



June 11, 2024

The Honorable Tom Umberg
Chair, Judiciary Committee
California State Senate
1021 O Street Suite 6530
Sacramento, CA 95814

Re: AB 3172

Dear Chair Umberg and members of the committee:

Chamber of Progress – a tech industry association supporting public policies to build a more inclusive country in which all people benefit from technological leaps writes to urge you to **oppose AB 3172**, as its overly broad language thwarts legally protected speech for both minors and adults through content overmoderation – disproportionately harming marginalized communities – and invites a protracted and unwinnable legal battle as the bill is preempted by federal law.

We remain committed to advocating for policies prioritizing young people's online safety. However, we oppose this bill for the aforementioned reasons. Therefore, we are also sharing the attached legal analysis to further elaborate on our concerns.

De facto age verification and content over moderation threaten legally protected speech

As drafted, AB 3172 presents a significant challenge with its overly broad language and obscurely defined parameters. Covered platforms would be held “liable for statutory damages” and “financially responsible for an injury” if the platform “fails to exercise ordinary care or skill toward a child” without clearly defining the standard of care. To avoid potential litigation, covered platforms face two options: implement age verification or excessively moderate content, both of which would restrict legally protected speech.

Many platforms will see this as a de-facto age verification requirement, which the courts have repeatedly rejected.¹ This will significantly infringe on individual privacy and deter

¹ See, e.g., *ACLU v. Mukasey*, 534 F.3d 181, 192 (3d Cir. 2008); *NetChoice, LLC v. Griffin*, No. 5:23-CV05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023).

people from accessing protected speech. Ascertaining a user's age will require more data, contrary to data minimization efforts. Many adult users reasonably would prefer not to share their identifying information with online services - creating an unpleasant dilemma for adult users: turn over sensitive personal data to access protected speech online or forgo the enjoyment of that online service entirely.

Alternatively, the bill would require platforms to arbitrate appropriate content for children of all ages and circumstances. Platforms would face difficult choices regarding what types of content that “injury” might apply to, in fear of potential litigation, resulting in excessive moderation and hesitation to deploy new features – including those aimed at improving online experiences for young people.

Both options would limit access to constitutionally protected speech for both adults and minors, likely triggering lengthy legal disputes.

AB 3172 invites litigation as it raises major First Amendment and preemption issues

AB 3172 stands in direct contradiction to established legal precedent. The First Amendment stringently restricts governmental interference with the editorial discretion of private entities and the rights of individuals, regardless of age, to access lawful expression. AB 3172 unequivocally infringes upon these fundamental freedoms through its content-based and speaker-based restrictions. Moreover, similar legislative efforts to restrict minors' access to protected speech have been met with significant judicial skepticism. Courts have consistently demanded a compelling justification for such measures alongside concrete evidence of their necessity and effectiveness in mitigating harm. Recent rulings from courts in Arkansas,² California,³ and Ohio⁴ underscore the principle that regulatory measures impacting the core editorial and curatorial functions of social media companies, even when intended to safeguard young users, are subject to rigorous constitutional scrutiny under the First Amendment – and the failure to meet this high bar of constitutional scrutiny renders these attempts legally untenable.

Moreover, Section 230 of the Communications Act of 1934 preempts this bill by holding platforms liable for the speech of third parties on the platform.⁵ Congress established this framework to foster the development of Internet services and sustain a “vibrant and

² See *NetChoice, LLC v. Griffin*, No. 5:23-cv-05105 (W.D. Ark. filed June 29, 2023). “If the State’s purpose is to restrict access to constitutionally protected speech based on the State’s belief that such speech is harmful to minors, then arguably Act 689 would be subject to strict scrutiny.”

³ See *NetChoice, LLC v. Bonta*, No. 5:2022cv08861 (N.D. Cal. 2023). “[T]he Act’s restrictions on the functionality of the services limit the availability and use of information by certain speakers and for certain purposes and thus regulate[s] protected speech.”

