

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SPB 7072

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Social Media Platforms

DATE: April 7, 2021

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Ponder</u>	<u>McVaney</u>	_____	<b>GO Submitted as Comm. Bill/Fav</b>

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**I. Summary:**

SPB 7072 establishes a violation for social media deplatforming of a political candidate and requires a social medial platform to meet certain requirements when they restrict speech by users.

The bill prohibits social media platforms from deplatforming candidates for political office 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 deplatforming all other candidates, in addition to the remedies provided in ch. 106, F.S., relating to campaign financing.

Additionally, if a social media platform knowingly provides free advertisements for a candidate, such advertisement is deemed an in-kind contribution, and the candidate must be notified.

The bill establishes restrictions for contracting with public entities for certain social media platforms who have violated antitrust laws and who have been placed on the Antitrust Violator Vendor List. The Department of Management Services is required to maintain the Antitrust Violator Vendor List (list) of the names and addresses of the people or affiliates who have been disqualified from the public contracting and purchasing process. The bill outlines the process for placing such person or affiliates on the list, and the process for a person or affiliates to appeal the decision to place such person or affiliate on the list. The bill provides for exceptions from the applicability of the antitrust violator provisions.

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;
- Apply censorship, deplatforming, and shadow banning 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 allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content (the opt-out opportunity must be reoffered annually);
- Provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning; and
- 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 establishes that 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). Additionally, a user may bring a private cause of action against a social media platform for failing to apply consistently certain standards and for censoring or deplatforming without proper notice.

The DMS and DLA may experience increased workloads and associated costs in carrying out the duties and responsibilities placed on the agencies in this bill.

The bill expressly provides that if any provision of the act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

The bill takes effect July 1, 2021.

## **II. Present Situation:**

### **Candidates for Office and In-Kind Contributions**

#### ***Violations of Florida Election Law***

The Division of Elections (division) is created within the Florida Department of State.<sup>1</sup> The division must ensure compliance with election laws, provides statewide coordination of election administration, and promotes public participation in the electoral process.

The Florida Elections Commission (Elections Commission) is created within the Department of Legal Affairs (DLA) of the Office of Attorney General. The Elections Commission is composed of nine members appointed by the Governor.<sup>2</sup> For purposes of the Elections Commission jurisdiction, a "violation" means the willful performance of a prohibited act or the willful failure to perform a required act.<sup>3</sup> Willfulness is a determination of fact; however, at the request of the

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<sup>1</sup> Section 20.10(2)(a), F.S.

<sup>2</sup> Section 106.24(1)(b), F.S.

<sup>3</sup> Section 106.25(3), F.S.

respondent at any time after probable cause is found, willfulness may be considered and determined in an informal hearing before the Elections Commission.<sup>4</sup>

The Elections Commission determines probable cause based on the investigator's report, the recommendation of counsel for the Elections Commission, the complaint, and staff recommendations, as well as any written statements submitted by the respondent and any oral statements made at the hearing.<sup>5</sup> If probable cause has been found by the Elections 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 elect to have a formal or informal hearing conducted before the Elections Commission.<sup>6</sup>

In order to carry out its responsibilities, the Elections 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.<sup>7</sup>

Civil penalties are generally limited to not more than \$1,000 per count or violation.<sup>8</sup> Other penalties include permanent or temporary injunctions, and restraining orders.<sup>9</sup> Any civil penalty or fine assessed is deposited into the General Revenue Fund.<sup>10</sup>

Actions for violation of ch. 104 and 106, F.S., (the elections code and campaign financing, respectively) must be commenced before 2 years have elapsed from the date of the violation.<sup>11</sup>

### ***In-kind Contributions to Candidates***

Section 106.011(3)(e), F.S., defines the term "candidate" to mean a person to whom any of the following applies:

- A person who seeks to qualify for nomination or election by means of the petitioning process;
- A person who seeks to qualify for election as a write-in candidate;
- A person who 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;
- A person who appoints a treasurer and designates a primary depository; or
- A person who files qualification papers and subscribes to a candidate's oath as required by law.

