HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB COM 21-01 Technology Transparency
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee	16 Y, 8 N	Wright	Hamon

SUMMARY ANALYSIS

A section of the Federal Communications Decency Act (Section 230) provides immunity from liability for information service providers and social media platforms that, in good faith, remove or restrict from their services information deemed "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." While this immunity has fostered the growth of certain parts of the internet, recently, there have been criticisms of the broad federal immunity provision due to actions taken or not taken regarding the censorship of users by internet platforms. Government regulators have recently investigated and initiated cases against certain platforms for antitrust activities.

The bill 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.
- inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days.
- notify the user within 30 days of censoring or deplatforming.
- provide a user with information relating to the number of other individuals who were provided or shown the user's content or posts upon request by the user.
- provide users with an opt out of post-prioritization and shadow banning algorithms to allow sequential or chronological posts and content.
- ensure that candidates for office in Florida are not deplatformed and that their posts are not shadow banned.
- ensure that journalistic enterprises are not censored, deplatformed, or shadow banned.

A social media platform that fails to comply with these requirements may be found in violation of the Florida Deceptive and Unfair Trade Practices Act by the Department of Legal Affairs (DLA). In addition, a user may bring a private cause of action against a social media platform for failing to consistently apply certain standards and for censoring or deplatforming without proper notice.

The bill prohibits social media platforms from deplatforming statewide candidates and allows the Florida Elections Commission to fine a social media platform $100,000 per day for deplatforming statewide candidates, and $10,000 per day for all other candidates. In addition, if a social media platform provides free advertisements for a candidate, it is an in-kind contribution and the candidate must be notified.

If a social media platform has been convicted of or has been held civilly liable for state or federal antitrust violations, such platform, or an affiliate of such, may be placed on the Antitrust Violator Vendor List by the Department of Management Services and is then prohibited from contracting with public entities. In certain circumstances, DLA may place a social media platform on such list temporarily.

The fiscal impact of the bill is indeterminate.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Freedom of Speech and Internet Platforms - Current Situation

Section 230

The federal Communications Decency Act (CDA) was passed in 1996 "to protect children from sexually explicit Internet content."[1] 47 U.S. Code § 230 (Section 230) was 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."[2]

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."[3]

Specifically, Section 230 states that no provider or user of an interactive computer service may be held liable on account of:[4]

- 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 "assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions,[5] both of which "appl[ied] traditional defamation law to internet providers."[6] The first decision held that an interactive computer service provider could not be liable for a third party's defamatory statement ... but the second imposed liability where a service provider filtered content in an effort to block obscene material."[7] 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.[8] In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.[9]

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.[10] Section 230 does not affect federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, or sex trafficking law.

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[1] *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (citing *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon))).
[2] *Force*, 934 F.3d at 63 (quoting *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).
[3] 47 U.S.C. § 230(b)(1)–(2).
[4] 47 U.S.C. § 230(c).
[5] *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),
[6] *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).
[7] *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))).
[8] 47 U.S.C. § 230(c)(1).
[9] *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).
[10] 47 U.S.C. § 230(e).

Recently, 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.[11] 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.[12] 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.[13] Proposals have also been offered to limit the liability shield for internet providers who restrict speech based on political viewpoints.[14]

Both sides of the political aisle have claimed that internet platforms engage in political censorship and unduly restrict viewpoints.[15]

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:

- Social media sites, which are websites and applications which allow users to communicate informally with others, find people, and share similar interests;[16]
- Internet platforms, which are servers used by an Internet provider to support Internet access by their customers;[17]
- Internet search engines, which are computer software used to search data (such as text or a database) for specified information;[18] and
- Access software providers, which are providers of software or enabling tools for content processing.[19]

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

- Data monetization.[20] 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.[21]