⁴ See *NetChoice, LLC v. Yost*, 2024 WL104336 (S.D. Ohio Jan. 9, 2024). “As the [Supreme] Court explained, ‘[s]uch laws do not enforce parental authority over children’s speech and religion; they impose governmental authority, subject only to a parental veto.’ The Act appears to be exactly that sort of law. And like other content-based regulations, these sorts of laws are subject to strict scrutiny.”

⁵ See 47 U.S.C. § 230(c)(1).

competitive free market” online free from federal or state regulation. Thus, the bill would likely also fail on preemption grounds.

AB 3172’s vague standard violates the Fourteenth Amendment

The "responsibility of ordinary care and skill to a child" is excessively vague, given the diverse range of opinions regarding appropriate content for children of varying ages. Faced with the risk of a deluge of litigation seeking high payments based on unclear standards, websites will be forced to strip any content or features that could be possibly considered inappropriate (or risk severe penalties), which is precisely the sort of “chilling” that the Supreme Court’s vagueness doctrine is intended to prevent.

This bill will have a particularly negative impact on marginalized communities

Furthermore, not all children feel accepted in their own homes, particularly for LGBTQ+ youth in unsupportive households seeking access to legally-protected queer or gender-affirming resources.

AB 3172 presupposes a strict causal relationship between social media platforms and “injuries,” yet scientific research on this matter is far from conclusive and is quite mixed.^{6,7} This assumption ignores the many benefits that social media offers young people, especially historically marginalized communities like LGBTQ+ youth, youth of color, and youth with disabilities, who often rely on digital spaces like social media as their primary avenue of accessing mental health support or other resources.⁸

LGBTQ+ youth, especially those who may live in communities hostile to their identity, see social media as a crucial tool to connect with LGBTQ+ groups, access content from people's shared experiences, maintain positive connections, and reduce perceived isolation.⁹ LGBTQ+ youth use online platforms to seek emotional support, search for information about their identities, and find communities that accept them when their own

⁶ See “Is Social Media Addictive? Here’s What the Science Says”:

<https://www.nytimes.com/2023/10/25/health/social-media-addiction.html>

⁷ Candice L. Odgers and Michaeline R. Jensen, “Annual Research Review: Adolescent Mental Health in the Digital Age: Facts, Fears, and Future Directions,” *Journal of Child Psychology and Psychiatry* 61, no. 3 (January 17, 2020): 336–48, <https://doi.org/10.1111/jcpp.13190>.

⁸ Claudette Pretorius, Derek Chambers, and David Coyle, “Young People, Online Help-Seeking and Mental Health Difficulties: A Systematic Narrative Review (Preprint),” *Journal of Medical Internet Research* 21, no. 11 (March 1, 2019), <https://doi.org/10.2196/13873>.

⁹ César G. Escobar-Viera et al., “Examining Social Media Experiences and Attitudes toward Technology-Based Interventions for Reducing Social Isolation among LGBTQ Youth Living in Rural United States: An Online Qualitative Study,” *Frontiers in Digital Health* 4 (June 27, 2022), <https://doi.org/10.3389/fdgth.2022.900695>.

parents do not.¹⁰ In fact, only 38% of LGBTQ youth report living in affirming households, while 60% reported finding online spaces to be supportive.¹¹

Through its ambiguous mandates on covered platforms, AB 3172 would limit and potentially cut off access for individuals under eighteen, disproportionately impacting marginalized communities, exacerbating disparities in access to vital resources, and ultimately causing more harm than good.

As such, AB 3172 would chill constitutionally protected speech and hinder the open exchange of ideas vital to a free and democratic society. Furthermore, it is likely unconstitutional under the First and Fourteenth Amendments. For these reasons, we urge you to **oppose AB 3172**.

Please review the attached legal analysis, which provides further insight into our legal concerns.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Robert Singleton', written in a cursive style.

