457–58.

63. *See id.*

> blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[64]

The Act was first struck down in *Reno v. American Civil Liberties Union*[65] in 1997 when the Supreme Court held that portions of the Act were unconstitutionally vague.[66] For instance, the Act's prohibition of the "transmission of 'indecent material'" was specifically found to be vague.[67] However, the Act itself was not challenged, and remains effective law today.[68]

2. Publisher vs. Distributor

Section 230 explicitly exempts interactive computer services as "publishers of information" posted on their platforms by third parties.[69] This designation came as a response to the *Stratton Oakmont* decision.[70] One year after section 230 was enacted, the Fourth Circuit dealt with the publisher versus distributor distinction in *Zeran v. American Online, Inc*.[71] The plaintiff, Zeran, sued AOL for failing to remove defamatory messages posted by an unidentified third party, failing to screen for similar posts thereafter, and refusing to post retractions of those messages.[72] Zeran argued that Congress' chosen designation, to explicitly treat interactive service providers as publishers, means that they did not mean to limit distributor liability by exclusion.[73] Therefore, because AOL knew of the defamatory nature of the posts, they should be held liable as distributors.[74]

The Fourth Circuit disagreed, reasoning that "imposition of distributor liability . . . is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by [section] 230."[75] The distinction between publishers and distributors is important because section 230 has granted social

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64. 47 U.S.C. § 230(b).
65. 521 U.S. 844 (1997); *see also* Leary, *supra* note 9, at 559.
66. *Reno*, 521 U.S. at 874; Leary, *supra* note 9, at 559.
67. *Reno*, 521 U.S. at 870–74; Leary, *supra* note 9, at 559.
68. Leary, *supra* note 9, at 559.
69. 47 U.S.C. § 230(c)(1).
70. LoNigro, *supra* note 55, at 464.
71. 129 F.3d 327 (4th Cir. 1997); *see also* Leary, *supra* note 9, at 575.
72. *Zeran*, 129 F.3d at 328.
73. *Id.* at 331. Zeran notified AOL "repeatedly" about the defamatory posts. *Id.* at 329. Thus, the Company was on notice. *See id.*
74. *See id.* at 331.
75. *Id.* at 332.

media platforms free reign to remove content they otherwise find objectionable without being classified as a *publisher* of such editorial choices.[76] As such, Big Tech companies are immune from civil liability.[77]

C. *2020 Election*

With more Americans turning to social media for their daily news, it is no surprise that political candidates have relied so heavily on these virtual platforms.[78] Social media platforms are amenable to political candidates' messages because of their capacity to reach a vast amount of people.[79] The 2020 election was unprecedented in that it occurred in the middle of a pandemic, where the majority of Americans were forced to stay at home and connect with people via social media.[80] Political ads on these social networks were an essential tool used by 2020 candidates to reach voters throughout their campaigns.[81]

While political ads that run on broadcast television remain the largest expenditure, online political ads are not far behind.[82] From 2018 through 2019, former President Donald J. Trump spent the most money of all online ad-spenders and more on Google and Facebook political advertisements than every other 2020 candidate.[83] Former President Trump spent approximately $852,000 on Facebook advertisements, which surpassed every other

76. *See* 47 U.S.C. § 230(c)(2)(A).

77. *See id.* at § 230(e). The only exceptions to the liability shield granted to Big Tech companies is if they violate a criminal law, violate intellectual property laws, or violate sex trafficking laws. *Id.* at § 230(e)(1)–(5).

78. *See* LoNigro, *supra* note 55, at 429.

79. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have been difficulty in identifying the most important places — in a spatial sense — for the exchange of views, today the answer is clear. It is cyberspace — the 'vast democratic forums of the Internet' in general, and social media in particular.") (citation omitted).

80. *See* Miles Parks, *Social Media Usage Is at an All-Time High. That Could Mean a Nightmare for Democracy*, NPR (May 27, 2020, 5:02 AM), http://www.npr.org/2020/05/27/860369744/social-media-usage-is-at-an-all-time-high-that-could-mean-a-nightmare-for-democr.

81. *See* Statista Rsch. Dep't, *2020 Presidential Election and the Media – Statistics & Facts*, STATISTA (Feb. 25, 2021), http://www.statista.com/topics/5934/2020-presidential-election-and-the-media/.

82. *Id.*

83. *Id.*

candidate's spending.[84] Twitter[85] and TikTok[86] currently prohibit political ads, but Facebook does not.[87] While these amounts may seem staggering to the average person, to a political candidate, they are essential to reach the voters.[88] For instance, every 2020 presidential candidate had a Twitter account.[89] One of the Democratic candidates in the 2020 presidential race, Bernie Sanders, had over ten million followers on Twitter, while President Joe Biden had over four million.[90] Former President Trump had nearly 88.9 million followers before he was banned from Twitter on January 7, 2021.[91] Former President Trump's use of Twitter was widely criticized, and according to a poll mid-way through his presidency, sixty percent of the pollsters claimed his Tweets were inappropriate.[92]

Whatever the content of his tweets, former President Trump was able to speak directly to his millions of followers and skip the *middleman* of mainstream news that would require one to sift through and interpret what the former President "meant."[93] In fact, he was not the only politician to see the

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84. *Id.*

85. *Political Content*, TWITTER BUS., http://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html (last visited Jan. 10, 2022) ("Twitter globally prohibits the promotion of political content. . . . [w]e define political content as content that references a candidate, political party, elected or appointed government official, . . . referendum, ballot measure, legislation, regulation, directive, or judicial outcome.").

86. Blake Chandlee, *Understanding Our Policies Around Paid Ads*, TIKTOK NEWSROOM, http://newsroom.tiktok.com/en-us/understanding-our-policies-around-paid-ads, (last visited Jan. 10, 2022) ("[W]e will not allow paid ads that promote or oppose a candidate, current leader, political party or group, or issue at the federal, state, or local level — including election-related ads, advocacy ads, or issue ads.").

87. *See Get Authorized to Run Ads About Social Issues, Elections or Politics*, FACEBOOK FOR BUS., http://www.facebook.com/business/help/208949576550051?id=288762101909005 (last visited Jan. 10, 2022) [hereinafter *Get Authorized to Run Ads*] (requiring advertisers that wish to run or edit political ads on Facebook in the United States to get special authorization first).