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[11] Zoe Bedell and John Major, *What's Next for Section 230? A Roundup of Proposals* Lawfare, (July 29, 2020) https://www.lawfareblog.com/whats-next-section-230-roundup-proposals (last visited Feb. 25, 2021).
[12] *Id*; United States Department of Justice, Department of Justice's Review of Section 230 of the Communications Decency Act of 1996, https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited Feb. 25, 2021); EARN IT Act of 2020, S.3398, 116th Cong. (2020).
[13] Bedell, s*upra* note 11; PACT Act, S.4066, 116th Cong. (2020); BAD ADS Act, S.4337, 116th Cong. (2020).
[14] Bedell, s*upra* note 11; Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020).
[15] For example, on May 28, 2020, an executive order was issued by President Trump suggesting that websites "should properly lose" their "limited liability shield" whenever they "remove or restrict access to content" not in good faith. Bedell, s*upra* note 11; Exec. Order No.13925, 85 Fed. Reg. 34079 (May 28, 2020).
[16] DelValle Institute Learning Center*, Social Media Platforms*, https://delvalle.bphc.org/mod/wiki/view.php?pageid=65 (last visited Feb. 24, 2021).
[17] IGI Global, *Internet Platform*, https://www.igi-global.com/dictionary/internet-platform/15441 (last visited Feb. 24, 2021).
[18] Merriam Webster, *Search Engine*, https://www.merriam-webster.com/dictionary/search%20engine (last visited Feb. 24, 2021).
[19] Cornell Law School, Legal Information Institute, *Access Software Provider,* https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=47-USC-629364878-1237841280&term_occur=1&term_src=title:47:chapter:5:subchapter:II:part:I:section:230#:~:text=(4)%20Access%20software%20provider%20The,C)%20transmit%2C%20receive%2C%20display (last visited Feb. 24, 2021).
[20] The Alexander von Humboldt Institute for Internet and Society, *How do digital platforms make their money?*, July 29, 2019, https://www.hiig.de/en/how-do-digital-platforms-make-their-money/ (last visited Feb. 27, 2021).
[21] Investopedia, *How Do Internet Companies Profit with Free Services?*, 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 Feb. 27, 2021).

- Subscription or membership fees. This model requires users pay for a particular or unlimited use of the platform infrastructure.[22]
- 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.[23]

The Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (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 commerce.[24] The FDUTPA is based on federal law.[25]

For example, Florida has determined that the following acts or practices are unfair or deceptive:
- Imposing unconscionable prices for the rental or lease of any dwelling unit or self-storage facility during a period of declared state of emergency.[26]
- Failing to abide by storage requirements for personal information and notice requirements for data breaches of such information,[27] and
- Failing to abide by requirements for weight-loss programs.[28]

The state attorney or the Department of Legal Affairs (DLA) may bring actions when it is in the public interest on behalf of consumers or governmental entities.[29] The Office of the State Attorney (SAO) may enforce violations of the FDUTPA if the violations take place in its jurisdiction. DLA 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.[30] Consumers may also file suit through private actions.[31]

DLA and the SAO have powers to investigate FDUTPA claims, which include:[32]
- administering oaths and affirmations,
- subpoenaing witnesses or matter, and
- collecting evidence.

DLA 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; and

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[22] HIIG, *supra* note 20.
[23] *Id*.
[24] Chapter 73-124, L.O.F., and s. 501.202, F.S.
[25] D. Matthew Allen, et. al., *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083 (Summer 2011).
[26] S. 501.160, F.S.
[27] S. 501.171, F.S.
[28] S. 501.0579, F.S.
[29] s. 501.207(1)(c) and (2), F.S.; *see* s. 501.203(2), F.S. (defining "enforcing authority" and referring to the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction; or the Department of Legal Affairs if the violation occurs in more than one circuit; or if the office of the state attorney defers to the department in writing; or fails to act within a specified period.); *see also* David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUPTA and the potential for deterrence of anticompetitive conduct in Florida), *available at* http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division* (last visited on Feb, 21, 2021).
[30] s. 501.203(2), F.S.
[31] s. 501.211, F.S.
[32] S. 501.206(1), F.S.

- Civil penalties of up to $10,000 per willful violation.[33]

Freedom of Speech

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment applies to the entire federal government, and the Supreme Court of the United States (Supreme Court) has interpreted the Due Process Clause of the Fourteenth Amendment as protecting the rights in the First Amendment from interference by state governments.[34]

The most basic component of freedom of expression is the right to freedom of speech. Freedom of speech may be exercised with words or actions. The Supreme Court requires the government to provide substantial justification for the interference with the right of free speech where it attempts to regulate the content of the speech.[35] The Supreme Court has recognized that the First Amendment's robust speech protections fully apply to online speech.[36]

Businesses are afforded some of the same First Amendment rights as individuals.[37] Generally, businesses cannot be compelled to host speech with which it disagrees absent a mandate with a narrowly tailored means of serving a compelling state interest.[38] Also, businesses have a right to unrestricted independent expenditures for political communications and elections as a form of corporate speech.[39]

Supremacy Clause

Article VI, Paragraph 2 of the U.S. Constitution is commonly referred to as the Supremacy Clause. It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect.[40]

Freedom of Speech and Internet Platforms - Effect of the Bill

The bill provides the following definitions:

- *Social media platform* means any information service, system, Internet search engine, or access software provider that does business in the state, and provides or enables computer access by multiple users to a computer server, including an Internet platform and/or a social media site. The Internet platform or social media site may be a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that does business in the state, and that satisfies at least one of the following thresholds:
    - Has annual gross revenues in excess of $100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.

