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Burning the House to Roast a Pig: Examining Florida's Controversial Social Media Law

Wes P. Rahn*

I. INTRODUCTION

The recent proliferation of social media platforms has revolutionized the way individuals convey ideas and communicate with one another. Social media has quickly become the most dominant form of communication, surpassing more traditional modes of communication such as newspapers and television. It is estimated that over two-thirds of American adults now use social networking sites.¹ Moreover, an astonishing 90% of young adults use social media.² Social media has not only become an integral part of American culture in terms of entertainment and communication, but has also become a useful tool for politicians and the electorate who wish to engage in political discourse. Social media sites like Facebook, Twitter, and Instagram enable politicians and candidates running for political office to reach a wide base of voters with targeted campaign advertisements. Consequently, between January 2019 and October 2020, both Joseph Biden and Donald Trump collectively spent a whopping \$201 million on Facebook advertisements alone.³ Moreover, it is impossible to calculate the

*I dedicate this article to my late grandmother and biggest supporter, Vivian Anderson Rahn. Furthermore, I would like to thank each of my past and present educators for instilling in me an unyielding passion for learning, curiosity, and academia. Last but not least, I would like to thank the faculty and staff of the Mercer University School of Law for providing me with the tools, resources, and ability to become a published author.

1. Andrew Perrin, *Social Media Usage*, PEW RESEARCH (Oct. 8, 2015), https://www.secretintelligenceservice.org/wp-content/uploads/2016/02/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.

2. Perrin, *supra* note 1.

3. Grace Manthey, *Presidential campaigns set new records for social media ad spending*, ABC7 (Oct. 29, 2020), <https://abc7.com/presidential-race-campaign-spending-trump-political-ads-biden/7452228/>.

insurmountable value of advertising that candidates receive from individual users on social media who share posts supporting a particular candidate at their own volition.

Due to the unique ability to provide a forum for candidates and voters to engage in political discourse, social media platforms have garnered tremendous influence over elections and their outcomes. These platforms have become the new town hall where individuals are influenced by ideas and users often debate one another on a variety of topics. While social media providers often claim to be independent unbiased networks, there are widespread allegations that these providers use their immense political influence to favor candidates and users who have liberal leanings. In response to these allegations, several state lawmakers have drafted laws aimed at regulating social media platforms and their allegedly biased influence on our political system. Below, I will discuss the legality of such laws by examining the intersectionality of social media platforms, preexisting federal law, and the United States Constitution.

II. BACKGROUND

United States politics have grown increasingly partisan over the last decade. Some Americans now fear that the partisan divide has infiltrated social media platforms and empowered such platforms to silence those with opposing political beliefs. The most common allegation is that social media companies censor politically right-leaning accounts and use algorithms to suppress the number of users that engage with posts shared by conservative accounts. Critics of the algorithms claim that users with conservative ideologies do not have nearly the same amount of engagement as users with more liberal views. However, while companies such as Twitter admit that they utilize algorithms to provide a more personalized experience to their users, former Twitter CEO, Jack Dorsey, has denied that such algorithms are used to suppress those with conservative ideologies.⁴ Facebook CEO and founder, Mark Zuckerberg, has echoed similar sentiments. Zuckerberg has defended Facebook's algorithms, adding that Facebook is a "platform for all ideas."⁵

4. Christopher A. Bail, *On social media, encountering opposing views can make people become even more wedded to their own.*, DUKE UNIVERSITY POPULATION RESEARCH INSTITUTE (Sept. 7, 2018), <https://dupri.duke.edu/news-events/news/twitters-flawed-solution-political-polarization>.

5. Morgan Chalfant, *Cruz presses Zuckerberg on alleged censorship of conservative speech*, THE HILL (April 10, 2018), <https://thehill.com/policy/technology/382538-cruz-tangles-with-zuckerberg-over-censorship-of-conservative-speech>.

Another common allegation is that social media platforms unfairly ban conservative users based on their political ideologies. Proponents of this theory claim that conservative voices, such as former President Donald Trump, are frequently banned from platforms simply because their political views run contrary to those of Facebook, Twitter, YouTube, and other providers. Following the U.S. Capitol protest that occurred on January 6, 2021, Twitter permanently banned former President Trump from the platform. Shortly thereafter, Facebook and YouTube followed suit and banned the controversial politician indefinitely.⁶ Twitter issued a statement declaring that “[a]fter close review of recent Tweets from the @realDonaldTrump account and the context around them we have permanently suspended the account due to the risk of further incitement of violence.”⁷ All three platforms assert that the former President was banned for inciting violence, however those statements have not satisfied a vocal minority who insist that Trump was wrongfully removed from the platforms due to partisan motivations.

In an effort to diminish the perceived influence that social media companies have on political discourse, Republican lawmakers have begun to pass laws aimed at regulating social media companies, the algorithms they use, and the methods in which they ban or censor content. Florida Governor Ron DeSantis recently became the first governor to sign such legislation.⁸ However, before examining the Florida bill, it is important to understand existing laws that protect private companies like social media providers from unwanted government interference. These companies are private entities, and they are afforded many of the same protections and rights under the United States Constitution as ordinary citizens. Is it constitutional under the First Amendment for the government to regulate the way social media platforms monitor speech on their site? Apart from the Constitution, are there existing federal laws that safeguard social media platforms who wish to censor certain users? These questions are

6. Jessica Guynn, *Donald Trump ruled Facebook, Twitter before he was banned. Will @realdonaldtrump log into Gab or somewhere else?*, USA TODAY (Feb. 8, 2021), <https://www.usatoday.com/story/tech/2021/02/08/trump-facebook-twitter-youtube-ban-where-next-gab-parler/4440645001/>.

7. Ben Collins, *Twitter permanently suspends President Donald Trump*, NBC News (Jan. 8, 2021), <https://www.nbcnews.com/tech/tech-news/twitter-permanently-bans-president-donald-trump-n1253588>.

8. Florida Governor, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, FLORIDA GOVERNOR (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/>.

paramount to understanding whether state or federal governments have the authority to regulate social media platforms and the content they choose to provide.

III. FIRST AMENDMENT AND THE INTERNET

The First Amendment of the United States Constitution is perhaps the most well-known and widely cited constitutional provision. The amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*”⁹ While the language of the amendment is straightforward, the application of the law to speech over the internet is far less elementary.

A. The Spectrum of First Amendment Scrutiny

Different forms of media are subject to different levels of First Amendment protections. The United States Supreme Court has held that “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”¹⁰ For example, out of all forms of communication, broadcast media has received the most limited First Amendment protection.¹¹ In reaching this conclusion, courts have reasoned that broadcast media has established “a uniquely pervasive presence in the lives of all Americans,” and “material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”¹² Accordingly, many laws regulating speech over broadcast media have been upheld, and there has been an extensive history of government regulation of broadcast media providers.¹³ Conversely, while broadcast media providers receive the most limited First Amendment protection, newspapers and other print mediums enjoy the highest degree of protection under the law. There, courts have held that any compulsion by government on newspapers, which requires them to publish that which reason tells

9. U.S. Const. amend. I. (emphasis added).

10. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

11. *Federal Communications Commission v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

12. *Id.*

13. *See Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

them they should not, is unconstitutional.¹⁴ These holdings have established a spectrum of how laws regulating speech should be applied differently under the First Amendment depending on the form of expression.

In *Reno v. American Civil Liberties Union*,¹⁵ the Supreme Court addressed the issue of how to treat speech on the internet under the First Amendment. There, the Court held that internet speech should receive the same First Amendment protection as other speech and the factors that favored government regulation of speech on broadcast platforms are “not present in cyberspace.”¹⁶ The Court reasoned that the internet is not as invasive as radio and television because “communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden.”¹⁷ Also, unlike the scarcity of broadcast media at the time Congress first began to regulate it, the internet is widely available to nearly every American. The court presumed that government regulation of speech on the internet is “more likely to interfere with the free exchange of ideas than to encourage it.”¹⁸ Therefore, the Court held that there was no basis for limiting the level of First Amendment scrutiny that should be applied to speech on the internet.¹⁹

While the internet does generally enjoy the highest level of First Amendment protection, that is not to say that speech on the internet cannot be regulated. The First Amendment does not guarantee that all speech is safe from government regulation. In fact, several forms of speech such as obscenity, libelous speech, and incitements to riot are not entitled to First Amendment protection and may be banned outright.²⁰ However, as long as internet speech does not contain any of these exceptions, the speech will be entitled to the highest level of protection.²¹ Such protected speech includes speech that may be considered by some to be offensive: “[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.”²² In conclusion, speech on the internet should be treated no differently than

14. *Miami Herald Publishing Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256 (1974).

15. 521 U.S. 844 (1997).

16. *Id.* at 868.

17. *Id.*

18. *Id.* at 885.

19. *Id.* at 870.

20. Ian C. Ballon, *E-Commerce and Internet Law* § 39.02[1] (2020).

21. *Id.*

22. *Pacifica*, 438 U.S. at 745.

any other speech, and therefore, should enjoy full First Amendment protection so long as the speech is not obscene, libelous, or an incitement of violence.

B. Internet Service Providers

The First Amendment prohibits both state and federal governments from infringing on an individual's right to free speech. However, does the Amendment's protection extend to speech on the internet that is regulated by privately owned service providers on their own platforms? The answer is no. Although the government is prohibited from regulating most speech on the internet, that prohibition does not apply to internet service providers who elect to self-regulate and control the information available on their sites.²³ On the contrary, courts would likely rule that internet service providers, such as social media platforms, actually have a constitutional right to decide whether to censor speech on their sites. Courts have recognized that "the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . . even where those decisions take place within the framework of a regulatory regime such as broadcasting."²⁴ Therefore, even when speech is communicated on mediums like broadcast media—which enjoys far less First Amendment protections than the internet—a private individual or provider has a right to restrict the speech of another user. Furthermore, not only do social media providers likely have a constitutional right to gatekeep content that users share on their sites, but there are other existing federal laws that encourage internet service providers to do so.

IV. EXISTING FEDERAL LAW

In *Stratton Oakmont v. Prodigy Services Co.*,²⁵ (PRODIGY), an internet service provider, operated a large computer network which had over two million subscribers.²⁶ The site was made up of several bulletin boards which subscribers used to communicate with one another.²⁷ The bulletin boards were akin to "what today might be called social

23. John B. Morris & Julie M. Carpenter, *Internet Law and Practice* § 24:11 (2021).

24. *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727, 737 (1996).

25. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

26. *Id.* at *1.

27. *Id.*

media.”²⁸ One of the bulletin boards, aptly named Money Talk, was, at the time, one of the largest and most widely read financial bulletin boards in the entire country.²⁹ In order to maintain a family-oriented site, PRODIGY undertook to screen and review the content posted on each bulletin board. The litigation arose out of the libelous post of an anonymous user on the Money Talk bulletin board which accused the plaintiff of committing criminal acts.³⁰ The court held that, because PRODIGY undertook to exercise editorial control and review posts made on the bulletin boards, PRODIGY had a legal duty to censor the libelous statements and was therefore liable to the plaintiff for the anonymous post.³¹ In the wake of this decision, one thing became apparent to internet service providers—by taking affirmative steps to monitor and censor content on a platform, internet service providers were subjecting themselves to liability for content shared by their users. Providers were in essence being punished for undertaking to screen their sites.

Partially in response to the *Stratton* decision, Congress enacted 47 U.S.C. § 230.³² The statute provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³³ Additionally, the law shielded internet service providers from liability by providing the following:

No provider or user of an interactive computer service shall be held liable on account of . . . *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.³⁴

Congress enacted this law in-part to eliminate the disincentives for self-regulation created by the *Stratton* decision.³⁵ “By its plain language, § 230 creates a federal immunity [for] any cause of action that would make service providers liable for information originating

28. *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 WL 2690876, *5 (N.D. Fla. June 30, 2021).

29. *Stratton*, 1995 WL 323710, at 1.

30. *Id.* at *1–*2.

31. *Id.* at *4.

32. 47 U.S.C. § 230 (2021).

33. 47 U.S.C. § 230(c)(1).

34. 47 U.S.C. §§ 230(c)(2), (c)(2)(a) (emphasis added).

35. *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

with a third-party user of the service.”³⁶ Furthermore, the statute encourages providers like social media platforms to restrict access of any content they themselves deem objectionable.

The statute also includes a preemption clause to establish how the statute comports with state law. Under § 230(e)(3), it is provided that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”³⁷ In other words, any state statute that imposes liability on internet service providers for restricting content will be preempted by the federal statute.

No longer are internet service providers discouraged from monitoring and restricting content on their platforms out of fear that they might be liable for the content of other users. The statute allows “computer service providers to establish standards of decency without risking liability to do so.”³⁸ The law encourages providers to create their own standards and policies for what content is or isn’t permitted on their platform. Moreover, courts have held that the statute does not require providers to use any particular form of restriction when determining which content to allow.³⁹ Internet service providers—including social media providers—are entitled under the law to censor or forbid any content in which they themselves find objectionable. This includes blocking and even deplatforming users who post objectionable content, and what is considered objectionable is left entirely for the provider to determine.

47 U.S.C. § 230 transformed the way social media providers monitor and restrict content on their platforms. These providers have unbridled discretion to control what content they choose to censor or allow. Accordingly, the federal law and traditional First Amendment protections have made it nearly impossible for state or federal governments to pass legislation aimed at regulating social media platforms. However, that has not prevented one state from attempting to do just that.

36. *Id.* at 330.

37. 47 U.S.C. § 230(e)(3).

38. *NetChoice*, 2021 WL 2690876, at *6 (quoting *Domen v. Vimeo, Inc.*, 991 F.3d 66, 73 (2d. Cir. 2021)).

39. *Domen*, 991 F.3d at 72.

V. FLORIDA BECOMES THE FIRST

On May 24, 2021, Governor Ron DeSantis signed Florida Senate Bill No. 7072.⁴⁰ During a press release on the day of the signing, Florida Lieutenant Governor Jeanette Nunez issued the following statement:

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. Today, by signing SB 7072 into law, Florida is taking back the virtual public square as a place where information and ideas can flow freely. Many of our constituents know the dangers of being silenced or have been silenced themselves under communist rule. 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.⁴¹

The law was a response to allegations of bias and censorship by large social media platforms in favor of liberal ideologies. Further proof of Florida's motivation for passing such a law can be found in the "findings" section of the bill. There, the bill provides that "[s]ocial media platforms have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians."⁴² Such claims are consistent with grievances that conservatives have commonly expressed regarding social media platforms.

To regulate the allegedly biased platforms, S.B. 7072 was codified into two statutes: Fla. Stat. §§ 106.072⁴³ and 501.2041.⁴⁴ Both statutes apply only to social media platforms that either have "annual gross revenues in excess of \$100 million" or have "at least 100 million monthly individual platform participants globally."⁴⁵

The first statute prohibits social media platforms from banning or deplatforming a candidate that is running for political office. Under Fla. Stat. § 106.072, "[a] social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate . . ."⁴⁶ The statute imposes a fine on social media platforms in violation of the statute in the amount of "\$250,000 per day for a candidate for statewide office and \$25,000 per day for a candidate for other offices."⁴⁷ The statute does not elaborate on how social media

40. S.B. 7072, 123rd Leg., Reg. Sess. (Fl. 2021).

41. Florida Governor, *supra* note 8.

42. S.B. 7072, 123rd Leg., Reg. Sess. (Fl. 2021).

43. Fla. Stat. § 106.072 (2021).

44. Fla. Stat. § 501.2041 (2021).

45. Fla. Stat. § 501.2041(1)(g).

46. Fla. Stat. § 106.072(2).

47. Fla. Stat. § 106.072(3).

platforms are expected to know which users are running for political office.

The second statute is broken down into ten subsections that address several issues including censorship and post-prioritization algorithms. These subsections place laborious burdens on social media platforms. First, “[a] social media platform must publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban.”⁴⁸ Second, “[a] social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform.”⁴⁹ Third, “[a] social media platform must 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.”⁵⁰ Fourth, “[a] social media platform may not censor or shadow ban a user’s content or material or deplatform a user from the social media platform . . . [w]ithout notifying the user who posted or attempted to post the content or material.”⁵¹ Fifth, “[a] social media platform must . . . 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, upon request, a user with the number of other individual platform participants who were provided or shown content or posts.”⁵² Sixth, “[a] social media platform must . . . [c]ategorize algorithms used for post-prioritization and shadow banning [and a]llow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content.”⁵³ Seventh, “[a] social media platform must provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annually the opt-out opportunity”⁵⁴ Eighth, “[a] social media platform may not apply or use 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”⁵⁵ Ninth, “[a] social media platform must allow a user who has been deplatformed to access or retrieve all of the user’s information, content, material, and data for at least 60 days after the

48. Fla. Stat. § 501.2041(2)(a).

49. Fla. Stat. § 501.2041(2)(b).

50. Fla. Stat. § 501.2041(2)(c).

51. Fla. Stat. § 501.2041(2)(d)(1).

52. Fla. Stat. § 501.2041(2)(e)(1).

53. Fla. Stat. § 501.2041(2)(f)(1)–(2).

54. Fla. Stat. § 501.2041(2)(g).

55. Fla. Stat. § 501.2041(2)(h).

user receives [] notice. . . .”⁵⁶ Tenth, “[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.”⁵⁷

Unsurprisingly, the law has been met with harsh criticism, condemnation, and legal challenges. Both statutes place extremely strenuous responsibilities on social media platforms. Furthermore, the vagueness of the statutes when combined with the arduous requirements therein create a recipe for litigation. Consequently, it wasn’t long before trade associations that represent affected social media platforms moved for a preliminary injunction to prevent the law from taking effect, and on the eve of the statutes’ effective dates, the United States District Court for the Northern District of Florida issued its decision in *NetChoice, LLC v. Moody*.⁵⁸

VI. CHALLENGING THE FLORIDA LAW

In *NetChoice, LLC v. Moody*, NetChoice and Computer & Communications Industry Association, two trade associations whose members include social media platforms, filed a complaint challenging Florida Senate Bill No. 7072—particularly Fla. Stat. §§ 106.072 and 501.2041.⁵⁹ The complaint included multiple counts alleging that the Florida statutes both violate constitutional rights and are preempted by existing federal law. In more detail, the complaint alleged that the law “violates the First Amendment’s free-speech clause by interfering with the providers’ editorial judgment, compelling speech, and prohibiting speech.”⁶⁰ Additionally, the complaint also alleged that the law is preempted by 47 U.S.C. § 230 which “expressly prohibits imposition of liability on an interactive computer service—this includes a social-media provider—for action taken in good faith to restrict access to material the service finds objectionable.”⁶¹

Ultimately, the United States District Court for the Northern District of Florida granted the plaintiff’s motion for preliminary injunction and ordered that the state of Florida take no steps to enforce Fla. Stat. §§ 106.072 or 501.2041.⁶² After determining that the plaintiff had fulfilled the prerequisites for a preliminary injunction, the court found the plaintiff was likely to succeed on the merits of their First

56. Fla. Stat. § 501.2041(2)(i).

57. Fla. Stat. § 501.2041(2)(j).

58. No. 4:21cv220-RH-MAF, 2021 WL 2690876, *5 (N.D. Fla. June 30, 2021).

59. *Id.* at *1.

60. *Id.*

61. *Id.*

62. *Id.* at *12.

Amendment claim; strict scrutiny should be applied to the Florida statutes in question; and the plaintiff was likely to succeed on the merits of their claim that the Florida statutes were preempted by federal law.⁶³

A. First Amendment Claim

The court in *NetChoice* acknowledged that it has not yet been settled where exactly social media fits into traditional First Amendment jurisprudence, but “three things are clear.”⁶⁴ First, the social media providers’ allegedly biased actions do not violate the First Amendment because the First Amendment “does not restrict the rights of private entities not performing traditional, exclusive public functions.”⁶⁵ Second, as discussed, the First Amendment applies to speech over the internet. Third, a state’s power to regulate speech does not increase simply because one or more “powerful entities have gained a monopoly in the marketplace of ideas, reducing the means available to candidates or other individuals to communicate on matters of public interest.”⁶⁶

The court then addressed the aforementioned issue of how to treat social media providers under the First Amendment. The plaintiff argued that social media providers should be treated just like any other private speaker, and therefore, the statutes infringe on their constitutional right to free speech.⁶⁷ In support of its argument, the plaintiff cited to three Supreme Court decisions which held that a private entity could not be required by the state to permit unwanted speech. In *Miami Herald Publishing Co. v. Tornillo*,⁶⁸ the Supreme Court held that a Florida statute requiring a newspaper to publish a candidate’s response to previous statements made by the newspaper was unconstitutional.⁶⁹ However, the court in *NetChoice* distinguished newspapers from social media providers because newspapers create or select all of their content, while it would be nearly impossible for social media providers to do the same.⁷⁰ In the plaintiff’s second case, *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,⁷¹ the Supreme Court held that an association had a First Amendment right

63. *Id.*

64. *Id.* at *7.

65. *Id.*

66. *Id.*

67. *Id.* at *8

68. 418 U.S. 241 (1974).

69. *NetChoice*, 2021 WL 2690876, at *8.

70. *Id.*

71. 515 U.S. 557 (1995).

to exclude a gay-rights group from a private parade.⁷² However, the court in *NetChoice* reasoned that, unlike social media platforms, the parade was not an “invisible-to-the-provider event.”⁷³ Lastly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,⁷⁴ the Supreme Court held that a state could not require a company to include in its billing envelopes an organization’s newsletter that contained viewpoints which the company disagreed with.⁷⁵ Again, the company knew exactly what went into every billing envelope. Thus, this was not an “invisible-to-the-provider forum.”⁷⁶ All three cases support the plaintiff’s argument that a private party exercising editorial judgment cannot be required by the government to publish or allow content with which the party disagrees. However, the court in *NetChoice* distinguished the parties in those cases from social media providers in that the content on social media platforms is mostly invisible to the provider. A social media provider does not have the resources to review each post shared on their platform, and the “overwhelming majority of the material never gets reviewed except by algorithms.”⁷⁷ Newspapers, on the other hand, personally select and publish their content and are well aware of all the material that is included in their publications. After making that distinction, the court did admit that it found the plaintiff’s line of cases convincing and acknowledged that states are commonly prohibited from interfering with a private entity’s editorial judgment.⁷⁸

The State relied on two Supreme Court cases to argue that the Florida statutes were not in violation of the First Amendment. In *Rumsfeld v. Forum for Academic & Institutional Rights*,⁷⁹ the Supreme Court upheld a federal statute that required schools to allow military recruiters access to the schools’ facilities and students.⁸⁰ In upholding the law, the Supreme Court determined that this was an issue of conduct, not speech.⁸¹ The statute did not require the schools to say anything, nor did the statute prohibit the schools from saying

72. *NetChoice*, 2021 WL 2690876, at *8.

73. *Id.*

74. 475 U.S. 1 (1986).

75. *NetChoice*, 2021 WL 2690876 at 8.

76. *Id.*

77. *Id.*

78. *Id.* at *9.

79. 547 U.S. 47 (2006).

80. *NetChoice*, 2021 WL 2690876, at *9.

81. *Id.*

“whatever they wished whenever and however they wished.”⁸² Similarly, in *PruneYard Shopping Center v. Robins*,⁸³ the Supreme Court held that there was no violation under the First Amendment when a state court ruling required a shopping center to allow individuals to solicit petition signatures while on the shopping center’s property.⁸⁴ Both of the State’s cases establish that a government can compel a private party to allow a visitor on their property so long as the private party is not required to speak or restricted from speaking. However, unlike the mandates in the State’s two cases, the Florida statutes in question do impede on the social media providers’ ability to speak freely. The Florida statutes “explicitly forbid social media platforms from appending their own statements to posts by some users.”⁸⁵ Additionally, the statutes “compel the platforms to change their own speech . . . by dictating how the platforms may arrange speech on their sites.”⁸⁶

The court concluded that neither line of cases is directly applicable to social media platforms, or the Florida statutes aimed at regulating them.⁸⁷ A social media platform is not like a newspaper or other traditional form of publication because, to a substantial extent, the content on a social media platform is invisible to the provider. On the other hand, the Florida statutes cannot be said to only regulate social media providers’ conduct, because the statutes clearly restrict the providers’ speech as well. However, after balancing the cases put forth to support each party’s arguments, the court determined that the prior decisions favor the plaintiff’s stance that the statutes should be subject to traditional First Amendment scrutiny.⁸⁸ Consequently, whether the plaintiff would succeed on the merits of their First Amendment claim now depended on the level of scrutiny which was to be applied.

B. Strict Scrutiny

As previously mentioned, the court held that strict scrutiny should be applied to the Florida statutes.⁸⁹ Both content-based and viewpoint-based restrictions on speech are subject to strict scrutiny.⁹⁰ A law

82. *Id.*

83. 447 U.S. 74 (1980).

84. *NetChoice*, 2021 WL 2690876, at *9.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at *12.

90. *Id.* at *9.

restricting speech is deemed to be content-based if it is limited to only certain speech because of ideas and messages expressed therein.⁹¹ Similarly, a law is deemed to be viewpoint-based if the motivation for passing the legislation is based on the perceived viewpoint of the individuals whose speech is being restricted.⁹² A finding of either restriction will trigger strict scrutiny.⁹³

The court determined that strict scrutiny should be applied because “[t]he Florida statutes at issue are about as content-based as it gets.”⁹⁴ First, Fla. Stat. § 106.072 prohibits a social media platform from deplatforming a candidate running for political office.⁹⁵ The statute does not apply to anyone else and is thus a content-based restriction.⁹⁶ Second, Fla. Stat. § 501.2041(2)(h) restricts social media providers from applying post-prioritization to content posted “by or about a candidate.”⁹⁷ This is yet another example of a content-based restriction. Third, under Fla. Stat. § 501.2041(2)(j), a social media provider is prohibited from taking any action to censor, deplatform, or shadow ban a journalistic enterprise based on the “content” of such an enterprise.⁹⁸ “[P]rohibiting a platform from making a decision based on content is itself a content-based restriction.”⁹⁹ For these reasons, the court found that the Florida statutes are content-based, and thus, subject to strict scrutiny.¹⁰⁰

Even if the court found that the restrictions in the Florida statutes were not content-based, the plaintiff provided ample evidence that the State’s primary motivation for passing the statutes was based on social media providers’ perceived liberal viewpoints.¹⁰¹ The State’s motivation for passing the statutes was made abundantly clear in Governor DeSantis’s signing statement. In the statement, Governor DeSantis wrote: “Day in and day out, our freedom of speech as conservatives is under attack by the ‘big tech’ oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated.”¹⁰² The motivation for the law is a thus a retaliation to the

91. *Id.* (citing *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155 (2015)).

92. *Id.* at *10.

93. *Id.* at *9.

94. *Id.* at *10.

95. Fla. Stat. § 106.072.

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

97. Fla. Stat. § 501.2041(2)(h).

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

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

perceived threat of social media providers' liberal ideologies. "This viewpoint-based motivation, without more, subjects the legislation to strict scrutiny, root and branch."¹⁰³

After determining that strict scrutiny applied to the Florida Statutes, the court examined whether or not the statutes would survive such scrutiny. To survive strict scrutiny, a law infringing on speech must both further a compelling state interest and be narrowly tailored to achieve that interest.¹⁰⁴ According to the court, "[t]hese statutes come nowhere close."¹⁰⁵ The court reasoned that promoting speech for one ideology while limiting speech for another is not a compelling state interest.¹⁰⁶ However, even if it were a compelling state interest, the Florida statutes are far from narrowly tailored. Accordingly, the court found that the Florida legislation could not survive strict scrutiny, and therefore the plaintiff was likely to prevail on the merits of their First Amendment claim.¹⁰⁷

C. Federal Preemption Claim

Lastly, the court held that some sections of the Florida statutes are preempted by existing federal law.¹⁰⁸ As previously discussed, 47 U.S.C. § 230 conferred upon social media providers the right to restrict content on their platforms which they find objectionable. Moreover, § 230 includes a preemption clause which prohibits states from imposing liability on internet service providers based on laws that are "inconsistent with this section."¹⁰⁹ After reviewing the Florida statutes, the court determined that several provisions are inconsistent with the federal law and are therefore preempted.¹¹⁰ First, Fla. Stat. § 106.072 prohibits a social media platform from deplatforming a candidate for political office and imposes several fines on platforms who violate the statute.¹¹¹ This statute is clearly inconsistent with 47 U.S.C. § 230(c)(2), which shields social media platforms from liability for restricting access of content they themselves find objectionable. Under the federal law, social media platforms are entitled to use their discretion when choosing to restrict content, and these restrictions come in many forms

103. *Id.*

104. *Id.* at *11 (citing *Reed*, 576 U.S. at 171).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at *6.

109. 47 U.S.C. § 230(e)(3).

110. *NetChoice*, 2021 WL 2690876, at *6.

111. Fla. Stat. § 106.072.

including the deplatforming of a user.¹¹² Accordingly, the court held that the Florida statute would impose liability on platforms who use their discretion to censor and remove content shared by a political candidate even if the platform found the candidate's content objectionable. Imposing such liability is at odds with a platform's statutory right to restrict access to objectionable content. "If this is done in good faith—as can happen—the Florida provision imposing daily fines is preempted by § 230(e)(3)."¹¹³ Second, parts of Fla. Stat. § 501.2041 are similarly preempted by the federal law. Fla. Stat. § 501.2041(2)(b) provides that a social media platforms must apply censorship, deplatforming, and shadow banning in a consistent manner.¹¹⁴ This provision would also infringe on a platform's right to use their discretion when deciding which content to censor. By forcing a platform to apply censorship in a consistent manner, the Florida statute would mandate that a social media platform censor innocuous content the same way they would treat content that violates the platform's standards. Again, this provision is preempted by § 230.¹¹⁵ Additionally, Fla. Stat. § 501.2041(2)(d) is inconsistent with the federal law. Under (2)(d), a social media platform may not censor content without first notifying the user whom the platform is restricting.¹¹⁶ As discussed in more detail above, a social media platform has the unbridled discretion to determine how to restrict content in accordance with their statutory rights under 47 U.S.C. § 230. Mandating that a social media platform notify a user before restricting content is a further violation of their rights under the federal statute.¹¹⁷ Both Fla. Stat. § 106.072 and some provisions in § 501.2041 are therefore preempted by 47 U.S.C. § 230.

The court in *NetChoice* dissected the Florida statutes aimed at regulating social media platforms and held that the statutes could not survive First Amendment strict scrutiny.¹¹⁸ Moreover, several provisions are preempted by § 230.¹¹⁹ Accordingly, the court granted the plaintiff's motion for preliminary injunction and ordered the State to "take no steps to enforce Florida Statutes §§ 106.072 or 501.2041 until otherwise ordered."¹²⁰ Nevertheless, the State is not yet ready to

112. *NetChoice*, 2021 WL 2690876, at *6.

113. *Id.*

114. Fla. Stat. § 501.2041(2)(b).

115. *NetChoice*, 2021 WL 2690876, at *6.

116. Fla. Stat. § 501.2041(2)(d).

117. *NetChoice*, 2021 WL 2690876, at *6.

118. *Id.* at *12.

119. *Id.*

120. *Id.*

surrender on their controversial law. Less than two weeks following the decision in *NetChoice*, the State of Florida filed an appeal challenging the preliminary injunction and the district court's findings. The United States Court of Appeals for the Eleventh Circuit will not issue its decision for some time, but it is never too soon to start considering how the State might try to carefully thread the needle to reverse the lower court's decision.

VII. THREADING THE NEEDLE

There are several arguments the State could make in an effort to persuade future courts to uphold the Florida statutes. The first argument is one that courts have been reluctant to examine but the State will almost certainly make. The State will argue that social media platforms should be treated as common carriers. This argument has been floated by legal scholars for years and would allow courts to treat social media providers differently than ordinary speakers under the First Amendment. The second argument the State could make is that the blocking, censoring, and deplatforming of users is not protected under § 230 because the social media platform's actions are not done in "good faith," which is required under the federal law.¹²¹ Both arguments are grounded in very little precedent, but nevertheless might be the only hope for the Florida statutes' survival.

A. Common Carriers

The Supreme Court has defined a "common carrier" as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."¹²² The Supreme Court has acknowledged that common carriers have long been subjected to special regulations including "a general requirement to serve all comers."¹²³ Furthermore, regulations placed on common carriers may be justified when "a business, by circumstances and its nature, rises from private to be of public concern."¹²⁴ There is precedent for treating communication networks in a similar manner as traditional common carriers and regulating them as such. This is especially true when the communication networks hold

121. 47 U.S.C. § 230.

122. *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

123. *Biden v. Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

124. *Id.* at 1223 (citing *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914)).

themselves out to the public and have a dominant market share of the kind of communication they provide.¹²⁵ Some examples include telephone communication companies. Since the communication networks hold themselves out to the public and have a monopoly over the medium, the government has granted these networks “special privileges.”¹²⁶ “By giving these companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken.”¹²⁷ Government regulations applied to such common carriers have been subject to a lower level of scrutiny compared to other private networks.

Can digital networks like social media platforms be considered common carriers? “In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers.”¹²⁸ Users of these platforms rely on the networks for all of their news and political engagements. Furthermore, some social media platforms dominate the market share thus making them akin to common carriers. For example, Facebook has over three billion users and Google makes up 90% of all online searches.¹²⁹ “[T]his concentration gives some digital platforms enormous control over speech.”¹³⁰ When assessing whether a platform’s dominance in the market makes it a common carrier, it is important to look at the available alternatives to using such a platform. However, sites like Twitter and Facebook do not have many such alternatives. The alternatives that do exist are not even comparable to these monopolistic social media sites. Accordingly, these factors—public usage and market share—do favor treating large social media platforms like common carriers, thus permitting government regulations that are subject to a lower level of scrutiny. However, Congress has been reluctant to pass regulations treating social media companies as such. To the contrary, Congress, in passing § 230, did the opposite by shielding social media platforms from liability. The Supreme Court has not made a decision on whether social media platforms are akin to common carriers because the issue has never been formally brought before the Court. Perhaps the Supreme Court will have its opportunity if the Eleventh Circuit’s upcoming decision is appealed.

125. *Id.* at 1222–23.

126. *Id.* at 1223.

127. *Id.*

128. *Id.* at 1224.

129. *Id.*

130. *Id.*

The State of Florida anticipated legal challenges from social media providers when drafting S.B. 7072. In many ways, the Florida legislature began arguing that social media companies should be treated as common carriers long before there were any challenges to the law. The anticipation of lawsuits led the legislature to include the common carrier argument in the language of the bill itself. The “findings” section of the bill provides that “[s]ocial media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers.”¹³¹ The inclusion of such language stands to reason that the Florida government intended on making this argument to rebuke claims that the statutes violated the First Amendment, and the State argued just that when the law was eventually challenged.

The *NetChoice* court did not go into great detail in dismissing the State’s common carrier argument. The court briefly acknowledged the argument in their decision before ultimately finding that social media platforms are not solely common carriers:

That brings us to issues about First Amendment treatment of social-media providers that are not so clearly settled. The plaintiffs say, in effect, that they should be treated like any other speaker. The State says, in contrast, that social-media providers are more like common carriers, transporting information from one person to another much as a train transports people or products from one city to another. The truth is in the middle.¹³²

As discussed above, the district court determined that the Florida statutes should be held to traditional First Amendment scrutiny thus dismissing the State’s common carrier argument. On appeal, the Eleventh Circuit will hear the State’s argument again. However, the result will likely be no different. Social media platforms simply do not have the same properties as traditional common carriers. They are private companies, which are entitled to the same free speech rights as any other individual. While public discourse including political speech is certainly a public concern, the social media providers do not inhibit such discourse. In fact, social media providers facilitate speech by providing a platform for such speech to occur. Even if a social media platform censored or silenced a group of individuals with opposing political views, there are still hundreds of other forms of online communication where these groups could convey their ideas and viewpoints. Additionally, while the large social media companies like Facebook and Twitter dominate the social media market, the Internet

131. S.B. 7072, 123rd Leg., Reg. Sess.

132. *NetChoice*, 2021 WL 2690876, at *8.

has the ability to foster alternatives. For the aforementioned reasons, it is my belief that these social media platforms are not like common carriers, and the Eleventh Circuit's decision will likely reflect that notion.

B. Good Faith Under § 230

While the State could make the common carrier argument to overcome the issue of First Amendment scrutiny, the State will still need to solve the issue of preemption by § 230. One argument that could be made is that the censoring and deplatforming of conservative voices by social media platforms is not done in “good faith.” Under § 230, social media platforms shall not “be held liable on account of—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”¹³³ Therefore, only those acts by social media platforms taken in good faith are protected under the law, and it could be argued that some acts of censorship are not done in good faith, and thus not protected. Similar to the State's common carrier argument, the Florida legislature alluded to this argument in the text of S.B. 7072. The bill provides that “[s]ocial media platforms that unfairly censor, shadow ban, deplatform, or apply post-prioritization algorithms to Florida candidates, Florida users, or Florida residents are not acting in good faith.”¹³⁴ However, for the State to successfully make this argument, courts will first have to determine what constitutes good faith under the federal law and what does not.

Courts have held that the availability of the exemption created by § 230 is not automatic and depends on “some evidence” of good faith.¹³⁵ The problem is that the threshold of showing such evidence is extremely low and involves a social media platform's subjective determination of what content is objectionable.¹³⁶ Almost any showing that content is objectionable to a social media platform will entitle such platform to protection under § 230. It is nearly impossible to argue that a social media platform does not act in good faith when censoring content that they themselves consider objectionable. The real issue, and reason the State's argument will not succeed, is that what might be considered objectionable to a social media platform may not be considered

133. 47 U.S.C. § 230 (emphasis added).

134. S.B. 7072, 123rd Leg., Reg. Sess.

135. See *Sabbato v. Hardy*, No. 2000CA00136, 2000 WL 33594542 (Ohio Ct. App. Dec. 18, 2000).

136. Ian C. Ballon, *E-Commerce and Internet Law* § 37.05[4][B] (2020).

objectionable by the user who is being censored. Due to the subjectivity of what is objectionable under § 230, the State will never succeed simply by making a blanket assertion that social media companies do not exercise good faith when censoring conservatives. The State would need to assert specific instances of bad faith which require specific assertions of fact. The bottom line is that social media platforms will be presumed to act in good faith so long as what they are censoring meets their own definition of objectionability.

VIII. FINAL THOUGHTS

The Florida social media statutes were passed by Governor DeSantis in an effort to “reign in” liberal controlled social media platforms. DeSantis and thousands of other conservatives in the United States contend that social media providers like Twitter and Facebook use their broad influence and power to silence conservative voices by deplatforming and shadow banning politically right-leaning users. The Florida statutes prohibit social media platforms from wrongfully censoring and shadow banning users, particularly candidates for political office, by regulating the activity and editorial discretion of social media providers. The statutes would likely succeed at regulating platforms if it wasn’t for First Amendment protections afforded in the United States Constitution.

A. The Eleventh Circuit Decision

The Eleventh Circuit Court of Appeals is likely to soon come to the same conclusion as the District Court for the Northern District of Florida. The statutes simply cannot overcome First Amendment scrutiny. The laws are content-based restrictions on speech and editorial judgment. Courts have long held that such content-based restrictions are subject to the highest levels of scrutiny. Additionally, the laws are clearly viewpoint-based. The Florida legislature and Governor have not been shy regarding the true purpose of the laws. As demonstrated by the Governor’s signing statement, the laws are an attempt to control the liberal “oligarchs” that operate large social media platforms. Both content-based and viewpoint-based laws are subject to strict scrutiny. To overcome strict scrutiny, the laws must both further a compelling state interest and be narrowly tailored to achieve that interest. Here, the Florida laws accomplish neither. The statutes are far from narrowly tailored and extremely vague as to what a social media platform is. Additionally, controlling the speech of a private platform is far from a compelling state interest. The Florida government has no reasonable argument that would enable the laws to overcome strict

scrutiny. Therefore, the Eleventh Circuit will likely find these statutes to be both unconstitutional and preempted by § 230.

B. Florida's Short-Sighted Approach

The Florida statutes were passed to regulate social media platforms and encourage free speech on their sites. It is my belief that the statutes themselves represent a threat to free speech. In their most basic form, the statutes prohibit social media providers from exercising their own editorial discretion when deciding what speech to include on their sites. The statutes are nothing more than a government's attempt to control private companies and dictate what speech the company can and cannot have on their sites. Is that not the exact regulation on speech that the Framers of the First Amendment sought to forbid? The true purpose of the First Amendment is to restrict the government's ability to regulate free speech, especially political speech. How can the Florida government claim they are promoting free speech, while at the same time attempting to control the speech of a private entity?

Let us assume, *arguendo*, that conservatives are censored by large social media platforms. That still does not give the government the right to circumvent the First Amendment and control a private entity. The Florida government should recognize that if these statutes are upheld, they will succeed in controlling a private company's editorial discretion at a huge cost. These statutes will undoubtedly benefit conservative users who have been censored and deplatformed. However, what is good for one political party today may be disadvantageous to the same party in the future. Upholding these statutes will open the door to government control of private social media companies. Governor DeSantis and proponents of the legislation claim to be on the side of the First Amendment yet, in the future, may quickly find themselves defending conservative platforms that are subject to similar Democrat bills aimed at regulating them. As the court in *NetChoice* so elegantly articulated, the statutes are an example of "burning the house to roast a pig."¹³⁷

The Florida statutes are a product of a short-sighted attempt at political theatrics, that if upheld could come back to silence more conservative voices than the law initially protected. Even if social media platforms wrongfully censor conservative voices, the alternative is much worse. The alternative is government control over free speech; something that conservatives have long claimed to stand against. The alternative would create a precedent that grants governments the

137. *NetChoice*, 2021 WL 2690876, at *11.

authority to control private platforms and the speech they choose to promote or censor. While censorship may stifle public discourse or be unfair to a certain political ideology, the alternative—government regulation—is far more sinister and will only serve to slowly erode at our First Amendment right to free speech.

C. The Free Market Solution

The Florida statutes will undoubtedly be held to be unconstitutional by the courts. However, if there is in fact a disparity between the way large social media platforms censor conservative accounts versus those accounts with liberal leanings, then luckily there is a perfectly legal constitutional solution to the issue. That solution is the free market. Conservatives who are outraged by social media platforms should simply boycott the allegedly partisan sites. I'm not claiming the boycott would hurt the deep pockets of Twitter CEO, Jack Dorsey, or Facebook's Mark Zuckerberg, but such a boycott could signal to savvy investors that there is a need for an alternative to liberal-leaning social media platforms: a platform made by conservatives for conservatives.

I know this free-market solution might be viewed as somewhat naïve considering the sheer size and indisputable power of sites like Facebook and Twitter. Nevertheless, I see few other legal solutions to the purported issue of social media providers' discrimination of political foes. The Florida statutes and the challenges thereto have shown that governments will be unable to regulate these providers through legislative acts. Moreover, the government's ability to regulate speech on social media platforms would violate the most fundamental principles of free speech found in the Constitution. This leaves only the free market solution. Again, while this might not be the most expedient or practical solution, it is the constitutional solution, and I fear that the alternative is far more treacherous.

IX. CONCLUSION

Governor Ron DeSantis's attempt at regulating social media platforms through legislative acts is the first of its kind. However, the Florida statutes will ultimately fail strict scrutiny and be held unconstitutional. While promoting the equal treatment of conservative users on social media platforms is an admirable goal, using legislation to accomplish it is far less commendable. The First Amendment's true purpose is to protect private individuals from government regulation of free speech. Upholding the Florida statutes would run contrary to that purpose and open the door to future partisan-driven legislation aimed at controlling the speech of political adversaries. The free market could

be a possible alternative to government regulations, albeit not an efficient solution.

Perhaps the real solution to the issue of political bias is to expel the divisive partisan culture that has infiltrated every aspect of American society. Perhaps the real solution is learning to respect one another's ideologies irrespective of party affiliation. Regardless of what you believe, the answer is never government regulation of free speech. Accordingly, Governor DeSantis will have to go back to the drawing board to accomplish his goal of leveling the playing field for conservative social media users.