88. *See* Statista Rsch. Dep't, *supra* note 81.

89. *See* Bridget Coyne, *Helping Identify 2020 U.S. Election Candidates on Twitter*, TWITTER: BLOG (Dec. 12, 2019), http://blog.twitter.com/en_us/topics/company/2019/helping-identify-2020-us-election-candidates-on-twitter (noting that all presidential candidates that have been confirmed by Ballotopia will have Election Labels — the blue checks — next to their name).

90. Statista Rsch. Dep't, *supra* note 81.

91. *Twitter 'Permanently Suspends' Trump's Account*, BBC NEWS, http://www.bbc.com/news/world-us-canada-55597840 (last visited Jan. 10, 2022).

92. Statista Rsch. Dep't, *supra* note 81.

93. *See Twitter 'Permanently Suspends' Trump's Account*, *supra* note 91; Brice C. Barnard, Comment, *The Tweet Stops Here: Politicians Must Address Emerging Freedom of Speech Issues in Social Media*, 88 UMKC L. REV. 1019, 1025 (2020).

value in speaking directly to his constituency.[94] President Biden relied heavily on social media networks, especially to connect with younger voters.[95]

D. *Deplatforming of Candidates*

Claims of Big Tech's censorship have recently come to the forefront of the news.[96] Because of section 230's protection, these companies do not risk civil liability for removing content posted on their platforms that violate their "terms of service."[97] Algorithms, which automate the detection of "misinformation" and violations of these platforms' terms of services, enable Big Tech to remove content, usually without warning and without a clear explanation of the standards that resulted in the removal.[98] Although technically not state actors, Big Tech companies have amassed such a large base and influence that they should be held to the same degree of scrutiny as government actors.[99] The fact that a few private companies essentially have an editorial monopoly over the vast amount of content posted on their sites is contrary to the principles of the Constitution.[100] Ostensibly, these social media sites should serve to foster more speech.[101] Big Tech's censorship of certain viewpoints was evident throughout the 2020 election.[102]

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94. *See Twitter 'Permanently Suspends' Trump's Account*, *supra* note 91; Peter Suciu, *Social Media Proved Crucial for Joe Biden — It Allowed Him to Connect with Young Voters and Avoid His Infamous Gaffes*, FORBES (Nov. 17, 2020, 4:35 PM), http://www.forbes.com/sites/petersuciu/2020/11/17/social-media-proved-crucial-for-joe-biden--it-allowed-him-to-connect-with-young-voters-and-avoid-his-infamous-gaffes/?sh=b49856841482.

95. Suciu, *supra* note 94.

96. *See, e.g.*, *How Big Tech Censorship is Harming Free Speech*, LIBERTIES (May 5, 2021), http://www.liberties.eu/en/stories/big-tech-censorship/43511.

97. LoNigro, *supra* note 55, at 431; *Twitter Terms of Service*, TWITTER, http://twitter.com/en/tos (last visited Jan. 10, 2022). Under its terms of service, Twitter can "suspend or terminate your account or cease providing you with all or part of the [s]ervices at any time for any or no reason . . . ." *Id.*

98. *See How Big Tech Censorship is Harming Free Speech*, *supra* note 96.

99. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946) (finding company-owned town was subject to the First Amendment because town was open to the public and used for public purposes, similar to the government); *see* LoNigro, *supra* note 55, at 429.

100. *See* discussion *supra* Section II.A; U.S. CONST. amend. I.

101. *See* 47 U.S.C. § 230.

102. *See* discussion *infra* Section II.D.1; Carla Marinucci & Daniel Strauss, *Tulsi Gabbard Sues Google Over Post-Debate Ad Suspension*, POLITICO (July 25, 2019, 1:35 PM), http://www.politico.com/story/2019/07/25/tulsi-gabbard-sues-google-account-suspension-1435405.

1. Congresswoman Tulsi Gabbard

The 2020 Democratic Party presidential candidate, Tulsi Gabbard of Hawaii, fell victim to Big Tech's censorship during her campaign.[103] Throughout her campaign, Representative Gabbard was critical of Big Tech.[104] Gabbard frequently voiced her concern about Facebook banning users and voiced her support for net neutrality as a "cornerstone of our democracy."[105] Right after the Democratic presidential debate in June 2019, Google suspended Gabbard's campaign ad account.[106] Only hours after the debate, Gabbard's performance earned her the title of one of Google's most searched candidates.[107] It was never proven why her campaign ad account was suspended at such a critical time.[108] Gabbard only received a message from Google that said her account was suspended "for violations of billing practices and advertising practices."[109] In July 2019, Representative Gabbard filed suit against Google, claiming they violated her First Amendment right of free speech by suspending her campaign account.[110] In a short decision, the court dismissed the case, finding Google was not a state actor and, therefore, not subject to the First Amendment.[111]

Representative Gabbard is not the only political official who faced Big Tech's censorship.[112] On September 13, 2019, Twitter suspended Republican Texas House Representative Briscoe Cain's account for one

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103. Marinucci & Strauss, *supra* note 102; *see* LoNigro, *supra* note 55, at 430.

104. Marinucci & Strauss, *supra* note 102.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. Marinucci & Strauss, *supra* note 102.

110. *See id.*; Tulsi Now, Inc. v. Google, LLC, No. 2:19-CV-06444, 2020 WL 4353686 at *1 (C.D. Cal. Mar. 3, 2020).

111. *Tulsi Now, Inc.*, 2020 WL 4353686 at *2.

> What Plaintiff fails to establish is how Google's regulation of its own platform is in any way equivalent to a governmental regulation of an election. Google does not hold primaries, it does not select candidates, and it does not prevent anyone from running for office or voting in election. To the extent Google "regulates" anything, it regulates its own private speech and platform.

Id.