Robert Singleton
Director of Policy and Public Affairs, California and US West
Chamber of Progress

¹⁰ Michele L. Ybarra et al., “Online Social Support as a Buffer against Online and Offline Peer and Sexual Victimization among U.S. LGBT and Non-LGBT Youth,” *Child Abuse & Neglect* 39, no. 39 (January 2015). 123–36, <https://doi.org/10.1016/j.chiabu.2014.08.006>.

¹¹ See “2023 U.S. National Survey on the Mental Health of LGBTQ Young People”: <https://www.thetrevorproject.org/survey-2023/>



MEMORANDUM

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TO Jess Miers,
Senior Legal Advocacy Counsel

ORGANIZATION Chamber of Progress

FROM Mark W. Brennan
J. Ryan Thompson
Thomas Veitch

TELEPHONE 202-637-6409

DATE May 29, 2024

By Electronic Mail
Privileged & Confidential

SUBJECT CA AB 3172: Example Legal Challenges

Viable legal challenges could be brought against California AB 3172, as currently drafted. For example, the bill appears to violate the First and Fourteenth Amendments to the U.S. Constitution because (1) it burdens access to legal speech for adults and minors, (2) uses content-based distinctions, (3) restricts platforms' speech in the form of content moderation and other expressive elements, and (4) is overly vague. In addition, Section 230 of the Communications Act of 1934, as amended, appears to preempt the bill because it would impose liability on platforms for publishing third-party content.¹ In this memorandum, we briefly discuss these example infirmities with AB 3172.²

AB 3172 BACKGROUND

AB 3172 would change the liability structure for platforms in California with respect to individuals under age 18 by specifying that "[a] social media platform that . . . breaches its responsibility of ordinary care and skill to a child shall, in addition to any other remedy, be liable for statutory damages."³ The bill does not define this care standard. Damages must be the greater of "[f]ive thousand dollars per violation up to a maximum, per child of one million dollars" or "[t]hree times the amount of the child's

¹ See 47 U.S.C. § 230(c)(1).

² We have focused this memorandum on example legal arguments under the federal Constitution, as well as Section 230. "The [California] state Constitution's free speech provision is 'at least as broad' as . . . and in some ways is broader than . . . the comparable provision of the federal Constitution's First Amendment." *Kasky v. Nike, Inc.*, 45 P.3d 243, 310 (Cal. 2002). This memorandum is not intended to provide an exhaustive analysis of all potential legal challenges and salient precedent.

³ AB 3172 Sec. 2.

actual damages.”⁴ A “child” is anyone below age 18, and a “social media platform” is as defined in Section 22675 of the Business and Professions Code.⁵

EXAMPLE INFIRMITIES

First and Fourteenth Amendments

The Internet has flourished under the strong First Amendment protections affirmed in *Reno v. ACLU*, 521 U.S. 844 (1997). Starting from a young age, people use websites to express themselves, connect with others, and learn about a world beyond what they experience in their everyday lives. Websites are the “principal sources for” everything from learning about “current events” to “speaking and listening in the modern public square” to “otherwise exploring the vast realms of human thought and knowledge.”⁶

As currently drafted, AB 3172 likely infringes on the speech rights enshrined in the First Amendment and at the core of this modern speech ecosystem. For example, it: (1) infringes on the rights of adults and minors to access legal speech; (2) infringes on the rights of platforms to moderate content and make other expressive decisions; and (3) treats speech differently based on content. Although our sense is that the bill would likely be subject to strict scrutiny as a content-based speech regulation, the bill could fail even intermediate scrutiny. The bill also appears unconstitutionally vague under the First and Fourteenth Amendments.

AB 3172 Will Impermissibly Burden Access to Speech for Adults and Minors

“[The] right to receive information and ideas . . . is fundamental to our free society.”⁷ Websites are now the most “important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.”⁸ Using this technology, “any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox.”⁹

⁴ AB 3172 Sec. 2.