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<sup>4</sup> *Id.* This section further provides that the Elections Commission may not by rule determine what constitutes willfulness or further define the term "willful" for purposes of election law.

<sup>5</sup> Section 106.25(2), F.S.

<sup>6</sup> Section 106.25(5), F.S.

<sup>7</sup> Section 106.26(1), F.S.

<sup>8</sup> Section 106.265, F.S.

<sup>9</sup> Section 106.27, F.S.

<sup>10</sup> Section 106.265(4), (5), F.S.

<sup>11</sup> Section 106.28, F.S.

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;
- 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.<sup>12</sup> 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.<sup>13</sup>

An in-kind contribution<sup>14</sup> is anything of value except money made for the purpose of influencing the results of an election.<sup>15</sup> The valuation of an in-kind contribution is fair market value, and in-kind contributions are subject to the same contribution limitations as money.<sup>16</sup>

## Freedom of Speech and Internet Platforms

### *Section 230*

The federal Communications Decency Act (CDA) was passed in 1996 “to protect children from sexually explicit Internet content.”<sup>17</sup> 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.<sup>18</sup>

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.”<sup>19</sup>

<sup>12</sup> Sections 106.011(5) and 106.07(1), F.S.

<sup>13</sup> Section 106.07(4)(a), F.S.

<sup>14</sup> 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>.

<sup>15</sup> Florida Department of State, Division of Elections, *Campaign Finance*, <https://dos.myflorida.com/elections/candidates-committees/campaign-finance/> (last visited April 2, 2021)

<sup>16</sup> Sections 106.011(5) and 106.055, F.S.

<sup>17</sup> *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))).

<sup>18</sup> *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))).

<sup>19</sup> 47 U.S.C. § 230(b)(1)–(2).

Specifically, Section 230 states that no provider or user of an interactive computer service may be held liable on account of:<sup>20</sup>

- 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,<sup>21</sup> both of which “appl[ied] traditional defamation law to internet providers.”<sup>22</sup> 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.”<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> Section 230 does not affect federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, or sex trafficking law.

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.<sup>27</sup> 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.<sup>28</sup> Bills have been filed that would require internet platforms to have clear content moderation policies,

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<sup>20</sup> 47 U.S.C. § 230(c).

<sup>21</sup> *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).

<sup>22</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).

<sup>23</sup> *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))).

<sup>24</sup> 47 U.S.C. § 230(c)(1).

<sup>25</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).

<sup>26</sup> 47 U.S.C. § 230(e).

<sup>27</sup> 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).

<sup>28</sup> *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).

submit detailed transparency reports, and remove immunity for platforms that engage in certain behavioral advertising practices.<sup>29</sup> Proposals have also been offered to limit the liability shield for internet providers who restrict speech based on political viewpoints.<sup>30</sup>

### *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;<sup>31</sup>
- Internet platforms, which are servers used by an Internet provider to support Internet access by their customers;<sup>32</sup>
- Internet search engines, which are computer software used to search data (such as text or a database) for specified information;<sup>33</sup> and
- Access software providers, which are providers of software (including client or server software) or enabling tools for content processing.<sup>34</sup>

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

- Data monetization.<sup>35</sup> 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.<sup>36</sup>
- Subscription or membership fees. This model requires users pay for a particular or unlimited use of the platform infrastructure.<sup>37</sup>
- 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.<sup>38</sup>

<sup>29</sup> Bedell, *supra* note 27; PACT Act, S.4066, 116th Cong. (2020); BAD ADS Act, S.4337, 116th Cong. (2020).

<sup>30</sup> Bedell, *supra* note 27; Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020)

<sup>31</sup> DelValle Institute Learning Center, *Social Media Platforms*, <https://delvalle.bphc.org/mod/wiki/view.php?pageid=65> (last visited Feb. 24, 2021).

<sup>32</sup> IGI Global, *Internet Platform*, <https://www.igi-global.com/dictionary/internet-platform/15441> (last visited Feb. 24, 2021).

<sup>33</sup> Merriam Webster, *Search Engine*, <https://www.merriam-webster.com/dictionary/search%20engine> (last visited Feb. 24, 2021).