112. *See* Marinucci & Strauss, *supra* note 102; Joseph Menn & Katie Paul, *Twitter, Facebook Suspend Some Accounts as U.S. Election Misinformation Spreads Online*, REUTERS (Nov. 3, 2020, 5:08 PM), http://www.reuters.com/article/us-usa-election-socialmedia/twitter-facebook-suspend-some-accounts-as-u-s-election-misinformation-spreads-online-idUSKBN27J2S4 ("Twitter, Inc.[] and Facebook, Inc.[] on Tuesday suspended several recently created and mostly right-leaning news accounts posting information about voting in the hotly contested U.S. election for violating their policies.").

hundred forty-one days.[113] On January 17, 2021, Twitter suspended Republican House Representative Marjorie Taylor Greene for twelve hours.[114] On June 11, 2021, Republican Senator Ron Johnson was suspended from YouTube for seven days,[115] and on January 9, 2021, Republican House Representative Barry Moore's Twitter account was suspended temporarily.[116]

2. Former President Donald J. Trump

During his presidency, former President Trump was also critical of Big Tech and called for the policing of section 230.[117] On May 28, 2020, President Trump issued an Executive Order ("EO") that commented on the selective censorship that Twitter, Facebook, Instagram, and YouTube were exercising over Americans.[118] One of the directives in the EO ordered the Department of Justice to develop proposed amendments to section 230 that

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113. Dave Montgomery & Nick Corsaniti, *Exchange Over Texas Ballot's 'Purity' Puts G.O.P. Firebrand in Hot Seat*, N.Y. TIMES, May 13, 2021, at A19; Texas Tribune Staff, *Briscoe Cain Says His "My AR is Ready For You" Tweet Benefited Him, Beto O'Rouke*, TEXAS TRIB. (Sept. 28, 2019, 3:00 PM), http://www.texastribune.org/2019/09/28/briscoe-cain-beto-orourke-gun-tweet/ (discussing how Republican Representative Briscoe Gain's Twitter account was suspended after he tweeted an alleged death threat towards Democratic presidential candidate Beto O'Rourke).

114. Bill Chappell, *Twitter Suspends Rep. Marjorie Taylor Greene's Account*, NPR (Jan. 17, 2021), http://www.npr.org/sections/insurrection-at-the-capitol/2021/01/17/957891462/twitter-suspends-rep-marjorie-taylor-greene-s-account-temporarily; *Twitter Suspends Republican Lawmaker's Account Over Violations of 'Integrity Policy'*, KOREA TIMES, http://www.koreatimes.co.kr/www/tech/2021/09/133_302634.html?KK (Jan. 18, 2021, 1:48 PM) (explaining how Representative Greene's account was suspended for tweeting about alleged 2020 election fraud, which was in violation of Twitter's civic integrity policy).

115. Shawn Johnson, *Republican US Sen. Ron Johnson Suspended from YouTube*, WIS. PUB. RADIO (June 11, 2021, 5:50 PM), http://www.wpr.org/republican-us-sen-ron-johnson-suspended-youtube (discussing how Senator Johnson was suspended for "violat[ing] the company's [COVID-19] medical misinformation [policy]").

116. *See* Zack Budryk, *Newly Sworn in GOP Rep Deletes Twitter Account After Suspension Following Controversial Riot Posts*, HILL (Jan. 11, 2021, 11:52 AM), http://thehill.com/homenews/house/533625-newly-sworn-in-gop-rep-deletes-twitter-account-after-suspension-following; *Barry Moore Deactivates Twitter Account After Being Suspended From Platform*, ALA. NEWS NETWORK, http://www.alabamanews.net/2021/01/11/barry-moore-deactivates-twitter-account-after-being-suspended-from-platform/ (Jan. 11, 2021, 3:04 PM) (discussing how House Representative Moore's Twitter account was suspended after tweets he shared following the riot at the U.S. Capitol).

117. Talia Kaplan, *Trump Lawsuit Against Big Tech Could 'Break New Ground' on First Amendment Protections: Parler Interim CEO*, FOX NEWS (July 8, 2021), http://www.foxnews.com/media/trump-lawsuit-big-tech-first-amendment-parler-ceo; *see* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

118. *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079.

would promote the policy goals outlined within the EO.[119] One of those goals was the "commitment to free and open debate on the internet" because it is "essential to sustaining our democracy."[120]

On January 8, 2021, Twitter permanently banned President Trump's account.[121] Following the United States Capitol protest—turned riot by fringed far-right members—on January 6, 2021, Twitter decided to permanently disable the President's account.[122] Twitter initially locked President Trump's account citing that "the risks of keeping his commentary live on its site [were] too high."[123] The company told former President Trump that he would be allowed back onto his account, provided he remove the offending posts.[124] After removing the posts that allegedly violated Twitter's policies, former President Trump was reinstated onto the site.[125] Shortly after being reinstated, the former President posted two tweets: one calling his

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119. *See id.* ("Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.").

120. *Id.* The Department of Justice hosted a "Public Workshop," a private "Expert Roundtable" discussion and "Industry Listening Sessions" where "the Department met individually with a diverse group of businesses that had attended the public event or otherwise expressed interest in Section 230." *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, U.S. DEPT. OF JUST. ARCHIVES, http://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited Dec. 29, 2021) ("[These meetings] were private and confidential to foster frank discussions about their use of Section 230 [of the Communications Decency Act of 1996] . . . .").

121. *Permanent Suspension of @realDonaldTrump*, TWITTER: BLOG (Jan. 8, 2021), http://blog.twitter.com/en_us/topics/company/2020/suspension.

122. *Id.*; *see also* Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES, http://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html (last updated Jan. 12, 2021).

123. Conger & Isaac, *supra* note 122. The events that led to Former President Trump's first temporary suspension resulted from a rally held on the White House Ellipse, where the former President said:

> Now it is up to Congress to confront this egregious assault on our democracy, and after this, we're gonna walk down and I'll be there with you. We're gonna walk down . . . to the Capitol and we're gonna cheer on our brave Senators and Congressmen and women and we'll probably not gonna be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong.

NBC News, *Trump Encourages Those at His Rally to March to the Capitol NBC News NOW*, YOUTUBE (Jan. 7, 2021), http://www.youtube.com/watch?v=5fiT6c0MQ58&ab_channel=NBCNews.

