



Internet Communications Utilities Regulation

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MEMORANDUM

Date: July 12, 2021

Subject: Texas SB 5 – 1st Special Session

Attachments:

1. Florida SB 7072
2. Preliminary Injunction, *Netchoice, et al v. Moddy et al*, No 4:21-cv-00220-RH-MAF, (N.D. Fla, June 30, 2021)
3. Volokh Draft, Social Media Platforms as Common Carriers?, (Jul. 25, 2021)
4. Volokh Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment? (Jan. 23, 2021)

This memorandum is presented on behalf of Golden Frog, GmbH and Giganews, Inc., two Internet companies with significant ties to Texas.¹ We will address four issues that support passage of SB 5 (Texas – 1st Special Session). First, we will explain why SB 5's finding that "social media platforms" are "akin to common carriers" is premised on sound legal, factual and policy considerations. Second, we will contrast SB 5 and the Florida "social media providers" bill recently enjoined by a federal district court and demonstrate that SB 5 does not suffer the same defects identified by that court. Third, we will show that SB 5 does not violate social media platforms' First Amendment rights, especially given that they do indeed meet the common law common carriage test. Finally, and fourth, we will relate a plausible argument for the proposition that 47 U.S.C. §230 cannot preempt state action protecting users' speech on social media platforms.

1. Social media platforms are common law common carriers.

"Common law" common carriage² is a legal status that arose under tort laws and is based on public policy. Typically common carriage law applies where the provision of

¹ Golden Frog, GmbH is chartered in Switzerland but maintains its main office in Austin. Giganews, Inc. is a Texas corporation, also with its main office in Austin.

² A common law common carrier can simultaneously or independently be deemed a common carrier as a matter of statute or by virtue of an administrative rule, or it can be purposefully excluded from regulatory coverage. In other words statutory definitions may or may not exactly track the common law. For example, the federal communications statutory definition of "telecommunications carrier" contains a second criterion not present in the common law, namely that "the system be such that customers transmit intelligence of their own design and choosing." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (1976) ("NARUC II"). The FCC initially added this criterion as part of an *ad hoc* rule in the 1970s, but the 1996 amendments to the federal Communications Act expressly added this criterion for statutory purposes through what is now the 47 U.S.C. §153(50) definition of "telecommunications." So it is possible for an entity to be a common carrier under the common law (or a state regulatory regime), but not a statutory telecommunications (common) carrier for

a service (bailment of property, or transport or caretaking of people) involves matters of public import and there is opportunity for economic or other exploitation. Texas, for example, tends to follow traditional common law common carrier principles in matters like transportation. See, e.g., *Via Metro. Transit v. Meck*, 620 S.W.3d 356 (Tex. 2020) citing Tex. Transp. Code § 5.001(a)(1) ("the duties and liabilities of a carrier in this state and the remedies against the carrier are the same as prescribed by the common law").

The concept goes back to the Roman Empire and extends to any number of endeavors, including transportation (shipping, rail, airlines, pipelines, taxis, information networks), smiths, surgeons and innkeepers. The class now includes even amusement parks. "Common" means "general" or "open to serving the public."³ All bear a common attribute: a service of *quasi*-public character with an undertaking or "holding out" to indifferently serve on uniform terms and conditions. See, e.g., *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 640-642 (D.C. Cir. 1976) cert. den, 425 U.S. 992 ("NARUC I"); *NARUC II*, *supra* and cases cited therein; see also more generally https://www.cybertelecom.org/notes/cc_history.htm.⁴

FCC purposes.