<sup>34</sup> 47 U.S.C. § 230(f)(4) (defining “access software provider to mean a provider of software (including client or server software), or enabling tools that do any one or more of the following: (i) filter, screen, allow, or disallow content; (ii) pick, choose, analyze, or digest content; or (iii) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content).

<sup>35</sup> 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).

<sup>36</sup> 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).

<sup>37</sup> HIIG, *supra* note 35.

<sup>38</sup> *Id.*

### *The Florida Deceptive and Unfair Trade Practices Act*

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) exists “to protect the consuming public and legitimate business enterprises from those who engage in (1) unfair methods of competition; or (2) unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.”<sup>39</sup> The FDUTPA is modeled after the federal statute that authorizes the Federal Trade Commission.<sup>40</sup>

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;<sup>41</sup>
- Failing to abide by storage requirements for personal information and notice requirements for data breaches of such information;<sup>42</sup> and
- Failing to abide by requirements for weight-loss programs.<sup>43</sup>

The state attorney or the Department of Legal Affairs (DLA) may bring FDUTPA actions when it is in the public interest on behalf of consumers or governmental entities.<sup>44</sup> The Office of the State Attorney (SAO) may enforce FDUTPA violations occurring 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.<sup>45</sup> Consumers may also file suit through private actions.<sup>46</sup>

DLA and the SAO have powers to investigate FDUTPA claims, which include:<sup>47</sup>

- 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;

<sup>39</sup> Section 501.202(2), F.S.

<sup>40</sup> 15 U.S.C. § 45.; *See* 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).

<sup>41</sup> Section 501.160, F.S.

<sup>42</sup> Section 501.171, F.S.

<sup>43</sup> Section 501.0579, F.S.

<sup>44</sup> Section 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*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUTPA 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\\*](http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division*) (last visited on Feb, 21, 2021).

<sup>45</sup> Section 501.203(2), F.S.

<sup>46</sup> Section 501.211, F.S.

<sup>47</sup> Section 501.206(1), F.S.

- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.<sup>48</sup>

### ***Freedom of Speech***

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>49</sup> “[T]he First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well.”<sup>50</sup> “[O]nline speech is equally protected under the First Amendment as there is ‘no basis for qualifying the level of First Amendment scrutiny that should be applied’ to online speech.”<sup>51</sup>

It is well established that a government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.<sup>52</sup> The government bears the burden of demonstrating the constitutionality of any such content-based regulation.<sup>53</sup>

The United States Supreme Court has recognized that First Amendment protection extends to corporations.<sup>54</sup> “This protection has been extended by explicit holdings to the context of political speech.”<sup>55</sup> Under these precedents, it is well settled that political speech does not lose First Amendment protection “simply because its source is a corporation.”<sup>56</sup> Generally, the government may not require a corporation to host another’s speech absent a showing of a compelling state interest.<sup>57</sup>

### ***Supremacy Clause***

It is a basic tenet of “Our Federalism”<sup>58</sup> that where federal and state law conflict, state law must yield.<sup>59</sup> This principle is captured in Article VI of the Constitution, known as the Supremacy

<sup>48</sup> Sections 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.

<sup>49</sup> See *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).

<sup>50</sup> *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).

<sup>51</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)

<sup>52</sup> *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004).

<sup>53</sup> *Id.* at 660.

<sup>54</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 342 (2010).

<sup>55</sup> *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 428-429 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936)).

<sup>56</sup> *Id.* (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. at 784 (1978); see *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (“The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster” (quoting *Bellotti*, 435 U.S., at 783)).

<sup>57</sup> *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *First National Bank of Boston v. Bellotti*, 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).

<sup>58</sup> See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

<sup>59</sup> *Denson v. United States*, 574 F.3d 1318, 1345 (11th Cir. 2009).