124. Conger & Isaac, *supra* note 122.

125. *Id.*

supporters "American Patriots" and another informing his followers that he would not be attending President Joe Biden's inauguration.[126]

Twitter found these tweets to condone the United States Capitol riot and claimed that the President was inciting violence.[127] A Twitter employee told the Washington Post that a petition signed by hundreds of employees asked the company to immediately remove President Trump's account.[128] After a meeting, Twitter stood by its decision and permanently banned the President from its platform.[129] Facebook, Snapchat, YouTube, and Reddit followed suit and limited the President's access to their platforms as well.[130]

Both Twitter and Facebook have decided to maintain their ban on the former President.[131] As a result, on July 7, 2021, President Trump filed a class action lawsuit in Federal court challenging Twitter's unilateral decision to ban him from its platform.[132] The lawsuit alleges that the Tech giant violated his First Amendment right to free speech.[133] As a way around the lack of state action that has already been alleged by various suits challenging Big Tech's censorship,[134] Trump claims that Twitter has been "engag[ing] in impermissible censorship resulting from . . . legislative action, a misguided reliance upon [s]ection 230 of the Communications Decency Act . . . and willful participation in joint activity with federal actors."[135] Twitter's status, the lawsuit goes on to say, "rises beyond that of a private company to that of a state actor, and as such, [Twitter] is constrained by the First Amendment

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126. *Id.* ("In one, he wrote: 'The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!'"); *Twitter 'Permanently Suspends' Trump's Account*, *supra* note 91.

127. *See Permanent Suspension of @realDonaldTrump*, *supra* note 121.

128. Conger & Isaac, *supra* note 122.

129. *Permanent Suspension of @realDonaldTrump*, *supra* note 121.

130. Conger & Isaac, *supra* note 122.

131. *See* Haley Messenger, *Twitter to Uphold Permanent Ban Against Trump, Even if He Were to Run for Office Again*, NBC NEWS, http://www.nbcnews.com/business/business-news/twitter-uphold-permanent-ban-against-trump-even-if-he-were-n1257269 (last updated Feb. 10, 2021, 10:36 AM); *Facebook's Trump Ban Upheld by Oversight Board for Now*, BBC NEWS, http://www.bbc.com/news/technology-56985583 (last updated May 25, 2021).

132. Complaint at 1–2, Trump v. Twitter, Inc., 21-CV-22441 (S.D. Fla. July 7, 2021) [hereinafter Trump Complaint].

133. *Id.* at 3.

134. *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) ("Because the state action doctrine precludes constitutional scrutiny of YouTube's content moderation pursuant to its Terms of Service and Community Guidelines, we affirm the District Court's dismissal of PragerU's First Amendment claim.").

135. Trump Complaint, *supra* note 132, at 2.

right to free speech in the censorship decisions it makes."[136] This *arm of the government* argument has not been alleged in any suit against Big Tech companies before, and we will have to wait to see if it will be successful.[137] As a result of these events, on May 24, 2021, Florida Governor Ron DeSantis signed into law SB 7072.[138] With the midterm elections just a year away, it is no surprise that the Governor does not want to be the next victim of Big Tech's censorship and thus fashioned a law that would monetarily affect Big Tech's decision to deplatform a candidate.[139]

III. SENATE BILL 7072

The impetus for SB 7072 was to hold Big Tech accountable for silencing dissent and certain viewpoints that were not consistent with "the dominant Silicon Valley ideology."[140] Lieutenant Governor of Florida, Jeanette Nuñez, commented that "by signing SB 7072 into law, Florida is taking back the virtual public square as a place where information and ideas can flow freely."[141] The Governor went on to note that many of Florida's constituents have had experience living in countries where speech is silenced, specifically in Venezuela and Cuba.[142] Florida Senator Ray Rodrigues, one of the co-sponsors of the bill, said that "[r]equiring Big Tech to define the behaviors that will lead to someone being deplatformed is a significant victory for free speech . . . ."[143]

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136. *Id.*

137. *See* Kaplan, *supra* note 117.

138. S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021); *see DeSantis Press Conference*, *supra* note 15.

139. *See* discussion *infra* Part III; *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS 46TH GOVERNOR OF FLA. (May 24, 2021), http://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/; Dan Trujillo, *DeSantis Running for Re-election and Not Considering Presidential Run, Governor Announces*, WFTS ABC ACTION NEWS (Oct. 1, 2021, 2:18 PM), http://www.abcactionnews.com/news/state/desantis-running-for-re-election-and-not-considering-presidential-run-governor-announces.

140. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139 ("A social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."); *see also* Fla. S.B. 7072

141. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* Fla. S.B. 7072.

142. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139.

143. *Id.*

SB 7072 creates three new Florida Statutes: section 106.072, section 287.137, and section 501.2041.[144] Under SB 7072, all Floridians, not just political candidates, will be able to directly sue companies that violate the law and seek monetary damages.[145] The bill enables the Attorney General of Florida to bring an action against Big Tech for violating the law under Florida's Unfair and Deceptive Practices Act.[146] Violations of antitrust laws will also enable the Attorney General to bring an action against the technology companies, and will result in these companies being added to an "antitrust violator vendor list."[147] Being placed on the antitrust violator vendor list will affect these companies' ability to receive government contracts.[148] Finally, the law imposes monetary repercussions with fees of up to $250,000 a day for state and local offices deplatforming political candidates.[149]

A. *Section 2*

1. Removing Candidates

Section 2 of SB 7072 is entitled: "Social media deplatforming of political candidates."[150] Under this section, "'[d]eplatform' has the same meaning as [it does] in [Florida Statute section] 501.2041," which defines "[d]eplatform" as "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 [fourteen] days."[151] Social media platform is defined as:

> [A]ny information service, system, Internet search engine, or access software provider that: [p]rovides or enables computer access by

144. Fla. S.B. 7072; FLA. STAT. § 106.072 (2021); FLA. STAT. § 287.137 (2021); FLA. STAT. § 501.2041 (2021); NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *2 (N.D. Fla. June 30, 2021).

145. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* FLA. STAT. § 501.2041(6); Fla. S.B. 7072.

146. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* Fla S.B. 7072; FLA. STAT. § 501.2041.

147. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* FLA. STAT. § 287.137(2)(a)–(b).