³ The original nomenclature referred to a "common" or "public calling." "The term common calling meant that the practitioner of an occupation (1) performed the occupation as a means of livelihood and (2) held himself out to serve the public at large, as distinct from performing the services exclusively under private arrangements" Sallyanne Payton (1981), *The Duty of a Public Utility to Serve in the Presence of New Competition*, in APPLICATIONS OF ECONOMIC PRINCIPLES IN PUBLIC UTILITY INDUSTRIES (Werner Sichel & Thomas G. Gies, eds.), University of Michigan. pp. 121-152, at p. 147 n. 1. The common law tort obligations of public callings remained for these kinds of businesses, even with the rise of the common law of contract that came to govern most general business transactions. The duty to serve had come to be "justified on the grounds of public necessity" or public policy. Charles K. Burdick (1911), *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUMBIA LAW REV. at 528. "Thus, certain occupations, because they did things that were public in nature...were under a special set of obligations that included the duty to serve all impartially and adequately" Alan Stone (1991), *PUBLIC SERVICE LIBERALISM: TELECOMMUNICATIONS AND TRANSITIONS IN PUBLIC POLICY*, Princeton, NJ: Princeton University Press, p. 30. "Before the arrival of regulatory agencies, policies for public utilities were made by judges employing an evolving common law and legislators promulgating rules in new situations" Stone, p. 26. Thus, common law common carriage was primarily a state-based evolution through state courts and state legislatures promulgating rules in new situations. See Stone, p. 26. The federal system did not develop a corollary "common law" and indeed entered the regulatory sphere relatively late in the game beginning in the late 1880s with railroads and then accelerated in the early to mid-1900s in other industries that involved significant interstate commerce. The first federal regulation of interstate communications arose in 1910, through amendments that delegated regulatory responsibility over interstate telegraphy and telephony to the Interstate Commerce Commission. This jurisdiction was transferred to the Federal Communications Commission in 1934.

⁴ The precedent for both common law and statutory common carriers provides that an entity can use the same infrastructure to provide both common carrier and private carrier services. A good example in the statutory realm is that mobile telephony providers are common carriers with regard to their interconnected mobile voice operations but are private (non-common carrier) for their "data" service operations. See 47 U.S.C. §332(c)(1)(A) ("A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier...")(emphasis added); *NARUC II*, 533 F.2d at 608 ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.")



Not all businesses are subject to common carrier treatment; only those where the endeavor is affected with the public interest, in that it has wide social or economic importance, in other words, a service of public importance or necessity. SB 5 properly finds that social media platforms “are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States.”

Significantly, common law common carriage status also turns on the type or function of the service being rendered, not the intent of the offeror of the service. As noted, it typically involves some kind of bailment – the entrustment of property or a person to another’s custody and care. Many, but not all “common carrier” endeavors also involve what are known as “network effects”: enhanced economies of scale and benefits as additional users join. The incremental cost of adding a new participant is far outweighed by the practical benefit to the existing and potential user base. Put simply, as the network gets larger it has more attraction to others and therefore competitive advantages over smaller potential competitors. But notably, one thing that is not materially pertinent is the existence or exertion of market power by any individual participant. Common carriage principles are routinely applied even to those operating in a robustly competitive market. *NARUC I*, 525 F.2d at 641 (“Subsequently, legislation has been upheld imposing stringent regulations of various types on entities found to be affected with a public character, even where nothing approaching monopoly power exists. In such cases as the Motor Carrier Act of 1935, relatively competitive carrying industries have been subjected to entry, rate and equipment regulations on the basis of the quasi-public character of the activities involved.”)

Common law common carriage has three aspects. First, there is a substantive requirement that the service or function be offered on nondiscriminatory (and often but not always just and reasonable) terms, prices and conditions. The second relates to standard of care for the property involved. The third is merely a recognition that the bailor owns or at least has a property interest in the item subject to the bailment and has continuing rights as the item moves through the service chain.