[33] Ss. 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. S. 501.2105, F.S.
[34] Cornell Law School, Legal Information Institute, *First Amendment*, https://www.law.cornell.edu/wex/first_amendment (last visited Feb. 23, 2021); *Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886).
[35] *Id*.
[36] *Reno v. ACLU*, 521 U.S. 844 (1997); Jason Kelley, *Section 230 is Good, Actually*, Electronic Frontier Foundation (de. 3, 2020) https://www.eff.org/deeplinks/2020/12/section-230-good-actually (last visited Feb. 25, 2021).
[37] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[38] *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).
[39] *Citizens United*, *supra* note 38.
[40] Cornell Law School, Legal Information Institute, *Supremacy Clause*, https://www.law.cornell.edu/wex/supremacy_clause (last visited Feb. 23, 2021).

    - Has at least 100 million monthly individual platform participants globally.
- *User* means a person who resides or is domiciled in the state and who has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform.
- *Algorithm* means a mathematical set of rules that specify how a group of data behaves that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material.
- *Censor* includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. This term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.
- *Deplatform* means the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 60 days.
- *Post-prioritization* means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, feed, view, or search results. The term does not include post-prioritization of content and material based on payments by a third party, including other users, to the social media platform.
- *Shadow ban* means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform. This term includes acts of shadow banning by a social media platform that are not readily apparent to a user.
- *Journalistic enterprise* means an entity that:
    - Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
    - Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
    - Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
    - Operates under a broadcast license issued by the Federal Communications Commission.

The bill requires a social media platform to:

- publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban users, and apply such standards in a consistent manner among users on the platform.
- inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days.
- provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts, and provide that information upon request.
- categorize algorithms used for post-prioritization and shadow banning and provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning. Users must be able to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content, and this opt-out opportunity must be reoffered annually.
- 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 being deplatformed.

The bill prohibits a social media platform from:

- censoring a user's content or material or deplatforming a user from the social media platform in a way that would otherwise violate FDUTPA, or without notifying the user who posted or attempted to post the content or material. Such notification must:

    - Be in writing;
    - Be delivered via electronic mail or direct electronic notification to the user within 30 days of the censoring action;
    - Include a thorough rationale explaining the reason that the social media platform censored the user; and
    - Include a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable.
- applying or using post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate for office in Florida, beginning from the date of qualification and ending on the date of the election or the date such candidate for office ceases to be a candidate before the date of election. Post-prioritization of certain content or material from or about a candidate for office based on payments to the social media platform by such candidate for office or a third party is not a violation. Social media platforms must provide users with a method to identify themselves as qualified candidates, and may confirm such qualification by reviewing the website of the Division of Elections of the Department of State.
- taking any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation.

The bill provides that a social media platform is not required to notify a user of a censoring action if the censored content or material is obscene, which means content or material that:

- the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
- taken as a whole, lacks serious literary, artistic, political, or scientific value.

If a social media platform fails to comply with any of the foregoing requirements, the bill provides that the social media platform commits an unfair or deceptive trade act or practice.

If DLA, by its own inquiry or as a result of a complaint, suspects that a violation is imminent, occurring, or has occurred, DLA may investigate the suspected violation in accordance with FDUTPA. In an investigation by DLA into alleged violations of this section, DLA's investigative powers include, but are not limited to, the ability to subpoena any algorithm used by a social media platform related to any alleged violation.

A user may bring a private cause of action against a social media platform for **failing to**:

- notify such user of an act of censoring or deplatforming, or
- apply censorship, deplatforming, and shadow banning standards in a consistent manner.

The court may award the following damages to the user:

- Up to $100,000 in statutory damages per proven claim;
- Actual damages;
- If aggravating factors are present, punitive damages;
- Other forms of equitable relief; and
- If the user was deplatformed, costs and reasonable attorney fees.

Each failure to comply with each of the individual requirements in the bill are treated as a separate violation, act, or practice by the social media platform.

The bill provides that its provisions may only be enforced to the extent they are not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

Antitrust Laws, and State Contracts and Incentives - Current Situation

Antitrust Law

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong, it can stifle competition, leading to higher prices and harm to consumers.

Antitrust law exists to protect competition, but not necessarily individual competitors, in economic markets. It is based on the idea that an unregulated market will lead to the creation of coercive monopolies.[41] Federal antitrust law includes the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. These laws are enforced in federal district court[42] by the U.S. Department of Justice (DOJ), the Federal Trade Commission (FTC), state Attorneys General, and private plaintiffs. Antitrust case law is well-developed, and it is often difficult to distinguish aggressive, pro-competitive conduct—which is legal—from predatory, anti-competitive conduct.[43]

