Subject: RE: S.B. 7072 Suggested Amendments
Date: Tuesday, January 18, 2022 at 8:53:40 PM Eastern Standard Time
From: Newman, Ryan
To: Treadwell, Ray

Just spoke with Stephanie. We're good. Thanks, Ray.

Ryan D. Newman
General Counsel
Office of Governor Ron DeSantis
[redacted]

From: Treadwell, Ray [redacted]@eog.myflorida.com>
Sent: Tuesday, January 18, 2022 8:38 PM
To: Newman, Ryan [redacted]@eog.myflorida.com>
Subject: Fwd: S.B. 7072 Suggested Amendments

FYI, here is the write-up from Cooper & Kirk several months ago.

From: Brian Barnes [redacted]@cooperkirk.com>
Sent: Friday, October 1, 2021 6:04:28 PM
To: Treadwell, Ray [redacted]@eog.myflorida.com>
Subject: S.B. 7072 Suggested Amendments

Dear Ray,

Below are some thoughts from the C&K team on ways the Legislature could consider amending S.B. 7072 to help strengthen our hand in court. We'd be happy to set up a call next week to discuss if that would be useful. I hope you have a nice weekend.

Brian

1. **Definition of social media platform.** As we've discussed, narrowing the number of companies regulated under the law's definition of "social media platform" is probably the single most worthwhile change the legislature could make. The narrowed definition should accomplish three goals: (1) allow the legislature to eliminate the "theme park" exception that has proven difficult to explain and defend and that would be unnecessary if Disney+ didn't otherwise qualify as a "social media platform"; (2) clarify that the law does not apply in the absurd situations Judge Hinkle asked

about during oral argument (i.e., make clear that the Home Depot website and company intranet systems are not "social media platforms"); and (3) strengthen our intermediate scrutiny argument by ensuring that there is a good fit between the scope of the problem the law addresses and the entities that are regulated by it (there's lots of strong evidence of inconsistent and arbitrary content moderation by Facebook, Twitter, and YouTube but very little such evidence for smaller platforms such as Etsy).

Texas's recently enacted social media law deals with these issues by limiting regulation to "an Internet website or application" that is (1) "open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images"; and (2) "has more than 50 million active users in the United States in a calendar month." We like the first part of this definition, which does a better job than Florida's law of identifying the entities that people generally understand to qualify as "social media platforms" without sweeping in a bunch of online retailers and other websites that don't really engage in problematic content moderation.

As for the 50 million monthly user cutoff that the Texas law uses, we want to do a little more work before making a recommendation. The legislative history associated with Texas's law doesn't explain where this number came from, and we think the most constitutionally defensible size threshold would correspond to the number of users a platform needs to benefit from strong network effects that make it hard for new competitors to enter the market. Whatever the precise user threshold the Legislature adopted under this approach, the aim would be to defend the new line in court by pointing to the economics literature on how network effects give larger platforms a chokehold over speech as well as the evidence we've already gathered that the larger platforms abuse their power by making lots of arbitrary content moderation decisions.

Finally, just to state the obvious, if the Legislature narrows the definition of social media platform, the industry is certain to argue that the narrowed definition impermissibly targets particular companies on account of their speech in violation of the Supreme Court's decision in *Minneapolis Star & Tribune v. Minnesota*. So to the maximum extent possible, supporters of the law in the Legislature should avoid suggesting that they are singling out particular companies because of their perceived bias. And however the Legislature redraws the line, it's critical for us to have a good explanation for why it's reasonable for the Legislature to treat companies regulated by this law as different from companies that aren't regulated.

2. **Addendum provision.** The statute's definition of "censorship" includes adding an addendum to user posts. This is probably the aspect of the law that is most difficult to defend on First Amendment grounds, and it has proven to be an enormous distraction that detracts from our much stronger First Amendment arguments in defense of other aspects of the law. There are colorable constitutional arguments that can be made in defense of limiting the ability of social media platforms to add addenda to user posts, and we don't think it's our place to second guess the Legislature's decision to try to regulate this. But to help contain the damage of an adverse First Amendment ruling, we

suggest removing language about addenda from the statute's definition of "censorship" and adding a new, standalone subsection that specifically addresses the limits on when a platform may add an addendum to a user's post. This way it would be crystal clear that the addendum regulations are severable from the rest of the law.

3. **Opting Out of Post-Prioritization.** We suggest a couple of technical changes to the provision of the law that lets users opt out of post-prioritization. *See* Fla. Stat. 501.2041(g). The aim of these suggested changes it to clarify what we understand the Legislature to have intended in the original law --

    a. First, we suggest adding language to Section 401.2041(g) that makes clear that when a user opts out of post-prioritization, material may be presented in either chronological or reverse-chronological order. The statute defines "post-prioritization" as putting posts "ahead of, below, or in a more or less prominent position" than other posts. Fla. Stat. 501.2041(e). As currently written, it's not entirely clear how material may be presented when a user opts out of having it presented "in a more or less prominent position" than other material.

    b. Second, also to clarify what we understand to have been the Legislature's intent in the original law, we would amend Section 401.2041(g) to clarify that the right to opt out of post-prioritization belongs to the user who views information, not the user who posts information. (Judge Hinkle raised a series of hypotheticals during the oral argument about a sexual predator posting dangerous material targeted at children and then opting out of having his posts subject to post-prioritization – this proposed change would eliminate that concern).

4. **Application of the statute outside of Florida**. We've spent most of our time so far fighting over Section 230 and the First Amendment, but there's a colorable argument that Florida's law violates the dormant commerce clause by unduly burdening platforms' conduct in other states. The definition of "user" limits the law's application to users who "reside[] in or [are] domiciled in" Florida, but nothing in the law clearly prevents it from being applied when a Florida resident is traveling out-of-state. There are also administrability concerns (important to the dormant commerce clause analysis) over whether platforms always know that a particular user is domiciled in Florida. To address these issues, we suggest adding a provision that makes clear that the law's regulations only apply when a platform knows or should know that material is being viewed by a user who is physically located in Florida.