148. FLA. STAT. § 287.137(2)(a)–(b) ("A public entity may not accept a bid, proposal, or reply from, award a new contract to, or transact new business with any person or affiliate on the antitrust violator vendor list . . . .").

149. FLA. STAT. § 106.072(3); *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139.

150. Fla. S.B. 7072 (codified as FLA. STAT. § 106.072 (2021)).

151. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(c) (2021).

> multiple users to a computer server; . . . [o]perates as a sole proprietorship, partnership, limited liability company, corporation, association; . . . [d]oes business in the [S]tate [of Florida], and [either] [h]as annual gross revenues in excess of $100 million . . . [or] [h]as at least 100 million monthly individual platform participants . . . .[152]

The definition of "social media platform" explicitly exempts "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 . . . ."[153]

Section 2 goes on to prohibit the willful deplatforming of "a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate."[154] As noted above, violating section 2 of SB 7072 may result in "the social media platform [being] fined $250,000 per day for a candidate for statewide office and $25,000 per day for a candidate for other offices."[155] Section 2 also states that any willful free advertising provided by the social media platform must be disclosed to the candidate.[156] Explicitly in section 2 is a provision that states the law "may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. § 230(e)(3) . . . ." otherwise known as the Communications Decency Act.[157]

B. *Section 4*

Section 4 of the bill, which creates Florida Statute section 501.2041, is entitled: "Unlawful acts and practices by social media platforms."[158] Section 4 provides that "[a] social media platform that fails to comply with any of the provisions of this subsection commits an unfair or deceptive . . . practice . . . ."[159]

152. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(g).
153. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(g).
154. Fla. S.B. 7072; FLA. STAT. § 106.072(2).
155. Fla. S.B. 7072; FLA. STAT. § 106.072(3).
156. Fla. S.B. 7072; FLA. STAT. § 106.072(4).
157. Fla. S.B. 7072; FLA. STAT. § 106.072(5); *see also* 47 U.S.C. § 230.
158. Fla. S.B. 7072 (codified as FLA. STAT. § 501.2041 (2021)).
159. Fla. S.B. 7072; FLA. STAT. § 501.2041(2).

1. Censor, Shadow Ban, and Use of Post-Prioritization Algorithms

Section 4 prohibits any social media platform from "censor[ing]" or "shadow ban[ning] a user's content . . . or deplatform[ing] a [candidate]," without first notifying them of the action taken against them.[160] "Shadow ban" is defined in this section to be "action by a social media platform . . . 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."[161] "Censor" is also defined in section 4 to include "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."[162]

Any use of "post-prioritization," which is "action by the 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, feed, or search results," is also prohibited against any political candidate.[163] The social media platform must allow "user[s] to opt-out of post-prioritization and shadow ban[] algorithms . . . ."[164] These platforms must also provide an annual notice to users on the use of such algorithms and shadow banning and to reoffer the opt-out opportunity annually.[165] The prohibition on post-prioritization algorithms, however, does not apply to advertisements or content the platform is paid to carry.[166]

2. Consistent Application of Standards

The provisions of this subsection require "[a] social media platform . . . [to] publish the standards, including detailed definitions, it uses . . . [to] determin[e] how to censor, deplatform, and shadow ban" a user.[167] The social media platform must apply those detailed standards "consistent[ly]" among all users on the platform.[168] Section 4 goes on to require "social media platform[s] [to] inform each user about any changes to its user rules, terms, and agreements before implementing the changes . . . ."[169]

160. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(d).
161. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(f).
162. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(b).
163. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(e), (2)(h).
164. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(f)(2).
165. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(g).
166. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(e).
167. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(a).
168. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(b).
169. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(c).

3. Damages

A private citizen can bring a cause of action against a social media platform for violating this section, for failing to apply consistent censorship standards among its users, or for shadow banning a user without notice.[170] The remedy provides "$100,000 in statutory damages per . . . claim" along with "actual damages," "punitive damages"—"if aggravating factors are present"—and "other forms of equitable relief".[171] Further, if the user was deplatformed in a manner that is inconsistent with the detailed standards required by section 4, then the user is entitled to "costs and reasonable attorney fees."[172]

IV. THE CONSTITUTIONALITY OF SECTION 2 AND 4 OF SENATE BILL 7072

In analyzing the constitutionality of the regulation at issue, a court must first determine if the speech is content-based or content-neutral, which in turn, determines the appropriate standard of review.[173] Laws that distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based and are subject to strict scrutiny.[174] By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral and are subject to intermediate scrutiny.[175] Cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.[176]

A. NetChoice v. Moody

Three days after SB 7072 was signed into law by Governor DeSantis, NetChoice and CCIA sued to enjoin its enforcement.[177] Count one of the complaint alleged that SB 7072 violated the plaintiff's First Amendment free speech rights by interfering with the providers' editorial judgment, compelling

170. Fla. S.B.7072; *see* FLA. STAT. § 501.2041(6).
171. Fla. S.B. 7072; FLA. STAT. § 501.2041(6)(a)–(d).
172. Fla. S.B. 7072; FLA. STAT. § 501.2041(6)(e).
173. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).
174. *Id.* at 642, 658.
175. *Id.* at 642.
176. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 315 (1990).
177. Kirkland, *supra* note 21; Fla. S.B. 7072.

speech, and prohibiting speech.[178] Count two alleged that SB 7072 was vague, and therefore in violation of the Fourteenth Amendment.[179] Count three claimed SB 7072 violated the Fourteenth Amendment's Equal Protection Clause by impermissibly discriminating between providers that do or do not meet the bill's size requirements.[180] Count four alleged that SB 7072 violated the Constitution's Dormant Commerce Clause,[181] and count five alleged that the bill was preempted by federal statute, namely section 230 of the Communications Decency Act.[182]

The discussion below will address the constitutionality of certain provisions of sections 2 and 4 of the bill, which encompasses counts one and five of the complaint.[183] On June 30, 2021, the United States District Court for the Northern District of Florida granted NetChoice and CCIA's preliminary injunction against SB 7072's enforcement.[184] Judge Robert Hinkle's order discussed the constitutionality of the provisions of SB 7072 to assess whether there is a likelihood of success on the merits because it is one of the elements a court must consider when issuing a preliminary injunction.[185]

Judge Hinkle noted that further factual developments may change the analysis of the constitutionality of the challenged sections of the law and that statements about the merits should be understood only as statements about the likelihood of success.[186]

1. Content-Based Restrictions

One of the first arguments the plaintiffs made was that SB 7072 violated the First Amendment's Free Speech Clause.[187] Specifically, sections 2 and 4 were alleged to "restrict speech based on its content and based on its

178. NetChoice Complaint, *supra* note 19, at 44–54; Fla. S.B. 7072.
179. NetChoice Complaint, *supra* note 19, at 55–58; Fla. S.B. 7072.
180. NetChoice Complaint, *supra* note 19, at 59–62; Fla. S.B. 7072.
181. NetChoice Complaint, *supra* note 19, at 62–64.
182. NetChoice Complaint, *supra* note 19, at 64–68.
183. Fla. S.B. 7072; *see* discussion *infra* Sections IV.A.1–3.
184. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *12 (N.D. Fla. June 30, 2021); *see also* Fla. S.B. 7072.
185. *NetChoice*, 2021 WL 2690876, at *2; *see also* Fla. S.B. 7072; *see, e.g.*, Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. 2005)

> As a prerequisite to a preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest.

NetChoice, 2021 WL 2690876, at *2.
186. *NetChoice*, 2021 WL 2690876, at *2.
187. *See* NetChoice Complaint, *supra* note 19, at 45; Fla. S.B. 7072.

speaker . . . ."[188] The plaintiffs contended that SB 7072, namely section 4, "authorizes the State to engage in highly intrusive investigations of content moderation processes and judgments, . . . " which requires detailed explanations of the algorithms used to censor political candidates.[189] Because both these provisions are content-based, the plaintiffs argued they are subject to strict scrutiny.[190] The plaintiffs claimed that neither section survives strict scrutiny because the government has no legitimate interest that supports sections 2 and 4's constraints, let alone a compelling interest.[191]

In the preliminary injunction, the court agreed with the plaintiffs, noting that "[t]he Florida Statutes at issue are about as content-based as it gets."[192] First, Florida Statute section 106.072 only applies to the deplatforming of political candidates, no one else.[193] This, the court writes, is a content-based restriction.[194] Second, the court points to the factual support asserted by the plaintiffs of the actual motivation for the legislation, which "was hostility to the social media platforms' perceived liberal viewpoint."[195]

According to the complaint, the plaintiffs claimed that the core goal of SB 7072 was to "punish the targeted companies because the Legislature and Governor dislike[d] the perceived political and ideological viewpoints that those private businesses supposedly express[ed] through their content judgments."[196] The order quotes the Lieutenant Governor, who said:

> 'What we've been seeing across the U.S. is an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations . . . . Thankfully in Florida we have a Governor that fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative.'[197]

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188. *See* NetChoice Complaint, *supra* note 19, at 45; Fla. S.B. 7072.

189. *See* NetChoice Complaint, *supra* note 19; Fla. S.B. 7072.

190. *Id.*; *see* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 285 (2009).

191. NetChoice Complaint, *supra* note 19, at 45. ("Because the State has no legitimate —much less compelling— governmental interest that supports these provisions, and because none of the provisions are narrowly tailored, they do not survive strict scrutiny. Indeed, they would fail under any standard of review."); *see* Fla. S.B. 7072.

192. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021).

193. *Id.*

194. *Id.*

195. *Id.*

196. NetChoice Complaint, *supra* note 19, at 50; *see* Fla. S.B. 7072.

197. *NetChoice*, 2021 WL 2690876, at *10.

The State could not assert a justification for the law, and the court contended that leveling the playing field by promoting speech on one side of an issue, or restricting speech on the other, was not a legitimate state interest.[198] According to the court, because the law was clearly motivated by the content of the speech, strict scrutiny applied, and the government's asserted reason, or lack of reason, for the legislation was neither legitimate nor compelling.[199]

2. Compelled Speech

Next, the plaintiffs asserted that SB 7072 compels speech by forcing the private social media platforms to carry content that the companies would not otherwise host.[200] The plaintiffs argued that they have a right to choose what to post on their platforms and section 4 of SB 7072 directly infringed on their protected editorial ability to do so.[201] The plaintiffs cited three cases to support their argument: (1) *Miami Herald Publishing Co. v. Tornillo*;[202] (2) *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*;[203] and (3) *Pacific Gas & Electric Co.* ("*PG&E*") *v. Public Utilities Commission of California*.[204] In *Tornillo*, the Supreme Court struck down a Florida law that required newspapers to offer candidates a right to reply to the newspapers' published criticisms of candidates.[205] The Supreme Court held that this was a form of compelled speech which infringed on the publishers' editorial freedom, and was therefore unconstitutional.[206]

Similarly, in *Hurley*, the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB") challenged a decision of the South Boston Allied War Veterans Council ("Veterans Council") that denied GLIB the opportunity to walk in an annual parade organized by the Veterans Council as being a violation of Massachusetts' public accommodations law.[207] The Veterans Council claimed that including GLIB in their parade would contravene what the association was attempting to communicate.[208] The Supreme Court held

198. *Id.* at *11; *see also* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011).
199. *NetChoice*, 2021 WL 2690876, at *10.
200. *See* NetChoice Complaint, *supra* note 19, at 46; *see* Fla. S.B. 7072.
201. *See* NetChoice Complaint, *supra* note 19, at 2–3.
202. 418 U.S. 241 (1974).
203. 515 U.S. 557 (1995).
204. 475 U.S. 1 (1986); *see also NetChoice*, 2021 WL 2690876, at *7–*8.
205. *See Tornillo*, 418 U.S. at 256–57.
206. *See id.* at 258.
207. *Hurley*, 515 U.S. at 561.
208. *Id.* at 562–63.

that the Veterans Council had a First Amendment right to exclude GLIB from the parade because a state may not require a private group to include a group whose message the organizers do not wish to promote.[209] Lastly, the legislation being challenged in *PG&E* required a private utility company to include newsletters from other organizations that held differing views from those of PG&E in their billing envelopes.[210] The Supreme Court held this legislation to be unconstitutional because it was a form of compelled speech.[211]

The United States District Court for the Northern District of Florida found that these three cases established that a "private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish content with which [they] disagree[d]" or would not otherwise publish.[212] Further, the court noted that social media providers' editorial process was different than those of the cases cited, in that the social media providers post material invisibly.[213] Algorithms do much of the sorting of the content posted by third parties, as opposed to the social media providers doing the sifting themselves, like a traditional publisher would.[214]

The State offers two cases in support of their legislation: (1) *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*[215] and (2) *PruneYard Shopping Center v. Robins*.[216] In *Rumsfeld*, the Supreme Court upheld a Federal statute that conditioned law schools' receipt of Federal funds on allowing military recruiters access to the school's campus.[217] The Court found that this was conduct, not speech; thus, the Federal law was not compelling the law school to adhere to the military's *speech*, but rather, they were simply opening their doors to the recruiters.[218] Similarly, in *PruneYard*, the Supreme Court found no First Amendment violation when the California Supreme Court upheld students' right to peacefully solicit signatures in a private

209. *See id.* at 575–76. ("[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

210. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15–16 (1986).

211. *Id.* at 20–21.

212. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *8 (N.D. Fla. June 30, 2021).

213. *Id.*

214. *See id.*; *see* discussion *supra* Section II.B.2.

215. 547 U.S. 47 (2006).

216. 447 U.S. 74 (1980).

217. *F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 51, 70 (2006).

218. *Id.* at 56–57.

shopping mall that removed the students from the premises because the students were violating PruneYard's regulations that forbade their conduct.[219]

The Northern District Court of Florida, in ruling on NetChoice and CCIA's preliminary injunction, noted that the cases raised by the State only established that:

> [C]ompelling a person to allow a visitor access to the person's property, for the purpose of speaking, is not a First Amendment violation, so long as the person is not compelled to speak, the person is not restricted from speaking, and the message of the visitor is not likely to be attributed to the person.[220]

SB 7072 is different, the court concluded, because it explicitly forbids social media platforms from adding their own statements, such as warnings to posts by other users and compelling speech by requiring the social media platforms to arrange their material in a certain way.[221]

3. Preemption

The plaintiffs also assert that SB 7072 is preempted by section 230 of the Communications Decency Act, and the Florida District Court agreed.[222] As noted above, section 230 provides a legal shield for interactive computer services—social media platforms—for "[any] action voluntarily taken in good faith to restrict 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 . . . ."[223] Thus, social media providers will likewise not be held liable for action taken to restrict access to material described above.[224]

According to the Florida District Court, because section 4 of SB 7072 explicitly imposes a daily fine for deplatforming a candidate and gives private citizens statutory damages for shadow banning them, SB 7072 contravenes section 230.[225] The Federal statute also explicitly states that "[n]o cause of

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219. *PruneYard Shopping Ctr.*, 447 U.S. at 88.

220. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *9 (N.D. Fla. June 30, 2021).

221. *NetChoice*, 2021 WL 2690876, at *9; S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021).

222. *NetChoice*, 2021 WL 2690876, at at *6; NetChoice Complaint, *supra* note 19, at 67–68; Fla. S.B. 7072; 47 U.S.C. § 230.

223. 47 U.S.C. § 230(c)(2)(A); *see* discussion *supra* Section II.B; *NetChoice*, 2021 WL 2690876, at *6.

224. 47 U.S.C. § 230(c)(2)(B); *see* discussion *supra* Section II.B.

225. Fla. S.B. 7072; 47 U.S.C. § 230; *see NetChoice*, 2021 WL 2690876, at *6.

action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[226] The District Court found that the plaintiffs are likely to prevail on their challenge of the preempted provisions of SB 7072.[227]

V. CONCLUSION

The Florida District Court's discussion of the constitutionality of SB 7072 was only to assess the likelihood of success on the merits as part of the ruling on the preliminary injunction.[228] With further discovery, it may be found that these social media companies are not actually removing and regulating content on their platforms in good faith, which would affect their legal immunity.[229] Governor DeSantis fully expected a challenge to SB 7072 and filed a Notice of Appeal of the District Court's decision on July 12, 2021.[230] Texas, Louisiana, and North Carolina have recently passed laws similar to Florida's SB 7072.[231]

One of the arguments that the defendants may raise on appeal is the *invisible* editorial process.[232] The District Court notes that social media platforms are different from traditional publishers in that they do not sort and sift through the material, rather they use algorithms to conduct this editorial feature.[233] If social media companies are creating the algorithmic equations to sort out certain material, however, then there is an argument that such *invisible* editing is actually manufactured to remove and filter material outlined by the companies and codified in their algorithms.[234]

Many of the District Court's decisions pertaining to the constitutionality of SB 7072 will likely be upheld because certain provisions

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226. 47 U.S.C. § 230(e)(3).

227. *NetChoice*, 2021 WL 2690876, at *6; *see* Fla. S.B. 7072.

228. *NetChoice*, 2021 WL 2690876, at *2.

229. *See id.* at *2, *6.

230. Notice of Appeal at 1, NetChoice, L.L.C. v. Moody, (No. 21-CV-220), 2021 WL 2690876, at *1; *see* Fla. S.B. 7072.

231. Debra Kaufman, *Federal Judge Blocks Florida Law That Restricts Social Media*, ETCENTRIC (July 2, 2021), http://www.etcentric.org/federal-judge-blocks-florida-law-that-restricts-social-media/; *see* Fla. S.B. 7072.

232. *See* discussion *supra* Section IV.A.2; *NetChoice*, 2021 WL 2690876, at *8.

233. *See* discussion *supra* Section IV.A.2; *NetChoice*, 2021 WL 2690876, at *8.

234. *See* Chris Meserole, *How Misinformation Spreads on Social Media — and What to Do About It*, BROOKINGS (May 9, 2018), http://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/. After Twitter moved away from chronological feeds in 2016, they incorporated algorithmic feeds, which sort material that the user would find most relevant. *Id.*

seem to be a clear case of the government interfering with private speech.[235] Presumably, Governor DeSantis thought it necessary to act when Congress did not.[236] Calls to reform section 230 are mounting from both sides of the political spectrum.[237] Federal government officials have discussed potential regulatory intervention, legislative reform, and amending or even dispensing section 230 entirely.[238] Even Justice Clarence Thomas has commented on the expansive scope of section 230 immunity and how it has exceeded its initial intended goal.[239]

One legislative proposal to change section 230 is the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act ("EARN IT Act").[240] Proposed in early March 2020 and sponsored by bipartisan legislators, the EARN IT Act would change section 230 by exempting "'child exploitation law'" from its scope of immunity.[241]

The EARN IT Act proposes to remove section 230 immunity for challenges brought by minors who were victims of sexual abuse material posted on social media platforms.[242] Critics of the EARN IT Act claim the act violates the First and Fourth Amendments of the Constitution by impermissibly regulating online platforms' editorial activity and allowing online platforms to engage in government action by searching users' accounts without a warrant based on probable cause.[243]

Other proposed legislation to curtail section 230 immunity includes, "'Stop the Censorship Act of 2020,'"[244] "'Online Freedom and Viewpoint

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235. *See* discussion *supra* Part IV; Fla. S.B. 7072.

236. *See* Ryan Mrazik & Natasha Amlani, *Cover Story Section 230: A Law on the Cusp of Change?*, ANTITRUST, Fall 2020, at 26, 27–28 (discussing the various bills the legislature has proposed to curtail section 230, but that have not "progressed meaningfully"); NetChoice Complaint, *supra* note 19 at 3–5.

237. *See* Mrazik & Amlani, *supra* note 236, at 26.

238. *Id.*; Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, BROOKINGS TECHSTREAM (Sept. 21, 2021), http://www.brookings.edu/techstream/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/.

239. *See* Mrazik & Amlani, *supra* note 236, at 26; Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 13 (2020).

240. *See* Mrazik & Amlani, *supra* note 236, at 27–28; S. 3398, 116th Cong. § 3 (2020).

241. Mrazik & Amlani, *supra* note 236, at 27; *see* S. 3398.

242. Mrazik & Amlani, *supra* note 236, at 27; *see* S. 3398.

243. Sophia Cope et al., *The EARN IT Act Violates the Constitution*, ELEC. FRONTIER FOUND. (Mar. 31, 2020), http://www.eff.org/deeplinks/2020/03/earn-it-act-violates-constitution; S. 3398.

244. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Congressman Paul Gosar. *Id.*; H.R. 4027, 116th Cong. (2019).

Diversity Act,'"[245] "'Stopping Big Tech's Censorship Act,'"[246] "'Limiting Section 230 Immunity to Good Samaritans Act,'"[247] and "'Ending Support for Internet Censorship Act.'"[248] None of these bills have progressed as far as the EARN IT Act, but they are all aimed at what the representative sponsors believe to be politically biased removal and censorship of content by social media providers.[249]

Another approach worth noting is one proposed by Justice Clarence Thomas in his concurring opinion in *Biden v. Knight First Amendment Institute at Columbia University*.[250] Justice Thomas suggests that the doctrines that limit the right of a private company to exclude might be the proper avenue to combat Big Tech's centralized control on communication, as opposed to First Amendment grounds.[251] One such doctrine is the treatment of certain large, private entities as common carriers, like communication and transportation providers.[252] In exchange for regulating these industries, federal and state governments have given these massive industries special government favors, such as liability immunity from suit.[253] Similarly, section 230 already grants Big Tech civil immunity from suit; however, serious regulation of these tech industries is missing.[254]

Justice Thomas also suggests that public accommodation laws are another avenue in which the government has limited a company's right to exclude.[255] Digital platforms may be subject to public accommodation laws because of the services they provide to the general public at large.[256] The Legislature may choose to treat Big Tech companies as public accommodations, making them susceptible to anti-discrimination laws such that digital platforms deal with consumers equally.[257] Justice Thomas notes,

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245. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Roger Wicker. *Id.*; S. 4534, 116th Cong. § 1 (2020).

246. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Kelly Loeffler. Mrazik & Amlani, *supra* note 236, at 28; S. 4062, 116th Cong. (2020).

247. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Josh Hawley. *Id.*; S. 3983, 116th Cong. (2020).

248. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Josh Hawley as well. *Id.*; S. 1914, 116th Cong. (2019).

249. *See* Mrazik & Amlani, *supra* note 236, at 28.

250. 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

251. *See id.* at 1222.

252. *Id.* at 1222–23.

253. *Id.* at 1223.

254. *See* 47 U.S.C. § 230(c)(2).

255. *Knight First Amend. Inst.*, 141 S. Ct. at 1223.

256. *See id.* at 1225.

257. *Id.* at 1225–26.

however, that the change would be better served coming from Congress.[258] Nonetheless, these are two arguments that potential plaintiffs may soon assert.[259]

Whichever approach the legislature ultimately decides to take, it is evident that Big Tech is affecting the dissemination of speech in the United States, and the rest of the world.[260] Many argue that allowing social media companies free reign to remove, silence, and otherwise edit content with impunity requires oversight.[261] SB 7072 will likely be struck down as unconstitutional, but that does not mean that Americans cannot act by voting for candidates that fight for a marketplace of ideas that is open and robust with debate in search of the truth.[262] In the words of Justice Oliver Wendell Holmes Jr., "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[263] Holmes continues, "[t]hat at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[264]

258. *Id.* at 1226.

259. *Id.* at 1223.

260. *See* discussion *supra* Sections II.C–D; Gregg Jarrett, *Gregg Jarrett: It's Time to Crush Big Tech Censorship Before Facebook, Twitter and Others Crush Us*, FOX NEWS (May 12, 2021), http://www.foxnews.com/opinion/big-tech-censor-gregg-jarrett.

261. *See, e.g.*, Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

262. S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021); *see* discussion *supra* Section II.A; *Thorbecke*, *supra* note 12; WFLA 8 On Your Side Staff, *Big Tech Associations Sue Florida Over New Social Media Censorship Law*, WFLA (May 27, 2021, 4:48 PM), http://www.wfla.com/news/politics/big-tech-associations-sue-florida-over-new-social-media-censorship-law/.

263. Abrams v. United States, 250 U.S. 616, 630 (1919).

264. *Id.*