The Clayton Act[44] prohibits specific business actions, including mergers and acquisitions, which may substantially lessen competition. To determine whether a merger violates the Clayton Act, a court must decide whether the merger is likely to create an appreciable danger of anticompetitive effects. The plaintiff must establish a prima facie case that a transaction is anticompetitive, such as by showing that an acquisition will significantly increase market concentration and lessen competition.[45] The burden then shifts to the defendant to rebut the prima facie case, such as by introducing evidence casting doubt on the plaintiff's prediction of anticompetitive effects.[46] If the defendant rebuts the prima facie case, the plaintiff has the final burden to demonstrate an antitrust violation.[47] If the plaintiff prevails, the customary remedy is for the court to order divestiture and unwind the merger.[48]

The Sherman Antitrust Act[49] prohibits any attempt to restrain trade or form a monopoly. A monopoly has two elements: (1) monopoly power and (2) willful acquisition or maintenance of that power, as opposed to power naturally resulting from a superior product, acumen, or historic accident. Stated differently, a plaintiff must prove the defendant acquired the monopoly power in a "predatory" manner. Penalties for violating the Sherman Act include up to ten years' imprisonment and a fine up to $100 million for a corporation or $1 million for any other person.[50]

The Florida Antitrust Act of 1980[51] is intended to complement federal antitrust law in order to foster effective competition. Implemented by the Office of the Attorney General (OAG), the Act essentially mirrors the federal Sherman Act, and prohibits:[52]

- Every contract, combination, or conspiracy in restraint of trade or commerce;[53] and
- Monopolization or attempted monopolization of any part of trade or commerce.[54]

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[41] John J. Miles, Antitrust Primer, 20140513 AHLA Seminar Papers 1 (2014) (stating the purpose of antitrust law is to "protect and promote competition as the primary method by which this country allocates scarce resources to maximize the welfare of consumers.").
[42] Steven Fox, Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes, The Florida Bar, Business Litigation in Florida (2017) (federal district courts have exclusive jurisdiction over federal antitrust actions).
[43] Animesh Ballabh, Antitrust Law: An Overview, 88 J. Pat. & Trademark Off. Soc'y 877 (2006); John J. Miles, Antitrust Primer, 20140513 AHLA Seminar Papers 1 (2014).
[44] 15 U.S.C. s. 18.
[45] *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993) (discussing how plaintiff's establishment of a prima facie case on statistical evidence is first step in analysis); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).
[46] Id.
[47] *Chicago Bridge & Iron*, 534 F.3d at 423.
[48] *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015).
[49] 15 U.S.C. ss. 1 et seq.
[50] 15 U.S.C. s. 1.
[51] Ss. 542.15 – 542.36, F.S.
[52] S. 542.16, F.S.
[53] S. 542.18, F.S.
[54] S. 542.19, F.S.

A violation of Florida antitrust law can be penalized with up to three years' imprisonment and fines up to $1 million for a corporation and $100,000 for any other person.[55] There is also a private right of action for any person injured by certain violations.[56]

Florida law does not provide a corollary to the federal Clayton Act, which specifically targets mergers and acquisitions that may lessen competition. However, the Attorney General considers the Florida Antitrust Act of 1980 and the FDUTPA broad enough to encompass those types of violations.[57]

Antitrust Actions Against Internet Platforms

Critics have argued for years that internet platforms like Google, Apple, Facebook and Amazon improperly built empires over commerce, communications and culture, and then abused their power. Recently, federal and state regulators investigated and brought antitrust cases against them.[58] For example, the FTC and over 40 states, including Florida, have brought an action against Facebook for allegedly buying smaller rivals to maintain market dominance.[59] Also, DOJ and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.[60]

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency[61] procurement of personal property and services. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods that include:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services. [62]

For contracts for commodities or services in excess of $35,000, agencies must utilize a competitive solicitation process.[63] However, specified contractual services and commodities are not subject to competitive solicitation requirements.[64]

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the

[55] S. 542.21, F.S.
[56] Ss. 542.21, 542.22, F.S.
[57] Florida Attorney General, *Antitrust*, http://myfloridalegal.com/antitrust (last visited Feb 23, 2021).
[58] David McCabe, Cecilia Kang, and Daisuke Wakabayashi, *Google's Legal Peril Grows in Face of Third Antitrust Suit*, New York Times (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html (last visited Feb. 25, 2021).
[59] *Id*; *Federal Trade Commission v. Facebook, Inc*., No. 1:20-cv-03590 (D.C. Cir. 2020).
[60] McCabe, supra note 59; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).
[61] Section 287.012(1), F.S., defines the term "agency" as any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.
[62] *See ss*. 287.012(6) and 287.057(1), F.S.
[63] Section 287.057(1), F.S., requires all projects that exceed the Category Two threshold amount ($35,000) contained in s. 287.017, F.S., to be competitively procured.
[64] *See* s. 287.057(3)(e), F.S.

procurement process,[65] creating uniform agency procurement rules,[66] implementing the online procurement program,[67] and establishing state term contracts.[68] The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

Certain persons and their affiliates are prohibited from contracting with public entities for services and goods, with certain exceptions, if they have been identified by DMS as violating certain restrictions and have been placed on one of the following lists:[69]

- Convicted Vendor List,
- Discriminatory Vendor List,
- Scrutinized Companies with Activities in Sudan List,
- Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, and
- Scrutinized Companies that Boycott Israel List.