Clause, which reads: “This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the ... Laws of any State to the Contrary notwithstanding.”<sup>60</sup> The United States Supreme Court has explained that the Supremacy Clause was designed to ensure that states do not “retard, impede, burden, or in any manner control” the execution of federal law.<sup>61</sup> The framers of the Constitution rejected a proposal to allow a federal veto of state laws “in favor of allowing state laws to take effect, subject to a later challenge under the Supremacy Clause.”<sup>62</sup> Outside the strictures of the Supremacy Clause, the States retain broad autonomy in structuring their governments and pursuing legislative objectives.”<sup>63</sup>

## **Antitrust Laws, and State Contracts and Incentives**

### ***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, based on the idea that an unregulated market will lead to the creation of coercive monopolies.<sup>64</sup> 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<sup>65</sup> 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.<sup>66</sup>

The Sherman Antitrust Act<sup>67</sup> 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’

<sup>60</sup> U.S. Const. art. VI, cl 2.

<sup>61</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, (1819); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, (1824) (Marshall, C.J.) (“[A]cts of the State Legislatures ... [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress ... is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it.”).

<sup>62</sup> *Shelby County v. Holder*, 133 S. Ct. 529, 543 (2013).

<sup>63</sup> *Id.*

<sup>64</sup> John J. Miles, Antitrust Primer, 20140513 AHILA 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.”).

<sup>65</sup> 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).

<sup>66</sup> Animesh Ballabh, Antitrust Law: An Overview, 88 J. Pat. & Trademark Off. Soc’y 877 (2006); John J. Miles, Antitrust Primer, 20140513 AHILA Seminar Papers 1 (2014).

<sup>67</sup> 15 U.S.C. §§. 1 et seq.

imprisonment and a fine up to \$100 million for a corporation or \$1 million for any other person.<sup>68</sup>

The Clayton Act<sup>69</sup> prohibits specific business actions, including sales, or setting a price, discount or rebate on condition that the buyer not deal with competitors of the seller where the effect may be to substantially lessen competition in interstate commerce.<sup>70</sup> Those types of practices have been held to violate s. 1 of the Sherman Act.<sup>71</sup> The Clayton Act also prohibits prospective corporate mergers and other asset acquisitions whose effects may substantially lessen competition.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> If the defendant rebuts the prima facie case, the plaintiff has the final burden to demonstrate an antitrust violation.<sup>75</sup> If the plaintiff prevails, the customary remedy is for the court to order divestiture and unwind the merger.<sup>76</sup>

In enacting the Florida Antitrust Act of 1980,<sup>77</sup> the Legislature expressly stated its “intent ... that, in construing this chapter, due consideration and great weight given to the interpretations of the federal courts relating to comparable federal antitrust statutes.”<sup>78</sup> The standing requirements for a private cause of action under the Florida Antitrust Act parallel the standing requirements of Section 4 of the Clayton Act.<sup>79</sup> Implemented by the Office of the Attorney General (OAG), the Florida Antitrust Act essentially mirrors the federal Sherman Act, and prohibits:<sup>80</sup>

- Every contract, combination, or conspiracy in restraint of trade or commerce;<sup>81</sup> and
- Monopolization or attempted monopolization of any part of trade or commerce.<sup>82</sup>

A Florida antitrust law violation is punishable by up to three years' imprisonment and fines up to \$1 million for a corporation and \$100,000 for any other person.<sup>83</sup> There is also a private right of action for any person injured by certain antitrust violations.<sup>84</sup>

<sup>68</sup> 15 U.S.C. §1.

<sup>69</sup> 15 U.S.C. § 18.

<sup>70</sup> 15 U.S.C. § 14.

<sup>71</sup> See, e.g., *U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30, 47, 51 (D.D.C. 2000), *aff'd, in part, rev'd in part, remanded in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>72</sup> 15 U.S.C. § 18.

<sup>73</sup> *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).

<sup>74</sup> *Id.*

<sup>75</sup> *Chicago Bridge & Iron*, 534 F.3d at 423.

<sup>76</sup> *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015).

<sup>77</sup> Sections 542.15 – 542.36, F.S.

<sup>78</sup> Section 542.32, F.S.

<sup>79</sup> *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 102 (Fla. 1st DCA 1996).

<sup>80</sup> Section 542.16, F.S.

<sup>81</sup> Section 542.18, F.S.

<sup>82</sup> Section 542.19, F.S.

<sup>83</sup> Section 542.21, F.S.

<sup>84</sup> Sections 542.21 and 542.22, F.S.

### ***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 these platforms.<sup>85</sup> 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.<sup>86</sup> Also, DOJ and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.<sup>87</sup>

### ***Procurement of Commodities and Services***

Chapter 287, F.S., regulates state agency<sup>88</sup> 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.<sup>89</sup>

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.<sup>90</sup> However, specified contractual services and commodities are not subject to competitive solicitation requirements.<sup>91</sup>

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 procurement process,<sup>92</sup> creating uniform agency procurement rules,<sup>93</sup>

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<sup>85</sup> 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).

<sup>86</sup> *Id.*; *Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. 2020).

<sup>87</sup> McCabe, *supra* note 59; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).

<sup>88</sup> 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.

<sup>89</sup> See Sections 287.012(6) and 287.057(1), F.S.

<sup>90</sup> 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.

<sup>91</sup> See Sections 287.057(3)(e), F.S.

<sup>92</sup> See Sections 287.032 and 287.042, F.S.

<sup>93</sup> See Sections 287.032(2) and 287.042(3), (4), and (12), F.S.

implementing the online procurement program,<sup>94</sup> and establishing state term contracts.<sup>95</sup> 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:<sup>96</sup>

- 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.<sup>97</sup> Enterprise Florida, Inc. (EFI) is a nonprofit corporation established by the Legislature to serve as the state's main economic development organization.<sup>98</sup> EFI is required to enter into a performance-based contract with DEO.<sup>99</sup>

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.<sup>100</sup>

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<sup>94</sup> See Section 287.057(23), F.S.

<sup>95</sup> See Sections 287.042(2), 287.056, and 287.1345, F.S.

<sup>96</sup> Sections 287.133-135, F.S.

<sup>97</sup> Section 20.60(4)(b)(f), F.S.; Florida Department of Economic Opportunity, About Us, <https://floridajobs.org/about-us> (last visited Feb. 22, 2021).

<sup>98</sup> Section 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.

<sup>99</sup> 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."

<sup>100</sup> OPPAGA, Report No. 16-09, p. 50-51.

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 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.<sup>101</sup>

### III. Effect of Proposed Changes:

The bill provides the following definitions:

- "Affiliate" means
  - 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.
- "Algorithm" means a mathematical set of rules that specify how a group of data behaves and that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material
- "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.
- "Candidate" has the same meaning as in s. 106.011(3)(e), F.S. (a person who files qualification papers and subscribes to a candidate's oath as required by law).
- "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.
- "Convicted or being held civilly liable" or "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.
- "Deplatform" has the same meaning as in the new provision of the bill addressing censorship, s. 501.2041, F.S. That is, the action or practice by a social media platform to

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<sup>101</sup> *Id.*

permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 60 days.

- “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.
- “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.
- “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.
- “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.
- “Public entity” means the state and any of its departments or agencies.
- “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.
- “Social media platform” means any technology platform or access software provider that does business in the state and provides or enables computer access by multiple users in a public digital forum for the primary purpose of connecting with other users and creating and sharing user generated content over the Internet. The internet platform or social media site may be a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity, that does business in this 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.
  - Has at least 100 million monthly individual platform participants globally.

**Section 1** creates s. 106.072, F.S., to provide requirements for candidates and social media platforms related social media deplatforming of political candidates. This section provides that a social media platform may not knowingly deplatform a candidate. Upon a finding of a violation of this section by the Elections Commission, in addition to the remedies provided in ss. 106.265

and 106.27, F.S., 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.

This section provides that if a social media platform knowingly provides free advertising for a candidate must inform the candidate of such in-kind contribution. Posts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' poses, content, material, and comments are not considered free advertising.

This section 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.

**Section 2** creates 287.137, F.S., to establish restrictions for contracting with public entities for certain social media platforms who have violated antitrust laws. This section provides that a person or affiliate who has been placed on the antitrust violator vendor list following a conviction or being held civilly liable for an antitrust violation 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.

This section 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 or before July 1, 2021.

This section provides that beginning July 1, 2021, all invitations to bid, requests for proposals, and invitations to negotiate, as those terms are defined in s. 287.012, F.S., and any contract document described in s. 287.058, F.S., must contain a statement informing persons of the public contracting and purchasing disqualifications imposed upon being placed on the antitrust vendor list.

The department must maintain an antitrust violator vendor list of 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 violator vendor list on January 1, 2022, and must update and electronically publish the list quarterly thereafter. A person or an affiliate disqualified from the public contracting and purchasing process is disqualified as of the date the final order is entered.

This section requires DMS to investigate, upon receiving 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.

This section allows a person or affiliate to dispute placement on the list. Within 21 days after receipt of the notice of intent, the person or affiliate may file a petition for a formal hearing under the Administrative Procedures Act (ss. 120.569 and 120.57(1), F.S.) to determine whether it is in the public interest for the person or affiliate to be placed on the list. A person or affiliate is prohibited from filing a petition for an informal hearing under s. 120.57(2), F.S.

This section specifies that the procedures of the Administrative Procedures Act apply to any formal hearing, except, within 30 days after the formal hearing or receipt of the hearing transcript, whichever is later, the administrative law judge (ALJ) must enter a final order that consist of findings of fact, conclusions of law, interpretation of agency rules, and any other information required by law or rule to be contained in the final order. The final order must direct the DMSA to place or not place the person or affiliate on the antitrust violator vendor list. The final order of the administrative law judge is final agency action for purposes of s. 120.68, F.S.

This section provides that any person or affiliate who has been notified by the DMS of its intent to place his or her name on the antitrust violator vendor list may offer evidence on any relevant issue. An affidavit alone does not constitute competent substantial evidence that the person has not been convicted or is not an affiliate of a person convicted or held civilly liable.

This section provides that, 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. If the ALJ determines that the person was not convicted or that the person was not civilly liable or is not an affiliate of such person, that person or affiliate may not be placed on the antitrust violator list.

This section provides that in determining whether it is in the public interest to place a person or affiliate on the list, the bill indicates that the ALJ 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 the 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 him or her on the antitrust violator vendor list, based upon evidence addressing the factors listed above.

This section permits the Attorney general to temporarily place any person charged or accused of any state or federal antitrust law in a civil or criminal proceeding brought by the Attorney General, a state attorney, the Federal Trade Commission, or the United States Department of Justice on or after July 1, 2021, on the list. The Attorney General 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 Attorney General 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 Attorney General 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.

Within 21 days 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. A person may not file a petition for informal hearing.

In determining whether it is in the public interest to temporarily place a person on the antitrust violator vendor, the ALJ 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.

This section specifies that the temporary removal procedure does not apply to affiliates.

Section 2 also 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 the DMS. A person or affiliate may be removed from the list subject to such terms and conditions as prescribed by the ALJ upon a determination that removal is in the public interest. In determining whether removal would be in the public interest, the ALJ must consider any relevant factors.

This section provides that 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 ALJ 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 nine months after the date of denial, unless the petition is based upon a reversal of the conviction on appellate review or a pardon. The DMS may petition for removal before the expiration of such period if it determines that removal would be in the public interest.

This section provides that the conviction of a person or a person held civilly liable for an antitrust violation, or placement on the antitrust violator vendor list, does not affect any rights or obligations under any contract, franchise, or other binding agreement that predates such conviction or placement on the antitrust violator vendor list.

This section provides that a person who has been placed on the antitrust violator vendor list is not a qualified applicant for economic incentives under chapter 288, and such entity shall not be qualified to receive such economic incentives.

This section specifies that the provision regarding the antitrust violator vendor list 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 under chapter 946, or from any qualified nonprofit agency for the blind or any qualified nonprofit agency for other severely handicapped persons under ss. 413.032-413.037. 337, F.S.

The bill expressly provides that the antitrust violator vendor list may only be enforced to the extent not inconsistent with federal law and notwithstanding any other provision of state law.

**Section 3** creates s. 501.2041, F.S., to establish unlawful acts and practices by social media platforms. This section 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;
- Apply censorship, deplatforming, and shadow banning 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 allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content (the opt-out opportunity must be reoffered annually);
- Provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning; and
- 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.

This section 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. The 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.

This section also prohibits a social media platform from:

- 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.

This section 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 (as defined in s. 847.001, F.S.), 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 the 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.

**Section 4** amends s. 501.212, F.S., to update a cross reference.

**Section 5** expressly provides that if any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity must not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

**Section 6** provides the bill take effect July 1, 2021.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

## E. Other Constitutional Issues:

### *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.<sup>102</sup>

The Florida Supreme Court set forth the two-prong test for personal jurisdiction: first, the complaint must allege sufficient jurisdictional facts to come within Florida's long-arm statute<sup>103</sup> (s. 48.193, F.S.); and second, the nonresident defendant must have minimum contacts with Florida to satisfy federal due process requirements.<sup>104</sup> The constitutional "minimum contacts" prong "is controlled by United States Supreme Court precedent interpreting the Due Process Clause and imposes a more restrictive requirement" than the long-arm statute.<sup>105</sup> Both prongs must be satisfied in order to exercise personal jurisdiction over a non-resident defendant.<sup>106</sup>

The long arm statute confers jurisdiction over parties who are "[o]perating, conducting, engaging in, or carrying on a business or business venture in [Florida] or having an office or agency in [Florida]."<sup>107</sup> "In order to establish that a defendant is 'carrying on business' for the purposes of [Florida's] long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit."<sup>108</sup> Courts consider the following factors in analyzing whether a non-resident defendant is engaged in "a general course of business activity": (1) "the presence and operation of an office in Florida"; (2) "the possession and maintenance of a license to do business in Florida"; (3) "the number of Florida clients served"; and (4) "the percentage of overall revenue gleaned from Florida clients."<sup>109</sup>

Whether a nonresident defendant has those requisite minimum contacts to satisfy constitutional due process requirements is a fact specific inquiry.<sup>110</sup> "Factors that go into determining whether sufficient minimum contacts exist include the foreseeability that the defendant's conduct will result in suit in the forum state and the defendant's purposeful availment of the forum's privileges and protections."<sup>111</sup> A nonresident's occasional physical presence in Florida to attend trade shows, or "to make a one-off corporate

<sup>102</sup> *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

<sup>103</sup> A long-arm statute is a statutory device by which a state obtains jurisdiction over certain causes of action involving parties or events (or both) outside that state. It is called a long-arm statute because it allows a state court to reach parties located outside the state and even possibly for events which occurred outside the state. In essence, it allows the state to reach its "long arm" outside the state.

<sup>104</sup> *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989).

<sup>105</sup> *Execu-Tech Bus. Sys. v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000).

<sup>106</sup> *Rollet v. de Bizemont*, 159 So. 3d 351, 356 (Fla. 3d DCA 2015).

<sup>107</sup> Section 48.193(1)(a)(1), F.S.

<sup>108</sup> *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1167 (11th Cir. 2005).

<sup>109</sup> *Id.*

<sup>110</sup> See *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989) (relying on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985), for the proposition that whether the minimum-contacts requirement has been satisfied depends upon the facts of each case).

<sup>111</sup> *Labry v. Whitney Nat'l Bank*, 8 So.3d 1239, 1241 (Fla. 1st DCA 2009).

solicitation” of a company whose office is in Florida is insufficient to comport with the constitutional due process requirements.<sup>112</sup> Minimum contacts may be satisfied, however, when a non-resident defendant enters into a contract with a Florida party for substantial services performed in Florida and agrees to make payment in Florida.<sup>113</sup>

Whether a Florida court would have personal jurisdiction over a nonresident internet or social media platform defendant involves a fact specific inquiry to be decided by a court on a case-by-case basis.

### ***Freedom of Speech***

First Amendment protection extends to corporations.<sup>114</sup> Corporations and other associations, like individuals contribute to the “discussion, debate, and the dissemination of information and ideas” that the First Amendment seeks to foster.<sup>115</sup> Because some provisions of the bill seek to restrict certain speech made by internet and social media platforms, the First Amendment protections afforded to corporate speech may be implicated.

Also, corporations have a right to unrestricted independent expenditures for political communications and elections as a form of corporate speech.<sup>116</sup> Some of the provisions of the bill may implicate First Amendment protections related to political corporate speech.

A state may “enforce reasonable time, place and manner regulations” in public spaces “as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>117</sup> However, a law may be invalid if it is overbroad, in the sense that it prohibits a substantial amount of protected speech in relation to the law’s “legitimate sweep.”<sup>118</sup> Because some provisions of the bill speak to solely to political speech, these provisions may be read as an unconstitutional content-based restriction.

### ***Supremacy Clause***

As discussed above, the Supremacy Clause was designed to ensure that states do not “retard, impede, burden, or in any manner control” the execution of federal law.<sup>119</sup>

<sup>112</sup> See *Piazenko v. Pier Marine Interiors GMBH*, 2020 WL 6751314 (Fla. 3d DCA Nov. 18, 2020); see also *Price v. Point Marine, Inc.*, 610 So. 2d 1339, 1342 (Fla. 1st DCA 1992) (affirming dismissal for lack of jurisdiction over non-resident defendant where, “absent a continued and sustained effort to procure business, or actual procurement of business, these activities are insufficient to constitute substantial activities within the state of Florida”).

<sup>113</sup> *Smith Architectural Grp., Inc. v. Dehaan*, 867 So. 2d 434, 436 (Fla. 4th DCA 2004).

<sup>114</sup> *Citizens United*, 558 U.S. at 342.

<sup>115</sup> *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986), quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>116</sup> *Id.* at 340.

<sup>117</sup> *United States v. Grace*, 461 U.S. 171, 177 (1983) (citation omitted); see, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

<sup>118</sup> See *U.S. v. Stevens*, 559 U.S. 460 (2010).

<sup>119</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, (1819); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, (1824) (Marshall, C.J.) (“[A]cts of the State Legislatures ... [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress ... is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it.”).

The bill may implicate the Supremacy Clause by attempting to regulate in an area that may be preempted by federal law.<sup>120</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

A person or affiliate may experience an indeterminate fiscal impact if such party is disqualified from state term contract eligibility upon removal from the vendor list as specified within the bill.

### C. Government Sector Impact:

The Department of Management Services may experience increased workload and associated costs in carrying out the provisions relating to the removal of vendors from state procurements of the bill.

The Department of Legal Affairs may experience increased workload and associated costs in carrying out its new duties and responsibilities under the bill.

## VI. Technical Deficiencies:

Lines 71 to 76 provide:

A social media platform may not *knowingly* deplatform a candidate. Upon a finding of a *violation* of this section by the Elections Commission, in addition to the remedies provided in ss. 106.265 and 106.27, the social media platform ... (emphasis added).

Section 106.25(3), F.S., provides that:

For the purposes of commission jurisdiction, a *violation* shall mean the *willful performance* of an act prohibited by this chapter or chapter 104 or the willful failure to perform an act required by this chapter or chapter 104. The commission may not by rule determine what constitutes willfulness or further define the term “willful” for purposes of this chapter or chapter 104. *Willfulness* is a determination of fact; however, at the request of the respondent at any time after probable cause is found, willfulness may be considered and determined in an informal hearing before the commission.

The bill creates a violation that is based on acting “knowingly” while the same chapter defines a violation to be a “willful act.” The term “willful” is generally taken to cover not only knowing violations of a standard, but reckless ones as well.<sup>121</sup> The use of the term “knowingly” suggests

<sup>120</sup> 47 U.S.C. § 203(e).

<sup>121</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

that a defendant acts with actual knowledge or awareness that the act he or she performs is unlawful. The Legislature may want to consider an amendment to align these provisions to the same standard.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 501.212 of the Florida Statutes.

This bill creates the following sections of the Florida Statutes: 106.072, 287.137, and 501.2041.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.