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Senator Thomas Umberg, Chair
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SUBJECT

Online marketplaces: illicit cannabis: reporting and liability

DIGEST

This bill places obligations on online platforms or marketplaces where advertising or sales of illicit cannabis or hemp products occur, including required disclosures, reporting mechanisms, and warnings. This bill prohibits “paid online advertising,” as defined, related to unlicensed sellers of cannabis or cannabis products, intoxicating hemp products, or unregistered hemp products. This bill provides that if any of these provisions are at least partially enjoined, then online platforms are subject to statutory damages of up \$1 million, as provided, if they negligently cause harm to an individual.

EXECUTIVE SUMMARY

The proliferation of illicit marijuana and intoxicating hemp markets poses significant challenges to legitimate cannabis businesses and society at large. A study published in 2023 found that approximately 13 percent of social media posts advertise illicit drugs, highlighting the extensive use of online platforms for illegal drug promotion.¹ This online presence not only undermines legal cannabis enterprises by diverting potential customers but also exposes consumers to unregulated products with potential health risks. Furthermore, the ease of accessing illegal substances through social media platforms has been linked to increased drug use among adolescents, as these platforms provide a convenient avenue for drug dealers to reach a younger audience. The growing role of online platforms in facilitating illegal sales necessitates enhanced regulation and monitoring to protect public health and support the legal cannabis industry.

¹ Mattha Busby, *Drug Dealers Have Moved on to Social Media* (December 17, 2024) Wired, <https://www.wired.com/story/drug-dealers-have-moved-onto-social-media/>. All internet citations are current as of April 16, 2025.

This bill takes a bold approach by requiring online marketplaces, online platforms where illegal cannabis and intoxicating hemp sales take place, to establish and maintain reporting mechanisms for individuals to report advertisements for illicit cannabis and hemp products. The bill also requires certain disclosures about whether the platforms verify the license of cannabis sellers and, if not, require a clear and conspicuous graphic to be interposed for a consumer to acknowledge and click through. These are enforced through civil actions with broad standing guidelines and stiff penalties. The bill explicitly prohibits engaging in “paid online advertising,” broadly defined and holds online platforms strictly liable for damages. Finally, the bill provides that if any of these provisions are at least partially enjoined, any form of negligence on the part of these online platforms, regardless of whether it is tied to cannabis or hemp sales, is liable for statutory penalties of at least \$5,000 and up to \$1 million per violation, as provided.

This bill is sponsored by the United Food and Commercial Workers Western States Council. It is supported by various organizations, including the California School Employees Association, the San Diego Regional Chamber of Commerce, and Children Now. The bill is opposed by various industry associations, including Technet and the Computer and Communications Industry Association.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides, in federal law, that a provider or user of an interactive computer service shall not be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. § 230(c)(1).)
- 2) Provides that a provider or user of an interactive computer service shall not be held liable on account of:
 - a) 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
 - b) any action taken to enable or make available to information content providers or others the technical means to restrict access to such material. (47 U.S.C. § 230(c)(2).)

Existing state law:

- 1) Provides that every person is responsible, not only for the result of their willful acts, but also for an injury occasioned to another by the person’s want of ordinary care or skill in the management of their property or person, except so

far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a) (“Section 1714(a)”)).

- 2) Defines “social media platform” as a public or semipublic internet-based service or application that has users in California and that meets both of the following criteria:
 - 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. 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.
 - b) The service or application allows users to do all of the following:
 - i. Construct a public or semipublic profile for purposes of signing into and using the service or application.
 - ii. Populate a list of other users with whom an individual shares a social connection within the system.
 - iii. 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. (Bus. & Prof. Code § 22675(e).)
- 3) Requires a social media platform to establish a prominent mechanism within its internet-based service that allows any individual, whether or not that individual has a profile on the internet-based service, to report cyberbullying or any content that violates the existing terms of service related to cyberbullying. (Bus. & Prof. Code § 22589.1(b).)
- 4) Requires a large social media platform to create a process by which a verified reporter can make a report of a social media-related threat or a violation of the large social media platform’s terms of service that in the verified reporter’s opinion poses a risk or a severe risk to the health and safety of a minor. (Bus. & Prof. Code § 22588.3(c).)

This bill:

- 1) Requires an online cannabis marketplace to address in its terms of service both of the following:
 - a) Whether the online cannabis marketplace permits advertisements from, or business information about, unlicensed sellers of cannabis or cannabis products (collectively “cannabis”) to be viewed by Californians on its marketplace.
 - b) Whether the online cannabis marketplace verifies that a seller of cannabis is licensed by the Department of Cannabis Control (DCC), as provided.

- 2) Defines “online cannabis marketplace” as an internet website, online service, online application, or mobile application, or a portion thereof, including a social media platform, as defined in Section 1798.99.20, that does any of the following in California:
 - a) Transmits or otherwise communicates between a third party and purchaser an offer for the sale of cannabis or a cannabis product that is accepted by the purchaser.
 - b) Processes, collects, or administers the payment for the sale of cannabis or a cannabis product.
 - c) Permits offers for the sale of cannabis or a cannabis product.
 - d) Connects a seller of cannabis or cannabis products and a consumer.
- 3) Defines “advertisement” as an advertisement about, or an offer of, a sale of cannabis or a cannabis product.
- 4) Requires an online cannabis marketplace to establish a clear and conspicuous mechanism that allows any individual to report the display, storing, or hosting on the marketplace of advertisements from, or business information about, an unlicensed seller of cannabis and that meets certain specified criteria, such as review by a natural person. The mechanism must provide confirmation of a report’s receipt within 36 hours, regular updates, and a final written determination within 30 days that makes one of five specified conclusions.
- 5) Authorizes a civil action for violations of the above seeking civil penalties of up to \$10,000 per violation per day, compensatory and punitive damages, injunctive relief, attorneys’ fees and costs, as well as other remedies for harms so caused. Such actions may be brought by any of the following:
 - a) An individual who submits a report.
 - b) A parent or legal guardian of a minor who submits a report.
 - c) A labor union that represents workers employed by licensed sellers of cannabis.
 - d) A licensed seller of cannabis.
 - e) A city attorney, a district attorney, or a county counsel.
 - f) The Attorney General.
- 6) Establishes an identical requirement regarding establishing a reporting mechanism for online hemp marketplaces with an identical enforcement scheme.
- 7) Provides that, if an online cannabis marketplace does not verify a seller is licensed, it must interpose a specified graphic with a warning immediately after a consumer has accessed the marketplace that a consumer must acknowledge and click through. Every person has standing to bring an action for violations of this provision with prevailing plaintiffs entitled to a civil penalty of \$250,000 and attorneys’ fees and costs. If a marketplace violates an injunction requiring

compliance herewith, the marketplace is suspended from doing business until a court-appointed receiver affirms the marketplace is in compliance. Actions to enforce such injunctions entitle the prevailing plaintiff to doubled attorneys' fees and costs and a civil penalty of \$500,000.

- 8) Prohibits an online cannabis or hemp marketplace from engaging in paid online advertising related to unlicensed sellers of cannabis or cannabis products, intoxicating hemp products, or unregistered hemp products.
- 9) Defines "paid online advertisement" as an advertisement or promotional information displayed on a computer or mobile device about, or for an offer of, the sale of cannabis, a cannabis product, an industrial hemp product, or an intoxicating hemp product, for which an online marketplace receives compensation either directly from a business or indirectly by increasing the number of individuals who visit the marketplace.
- 10) Provides that an online marketplace that violates the prohibition on paid online advertising and is a substantial factor in an unlawful transaction between a consumer and an unlicensed seller of cannabis or intoxicating hemp or unregistered hemp product shall be strictly liable for damages caused to the consumer by the product to the same extent as a retailer would be liable for selling a defective product in the retailer's physical store, regardless of whether the online marketplace ever took physical possession of, or title to, the product.
- 11) Authorizes two times the damages in the above action if the marketplace knew or should have known that the product was unlicensed cannabis or intoxicating or unregistered hemp. Damages are trebled if the victim is a minor.
- 12) Provides that if any of the above provisions are stricken or permanently enjoined in a final judgment an online cannabis or hemp marketplace that violates Section 1714(a) of the Civil Code and breaches its responsibility of ordinary care and skill, and is a substantial factor in causing harm to a consumer, shall be liable for statutory damages for the larger of the following:
 - a) \$5,000 per violation, up to a maximum per consumer of \$250,000, or a maximum of \$1 million if the individual harmed was a child. The court shall determine the amount based upon the degree to which the marketplace failed to exercise ordinary care.
 - b) Three times the amount of the consumer's or child's actual damages.
- 13) Prohibits waiver of the previous provision.
- 14) Provides that the Attorney General shall be notified of any action filed pursuant to paragraph 12 and that settlement of such actions must be approved by the court.

- 15) Clarifies that the duties, remedies, and obligations imposed above are cumulative to those imposed under other laws.
- 16) Includes a severability clause.

COMMENTS

1. The scourge of illicit online drug sales

This bill takes aim at the intractable illicit market for unlicensed cannabis and intoxicating hemp. Despite legalization of products and regulatory efforts to address the illegal sales of them, the problem is only growing:

Far from being eradicated, the black market is booming in plain sight, luring customers away from aboveboard retailers with their cheaper — if untested and unregulated — product.

Unlicensed dispensaries have become hotbeds of crime. Sometimes the operators are the perpetrators, authorities say, selling cocaine and methamphetamine alongside cannabis. At other times, they are the victims. In August 2021, a man was gunned down in the doorway of the illegal dispensary he ran in East Los Angeles.

Authorities have made little progress in curbing the cannabis black market. Prosecutions are rare, according to court records, and shop employees say some dispensaries don't even wait a day to reopen after being shut down by the police.

"I don't see it slowing down," said one security guard at an illegal dispensary that has been raided four times in the last year and a half. "Just look up and down the street. It's everywhere. And everyone's making money."²

Increasingly these sales are moving out of physical storefronts and onto online platforms, especially for younger drug users:

For every illegal drug, there is a combination of emojis that dealers and consumers use to evade detection on social media and messaging platforms. Snowflakes, snowfall, and snowmen symbolize cocaine. Love hearts, lightning bolts, and pill capsules mean MDMA, or molly. Brown

² Matthew Ormseth, *Killings, robberies, extortion. California can't stop its booming illegal cannabis stores* (September 13, 2022) Los Angeles Times, <https://www.latimes.com/california/story/2022-09-13/illegal-weed-dispensaries-police-raids-crime>.

hearts and dragons represent heroin. Grapes and baby bottles are the calling cards for codeine-containing cough syrup, or lean. The humble maple leaf, meanwhile, is the universal symbol for all drugs.

The proliferation of open drug dealing on Instagram, Snapchat, and X – as well as on encrypted messaging platforms Telegram and WhatsApp – has transformed the fabric of illegal substance procurement, gradually making it more convenient, and arguably safer, for consumers, who can receive packages in the mail without meeting people on street corners or going through the rigmarole of the dark web. There is no reliable way to gauge drug trafficking on social media, but the European Union Drugs Agency acknowledged in its latest report on the drivers of European drug sales that purchases brokered through such platforms “appear to be gaining in prominence.”

Initial studies into drug sales on social media began to be published in 2012. Over the next decade, piecemeal studies began to reveal a notable portion of drug sales were being mediated by social platforms. In 2021, it was estimated some 20 percent of drug purchases in Ireland were being arranged through social media. In the US in 2018 and Spain in 2019, a tenth of young people who used drugs appear to have connected with dealers through the internet, with the large majority doing so through social media, according to one small study.

Some dealers these days are even brazen enough to boost their posts and pay for sponsored advertising. “Mushrooms and marijuana used to be hard to get and now they’re being marketed to me in beautiful packaging on Instagram,” says one 34-year-old in Austin, Texas, whom WIRED spoke to. Dealers ran hundreds of paid advertisements on Meta platforms in 2024 to sell illegal opioids and what appeared to be cocaine and ecstasy pills, according to a report this year by the Tech Transparency Project, and federal prosecutors are investigating Meta over the issue.³

The federal Drug Enforcement Administration (DEA) has also warned of the increased threat of drug trafficking on social media:

With the growth of social media and the proliferation of smartphones, a dangerous and deadly new drug threat has emerged: criminal drug networks are abusing social media to expand their reach, create new markets, and target new clientele. This includes by selling deadly fake fentanyl and methamphetamine pills, often to unsuspecting teenagers,

³ Mattha Busby, *Drug Dealers Have Moved on to Social Media* (December 17, 2024) Wired, <https://www.wired.com/story/drug-dealers-have-moved-onto-social-media/>.

young adults, and older Americans, who think they are buying the real thing.