Economic Incentives

The Department of Economic Opportunity (DEO) advances Florida's economy by championing the state's economic development vision and by administering state and federal programs and initiatives to help visitors, citizens, businesses, and communities.[70]

Enterprise Florida, Inc. (EFI) is a nonprofit corporation established by the Legislature to serve as the state's main economic development organization.[71] EFI is required to enter into a performance-based contract with DEO.[72]

EFI works with businesses and economic development partners to determine whether projects are eligible for state economic development incentives. A project must be vetted by EFI and EFI must determine that incentives are necessary to secure a deal in order for an incentive package to be developed and sent to DEO for further review. Once the incentive package is finalized, DEO and other appropriate state bodies issue formal approvals.

Florida has a number of incentive programs intended to promote economic development in the state. These programs come in a variety of forms including tax refunds, tax credits, tax exemptions, and cash grants under chapter 288, Florida Statutes.

Businesses interested in expanding or relocating in Florida learn about the state's economic incentive programs through several channels, including EFI, state and local economic development organizations, and private site selection consultants. Businesses can apply for more than one incentive to support their expansion or relocation projects.[73]

Once a company begins the application process, EFI notifies the division so that it may begin the formal due diligence process to determine the business's statutory eligibility and financial standing. When due diligence and the application are complete, EFI determines what incentives and associated amounts may be available to the applicant and makes an approval or disapproval recommendation to DEO's

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[65] *See* ss. 287.032 and 287.042, F.S.
[66] *See* ss. 287.032(2) and 287.042(3), (4), and (12), F.S.
[67] *See* s. 287.057(23), F.S.
[68] *See* ss. 287.042(2), 287.056, and 287.1345, F.S.
[69] Ss. 287.133-135, F.S.
[70] S. 20.60(4)(b)(f), F.S.; Florida Department of Economic Opportunity, About Us, https://floridajobs.org/about-us (last visited Feb. 22, 2021).
[71] S. 288.901, F.S. Chapter 92-277, Laws of Fla., created EFI, while ch. 96-320, Laws of Fla, established EFI as a public-private partnership.
[72] Section. 20.60(1), F.S., requires DEO to "establish annual performance standards for Enterprise Florida, Inc., CareerSource Florida, Inc., the Florida Tourism Industry Marketing Corporation, and Space Florida and report annually on how these performance measures are being met".
[73] OPPAGA, Report No. 16-09, p. 50-51.

executive director. If the business is approved, DEO will develop a contract or agreement with the applicant that specifies the total incentive amount, performance conditions that must be met to receive payment, payment schedule, and sanctions for failure to meet performance conditions.[74]

Antitrust Laws, and State Contracts and Incentives - Effect of the Bill

The bill provides the following definitions:

- *Person* means a natural person or an entity organized under the laws of any state or of the United States **who operates as a social media platform**, with the legal power to enter into a binding contract and which bids or applies to bid on contracts let by a public entity, or which otherwise transacts or applies to transact business with a public entity. The term includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity.
- *Affiliate* means either
    - a predecessor or successor of a person convicted of or held civilly liable for an antitrust violation; or
    - an entity under the control of any natural person who is active in the management of the entity and who has been convicted of or held civilly liable for an antitrust violation. The term includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in the management of an affiliate. The term also includes a person who knowingly enters into a joint venture with a person who has violated an antitrust law during the preceding 36 months.
- *Antitrust violation* means any state or federal antitrust law as determined in a civil or criminal proceeding brought by the Attorney General, a state attorney, a similar body or agency of another state, the Federal Trade Commission, or the United States Department of Justice.
- *Convicted or held civilly liable* means a criminal finding of guilt or conviction, with or without an adjudication of guilt, being held civilly liable, or having a judgment levied for an antitrust violation, in any federal or state trial court of record relating to charges brought by indictment, information, or complaint on or after July 1, 2021, as a result of a jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere or other order finding liability.
- *Public entity* means the state and any of its departments or agencies.

Antitrust Violator Vendor List

If a person has been convicted of or has been held civilly liable for antitrust violations, the bill allows DMS to place such person, or an affiliate of such person, on the Antitrust Violator Vendor List (list).

If a person or an affiliate is placed on the list, such person or affiliate may not:

- submit a bid, proposal, or reply for any new contract to provide any goods or services to a public entity;
- submit a bid, proposal, or reply for a new contract with a public entity for the construction or repair of a public building or public work;
- submit a bid, proposal, or reply on new leases of real property to a public entity;
- be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a new contract with a public entity; or
- transact new business with a public entity.