Finally, it is important to note that common law common carriage routinely operates outside of state or federal administrative agency economic regulation. While there is a considerable variety of regulated, statutory, common carriers that are subjected to economic or price regulation there are many common carrier endeavors that are still immune from economic regulation and operate in an unsupervised market. The only oversight comes from the courts. This is not to say, however, that a state legislature cannot impose restrictions through statute. They often do, by providing consumer protections very similar to those in SB 5, Section 2 (through new provisions in the Texas Business and Commerce Code). In this vein the legislature is merely recognizing an imbalance in negotiating power between individual consumers and the providers and ensuring the contract between user and provider is not adhesive. Such statutes typically afford or preserve basic and reasonable disclosure obligations or prohibit certain actions deemed to be unfair or deceptive trade practices.

This is not a hard question at all for those who understand the long history of and policy reasons for the common carrier concept, and how it has evolved and persisted despite extraordinary technological and societal changes since it was first conceived in the Roman times. The firms covered by the SB 5 definition of “social media platform”



uniformly meet the traditional common law test for common carriage. The endeavor has become affected with the public interest. These providers do “hold out” to indifferently serve: They do not negotiate individual contracts and do not have a practice of making “individualized decisions in particular cases whether and on what terms to deal.” *NARUC I*, 525 F.2d at 641, *citing Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739-40 (5th Cir. 1960); *NARUC II*, 525 F.2d at 641. They consistently refuse to even discuss any potential negotiated changes to their Terms of Service or other policies, which are basically clickwrap, but they will accept and service any applicant that does agree to their non-negotiable terms.

The SB 5 finding that social media platforms are “akin to common carriers” is well justified as a matter of fact, policy and law. The bill *does not* involuntarily force them to assume common carriage status; it merely recognizes **a status they already possess** by virtue of the functions they perform and the nature of the services they provide.⁵

2. SB 5 is different from the Florida “social media providers” bill recently enjoined in part by a federal district court and does not suffer the same defects identified by that court.

A federal district court recently issued a preliminary injunction prohibiting enforcement of certain portions of Florida SB 7072,⁶ which also addressed “social media platforms.” There are legitimate reasons to doubt whether the district court decision will survive appeal to the Eleventh Circuit or Supreme Court given the unduly harsh analysis of and holdings on at least some of the Florida provisions. But we need not extensively address most of potential errors in the district court’s treatment since most, if not all, of the perceived First Amendment putative defects described by that court are absent from SB 5.⁷

The Florida district court specifically identified certain perceived defects in Florida SB 7072 that led to adverse First Amendment findings. First, the court noted an “under-

⁵ See *NARUC I*, 525 F.2d at 641, *citing Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12, 48 S.Ct. 41, 42, 72 L.Ed. 241 (1927) and *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647-48 (5th Cir. 1967) (“It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.”); 525 F.2d at 644, *citing United States v. California*, 297 U.S. 175, 181 (1936); *Lone Star Steel*, *supra*, 380 F.2d at 648 (A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”); *NARUC II*, at , *citing Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927) and *United States v. California*, *supra* (“it has long been held that ‘a common carrier is such by virtue of his occupation,’ that is by the actual activities he carries on.”)

⁶ Florida SB 7072 and the district court preliminary injunction decision are contained in Attachments 1 and 2 to this memo.

⁷ The district court held that the Florida statute is preempted in part by 47 U.S.C. §230(c)(2) and (e)(3). This holding is debatable, especially given the potential argument addressed below that Section 230’s preemption is itself unconstitutional in some respects under a proper and full First Amendment analysis. But even if that holding is correct and can be applied to any part of SB 5, the SB 5 provision inserting Tex.Civ.Prac. & Rem. Code §143A.004 and the severance and savings clauses in SB 5 Section 4 protect all remaining provisions.



inclusiveness” problem: the bill excluded many firms operating in what the court deemed to be the same functional market,⁸ including, most famously, all Disney-related endeavors. Opinion (Op.) pp. 4-5. Second, the bill specifically treated and gave protection to candidates for elective office, and “journalistic enterprises” and the court deemed these measures problematic for several reasons. Op. pp. 6-10. The court also identified some definitions and standards that were vague or internally inconsistent. Op. pp. 11-12, 28-29. These perceived defects do not appear in SB 5.

The district court properly held that social media platforms have First Amendment rights. This is not a debatable issue: they do have First Amendment rights; the question is how they manifest in relation to the specific activities regulated by SB 5 and in particular how it pertains to user speech the bill protects. But the court determined that so-called “strict scrutiny” applied, largely because it treated the platforms like publishers and also because the Florida legislation both prohibited platforms from making their own expressions and required them to speak in some circumstances. Op. p. 23. Once again, SB 5 does not contain these features. Nothing in SB 5 requires “platform speech” or prohibits any “platform speech.” They are free to express any self-created message they wish, or refrain from expressing all they wish. They can expressly disclaim association or approval of any content they host. Nor does SB 5 compel any platform to “reorder” speech Op. p. 23. SB 5 merely prohibits the platform from refusing to host certain other persons’ speech because of viewpoint or location, and that is a distinction that makes a material difference.

In the particular circumstance of “hosting” others’ speech the analogy is not to newspapers, broadcasting and publishing, as in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) or *FCC v. Midwest Video*, 440 U.S. 689 (1979). Rather one must apply public forum, public mall and conceptually similar “common carrier” cases dealing with “host” functions. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) and *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); *Carlin Communications v. Mountain St. Tel. & Tel.*, 827 F.2d 1291, 1295 (9th Cir., 1987), *cert. den.*, 485 U.S. 1029 (1988) (noting that traditional public utility law does not compel a right of access but observing that a state could “of course, decide to make the phone company operate the 976 network as a content-neutral public forum open to any and all speakers.”). Similarly, the precedent on cable “must carry” laws requiring cable television systems to dedicate some of their channels to local broadcast television stations also greatly inform us on proper treatment for First Amendment purposes. *Turner Broadcasting System v. FCC*, 520 U.S. 180, 224–25 (1994).⁹ This is also consistent with the Communications Act statutory treatment. 47 U.S.C. §153(11) specifically prohibits common carrier regulation over

⁸ The court appears to have crafted its own definition of “social media provider” that it then applied for unclear purposes. Op. pp. 4-5. The court’s formulation does not match with, for example, the type of service or product market definition that is typically used for anti-trust purposes. It is functional rather than an attempt to discern services that are substitutable with each other.

⁹ The Supreme Court held the must-carry provisions were content-neutral restrictions on speech, subject to intermediate First Amendment scrutiny. The Court also concluded that the must-carry provisions were consistent with the First Amendment because “must-carry” furthered important governmental interest and did not burden substantially more speech than necessary to further those interests.



broadcasting, and §326 denies “censorship” powers over radio communications, but it expressly provides for state and federal regulation over wireline and wireless communications services other than broadcasting, and it is clear that a common carrier can be required to host content and not discriminate based on user identity, viewpoint or other legislatively-identified suspect classifications.¹⁰ See, e.g., *Mitchell v. United States*, 313 U.S. 80, 94–95 (1941) (approving statute that banned race discrimination by common carriers); *Carlin Communications*, *supra*.

The district court characterized the Florida statutes as being “about as content-based as it gets.” Op. p. 24. This was one of the reasons it applied strict scrutiny. SB 5, however, does not specifically identify candidates or journalistic enterprises for extra protection. Indeed, it is scrupulously viewpoint-neutral. It is true that SB 5 does – like Florida SB 7072 “prohibit[] a platform from making a decision based on content” Op. p. 24. But here the district court simply errs when it claims doing so is “itself a content-based decision” that triggers strict scrutiny. To the contrary, it is well established that while states cannot impose, grant or withhold special restrictions or protections based on the type of content it **can** require rigorous viewpoint neutrality practices for *quasi*-public forums and special venues like public malls. More important, a state can require viewpoint neutrality for common carrier service; indeed such nondiscrimination is one of the essential characteristics of common carriers.

3. SB 5 does not violate social media platforms’ First Amendment rights.

Eugene Volokh, a noted Constitutional Law scholar with deep experience in this area¹¹ recently posted a draft article on this topic. Volokh Draft, Social Media Platforms as Common Carriers?, (Jul. 25, 2021) (Attachment 3).¹² As Professor Volokh notes, the

¹⁰ The citation to *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1996) is also inapt, as the district court ultimately recognizes on Op. p. 21, since user posting is “invisible to the provider.” The court’s later assertion that social media platforms are exercising “editorial judgment” with regard to user posting is quite revealing, because absent claimed §230 preemption (which is arguable, to say the least) the platforms would be held to account for those postings in the same manner as publishers. Further, the utility was indeed occupying a separate publisher role in its newsletter, and that endeavor was not an essential part of the other “common carrier” aspect of its electric utility service. Regardless, the district court did not analyze the Florida statute from a “common carrier” perspective even though the statute makes reference to that status and the state raised it in briefing. Op. p. 19.

¹¹ The much-discussed recent “concurrence” relating to reassessment of §230 and potential common carriage treatment by Supreme Court Justice Thomas in *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220 (2021) cites to an earlier Volokh post See Volokh, Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment? The Volokh Conspiracy, Reason, Jan. 23, 2021. That post is also attached to this memo.

¹² While we heavily rely on the Volokh First Amendment analysis we do disagree with the note 12 contention in the paper that social media platforms “aren’t common carriers under some traditional definitions of the term because they don’t hold themselves out as ‘neutral conduits of information.’” Volokh made the mistake of relying other authors’ misconstruction of FCC precedent for this proposition. As noted above the FCC at first added the “neutral conduit” criterion to the definition of “Communications Common Carrier” through an *ad hoc* rule in the 1970s. Congress later inserted that criterion to the definition of “telecommunications” in 47 U.S.C. §153(11) but notably not the definition of “common carrier” in §153(11). So Congress subtly changed the terminology and outcome from that obtaining under the



appropriate scrutiny for a legislative mandate of viewpoint neutrality in the context of platforms' hosting other's speech is some form of intermediate scrutiny. The Florida court's selection of *Tornillo* and application of strict scrutiny would be inappropriate for SB 5. Common carrier treatment with a nondiscrimination hosting obligation will also pass First Amendment muster under intermediate scrutiny. Volokh pp. 34-57. In other words and in plain English, there is "no First Amendment right not to host." *Id.*

Professor Volokh makes a compelling case for "not particularly demanding scrutiny" for imposing "viewpoint-neutral" hosting requirements. *Id.* pp. 57-59, 65-67. He also explains why obligations relating to platforms' "subscription" and "directory" functions involve more complicated considerations but will likely receive the same level of review and ultimate approval. *Id.* pp. 59-64. Volokh draws the line, however, with regard to platform "news" functions, and we agree. SB 5, however, does not address news functions so we need not worry about that issue.

Finally, Professor Volokh provides a good response to the Florida district court's fixation on public statements by Florida officials relating to partisan concerns about platform hostility to certain viewpoints. Op. pp. 24-26; Social Media Platforms, pp. 67-70. Simply put, the Florida district court failed to consider and apply *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support") and *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) ("a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics"). Social Media Platforms at 68-70.

In any event, as noted, SB 5 has no viewpoint discrimination; indeed the entire purpose is to prohibit viewpoint discrimination. Thus, the cases cited by the Florida district court (*Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983)) actually support the viability of SB 5. Nor does SB 5 in any manner "discriminate between speakers" so there is no "tell for content discrimination." *C.f.*, Op. pp. 25-26, citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

There is one area of overlap between Florida SB 7072 and SB 5: both target only large providers, and exclude smaller "competitors." Florida SB 7072 covered only those platforms with 100 million monthly global participants or \$100 million in annual revenues. SB 5 covers platforms with 65 million active users in the United States. The district court held this was a form of prohibited discrimination between speakers. Op. p. 25. Professor Volokh also gently suggests any regulation should apply to all social media platforms. Social Media Platforms at 58. Both cite to *Minneapolis Star & Trib. Co.*

FCC's post 1970s precedent, largely under the *Computer Inquiries* regime. There are many reasons for this change and it would take too long to explain them, but to be clear: **nothing** in the current Communications Act definition of "common carrier" imposes the "neutral conduit" criterion. It is an element of "telecommunications" but not "common carrier" for purposes of the Communications Act. Thus one must be a neutral conduit and a common carrier to be a "telecommunications carrier" under 47 U.S.C. §153(51). Being a neutral conduit was never a conclusive criterion under the common law in any event.



v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983). The district court also mentions *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

These cases do not, however, directly address the kind of line-drawing used in both statutes. Statutes routinely specifically isolate a specific industry for regulation and common carriers are a common target, largely because they present unique issues not shared with other business endeavors. Similarly legislatures routinely engage in line-drawing relating to entity size, and this can be reasonable for any number of reasons. The primary problem in *Minneapolis Star & Trib. Co.* and *Arkansas Writers' Project* was that the state could not present a reasonable justification for the particular lines that were drawn and there was a basis to infer the actual purpose was to punish or inhibit speech the state did not favor. If there is a satisfactory basis for including only very large platforms that is not related to the speech-permitting purpose then these cases do not present a problem.

We note, first, that SB 5 does not in any manner inhibit the platforms' own speech. They are free to say what they wish and suffer no penalty for it. The line drawing purpose likely relates to a determination that smaller platforms have a much lesser effect on discourse in general, and the regulatory burdens might themselves become a barrier to entry. If a new entrant or current small provider reaches the statutory threshold then it will be covered by the bill.

Second, it is important to recognize that regulatory regimes routinely provide for lesser regulatory burdens on small providers. To take a single example, small providers and new entrants in the telecommunications service market have a much lower regulatory burden than those deemed "dominant." They are still statutory common carriers but receive more favorable treatment on account of size. See 47 C.F.R. Part 61, Subparts B-E; 47 C.F.R. §§63.10, 63.13. The distinctions have a reasonable basis, including regulatory efficiency and administrability and identifying and then properly treating those providers that require a higher level of duty simply because of size and scope and therefore impact on society and the market itself. These kinds of lines are defensible based on a legislative judgment that the costs outweigh the benefits with regard to smaller firms. Stated another way, the legislature can reasonably find that smaller providers that operate in the same market are not in fact "like" the larger providers in terms of social import, market impact and the object sought: here viewpoint neutrality by entities that are significantly affected with the public interest, do indeed have wide social or economic importance, and are in fact services of public importance or necessity.

So long as the legislative history provides a reasonable basis for the lines that are drawn and the basis has nothing to do with illicit purposes the courts are likely to accept the distinction. Here, the statutory terms reveal no illicit purposes. They do not target a specific type of content (other than it must be lawful) or viewpoint. The line drawing here is necessary and directly related to the harms identified and sought to be remedied through the consumer and user protections the bill supplies. In sum, the size limitation is not unreasonable discrimination.



4. 47 U.S.C. §230 cannot completely preempt all state action protecting users' speech on social media platforms.

SB 5 was expressly written to take into account that 47 U.S.C. §230(c)(2) and (e)(3) at least arguably preempt some of the provisions in the bill to the extent they impose "liability." The question is whether the federal law does, or can, preempt any and all of the "liability" provisions in the bill.

We first note that §230(c)(2) is not an absolute immunity provision. It applies only to "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." Thus SB 5 can target – and impose liability – for any social media platform's "action" that was not "voluntary" or was not "taken in good faith" or there was not an "access restriction" to "material" the platform "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Specific complaints will require fact-based inquiries into each component on a case-by-case basis. No facial challenge to the legislation will completely eliminate all provisions because, for example, there may be legitimate questions whether the "action" was indeed "voluntary" and taken "in good faith."

We cannot comment on the factual legitimacy of recent claims regarding platform censorship but note that some complainants have asserted that a platform acted at the behest of certain government actors. If and to the extent these claims are correct then a plausible argument could be made that the platform's action was not, in fact, "voluntary" and the plain text of §230(c)(2) would permit "liability." Similarly, there have been claims that the platforms have restricted access based on undisclosed partisan or other political concerns.¹³ One could plausibly argue that such reasons cannot meet the statutory "good faith" test¹⁴ since the access restriction flows from malice to a particular person or viewpoint, not pure motive relating to what might fairly be deemed "objectionable." If and to the extent one does show either involuntariness or lack of good faith then §230 does not bar liability and therefore does not preempt SB 5. *See Moving & Storage, Inc. v. Panayotov*, No. 12-12262-GAO, 2014 U.S. Dist. LEXIS 31546, at *7 (D. Mass. Mar. 12, 2014) (denying motion to dismiss because plaintiffs adequately alleged bad faith); *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019) ("We must today recognize that interpreting the statute to give providers unbridled discretion to block online content would...enable and potentially motivate internet-service providers to act for their own, and not the public, benefit.") *cert. den.* 141 S.Ct. 13 (2020); *see also* Thomas Concurring Statement (*dubitante*).

There is another reason why §230 may not be the high hurdle some claim. Specifically, there are plausible arguments that §230 itself fails a proper First

¹³ We emphasize that we are interpreting the plain terms of §230, not at this point addressing whether the First Amendment might protect the action. That is addressed above in Section 3.

¹⁴ "Good faith is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others. It derives from the translation of the Latin term *bona fide*, and courts use the two terms interchangeably." <https://legal-dictionary.thefreedictionary.com/good+faith>.



Amendment test. Professor Volokh has noted that “Questions under the First Amendment are presented when Congress preempts state law that protects speech against private action, because the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.” See Volokh Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment? (Jan. 23, 2021) (attached).¹⁵ Professor Volokh notes that §230 is itself subject to First Amendment analysis, especially in the context where it would preempt a state law protecting speech. While he does not firmly conclude that §230 is invalid, he notes it would likely be subject to some form of intermediate scrutiny – just like the platforms’ own claim of First Amendment protection. And, this argument can (and should) be raised as a defense in any challenge to SB 5 based on §230 preemption. In other words the defense would be that §230 itself violates the First Amendment and therefore cannot lawfully preempt the state law.

Section 230 “immunity” was not created for the sole purpose of protecting interactive computer services from liability under proper circumstances. The main goal was to ensure that the Internet facilitated “user control” and access to “informational resources” (§230(a)(1), (2), (b)(3)), allow for parental control over “children’s access to objectionable or inappropriate online material” (§230(b)(4)) and provide a “true diversity of political discourse” (§230(a)(3)). The immunity for providers was deemed necessary because it would enhance individual choice and utility, not for the online providers’ own benefit and to the detriment of society. Sadly, this provision has been misused and misinterpreted and Congress’ original goals are no longer served. The states have a legitimate role in protecting their own citizens, and it is a proper activity to enact statutory measures like SB 5 that correct abuses that improperly claim protection under §230.

The Legislature should promptly pass, and the Governor should quickly sign, SB 5. If the providers want to challenge it they know how to get to the courthouse door. But they should be careful about what they do. It is far past time for a clear (and ultimate) judicial statement of the scope of §230 immunity in the face of legitimate state efforts to protect their citizens’ ability to meaningfully engage in speech-related activities in the today’s digital network driven society. The Supreme Court may well view this bill and any case about it as a good vehicle to resolve the controversy. We suspect it will not end well for those who try to employ §230 as a sword rather than the limited shield it was intended to be and silence millions of citizens or use their immense power as a tool to directly control and limit public discourse on the many weighty issues of the day.

¹⁵ This is the Volokh blog post mentioned by Justice Thomas in his now-famous *dubitante* in *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220 (2021).

