From the Desk of:
Sen. Daniel Bonham

Harrang Long P.C.

C. ROBERT STERINGER
ADMITTED IN OREGON AND WASHINGTON
111 SW COLUMBIA ST., SUITE 950
PORTLAND, OR 97201
BOB.STERINGER@HARRANG.COM
(503) 242-0000
(541) 686-6564 (FAX)

June 24, 202

TO: Oregon State Senators

FROM: C. Robert Steringer and J. Aaron Landau, Harrang Long P.C.

DATE: June 18, 2025

RE: Continued Constitutional and Other Legal Defects in SB 686-B

Earlier this month, our office was retained by TechNet to provide a legal opinion concerning whether SB 686-A would survive challenges on several constitutional and other legal grounds. Our June 10, 2025, memorandum to the Senate Committee on Rules detailed several constitutional and other legal defects in the legislation. We understand that the bill's proponents now contend that the concerns raised about earlier versions of SB 686 (including those identified by Legislative Counsel) have been resolved through changes contained in the bill's -9 Amendments and now incorporated in SB 686-B. We respectfully disagree. This memo is intended to explain why, in our view, those recent amendments do not resolve several of the problems we described and to note several additional problems in the legislation we have identified since then.

To summarize:

- **SB 686-B still violates state and federal constitutional protections of free speech.** New provisions pointed at "accessing" news content do not make the bill's targeted conduct *non*-expressive, because the very same conduct is at issue: the display of news content to users.

- **SB 686-B's new review procedures continue to violate the right to a jury trial** under the Oregon Constitution, because it deprives covered platforms of the right to jury trial in proceedings to adjudicate the amounts they are required to pay to digital journalism providers.

- **SB 686-B's new review procedures likely violate covered platforms' Due Process rights** through truncated civil litigation rights and one-sided procedural rules.

- **SB 686-B's new review procedures likely violate separation-of-powers principles** by unconstitutionally interfering with the core function of reviewing courts.

- **SB 686-B unconstitutionally takes private property without just compensation** because it requires covered platforms to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Violation of Free Speech Rights

Proponents of SB 686-B say the -9 Amendments avoid the free speech problems presented by prior versions of the bill in two ways. First, while earlier versions targeted platforms' *expression* regarding news and journalism, proponents say the new language now targets only platforms' *access* to that content, which they say is "non-expressive" conduct. Second, while earlier versions conditioned the exercise of that right on payment of money, the new amendments instead require the platforms merely to have a contractual agreement with the news and journalism providers whose content they access, which proponents say is permitted. Both points are incorrect and would likely fail in a constitutional challenge.

First, the -9 Amendments attempt to clothe key provisions in terms of "access." Section 2(1) now states, "A covered platform may not *access for an Oregon audience* the online content of a digital journalism provider" unless it first complies with the pre-conditions the legislation describes. But "access for an Oregon audience" is itself a defined term in the legislation – and it is defined to mean acquiring that content for purposes of making money by "aggregating, distributing, rendering or displaying" that content for users. *See* Section 1(2). That is precisely the same expressive activity that prior versions targeted, and it presents the same problem. Under *Moody v. NetChoice, LLC*, 603 U.S. 707, 731-37 (2024), a platform's choices about how to aggregate, distribute, render, or display third party content to users is itself expressive conduct protected under the First Amendment. (Indeed, if a platform obtains that news content for any other reason – that is, for any reason *other* than to make money by displaying it to users – then that mere "access" will not trigger this legislation at all.)

The government cannot evade First Amendment scrutiny merely by relabeling expressive conduct as something else. Courts examine the *substance* of the activity at issue, not its regulatory label. Here, calling the expressive conduct at issue "access," as the -9 Amendments do, does not change the fact that it is still the same expressive conduct – and it does not change the underlying violation of rights to free speech.

Second, in contrast to prior versions that conditioned the exercise of that expression on the payment of money to a government-assembled "consortium," the -9 Amendments instead require the platforms to have a contractual agreement with the news and journalism providers whose content they "access." (And that contract, in turn, is required to include the payment of money.) Here, again, the problem is disguised but not actually addressed. Where a person has the constitutional right to engage in expressive conduct, the government cannot impose burdens on the exercise of that right (other than reasonable time, place, and manner restrictions) without violating the First Amendment.

Crucially, that burden need not be an outright fine or penalty to be unconstitutional. The government is prohibited from imposing even relatively minor bureaucratic conditions on the exercise of free speech, such as simply requiring registration with the state, *Thomas v. Collins,* 323 U.S. 516 (1945), or requiring that a speaker publicly disclose his own name, *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995). Here, the burden is greater: by being required to enter into a contract that the speaker does not wish to enter into, the contents of which are mandated by the government, covered platforms are subject to an impermissible burden on their exercise of protected speech.

Insufficiency of Review Procedures (Rights to Jury Trial and Due Process; Separation of Powers)

We understand that the proponents of SB 686-B say the bill's arbitration and "de novo" appeal procedures resolve the concerns that earlier versions violated the right to jury trial (under Article I, section 17, of the Oregon Constitution) and the right to due process (under the 14th Amendment). Again, we respectfully disagree. The new procedures not only fail to address those problems, but likely introduce a new separation of powers problem as well.

First, as we identified in our June 10 memo, for all civil actions in which there exists a right to jury trial under the Oregon Constitution (including in actions seeking monetary compensation, as SB 686-B provides), "the right of Trial by jury shall remain inviolate." Art. I, §17. That right is a guarantee to have a jury, rather than a judge or arbitrator, determine all of the facts that bear on one party's entitlement to relief and the other party's defenses. Here, the -9 Amendments create new procedures by which an arbitration award can be reviewed, but the legislation does not provide for anything remotely like a jury trial. Absent jury trial review, SB 686's appeal process does not remedy the constitutional defect in the bill -- an opinion apparently shared by Legislative Counsel.

Similarly, the -9 Amendments do not resolve the fundamental due process problems that prior versions of the legislation presented. As described in our prior memo, the 14th Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law." The amount of process due for a particular deprivation of property depends on the particular circumstances and interests involved. *Tupper v. Fairview Hosp. & Training Ctr., Mental Health Div.*, 276 Or 657, 662 (1976). Here, if one assumes that Sections 2b(1)(a) and (b) reflect the value of covered platforms' "accessing" of digital journalism providers' online content over a two year period (as its proponents submit), then the size of the interest involved is substantial—certainly in the millions of dollars.

Especially in light of the substantial property interests at stake, the procedures the legislation describes bear no resemblance at all to even the most basic procedural safeguards required in typical civil actions. For example, in an action for damages a jury is permitted to consider all admissible evidence to decide the amount in damages for which the defendant is responsible. Here, the arbitration panel and court are limited to consideration of only two outcomes, may not

modify either option presented by the parties, and are not allowed to consider offsetting benefits to digital journalism providers created by covered platforms' access. Worse, the facts that the parties are permitted to present to the court on review are severely constrained. Additionally, the arbitration process is designed to create a future financial arrangement between the parties despite permitting no consideration of whether the covered platform intends to access a specific digital journalism provider's content going forward. Such procedural limitations create significant risks that the outcome will not reflect the benefit that one party gains, or the harm (if any) imposed on the other party. Due process requires far more robust procedures than the severely abbreviated processes and one-sided rules set out in SB 686-B.

Indeed, what the –9 Amendments call "trial de novo" looks *nothing* like de novo review as that term is commonly understood in Oregon law. *See, e.g., Hannan v. Good Samaritan Hosp.*, 4 Or App 178, 187 (1970) ("in Oregon a *de novo* review is a trial anew in the fullest sense"). Just as above, in evaluating the constitutional validity of SB 686-B, courts will look to the *substance* of its provisions, not the legislature's labels.

Here, the incongruity between the substance of what SB 686-B provides and the labels it uses is a problem not only with respect to the parties' rights, but also as an attempt to curtail the powers of the judiciary itself – likely representing an unconstitutional interference by the legislature with the core functions of the judicial branch. Oregon's legislature has only very limited power to tell the courts how to do their job, and the courts have rejected legislative attempts to limit the courts' power of review in a variety of contexts. *See, e.g., City of Damascus v. State*, 367 Or 41, 68 (2020) (declining to follow legislative mandate to consider the validity of one section of particular legislation before proceeding to other sections, noting the potential for such rules to "unduly interfere[] with or burden[] our exercise of the judicial function"). Here, by constraining the circuit court's review (including by mandating that it reach only one of two pre-determined outcomes), Section 5 of SB 686-B unduly interferes with the court's core judicial function to hear and decide cases in violation of the separation of powers provision of the Oregon Constitution, Article. III, section 1. *See id.* (noting that a legislative effort to "tell us what result we should reach in deciding the case" would represent "a clear interference with the judicial function.")

Unconstitutional Taking Without Just Compensation

The -9 Amendments do not cure the potential for a violation of the takings clause. The financial obligation imposed by SB 686-B remains a burden placed on covered platforms that, in all fairness and justice, should be borne by the public as a whole. *See Eastern Enters. v. Apfel*, 524 US 498, 522 (1998) (quoting *Armstrong v. United States*, 364 US 40, 49 (1960)). The benefit that SB 686-B seeks to provide is largely one that inures to the general public, and that everyone should be responsible for supporting. (For instance, the preamble to the -9 Amendments emphasizes "supporting the ability of local news organizations to continue to provide the public with critical information about their communities," because "everyday journalism plays an essential role in Oregon life".)

The bill's prior versions presented a potential takings violation by funding that broader benefit through imposing outright financial penalties on covered platforms. The -9 Amendments have changed the bill's mechanism by compelling covered platforms to negotiate with digital journalism providers to arrange for access agreements or allowing digital journalism providers to obtain future access agreements through arbitration. But just as described above in the free-speech context, that change does not alter the fundamental problem of imposing financial burdens on only a subset of the market to subsidize local digital journalists. Tying covered platforms' financial obligations under the bill to their advertising revenue further exacerbates this problem, as it identifies specific property of the covered platforms that is being taken for the benefit of digital journalism producers. By singling out covered platforms to bear the burden of subsidizing local journalism, SB 686-B is vulnerable to challenge as a violation of the takings clause.

Other Problems

The -9 Amendments continue to leave unaddressed several other infirmities that make SB 686-B vulnerable. Of particular concern, the ambiguity of its terms invites vagueness challenges. For instance, if a user on Facebook writes a post summarizing a newspaper article she read, has Facebook "aggregated," "distributed," "rendered," or "displayed" that news content under Section 1(2) of the bill? What if she includes a quote from the article? What if she also pastes a link to the newspaper's website? If a platform cannot accurately identify at what point that conduct occurs, then the notion of imposing multi-million dollar burdens on that conduct flies in the face of basic due process protections. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (impermissibly vague statutes violate due process requirements).

Further, particularly if the conduct at issue is as innocuous as described above, a court could reasonably deem the financial burdens imposed by SB 686-B excessive in violation of the Eighth Amendment. *See Hudson v. United States*, 522 U.S. 93, 103 (1997) (stating that the Eighth Amendment protects against excessive civil fines).

SB 686-B is also problematic under Section 230 of the Communications Decency Act. That law provides that no provider of an interactive computer service is to be treated as the publisher or speaker of any information provided by another information content provider, and it preempts state law concerning the same subject. Accordingly, it "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. Am. Online*, 129 F.3d 327, 330 (1997). That appears to be precisely what SB 686-B would do.

Finally, the bill is vulnerable to a challenge under the dormant or negative due process clause. The Supreme Court has long interpreted the Commerce Clause as implicitly preempting state laws that regulate commerce in a manner that is disruptive to economic activities in the nation as a whole. *Nat'l Pork Prods. Council v. Ross*, 6 F.4th 1021, 1026 (9th Cir. 2021). States may neither

discriminate against interstate commerce nor impose undue burdens on interstate commerce. *Id.*

Conclusion

The -9 Amendments to SB 686 did not cure the constitutional and other legal defects that previously were identified by Legislative Counsel or by us in our opinion. Instead of addressing the substance of those concerns, the amendments largely paper over them. We are of the opinion that the core problems presented by earlier versions of SB 686-B remain, and that they likely will lead to its invalidation by a reviewing court.