The bill prohibits a public entity from accepting a bid, proposal, or reply from, awarding a new contract to, or transacting new business with any person or affiliate on the list unless that person or affiliate has been removed from the list. This prohibition does not apply to contracts that were awarded or business transactions that began before a person or an affiliate was placed on the list, and in no event before July 1, 2021.

DMS must maintain the list with the names and addresses of the people or affiliates who have been disqualified from the public contracting and purchasing process. DMS must publish the initial antitrust

[74] *Id.*

violator vendor list on January 1, 2022, and publish an updated version of the list quarterly thereafter. The revised quarterly list must be electronically posted. A person or affiliate on the list is disqualified as of the date the final order placing them on the list is entered.

DMS must investigate receipt of reasonable information from any source that a person was convicted or held civilly liable for antitrust violations, and determine whether good cause exists to place that person or an affiliate of that person on the list. If good cause exists, DMS must notify the person or affiliate in writing of its intent to place the name of that person or affiliate on the list, and of the person's or affiliate's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person or affiliate does not request a hearing, DMS must enter a final order placing the name of the person or affiliate on the list. A person or affiliate may not be placed on the list without receiving an individual notice of intent from DMS.

The bill allows a person or affiliate to dispute placement on the list. After receipt of the notice of intent, the person or affiliate may file a petition for a formal hearing under the Administrative Procedures Act to determine whether it is in the public interest for the person or affiliate to be placed on the list. In a formal hearing, DMS must prove that it is in the public interest for the person or affiliate to be placed on the list. Proof that a person was convicted or was held civilly liable for antitrust violations, or that an entity is an affiliate of such a person constitutes a prima facie case that it is in the public interest for the person or affiliate to be put on the list. Status as an affiliate must be proven by clear and convincing evidence. The ownership by one person of shares constituting a controlling interest in another person, or a pooling of equipment or income among persons when not for fair market value under an arm's length agreement, is a prima facie case that one person controls another person.

In determining whether it is in the public interest to place a person or affiliate on the list, the bill indicates that the administrative law judge must consider the following factors:

- Whether the person or affiliate committed an antitrust violation.
- The nature and details of the antitrust violation.
- The degree of culpability of the person or affiliate proposed to be placed on the antitrust violator vendor list.
- Reinstatement or clemency in any jurisdiction in relation to the antitrust violation at issue in the proceeding.
- The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

Upon establishment of a prima facie case that it is in the public interest for the person or affiliate to whom DMS has given notice to be put on the list, the person or affiliate may prove by a preponderance of the evidence that it would not be in the public interest to put them on the list, based upon evidence addressing the factors above.

Temporary List Placement Procedure

The bill allows any person charged or accused of any state or federal antitrust law in a civil or criminal proceeding brought by the OAG, a state attorney, the Federal Trade Commission, or the United States Department of Justice on or after July 1, 2021, to be placed on the list temporarily by the OAG. The OAG may make a finding of probable cause that a person has likely violated the underlying antitrust laws, and temporarily place such person on the antitrust violator vendor list until such proceeding has concluded. Affiliates may not be placed on the list under this temporary procedure.

If probable cause exists, the OAG must notify the person in writing of its intent to temporarily place the name of that person on the antitrust violator vendor list, and of the person's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person does not request a hearing, the OAG must enter a final order temporarily placing the name of the person on the antitrust violator vendor list. A person may not be placed on the antitrust violator vendor list without receiving an individual notice of intent from the Attorney General.

After receipt of the notice of intent, the person may file a petition for a formal hearing under the Administrative Procedures Act to determine whether it is in the public interest for the person to be temporarily placed on the antitrust violator vendor list.

In determining whether it is in the public interest to temporarily place a person on the antitrust violator vendor, the administrative law judge must consider the following factors:

- The likelihood the person committed the antitrust violation.
- The nature and details of the antitrust violation.
- The degree of culpability of the person proposed to be placed on the list.
- The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

Removal from the List

The bills allows a person or affiliate to petition for removal from the Antitrust Violator Vendor List no sooner than 6 months after the date a final order is entered. If the petition is based upon a reversal of the conviction or liability on appellate review or pardon, then they may petition at any time. The petition must be filed with DMS. A person or affiliate may be removed from the list subject to such terms and conditions as prescribed by the administrative law judge upon a determination that removal is in the public interest. In determining whether removal would be in the public interest, the administrative law judge must consider any relevant factors.

Upon proof that a person was found not guilty or not civilly liable, the antitrust violation case was dismissed, the court entered a finding in the person's favor, the person's conviction or determination of liability has been reversed on appeal, or that the person has been pardoned, the administrative law judge must determine that removal of the person or an affiliate from the list is in the public interest.

If the petition for removal is denied, the person or affiliate may not petition for another hearing on removal for a period of 9 months after the date of denial, unless the petition is based upon a reversal of the conviction on appellate review or a pardon. DMS may petition for removal before the expiration of such period if it determines that removal would be in the public interest.

Economic Incentives and Exceptions

The bill excludes a person or entity who has been placed on the Antitrust Violator Vendor List from being a qualified applicant for economic incentives, and such person or entity is not qualified to receive such economic incentives. Economic incentives means state grants, cash grants, tax exemptions, tax refunds, tax credits, state funds, and other state incentives under chapter 288 or administered by Enterprise Florida, Inc.

The placement on the list does not affect any rights or obligations under any contract, franchise, or other binding agreement which predates such placement on the list.

This exclusion does not apply to any activities regulated by the Public Service Commission or to the purchase of goods or services made by any public entity from the Department of Corrections, from the nonprofit corporation organized to operate correctional work programs, or from any accredited nonprofit workshop designed to assist blind and other severely handicapped individuals to achieve maximum personal independence.

These limitations may only be enforced to the extent not inconsistent with federal law, and notwithstanding any other provision of state law.

Candidates for Office and In-kind Contributions – Current Situation

Violations of Florida Election Law

The Division of Elections (division) under the Florida Department of State ensures compliance with election laws, provides statewide coordination of election administration, and promotes public participation in the electoral process. The division consists of three bureaus - the Bureau of Election Records, the Bureau of Voter Registration Services, and the Bureau of Voting Systems Certification.[75]

The Florida Elections Commission (commission) has the sole civil jurisdiction to investigate and determine violations of the portion of the Florida Election Code in Chapters 104 and 106, Florida Statutes, but only after receiving either a legally sufficient sworn complaint or information from the division. The commission is composed of nine members appointed by the Governor.[76]

The commission determines probable cause based on the investigator's report, the recommendation of counsel for the commission, the complaint, and staff recommendations, as well as any written statements submitted by the respondent and any oral statements made at the hearing.[77] If probable cause has been found by the commission, a respondent may agree to a consent order, elect to have a formal administrative hearing conducted by an administrative law judge in the Division of Administrative Hearings, or to elect to have a formal or informal hearing conducted before the commission.[78]

In order to carry out its responsibilities, the commission may subpoena any person in the state, doing business in the state, or who has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof, and require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state.[79]

Civil penalties are generally limited to not more than $1,000 per count or violation.[80] Other penalties include permanent or temporary injunctions, and restraining orders.[81] Any civil penalty or fine assessed is deposited into the General Revenue Fund.[82]

Actions for violation of chapters 104 and 106, Florida Statutes, must be commenced before 2 years have elapsed from the date of the violation.[83]

In-kind Contributions to Candidates

A *candidate* means a person who does any of the following:[84]

- seeks to qualify for nomination or election by means of the petitioning process.
- seeks to qualify for election as a write-in candidate.
- receives contributions or makes expenditures, or consents for any other person to receive contributions or make expenditures, with a view to bring about his or her nomination or election to, or retention in, public office.
- appoints a treasurer and designates a primary depository.
- files qualification papers and subscribes to a candidate's oath as required by law.

Generally, a *political committee* means a combination of two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of $500 during a single calendar year:

- accepts contributions for the purpose of making contributions to any candidate, political committee, affiliated party committee, or political party;

[75] Florida Department of State, Division of Elections, *About Us*, https://dos.myflorida.com/elections/about-us/ (last visited Feb. 21, 2021).
[76] S. 106.25(1), F.S.
[77] S. 106.25(4), F.S.
[78] S. 106.25(5), F.S.
[79] S. 106.26(1), F.S.
[80] S. 106.265(1), F.S.
[81] S. 106.27, F.S.
[82] S. 106.265(4), (5), F.S.
[83] S. 106.28, F.S.
[84] S. 106.011(3), F.S.

- accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue;
- makes expenditures that expressly advocate the election or defeat of a candidate or the passage or defeat of an issue; or
- makes contributions to a common fund, other than a joint checking account between spouses, from which contributions are made to any candidate, political committee, affiliated party committee, or political party.

Candidates and political committees must report all contributions, loans, expenditures, distributions, and transfers, regardless of the amount.[85] They must report the full name and address of each person making the contribution or receiving the expenditure and, for contributions over $100, the occupation.[86]

An in-kind contribution[87] is anything of value except money made for the purpose of influencing the results of an election.[88] The valuation of an in-kind contribution is fair market value, and in-kind contributions are subject to the same contribution limitations as money.[89]

Candidates for Office and In-kind Contributions – Effect of the Bill

The bill provides that a social media platform may not knowingly deplatform a candidate. If the commission finds that a social media platform has violated this provision, the social media platform may be fined $100,000 per day for deplatforming a statewide candidate, and $10,000 per day for deplatforming all other candidates.