No longer confined to street corners and the dark web, criminal drug networks are now in every home and school in America because of the internet apps on our smartphones.⁴

2. Holding online platforms liable for illicit drug sales

This bill targets “online marketplaces” that allow for unlicensed sellers of cannabis and intoxicating hemp to advertise, offer, and sell their products online. “Online cannabis marketplace” means an internet website, online service, online application, or mobile application, or a portion thereof, including a social media platform, that does any of the following in California:

- Transmits or otherwise communicates between a third party and purchaser an offer for the sale of cannabis or a cannabis product that is accepted by the purchaser.
- Processes, collects, or administers the payment for the sale of cannabis or a cannabis product.
- Permits offers for the sale of cannabis or a cannabis product.
- Connects a seller of cannabis or cannabis products and a consumer.

An online hemp marketplace is similarly defined for its respective product.

The bill requires these marketplaces to establish mechanisms for users, and individuals who are not users, to report to the online marketplace the existence of an advertisement of one of these products, which all must be reviewed by a human. This mechanism is similar to other requirements for platforms to establish such mechanisms for reporting cyberbullying or threats, as examples.

The bill establishes certain timelines for responding to reports and providing updates, as well as a series of prescribed final determinations as follows:

- The report has provided evidence that an advertisement of an illicit product was displayed, stored, or hosted on the marketplace and the seller’s advertisements and business information have been blocked from being viewable on the marketplace.
- The report has provided evidence that an advertisement of an illicit product was or is displayed, stored, or hosted on the marketplace and the seller’s advertisements and business information will not be blocked from being

⁴ *Social Media Drug Trafficking Threat* (January 2022) DEA, https://www.dea.gov/sites/default/files/2022-03/20220208-DEA_Social%20Media%20Drug%20Trafficking%20Threat%20Overview.pdf.

viewable on the marketplace. The final written determination issued pursuant to this subclause shall also state that the marketplace acknowledges that it is aware that the seller is advertising an illicit product and whether the marketplace has referred the report to a law enforcement agency. If the marketplace has referred the report to a law enforcement agency, the final written determination shall provide a true and correct copy of the report that the marketplace made to the law enforcement agency.

- The report lacks evidence that the identified seller whose advertisement or business information was or is displayed, stored, or hosted on the marketplace was or is advertising an illicit product and the seller's advertisements and business information will not be blocked from being viewable on the marketplace.
- The report lacks evidence that the identified seller whose advertisements and business information was or is displayed, stored, or hosted on the marketplace was or is advertising an illicit product and the seller's advertisements and business information will be blocked from being viewable on the marketplace for reasons unrelated to the reported advertisement.
- The report lacks evidence that an advertisement of an illicit product was or is displayed, stored, or hosted on the marketplace.

Online cannabis marketplaces are also required to state in their terms of service whether they permit advertisements from, or business information about, unlicensed sellers of cannabis to be viewed by Californians. They must also state whether they verify that a seller of cannabis has a valid, unexpired license by utilizing the DCC's website before displaying, storing, or hosting the seller's advertisements or business information in a manner that is viewable to Californians.

Violations of these provisions subject these online marketplaces to civil penalties of up to \$10,000 per violation, per day, along with other remedies, such as punitive and compensatory damages and attorneys' fees and costs. These actions can be brought by specific public prosecutors; individuals or their parents or guardians who submit reports; labor unions representing licensed sellers of cannabis; and licensed sellers of cannabis.

If the cannabis marketplace does not verify whether a seller of cannabis is licensed, the bill requires them to interpose a clear and conspicuous graphic that a consumer must acknowledge and click through before viewing or engaging with the marketplace. The graphic must take up at least one-half the screen and shall warn the consumer of specified dangers.

This provision can be enforced in a civil action by any person who identifies an advertisement from, or business information about, an unlicensed seller of cannabis on the platform. The plaintiff in such cases can see civil penalties of \$250,000 along with reasonable attorneys' fees and costs. If the online cannabis marketplace violates an

injunction requiring compliance herewith, it must cease operations in the state until a receiver appointed by the court affirms to the court that the marketplace is in compliance. In any action to enforce such an injunction, the party obtaining enforcement shall be entitled to an award of twice its reasonable attorneys' fees and costs and a civil penalty of \$500,000.

The bill also explicitly prohibits these online marketplaces from engaging in "paid online advertising" related to unlicensed sellers of cannabis, intoxicating hemp products, or unregistered hemp products. "Paid online advertisement" is defined to mean an advertisement or promotional information displayed on a computer or mobile device about, or for an offer of, the sale of these products, for which an online marketplace receives compensation. However, it provides that such compensation can either be directly from a business or "indirectly by increasing the number of individuals who visit the marketplace."

If a platform violates this provision and is a *substantial factor* in an unlawful transaction, it is strictly liable for any damages caused to the consumer. The bill ties this to traditional products liability standards, regardless of whether the platform ever took physical possession of the product or even had knowledge of the offer. Damages are doubled if the platform knew or should have known that the seller was not licensed. The damages are tripled if the consumer was a minor.

Finally, the bill provides that if any of the above provisions are at least partly stricken or enjoined in a final judgment, platforms can be held liable in negligence actions, regardless of the basis for the action, for statutory damages of \$5,000 to \$250,000 per violation per consumer, and up to \$1 million if the consumer is a minor, or three times the amount of damages, whichever is more. To summarize, this applies in actions completely unrelated to the offering, advertising, or sale of illicit products, and given the broad definition of online marketplace, likely applies to many online platforms. The author has agreed to remove this provision of the bill.

3. Legal considerations

a. *Section 230 of the Communications Decency Act*

Concerns have been raised about whether the bill is preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. Section 230(c)(1) shields online platforms from liability for third-party content: "No 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."⁵ This provision has been hailed as

⁵ 42 U.S.C. § 230(c)(1). Section 230 also (1) provides a safe harbor for good faith content moderation, (2) preempts contrary state laws, and (3) enumerates exemptions for enforcement of federal criminal statutes, intellectual property laws, communications privacy laws, and sex trafficking.

the law that created the modern internet, fostering free expression online and allowing an array of innovative services and spaces to flourish, from search engines to social media.⁶ To summarize:

For a statute that has caused so much confusion, the basic idea behind § 230 is simple. Generally speaking, the law shields websites from being held legally responsible for content that others post – a protection not available for print material or television broadcasts. If I post something defamatory about you on Twitter, for example, you can sue me, but you can’t sue Twitter.

...

In brief, as courts have interpreted the law, § 230 (c)(1) protects platforms from civil liability for leaving content up; § 230 (c)(2) protects them if they choose to take content down.⁷

Relevant here, Section 230 not only provides protection against federal civil claims, but it also protects against litigation “under any State or local law that is inconsistent with this section.” This preemptive effect has kept states from meaningfully regulating in this space, absolving platforms of responsibility for virtually all third-party harms arising from the use of their services.

Since its enactment, the courts have continued to expand its scope with broad interpretations of its protective ambit. One early case construed “publisher” immunity as encompassing “traditional editorial functions” such as deciding whether to publish, remove, or even alter content.⁸ Consequently, the plaintiff, a victim of online defamation by an anonymous user, had no recourse against the platform despite its failure to timely remove the content, which would have resulted in liability in the offline world. Following this logic, courts have extended Section 230 well beyond the defamation context, routinely concluding that online intermediaries are not liable for harms related to third-party illicit content.⁹

This sweeping grant of immunity has been the subject of widespread criticism and calls for reform.¹⁰ Such criticism does not constrain itself to one side of the political aisle; President Trump has tweeted dozens of times for § 230 to be repealed, and President Biden commented during the 2020 Democratic primary that the law should be done

⁶ See e.g., Kosseff, *The Twenty-Six Words that Created the Internet* (2019).

⁷ Quinta Jurecic, *The politics of Section 230 reform: Learning from FOSTA’s mistakes* (Mar. 1, 2022) Brookings, <https://www.brookings.edu/articles/the-politics-of-section-230-reform-learning-from-fostas-mistakes>.

⁸ *Zeran v. Am. Online, Inc* (4th Cir. 1997) 129 F.3d 327.

⁹ Michael Rustad & Thomas Koenig, *The Case for a CDA Section 230 Notice-and-Takedown Duty* (2023) 23 Nev.L.J. 533, 566.

¹⁰ E.g., John Lucas, *AG Moody Joins with Other Attorneys General to Urge Congress to Stop Protecting Illegal Activity on the Net* (May 23, 2019) Capitolist, <https://thecapitolist.com/ag-moody-joins-with-other-attorneys-general-to-urge-congress-to-stop-protecting-illegal-activity-on-the-net>.

away with.¹¹ Justice Clarence Thomas has called for the Supreme Court to review the scope of Section 230.¹² Ninth Circuit Judge Ryan Nelson recently stated that courts have “stretch[ed] the statute’s plain meaning beyond recognition,” leading to “perverse effects.”¹³

Despite its seemingly untethered reach, courts have emphasized that Section 230 immunity is not absolute.¹⁴ Section 230(c)(1) immunity exists for “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.”¹⁵ While the first prong is rarely at issue – the term “interactive computer service” is broadly defined¹⁶ – the second and third prongs, which “tend to overlap in significant ways,”¹⁷ require courts to analyze the role a website plays in the offensive conduct.

With respect to the second prong, Section 230 does not immunize a website that is itself an “information content provider” who is “responsible, in whole or in part, for the creation or development of information” that is the source of liability.¹⁸ In *Fair Housing Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1163 (*Roommates.com*), the Ninth Circuit interpreted the phrase “creation or development in whole or in part” to mean that “a website helps to develop unlawful content . . . if it contributes materially to the alleged illegality of the conduct.” The court held that a roommate-matching service acted as an information content provider, and thus enjoyed no immunity, when it required that users disclose protected characteristics that materially contributed to alleged violations of anti-discrimination laws. The court noted that, by contrast, “providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to ‘development’ for purposes of the immunity exception.”¹⁹

With respect to the third prong, Section 230 protection extends only to claims that “derive[] from the defendant’s status or conduct as a publisher or speaker.”²⁰ If, instead, the claim “springs from something separate from the defendant’s status as a publisher, such as from . . . obligations the defendant has in a different capacity,” Section 230 immunity does not apply.²¹ Examples of such cases include:

¹¹ Jerecic, *supra*.

¹² *Doe ex rel. Roe v. Snap, Inc.* (2024) 144 S. Ct. 2493 (Thomas, J., dissenting from denial of certiorari).

¹³ *Calise v. Meta Platforms, Inc.* (9th Cir. 2024) 103 F.4th 732, 747 (Nelson, J. concurring) (*Calise*).

¹⁴ *Calise, supra*, 103 F.4th at p. 739, citing cases.

¹⁵ *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1109 (*Barnes*).

¹⁶ The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. (42 U.S.C. § 230(f)(2).)

¹⁷ *In re Apple Inc. Litig.* (N.D.Cal. 2022) 625 F. Supp. 3d 971, 978.

¹⁸ 42 U.S.C. § 230(f)(3).

¹⁹ *Roommates.com, supra*, 521 F.3d at p. 1169, emphasis in original.

²⁰ *Barnes, supra*, 570 F.3d at p. 1102.

²¹ *Calise v. Meta Platforms, Inc.* (9th Cir. 2024) 103 F.4th 732, 742.

- Yahoo’s promise and subsequent failure to remove revenge pornography and defamatory content, as the asserted liability derived from contract principles.²²
- A networking website owner’s unlawful failure to warn a woman who was raped by two users of the website who posed as talent scouts to lure her to a fake audition, where it was alleged that an outside source had informed the owner about the predatory scheme.²³
- A city ordinance that required short-term home rental websites to refrain from completing booking transactions for properties not registered with the city, and to refrain from collecting or receiving a fee for “facilitating or providing services ancillary to a vacation rental or unregistered home-share.”²⁴
- Snap’s allegedly defectively-designed app, which promoted content that encouraged two teen boys who died in a high-speed car accident to drive at dangerous speeds.²⁵
- The claim that Google aided and abetted terrorism by sharing advertising revenue with ISIS.²⁶
- Platforms that processed payments for unlawful purchases of virtual chips for illegal casino apps.²⁷

While these cases are highly fact-specific, taken together they establish that Section 230 does not shield conduct, including sharing revenue or otherwise facilitating illegality, that can be characterized as the platform’s own unlawful act.²⁸ Section 230 is not “an all-purpose get-out-of-jail-free card”²⁹ that “create[s] a lawless no-man’s-land on the internet.”³⁰ The Ninth Circuit has “consistently eschewed an expansive reading of the statute that would render unlawful conduct ‘magically . . . lawful when [conducted] online,’ and therefore ‘giv[ing] online businesses an unfair advantage over their real-world counterparts.’”³¹

This bill regulates online cannabis or hemp marketplaces, broadly defined to essentially mean any online platform that does any of a list of things. Arguably the broadest of these is “permitting an offer for the sale of cannabis.” As the research and reporting shows, nearly all major platforms have offers for sale on them. Therefore, imposing liability on these platforms for content posted on them by users may expose it to Section 230 challenges.

²² *Barnes, supra*, 570 F.3d at p. 1109.

²³ *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 852-853

²⁴ *HomeAway.com, Inc. v. City of Santa Monica* (9th Cir. 2019) 918 F.3d 676, 682 (*HomeAway*).

²⁵ *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, 1092.

²⁶ *Gonzalez v. Google LLC* (9th Cir. 2021) 2 F.4th 871, 890 (*Gonzalez*). This case was eventually resolved on the grounds that the plaintiffs did not allege facts sufficient to show a violation of anti-terrorism laws.

²⁷ *In re Apple Inc. Litig.* (N.D.Cal. 2022) 625 F. Supp. 3d 971, 994.

²⁸ *See ibid.*

²⁹ *Doe v. Internet Brands, Inc., supra*, 824 F.3d at p. 853.

³⁰ *HomeAway, supra*, 918 F.3d at p. 683.

³¹ *Ibid.*, citation omitted.

While the bill's reporting mechanism requirement may not be as vulnerable, the strict liability imposed for paid online advertising can apply when a user posts promotional information on their account and this leads to increased visits to the platform. Arguably this is susceptible to claims that the platform's conduct in such an instance does not contribute "materially to the alleged illegality of the conduct" and does not make the platform an information content provider, exposing it to Section 230 preemption. The bill does attempt to counter this by requiring that the marketplace is a "substantial factor" in the unlawful transaction.

Ultimately, although cases have held Section 230 immunity applies even to platforms whose recommendation algorithms curate and promote illicit content, multiple judges in the Ninth Circuit have argued that publisher immunity should not apply in such cases,³² and last year the Third Circuit adopted this position in light of a recent Supreme Court decision.³³ The Ninth Circuit may well follow suit. The bill covers a range of conduct and the application of Section 230 immunity will ultimately be determined on a case-by-case basis.

UFCW, the sponsor of the bill, makes the case:

Until Congress finally acts to reform Section 230 of the Communications Decency Act, California cannot, in the main, enact a law prohibiting Internet companies from posting unlawful content. But, as recent case authority correctly affirms, California can require such corporations under certain circumstances to forgo being enriched by participating in an unlawful enterprise and pay for the harms caused by their own operations and conduct.

b. The First Amendment

The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits Congress or the states from passing any law "abridging the freedom of

³² See, e.g., *Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 76 (Katzmann, C.J., concurring in part and dissenting in part); *Gonzalez, supra*, 2 F.4th at p. 913 (Berzon, J., concurring); *Calise, supra*, 103 F.4th at p. 747 (Nelson, J. concurring).

³³ *Anderson v. TikTok Inc.* (3d Cir. 2024) 116 F.4th 180, 184 184 held that TikTok's recommendation algorithm – which promoted a "Blackout Challenge" to a 10-year-old girl who then died from self-asphyxiation – was the platform's own expressive conduct that falls outside of section 230. The court drew on a recent Supreme Court holding that an algorithm that editorially curates third-party speech is protected by the First Amendment. (*Id.*, discussing *Moody v. NetChoice, LLC* (2024) 603 U.S. 707.) As to the interplay between section 230 and the First Amendment, the Third Circuit quoted Justice Thomas's observation that "[i]n the platforms' world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry." (*Doe ex rel. Roe v. Snap, Inc.* (2024) 144 S. Ct. 2493 (Thomas, J., dissenting from denial of certiorari).)

speech.”³⁴ “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³⁵ The right to speak also encompasses the right *not* to speak.³⁶ Compelled speech in the commercial context, however, is subjected to much less exacting scrutiny than in other arenas; a law concerning commercial speech is generally upheld if the law advances a substantial government interest and directly advances that interest.³⁷ The bill may implicate free speech principles by requiring terms of service disclosures and warnings about the dangers of illicit drugs. The provisions certainly advance a substantial government interest to combat illegal drug sales, but the breadth of its definitions may make it susceptible to arguments that it does not “directly advance that interest.”

4. Stakeholder positions

According to the author:

California’s legal cannabis industry has struggled in the face of a growing illicit market for so-called “hemp” products that doesn’t provide any health or safety protections for consumers, or even prevent minors from purchasing dangerous intoxicating products. Consumers are finding products advertised as hemp on Amazon and other digital platforms, but studies show that these products contain alarming amounts of synthetic intoxicants, undermining both California’s legal cannabis market and public health and safety. SB 378 provides enhanced consumer protections by holding online marketplaces strictly liable for damages, and includes reporting requirements for users to flag and report illicit product. I have long supported cannabis legalization and safe access to it, including authoring laws to expand access to medical cannabis and reduce taxes on legal cannabis. By tackling illicit hemp products, we can support legal cannabis businesses and improve California’s legal market while protecting minors and consumers from potentially dangerous unregulated substances.

UFCW writes:

Bold action is required. California simply cannot countenance Internet companies engaging in and profiting from brazen and open lawbreaking,

³⁴ U.S. Const., 1st & 14th amends.

³⁵ *Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.

³⁶ *U.S. v. United Foods, Inc.* (2001) 533 U.S. 405, 410.

³⁷ *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 477 U.S. 556, 566.

especially when, as here, the lawbreaking contributes to violent crime, child endangerment, environmental catastrophes, and the destruction of a lawful business sector, employing thousands of Californians.

Writing in opposition, a coalition of industry associations, including the California African American Chamber of Commerce, argues:

Overbroad definition

SB 378 has an extremely broad definition of “online cannabis marketplace” and “online hemp marketplace.” These definitions include an internet website, online service, online application, or mobile application, or social media platforms that create any connection between the seller of cannabis, cannabis products, or hemp products consumers.

This is a highly broad definition that reflects an unprecedented expansion of strict liability. For example, an internet service that simply displays a link, a mapping service that allows users to place pins, social media platforms that host content from users, or search engines providing information based on a user inputted query would be impacted and risk liability under this bill even when they had no direct role in the sale, processing of payments, or had a commercial agreement with the seller. Their liability would stem from this definition where they are deemed to have created a connection between the consumer and seller.

...

Paid Advertisements

The advertising provisions of SB 378 create far-reaching problems by adopting an overly broad definition of “paid online advertisement” and imposing strict liability on platforms that display them. These rules require online marketplaces (which also has an overly broad definition) to undertake the onerous – and impractical – task of continuously verifying advertisers’ licensing or registration status for every cannabis or hemp product featured. Faced with the risk of steep penalties and extensive litigation, many platforms would likely ban all cannabis and hemp-related advertising – whether legitimate or not – rather than attempt compliance. As a result, reputable businesses that follow California’s licensing requirements lose critical channels to reach consumers, while users are deprived of accessible, trustworthy information about legal products. Additionally, the law’s ambiguous “substantial factor” standard could subject platforms to lawsuits simply for displaying third-party ads, effectively conflating neutral content hosting with active facilitation of illegal transactions.

SB 378 creates a heavy-handed approach that undermines established liability protections for online intermediaries, stifles e-commerce

innovation, and ultimately fails to advance the intended goal of eliminating unlawful cannabis sales.

SUPPORT

United Food and Commercial Workers Western States Council (sponsor)
California Cannabis Operators Association
California Federation of Labor Unions, AFL-CIO
California Medical Association
California School Employees Association
California State Council of Service Employees International Union (SEIU California)
California Teamsters Public Affairs Council
Children Now
County Health Executives Association of California
Getting It Right From the Start
San Diego Regional Chamber of Commerce
San Mateo County Board of Supervisors
Youth Forward

OPPOSITION

California African American Chamber of Commerce
Computer & Communications Industry Association
Internet Works
Technet
U.S. Hemp Roundtable

RELATED LEGISLATION

Pending Legislation: AB 2 (Lowenthal, 2025) increases the penalties that can be sought against a large social media platform, if the platform fails to exercise ordinary care or skill toward a child, with statutory penalties ranging from \$5,000 to \$1 million if the victim is a child. AB 2 is currently on the Assembly Floor.

Prior Legislation:

AB 2481 (Lowenthal, Ch. 832, Stats. 2024) required social media platforms to establish a mechanism for “verified reporters” to report “social media-related threats” and to substantively respond to such reports, as provided. Platforms are also required to disclose these procedures in their terms of service and post annual reports detailing reports from verified reporters.

AB 3172 (Lowenthal, 2024) would have increased the penalties that can be sought against a social media platform, as defined, if the platform fails to exercise ordinary care or skill toward a child. AB 3172 died on the Senate Floor.

AB 45 (Aguiar-Curry, Ch. 576, Stats. 2021) established a regulatory structure in the California Department of Public Health (CDPH) for food, beverage and cosmetic products containing industrial hemp, and limits these products to containing no more than 0.3% concentration of tetrahydrocannabinol.