⁵ “‘Social media platform’ means a public or semipublic internet-based service or application that has users in California and that meets both of the following criteria: (1)(A) A substantial function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application. (B) A service or application that provides email or direct messaging services shall not be considered to meet this criterion on the basis of that function alone. (2) The service or application allows users to do all of the following: (A) Construct a public or semipublic profile for purposes of signing into and using the service or application. (B) Populate a list of other users with whom an individual shares a social connection within the system. (C) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users.” Cal. Bus. & Prof. Code § 22675.

⁶ *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017).

⁷ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁸ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

⁹ *Reno*, 521 U.S. at 870.

Courts have repeatedly rejected laws that require websites to adopt age verification requirements.¹⁰ Age verification requires would-be website visitors to give up some of their privacy to enjoy access, thus deterring people from accessing lawful speech. Alternatively, if websites do not employ age verification, they would need to reduce the scope of permissible content to only the completely innocuous, effectively censoring vast amounts of speech. The Northern District of California recently observed this problem when it enjoined California's Age-Appropriate Design Code Act, explaining that "if a business chooses not to estimate age but instead to apply broad privacy and data protections to all consumers, it appears that the inevitable effect will be to impermissibly 'reduce the adult population . . . to reading only what is fit for children.'"¹¹

Similarly, AB 3172 likely infringes on the First Amendment rights of adults by conditioning access to legal speech on compliance with privacy-invasive measures, which is untenable under the First Amendment. The bill practically requires age verification because it imposes a different liability regime for users under 18 that brings severe penalties based on highly subjective, undefined, and difficult to predict standards of care. Even if the bill stated that age verification is unnecessary, websites would practically need to either employ this option or flatten their content to avoid substantial liability exposure.

The bill also infringes on the First Amendment rights of minors by imposing a structure that will inevitably deprive them of access to legal content. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or that a legislative body thinks unsuitable for them."¹² "No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed."¹³ For these reasons, courts have invalidated various restrictions that would limit minors' access to social media, and AB 3172 is likely to face similar challenges.¹⁴

AB 3172 Will Restrict Platforms' Protected Speech

AB 3172 also infringes on the First Amendment rights of websites that exercise their constitutionally protected editorial discretion in deciding what content to publish through their content moderation practices. The publishing process for both print and online media requires such discretion, involving choices about what kind of content to allow, what content to prioritize, and how to display this content.¹⁵

AB 3172 interferes with this editorial discretion for the same reasons discussed above regarding the rights of adults and minors. It creates a liability regime that will inevitably force websites to either

¹⁰ See, e.g., *ACLU v. Mukasey*, 534 F.3d 181, 192 (3d Cir. 2008); *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023).

¹¹ *NetChoice, LLC v. Bonta*, No. 22-cv-08861-BLF, 2023 WL 6135551, at *13 (N.D. Cal. Sep. 18, 2023) (quoting *Butler v. Michigan*, 352 U.S. 380, 381, 383 (1957)).

¹² *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794-95 (2011).

¹³ *Id.* at 794-95.

¹⁴ See, e.g., *Bonta*, 2023 WL 6135551, at *13; *Griffin*, 2023 WL 5660155, at *17; *Yost*, 2024 WL 555904, at *12.

¹⁵ See Herbert J. Gans, *Deciding What's News: A Study Of CBS Evening News, NBC Nightly News, Newsweek, and Time 5* (2004).

verify user age or reduce content to a level of complete innocuousness. For example, websites might be compelled to remove or avoid promoting content about the wars in Gaza and Ukraine, the LGBTQ+ community, or reproductive health, which are all subject to controversy and subjective standards about what is acceptable for young audiences.

The Assembly Bill Policy Committee Analysis document underscores this point. It asserts that “[o]pponents warn that platforms, faced with enormous exposure to liability, may feel they have no choice but to dramatically restrict content or cease operations for minors.”¹⁶ In an attempt to rebut this issue, the document argues that “[t]his seems to tacitly concede that current practices are resulting in widespread harms—the very reason the sponsors introduced this bill.”¹⁷ This argument ignores the possibility that platforms *are* engaging in editorial discretion by moderating certain content and that, under AB 3172, their alternatives would be to either heavily moderate *or* leave a large amount of lawful content online but restrict access to children (which would be privacy-invasive and technically difficult).

The document also erroneously asserts that “the bill does not ‘regulate’ speech; any burden imposed on speech would result from the social media platform’s own content moderation” and that “[p]resumably this would begin with filtering the most odious content—the very result the sponsors are seeking.”¹⁸ But this analysis gets to the heart of the problem with the bill. First, as discussed, content moderation is protected speech. “Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”¹⁹ Second, it is still a constitutional problem for laws to censor speech via an intermediary, resulting in First Amendment harms discussed above for adults and minors. Otherwise, a state could wield the mere threat of liability “to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly.”²⁰ Third, the document makes plain that the bill indeed aims to regulate speech via content moderation based on the vague notion of what various members of the legislature and individual litigants and judges might consider “odious.”

AB 3172 Includes Impermissible Content-Based Restrictions

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”²¹ Such regulations “are presumptively invalid”²² and subject to strict scrutiny even if they have a “benign motive.”²³

AB 3172 applies only to “social media platforms,” which are defined based on features like whether “[a] substantial function of the service or application is to connect users in order to allow users to

¹⁶ Assembly Committee on Privacy and Consumer Protection (Apr. 16, 2024), <https://apcp.assembly.ca.gov/system/files/2024-04/ab-3172-lowenthal-apcp-analysis.pdf>.

¹⁷ Assembly Committee on Privacy and Consumer Protection (Apr. 16, 2024), <https://apcp.assembly.ca.gov/system/files/2024-04/ab-3172-lowenthal-apcp-analysis.pdf>.

¹⁸ *Id.*

¹⁹ *Brown*, 564 U.S. at 792 n.1.

²⁰ *Smith v. California*, 361 U.S. 147, 153–54 (1959).

²¹ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

²² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

²³ *Reed*, 576 U.S. at 165.

interact socially with each other.”²⁴ Courts have recognized that this kind of distinction can be content-based because “[t]he existence of functionalities allowing users to post, comment, and privately chat—in other words, to connect socially online—may very well be conveying a message” about the sort of community the platform is promoting.²⁵ In other words, “[t]he features that the [bill] singles out are inextricable from the content produced by those features.”²⁶ Accordingly, the bill would then be “presumptively invalid” and subject to strict scrutiny.²⁷

AB 3172 Likely Fails Under Either Strict or Intermediate Scrutiny

Courts assess First Amendment challenges to government action based on levels of scrutiny that vary according to the nature of the action and constitutional violation. As discussed, the bill is likely subject to strict scrutiny because it regulates speech differently based on content, so California would need to show that the bill “furthers a compelling interest and is narrowly tailored to achieve that interest.”²⁸

AB 3172 would almost certainly fail this high bar, but the bill could also fail under intermediate scrutiny, which generally applies to content-neutral speech restrictions.²⁹ Under this standard, the government would need to show that “(1) ‘it furthers an important or substantial government interest’; (2) ‘the governmental interest is unrelated to the suppression of free expression’; and (3) ‘the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’”³⁰

Although California undoubtedly has a “substantial government interest” in protecting young people, it likely cannot satisfy the other requirements. For example, social media can provide a number of expressive and other benefits to young people. The bill also appears directly related to suppressing expression (as revealed by commentary in the Assembly Bill Policy Committee Analysis discussed above), and it would likely restrict First Amendment rights far more than “essential” to protect young people. Indeed, courts have recently found other laws regulating social media fail intermediate scrutiny.³¹

AB 3172 Is Unconstitutionally Vague

²⁴ See Cal. Bus. & Prof. Code § 22675.