The bill provides that if a social media platform provides free advertisement to a candidate, it must be reported as an in-kind contribution to the candidate. Free advertising does not include posts, content, material, and comments made on the social media platform that are shown in the same or similar way as those from other users.

The bill provides the following definitions for this provision:
- *Candidate* means a person who files qualification papers and subscribes to a candidate's oath as required by law.
- *Deplatform* and *Social media platform* have the same meaning as in the new provision addressing censorship.

The bill provides that this provision may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

The bill has an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Provides requirements for candidates and social media platforms related to content restrictions and campaign contributions for candidates.
Section 2: Creates restrictions for contracting with public entities for certain social media platforms who have violated antitrust laws.
Section 3: Creates requirements for social media platforms for how and when they can restrict user content.
Section 4: Provides a cross-reference.
Section 5: Provides an effective date.

[85] Ss. 106.011(5) and 106.07(1), F.S.
[86] S. 106.07(4)(a), F.S.
[87] Examples of in-kind contributions include food provided for a fundraiser free of charge, donated tickets to an event, and certain kinds of free advertisement. DE 04-06 Fla. Op. Dept. of State, Div. of Elections (2004). https://opinions.dos.state.fl.us/searchable/pdf/2004/de0406.pdf.
[88] Florida Department of State, Division of Elections, *Campaign Finance*, https://dos.myflorida.com/elections/candidates-committees/campaign-finance/ (last visited Feb. 21, 2021).
[89] Ss. 106.011(5) and 106.055, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may increase revenues in the state related to fines or civil penalties collected related to violations of the bill's provisions. The estimated impact is indeterminate.

2. Expenditures:

The bill may increase expenditures based on costs to implement the bill, including costs to investigate and prosecute violations of the bill provisions. The estimated impact is indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will require social media platforms to implement systems in conformance with the bill that will help protect Florida consumers and businesses online.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Jurisdiction

For a court to exercise jurisdiction over a respondent, it must have subject matter jurisdiction and personal jurisdiction. State courts have general jurisdiction, and therefore a claim made under a state statute meets the subject matter jurisdiction requirement.[90] Personal jurisdiction is a constitutional requirement that a respondent have minimum contacts with the state in which the court sits so that the court may exercise power over the respondent.[91] A non-resident respondent may have sufficient contacts with Florida if he or she commits acts expressly enumerated in Florida's long-arm statute.[92] Alternately, the non-resident respondent may be subject to a Florida court's personal jurisdiction because he or she has minimum contacts with the state that are otherwise unrelated to matter that brings him or her into court.[93] Examples of sufficient minimum contacts include frequent business travel to the state, owning a company with a Florida office branch, or subjecting oneself to the court's

[90] *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).
[91] *Id*.
[92] *Id*; § 48.193, F.S.
[93] *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

jurisdiction by presenting oneself in the Florida court.[94] These jurisdictional requirements ensure that a respondent has sufficient notice and due process afforded to him or her under the U.S. Constitution before his or her rights are subjected to the court.[95]

Whether a non-resident internet or social media platform has sufficient minimum contacts with the state is a fact-specific question that would likely need to be addressed on a case-by-case basis by a court.[96]

Freedom of Speech

Businesses are afforded some of the same First Amendment rights as individuals.[97] Generally, businesses cannot be compelled to host speech with which it disagrees absent a mandate that has been narrowly tailored to serve a compelling state interest.[98] Some of the provisions of the bill may implicate First Amendment protections regarding speech by a business.

Also, businesses have a right to unrestricted independent expenditures for political communications and elections as a form of corporate speech.[99] Some of the provisions of the bill may implicate First Amendment protections related to political speech by a business.

Content-neutral regulations are legitimate if they advance important governmental interests that are not related to suppression of free speech, and do not substantially burden more speech than necessary to further those interests.[100] However, a law may be determined to be overbroad if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[101]

Supremacy Clause

Article VI, Paragraph 2 of the U.S. Constitution is commonly referred to as the Supremacy Clause. It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect.[102] The bill may implicate the Supremacy Clause by attempting to regulate in an area that may be preempted by federal law.[103]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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[94] *Id*.
[95] *Id*. at 250-251.
[96] *See Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, (Fla. 4th DCA 2011); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
[97] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[98] *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).
[99] *Citizens United*, *supra* note 38.
[100] *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).
[101] *U.S. v. Stevens*, 559 U.S. 460 (2010), *quoting*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, (2008).
[102] Cornell Law School, Legal Information Institute, *Supremacy Clause*, https://www.law.cornell.edu/wex/supremacy_clause (last visited Feb. 23, 2021).
[103] 47 U.S.C. § 203(e).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES