Twitter Thread by Ari Cohn

Ari Cohn
@AriCohn

1/ On Friday the Florida legislature passed the @GovRonDeSantis-backed Transparency in Technology Act, attempting to regulate how social media sites moderate content. DeSantis has 15 days to sign the bill, and is expected to. Here's why he shouldn't.

2/ The bill would, in part, force platforms to carry the speech of candidates for office, publish detailed content moderation policies, and moderate content "consistently."

That's going to violate the First Amendment. Ironic, for a bill that's supposedly about free speech.

3/ Florida has tried this once before, with newspapers. In 1974, the Supreme Court struck down a Florida law requiring newspapers to publish responses from candidates who had been criticized in their publication. https://t.co/mhI7SyfGnf

4/ Florida claimed that because newspapers were owned largely by a small and powerful group, the law was necessary to protect the public's ability to meaningfully participate in debate without abusive bias by powerful interests with control over the means of communication.

> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward *250 concentration of control of outlets to inform the public.
>
> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.[15] Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

5/ If that sounds familiar, it should: it's exactly the argument being advanced to support legislation regulating social media content moderation.

6/ But the argument was unavailing for Florida then, and it is unavailing now. The Supreme Court held that whatever the *normative* merits of that justification, the government cannot compel private parties to publish speech that they don't wish to.

> We see that beginning with *Associated Press, supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

7/ That principle applies equally to social media. Platforms, like newspapers, have a First Amendment right to make editorial decisions about what may be published—or who may publish—using their platform, whether or not they do it "consistently." The decision is theirs to make.

8/ Related: in 2019, a unanimous 4th Circuit panel upheld an injunction prohibiting Maryland from enforcing a law regulating political adverts in media.

Like this bill, that law singled out campaign-based speech for special treatment, and required media to publish disclosures.

9/ The 4th Circuit opinion called the Maryland bill a "compendium of traditional First Amendment infirmities," eviscerating it for being a content-based regulation and compelling speech: https://t.co/aZhbqmP8Vd

> First, the Act is a content-based regulation on speech. It singles out one particular topic of speech—campaign-related speech—for regulatory attention. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). The lodestar for the First Amendment is the preservation of the marketplace of ideas. *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991). When the government seeks to favor or disfavor certain subject-matter because of the topic at issue, it compromises the integrity of our national discourse and risks bringing about a form of soft censorship. For this reason, content-based laws are "presumptively unconstitutional," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016), the presumption being necessary to ensure that the marketplace of ideas does not deteriorate into a forum for the subjects of state-favored speech.

10/ The panel's opinion also keenly noted that this type of regulation likely ends with less speech, not more. Beyond not carrying political ads (as Twitter has decided), platforms could just give politicians the boot in general.

> Publishers). Faced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?

11/ This bill will certainly meet the same end. The First Amendment does not permit the government to tell media what they must say, or allow others to say on their platform. Those decisions are left to society to debate, and market forces to decide—not for the law to impose.

12/ The constitutional smackdown this bill faces is not going to be helped by the last-minute amendment from Ray Rodrigues exempting services run by owners of a theme park (read: Disney). You really didn't need to flush twice to get your strict scrutiny argument down the toilet.

The term does not include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in s. 509.013.

13/ Even if the bill wasn't unconstitutional, it would still be preempted by #Section230, which expressly prohibits any state-level liability that is inconsistent with 230's protection:

(3) STATE LAW
Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

14/ Section 230 prohibits imposing liability on websites for content moderation decisions, including the exercise of traditional editorial functions, which is exactly what this bill tries to do.

https://t.co/LazNzy5DYs

computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.

15/ The Florida legislature acknowledges as much in the bill's text, which is either an explicit admission that the bill is purely performative, or a weak-as-hell attempt at a savings clause. Might as well have written "this bill may not be enforced."

(9) This section 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.

16/ DeSantis and his allies seem to think that by shrouding the bill in the language of "consumer protection," they can get around the problem. Here's what he told Jesse Watters:

> But Jesse, I think Big Tech is just very arrogant. I don't think that they think -- I think they think they're bulletproof because of Section 230, under Federal law, but what we did is we didn't touch Section 230 at the state level, because we can't, obviously, so we focused on a consumer fraud theory.
>
> So they have these Terms of Service, they apply it in ways that are discriminatory. And so if you're someone that's been censored unfairly, or deplatformed, we're giving you the ability to sue Big Tech yourself. And I don't think that that was something that they necessarily thought we would do, so we were able to get it through.

17/ But no matter how much lipstick you put on this pig, it still purports to impose liability for platforms' decisions to take down content or ban users. It doesn't matter what you call it; that's what it is and it's unquestionably preempted.

18/ And there's no question that this is the point of the bill. DeSantis himself gave up the game when he called it "the most ambitious reforms yet proposed for combating political censorship and deplatforming."

This is precisely the type of state law that #Section230 forbids.

19/ And If they didn't think you were going to do this, it's only because the "consumer protection" diversion is so incoherent that no court could ever be reasonably expected to fall for. It's the legislative equivalent of "I'm not touching you," but somehow even less successful.

20/ In short, what we have here is a bill that is unenforceable, unconstitutional, and a waste of taxpayers' time and money. It shouldn't have been passed, and it certainly should not be signed into law.