²⁵ See, e.g., *NetChoice, LLC v. Yost*, No. 2:24-CV-00047, 2024 WL 555904, at *11 (S.D. Ohio Feb. 12, 2024) (citing *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1108 (W.D. Tex. 2021) (Pitman, J.)).

²⁶ *Id.*

²⁷ See *R.A.V.*, 505 U.S. at 382.

²⁸ *Reed*, 576 U.S. at 171 (quoting *Ariz. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

²⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661–62 (1994).

³⁰ *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008) (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 661–62).

³¹ See, e.g., *NetChoice, LLC v. Bonta*, No. 22-cv-08861-BLF, 2023 WL 6135551, *13 (N.D. Cal. Sep. 18, 2023); *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023)

AB 3172 also appears unconstitutionally vague under the First and Fourteenth Amendments. Under these provisions, a law must give “fair notice of what is prohibited” and may not be “so standardless that it authorizes or encourages seriously discriminatory enforcement.”³² This consideration is essential in the context of the First Amendment due to the “obvious chilling effect on free speech.”³³

The bill’s liability regime turns on the “responsibility of ordinary care and skill to a child,” and this is an inherently “standardless” approach. As noted above, people have dramatically varying views about what content is appropriate for children of different ages. This country has long taken the view that parents and guardians are in the best position to decide what is appropriate for their children. As explained, faced with the risk of a deluge of litigation seeking high financial penalties based on unclear standards, websites will be forced to strip any content or features that could possibly be considered inappropriate (or risk severe penalties), which is precisely the sort of “chilling” that the Supreme Court’s vagueness doctrine intended to prevent. Logically, the government should not be permitted to instill “timidity” in businesses that “tend[s] to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly.”³⁴

Section 230 Likely Preempts AB 3172

Section 230 appears to preempt this bill. Working in concert with the First Amendment, Section 230 has enabled the success of a thriving Internet in the United States. It states: “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁵ Further, “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”³⁶ As declared by Congress, this framework intends “to promote the continued development” of Internet services and “preserve the vibrant and competitive free market” for these services “unfettered by Federal or State regulation.”³⁷ As the Supreme Court of California has explained, Section 230 immunity protects “the vigor of Internet speech.”³⁸

Courts, including the Supreme Court of California, have routinely affirmed that Section 230 gives service providers “broad immunity” from claims based on third-party content.³⁹ AB 3172 likely fails this fundamental element. As discussed, the Assembly Bill Policy Committee Analysis document explicitly

³² *United States v. Williams*, 553 U.S. 285, 304 (2008).

³³ *Reno*, 521 U.S. at 872.

³⁴ *Smith v. California*, 361 U.S. 147, 153-54 (1959).

³⁵ 47 U.S.C. § 230(c)(1).

³⁶ *Id.* § 230(e)(3).

³⁷ *Id.* § 230(b).

³⁸ *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006).

³⁹ *Id.* at 513; see also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (“The majority of federal circuits have interpreted the CDA to establish broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service’” (quoting *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006))).

discusses the bill's aim to compel websites' content moderation decisions.⁴⁰ As stated, "filtering . . . content" is "the very result the sponsors are seeking."⁴¹

It is no help for California to assert that any liability for content moderation is merely incidental and not within the specific terms of the bill. Section 230 does not allow litigants to circumvent its protections through "creative pleading."⁴² "[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."⁴³ It stands to reason that legislatures may also not creatively write around Section 230, including here.

⁴⁰ Assembly Committee on Privacy and Consumer Protection (Apr. 16, 2024), <https://apcp.assembly.ca.gov/system/files/2024-04/ab-3172-lowenthal-apcp-analysis.pdf>.

⁴¹ *Id.*

⁴² *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016); see also *Hassell v. Bird*, 420 P.3d 776, 790 (Cal. 2018) (plurality opinion) ("Plaintiffs' attempted end-run around section 230 fails.").

⁴³ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc).