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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 21, 2025

Senator Daniel Bonham
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: Senate Bill 686 constitutional and preemption issues

Dear Senator Bonham:

You asked several questions regarding Senate Bill 686, a bill that would require certain online platforms to annually pay digital journalism providers and donate to the Oregon Civic Information Consortium, an organization that the bill establishes. Specifically, you asked about SB 686 in the context of free speech under the state and federal constitutions, preemption of state laws by federal copyright law, the constitutionality of compulsory binding arbitration and the constitutionality of the bill under the dormant Commerce Clause of the United States Constitution.

We believe the bill would likely be successfully challenged under Article I, section 8, of the Oregon Constitution, but not under the First Amendment to the United States Constitution. Additionally, we believe that, if SB 686 were challenged under the remaining grounds—i.e., federal copyright preemption, constitutionality of compulsory binding arbitration and constitutionality under the dormant Commerce Clause—there would likely be compelling arguments on both sides of those issues. However, we caution that there are no court cases analyzing these issues within this context because there are no laws like SB 686 in the United States. Thus, your questions raise issues of first impression and the conclusions expressed in this opinion cannot be free from doubt.

I. SENATE BILL 686

As we understand it, the sponsors of SB 686 intend to proceed under the Proposed Amendments to Senate Bill 686 dated April 7 (SB 686-2). Therefore, this opinion is directed at the version of the bill incorporating those proposed amendments.

Senate Bill 686 requires certain online platforms to compensate digital journalism providers for accessing the content of those providers for an Oregon audience. Section 2 of the bill directs online platforms to comply in one of two ways: (1) "Pay at least $122 million annually to compensate digital journalism providers for accessing the Internet websites of the providers for an Oregon audience," with 10 percent distributed to the Oregon Civic Information Consortium, an organization that the bill establishes, and the remaining 90 percent distributed to digital journalism providers proportionally based on the number of staff employed by those organizations; or (2) pay an award as determined in an arbitration process specified in the bill, with 10 percent distributed to the Oregon Civic Information Consortium and 90 percent distributed to a claims administrator who shall distribute the award to digital journalism providers participating in the arbitration process in amounts proportionally based on the number of staff employed by those organizations.

Section 10 of SB 686 establishes the Oregon Civic Information Consortium as a nonprofit corporation within the University of Oregon. The purpose of the consortium is to "support Oregon news content providers, journalism, news, public information projects and public interest initiatives that address Oregonians' civic information needs" through a grant process funded by proceeds directed to the consortium under the bill.

II. FREE SPEECH

Question

"Is it consistent with the First Amendment or Article I, section 8, of the Oregon Constitution, to compel a private business to pay money to expressive media outlets whose speech it does not want to subsidize or to compel an online platform to continue to display third-party speech, or to give that speech particular prominence, if the platform disagrees?"

Short Answer

We believe that SB 686 is likely a category two *Robertson* law[1] and is susceptible to a successful free speech challenge as overbroad under Article I, section 8, of the Oregon Constitution. Senate Bill 686 is directed at online platforms' expressive products not in terms of their substance or opinion, but in terms of their status as products that have caused financial harm to news providers. However, section 2 (1) of SB 686—which requires online platforms to pay "at least $122 million annually" to compensate news providers—is likely overbroad to the extent that it regulates any aspect of online platforms' expressive products that did not directly cause financial harm to news providers. In contrast, the arbitration process under section 2 (2) is more likely to withstand a free-speech challenge under the Oregon Constitution, because it is directed at relevant financial harms. Specifically, under section 5 (6)(b), news providers and covered platforms are required to submit final offer proposals "based on the value that access provides to the platform."

We do not believe that SB 686 is as susceptible to a free-speech challenge under the First Amendment. We do observe that SB 686 is similar to other "compelled subsidy" laws struck down by the United States Supreme Court, in that SB 686 compels online platforms to subsidize private speech. The Court has strongly disfavored such laws because they restrict individuals' choice of whether or not to associate with particular speech. Here, however, the difference is that an online platform would only be required to pay a news provider under SB 686 if the platform has already made a choice to support or amplify a specific expression by making available a newspaper or article. In that sense, SB 686 does not compel an online platform to subsidize private speech that the online platform has not already chosen to support or amplify.

Full Answer

Free Speech under the First Amendment

We understand your question to ask whether requiring an online platform to "subsidize" the speech of private businesses violates the First Amendment.[2] That question invokes First

[1] *See* case cited i*nfra* 26.

[2] You asked about the subsidization of *private* speech, and therefore we do not address in depth any potential implications of the subsidization of a nonprofit corporation established within the University of Oregon. It is possible that that component of SB 686 involves subsidization of government speech, but the Court has made clear that compelled subsidization of government speech is constitutional. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) ("'Compelled support of government'—even those programs of government one does not approve—is of

Amendment issues involving "compelled speech" and "compelled subsidies" for speech. We first explain free speech rights under the First Amendment and then proceed to the particular free speech rights implicated in SB 686.[3]

A. "Compelled speech" and "compelled subsidy" cases generally

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The First Amendment is incorporated by the Fourteenth Amendment and therefore applies to states.[4] Commercial speech is protected under the First Amendment.[5] The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."[6] To that end, the government may not compel a person to speak the government's message, to host or accommodate another speaker's message[7] or to speak when the person would prefer to remain silent.[8] The Supreme Court has "universally condemned" government actions compelling an individual to mouth support for views they find objectionable.[9]

The Court has carried First Amendment "compelled speech" concerns over to "compelled subsidy" cases, explaining that the latter type of cases raise similar speech and association issues.[10] The Court strongly disfavors compelled subsidies of private speech, holding that such government-mandated compulsion "seriously impinges on First Amendment rights" and "cannot be casually allowed."[11] In *Johanns*, the Supreme Court distinguished three types of compelled-speech cases: (1) "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government;" (2) "'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity;" and (3) "government-compelled subsidy of the government's own speech."[12]

As we explain below, at their core, compelled subsidy cases appear geared toward protecting speakers from associational harms—i.e., from the danger that the provider of funds will be associated with the speech to which the provider objects.

In *United Foods*, the Court held that a statute unconstitutionally compelled certain individuals to pay subsidies for speech to which they objected.[13] The statute at issue in that case had allowed the government to impose mandatory assessments upon mushroom farmers, and

course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position.").

[3] Senate Bill 686, as amended by SB 686-2, no longer contains the "retaliation" provisions at issue in your question. Generally speaking, the "retaliation" provisions in the introduced version of the bill—which would have prevented online platforms from "retaliating" against digital journalism providers by removing those providers' content in order to avoid paying compensation—likely raise free speech concerns under the First Amendment. However, the bill's proponents have indicated they are proceeding with the bill as amended, and thus we do not further address the "retaliation" provisions.

[4] *Near v. Minnesota*, 283 U.S. 697 (1931).

[5] *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023) (stating that speakers do not "shed their First Amendment protections by employing the corporate form to disseminate their speech").

[6] *Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018), *quoting Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[7] *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

[8] *303 Creative*, 600 U.S. at 586.

[9] *Janus*, 585 U.S. at 892-893.

[10] *Id.* at 893-894.

[11] *Id*. at 894.

[12] *Johanns*, 544 U.S. at 557.

[13] *United States v. United Foods, Inc.*, 533 U.S. 405, 415-416 (2001).

the majority of those funds were spent on generic advertising to promote mushroom sales.[14] The Court explained that it has "not upheld compelled subsidies for speech in the context of a program where the *principal object* is speech itself" and the compelled payment is not germane to a larger regulatory scheme requiring mushroom farmers to associate as a group and make marketing decisions together.[15]

In *Janus*, the Court held that a law authorizing public-sector unions to charge dues—even if employees do not join and strongly object to the union's bargaining positions—violates nonmembers' free speech rights by "compelling them to subsidize private speech on matters of substantial public concern."[16] That is so, in part, because "when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*."[17] The Court noted that "forced associations that burden protected speech are impermissible" and that, under "exacting" scrutiny, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[18] Ultimately, the Court stated that the government's interests in ameliorating "whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters" could be resolved through means that are "significantly less restrictive of associational freedoms."[19]

B. Application to SB 686

Under section 2 of SB 686, online platforms are required to financially compensate digital journalism providers for "accessing" the content of those providers for an Oregon audience. Digital journalism providers are required to spend compensation received under the bill on hiring and supporting journalists and support staff. Thus, the bill requires online platforms to subsidize the speech of inherently expressive private entities and likely falls under the second type of "compelled speech" cases identified in *Johanns*. A court could plausibly conclude that, like in *United Foods*, SB 686 does not fit within a larger regulatory scheme requiring online platforms and digital journalism providers to associate or collaboratively make decisions regarding the content of speech or opinion. Additionally, a court could plausibly conclude that the governmental interests supporting SB 686 could be addressed by means less restrictive of associational freedoms. In *Janus*, the Court opined that individual nonmembers could be required to pay for particular services offered by the union.[20] Here, the state could instead directly tax online platforms and allocate those funds to support local journalism.[21]

However, we believe that a "compelled subsidy" challenge to SB 686 would be unsuccessful. As explained, the Court has scrutinized the burdens on speech and associational freedoms in "compelled subsidy" cases. We believe that any such burden on those freedoms here is minimal. An online platform would only be required to pay a news provider under SB 686 if the platform has <u>already</u> made a choice to support or amplify a specific expression by making available a newspaper or article. Any burden on speech or associational freedoms is even less compelling for online platforms that have existing commercial licensing agreements with digital journalism providers. To the extent that an online platform argues that the speech implications of acquiring, crawling or indexing journalism content for an audience is significantly different from

[14] *Id.* at 408. The Court explained later in *Johanns* that it had decided *United Foods* "on the assumption that the advertising was private speech, not government speech" because the government there did not argue that compelled subsidy was constitutionally permissible government speech. *Johanns*, 544 U.S. at 558.
[15] *United Foods*, 533 U.S. at 412-413, 415 (emphasis added).
[16] *Janus*, 585 U.S. at 885-886.
[17] *Id.* at 910.
[18] *Id.* at 892-894.
[19] *Id.* at 900.
[20] *Id.* at 900-901.
[21] We do not express an opinion as to other possible implications of this type of direct tax on online platforms.

the speech implications of paying for access to that content, we believe that that distinction and its impact on First Amendment analysis is not clearly established in case law. Therefore, we believe a court would ultimately hold that SB 686 does not violate the First Amendment by requiring online platforms to compensate digital journalism providers. As noted, the lack of case law directly on point means that our conclusion cannot be free from doubt.

Free Speech under Article I, Section 8, of the Oregon Constitution

We understand your question to ask whether requiring an online platform to "subsidize" the speech of private businesses violates the Article I, section 8, of the Oregon Constitution. The Oregon Supreme Court has not addressed free speech issues in terms of "compelled speech" or "compelled subsidization of speech."[22] Instead of applying a "compelled speech" or "compelled subsidy" analysis under Oregon law, we first explain free speech analysis under the Oregon Constitution and then conclude that SB 686 is likely subject to a successful challenge under Article I, section 8.

A. Free speech under the Robertson framework

Oregon courts analyze independently the speech protections under Article I, section 8, and under the First Amendment to the United States Constitution.[23] Article I, section 8, provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The text of Article I, section 8, provides "broader" speech protections than the text of the First Amendment[24] and protects commercial speech to the same extent as other categories of speech.[25]

To evaluate a claim under Article I, section 8, courts apply the analysis established in *State v. Robertson*.[26] That analysis separates laws that affect speech into three categories. The first *Robertson* category applies to laws that expressly prohibit speech because of the subject or opinion of the speech. "[L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end."[27] A category one law is unconstitutional on its face, unless it falls within an historic exception.[28] The second *Robertson* category applies to laws that expressly prohibit speech to prevent forbidden effects or harms of the speech. A category two law is analyzed for overbreadth based upon the extent to which the law prohibits or regulates constitutionally protected expression. The third *Robertson* category applies to laws that focus on preventing forbidden effects or harms without expressly prohibiting speech, but upon application prohibit or limit speech. A category three law is not facially unconstitutional but is subject to as-

[22] We note that the Oregon Supreme Court has rejected the premise that payment in a similar context—political campaign contributions—is necessarily "speech" under Article I, section 8, of the Oregon Constitution. We think an Oregon court would similarly conclude that compelled payment to entities is not necessarily "speech" under the Oregon Constitution simply because the payment goes toward expressive media outlets. *See Matter of Validation Proceeding to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Fin. & Disclosure*, 366 Or. 295, 308, (2020) (explaining that the fact "that campaign contributions often may be used by a candidate to communicate a message also fails to convert campaign contributions into conduct that is necessarily expressive").
[23] *State v. Henry*, 302 Or. 510, 515 (1987).
[24] *Id.*
[25] *See Moser v. Frohnmayer*, 315 Or. 372, 376-378 (1993) (applying to advertising the Article I, section 8, test for restrictions on other categories of speech); *see also id.* at 382 (Graber, J., concurring) (stating that "Article I, section 8, protects the substance of any speech—the merchant's as well as the mayor's").
[26] *State v. Robertson*, 293 Or. 402 (1982).
[27] *Id.* at 416-417.
[28] *State v. Plowman*, 314 Or. 157, 164 (1992).

applied challenges. A court analyzes an as-applied challenge to determine whether application of a law to specific facts and circumstances impermissibly burdens speech protected by Article I, section 8. If a court concludes that it does, the court invalidates application of the law to those facts and circumstances, but otherwise the law remains in effect.[29]

B. Application to SB 686

First, we believe that SB 686 is a category two *Robertson* law. By directing online platforms to "compensate" news providers for accessing those providers' "Internet websites" for an Oregon audience, SB 686 is directed at online platforms' expressive products not in terms of their communicative substance, but in terms of their status as products that have caused financial harm to news providers. Thus, SB 686 can be distinguished from laws that are directed at the substance of speech or opinion, such as a law prohibiting the sale of inhalant delivery systems that are packaged in a manner that is "attractive" to minors.[30]

As such, a court would then determine whether SB 686 is unconstitutionally overbroad. The Oregon Supreme Court has held that laws are "overbroad" when, for example, a law is not "limited to and contained by the consequences the law seeks to protect."[31] We believe that section 2 (1) of SB 686 is susceptible to a successful free speech challenge as overbroad under Article I, section 8, of the Oregon Constitution. Section 2 (1) of SB 686—which requires online platforms to pay "at least $122 million annually" to compensate news providers—is likely overbroad to the extent that it regulates any aspect of online platforms' expressive products that did not directly cause financial harm to news providers. The bill is not tailored in a way that targets particular financial benefits obtained by online platforms when those platforms access third-party speech. In contrast, the arbitration process under section 2 (2) is more likely to withstand a free-speech challenge under the Oregon Constitution, because it is directed at relevant financial harms. Specifically, under section 5 (6)(b), news providers and covered platforms are required to submit final offer proposals "based on the value that access provides to the platform." Therefore, we conclude that section 2 (1) of SB 686 is susceptible to a successful challenge under Article I, section 8, of the Oregon Constitution.

III. FEDERAL PREEMPTION OF COPYRIGHT LAW

Question

Is this bill preempted by federal copyright law?[32]

Answer

As we have noted, there are no state laws similar to SB 686. If SB 686 is challenged as preempted by federal copyright law, both sides would likely have good arguments. Given the lack of case law directly on point, we summarize the general legal landscape on this issue and describe potential arguments on either side of this issue.

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[29] *Couey v. Clarno*, 305 Or. App. 29, 34-35 (2020), *rev den.* 367 Or. 496 (2021).
[30] In explaining that ORS 431A.175 (2)(f)—which prohibits sale of inhalant delivery systems that are packaged in a manner that is "attractive" to minors—is a category one law, the Oregon Court of Appeals explained that the law is written in terms directed at the substance of a communication: the content of packaging. *Bates v. Oregon Health Authority*, 335 Or. App. 464, 473-474 (2024) (internal citations omitted).
[31] *See City of Hillsboro v. Purcell*, 306 Or. 547, 556 (1988) (explaining that a city could place reasonable limitations on door-to-door solicitations but holding that the regulation at issue is unconstitutionally overbroad because it "impermissibly has prohibited all persons from approaching people in their homes at any time to sell merchandise," thereby reaching protected expression).
[32] This question has been modified for clarity.

A. Preemption under the Copyright Act of 1976

The federal Copyright Act of 1976[33] (Copyright Act) preempts all state laws that come within the general subject matter of copyright described in the Act and provide rights equivalent to those set forth in the Act. The Copyright Act "affords copyright owners the 'exclusive rights' to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work."[34]

Courts have adopted a two-part test to determine whether a state law claim is preempted by the Copyright Act. First, courts decide whether the subject matter of the state law claim falls within the subject matter of copyright in 17 U.S.C. 102 and 103.[35] Importantly, courts have held that the Copyright Act "prevents the States from protecting [a work] even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify,"[36] indicating that the Act may preempt states from enacting copyright-like protections for works that are of the same subject matter categories as federal copyright law but would not qualify for copyright protection. Provided that a work meets the subject-matter requirement, courts then determine whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. 106, which specifies the exclusive rights of copyright holders.[37] In other words, the state law claim must involve acts of reproduction, adaptation, performance, distribution or display. However, a state law is not preempted by the Copyright Act if the state law includes any extra element that makes it qualitatively different from a copyright infringement claim—i.e., "an extra element which changes the nature of the action."[38]

B. Potential preemption arguments

It is well established that news articles are forms of literary expression that generally qualify for copyright protection, so we think a court would likely conclude that the subject-matter requirement is met in SB 686. The more likely debatable issue is whether SB 686 would create a state right equivalent to any of the exclusive rights within the general scope of copyright.

Senate Bill 686 applies broadly to all news content,[39] including content that is generally protected by federal copyright law—such as full news articles[40]—and "portions" of such content

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[33] 17 U.S.C. 101 et seq.
[34] *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017), *citing* 17 U.S.C. 106.
[35] *Best Carpet Values, Inc. v. Google, LLC*, 90 F.4th 962, 971 (9th Cir. 2024); *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1069 (9th Cir. 2018), *quoting* 17 U.S.C. 102(a) ("[T]he subject matter of copyright encompasses 'original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.'").
[36] *ML Genius Holdings LLC v. Google LLC*, 20-3113, 2022 WL 710744, at *2 (2d Cir. Mar 10, 2022).
[37] *Best Carpet Values, Inc.*, 90 F.4th at 971.
[38] *Id.* at 972.
[39] *See, e.g.*, section 1 (8) of SB 686-2:

> (8) "Online platform" means an Internet website, online or mobile application, digital assistant or online service that:
> (a) Accesses news articles, works of journalism or other content, or portions thereof, generated, created, produced or owned by a digital journalism provider; and
> (b) Aggregates, displays, provides, distributes or directs users to content described in paragraph (a) of this subsection.

(Emphasis added.)
[40] *See* U.S. Copyright Office, *Copyright Protections for Press Publishers* at 30, https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf (June 30, 2022) (explaining that "[w]hen a press publisher owns a copyright in either a print issue or website or in an individual article, it has the exclusive right to do or authorize the reproduction, preparation of derivative works, distribution, public

that may be too minimal or lacking in originality to qualify for federal copyright protection—such as headlines and snippets of articles.[41] Opponents of the bill may argue that SB 686 is preempted by the Copyright Act because the bill creates copyright-like protections for content already protected under the Copyright Act—i.e., news articles—and also because the bill allows enforcement of those protections for material that online platforms may otherwise freely use under the fair use doctrine recognized by the Copyright Act.[42] Additionally, opponents may argue that SB 686 is preempted because it creates copyright-like protections for "portions" of such content that fall within the general subject matter of the Copyright Act but do not qualify for federal copyright protection—i.e., headlines and short snippets of fact.

On the other hand, proponents of the bill might argue that, by requiring online platforms to compensate for "accessing" journalism content, the bill adds an extra element that "changes the nature of the action" and therefore is not preempted by the Copyright Act. Proponents of SB 686 have testified that the bill is based in part on the California Journalism Preservation Act (CJPA), which was proposed in 2023 and 2024 but was not enacted.[43] The CJPA similarly proposed requiring online platforms to compensate digital journalism providers for "accessing" content, and the CJPA's definition of "access" is the same as the definition in SB 686. The author and sponsors of the CJPA likewise faced federal copyright preemption concerns, responding that

> [T]he bill's amended language—requiring a platform to pay for the value platforms derive from "accessing" news providers' websites—makes clear that the CJPA seeks more than to have the platforms pay for clicks. They assert that matters such as the value of the data collected by platforms through access to publishers' platforms, the value of the facts made available to the platforms as a result of publishers' news-gathering efforts, and, more recently, the use of publishers' works to train AI platforms are all relevant to the necessary valuation, and therefore that the CJPA seeks to vindicate rights not covered by the Copyright Act.[44]

We anticipate that proponents of SB 686 would make similar arguments here. It is likely that, if SB 686 is challenged as preempted by federal copyright law, a key issue for a court to decide is whether the meaning of "access" to content "for an Oregon audience" is limited to the reproduction or display of news content. Here, SB 686 requires online platforms to "compensate digital journalism providers for accessing the Internet websites of the providers for an Oregon audience." "Access" is defined in section 1 as "to acquire, crawl or index content," but those terms

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performance, and public display of that work, including on the internet," but noting that "[u]nder U.S. copyright law, several doctrines allow certain uses of news content, by news aggregators or others, without the news publisher's permission or payment of licensing fees") (footnotes omitted).

[41] *Id.* at 58 ("Some elements of news articles are not protectable as a matter of Constitutional law—because they are facts or because the expression merges with the facts described. Smaller elements like headlines may not be copyrightable under the words and short phrases doctrine. Even where an aggregator reuses protectable expression, the fair use doctrine may offer a defense in many circumstances. These doctrines are more likely to allow the reuse of news content where only the headline or the lede is taken.").

[42] Some protectable elements of news stories may be used without authorization under applicable exceptions and limitations in the Copyright Act, including the fair use doctrine codified at 17 U.S.C. 107. *See* U.S. Copyright Office, *Copyright Protections for Press Publishers* at 44, 42, https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf (June 30, 2022) (explaining that "some, but not all, news aggregation is likely to qualify as fair use" and noting that courts "have been more skeptical of fair use defenses by aggregators who took larger segments of copyrighted works").

[43] Assembly Bill 886, California Journalism Preservation Act, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB886.

[44] *Bill Analysis*, Senate Judiciary Committee, at 20 (June 21, 2024) https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB886.

are not individually defined in SB 686. We are not aware of controlling case law that analyzes the meaning of "to acquire, crawl or index content" in this context. The use of "for an Oregon audience" gives some indication that the bill is directed at the reproduction or display of news content that is viewed by an Oregon user of an online platform. But, without controlling case law on point, it is unclear whether SB 686 creates a right beyond those that are clearly established in federal copyright law. At minimum, however, it appears clear that the bill allows digital journalism providers to be compensated for enforcing copyright or copyright-like protections—i.e., for a portion of online platforms' advertising revenue resulting from the reproduction or display of content generated, created, produced or owned by a digital journalism provider.

Alternatively, proponents of SB 686 may argue that the bill should be characterized differently—not as a law governing fair compensation for copyrighted content, but as a competition-based law addressing the bargaining relationship between news publishers and online platforms. As noted, if enacted, SB 686 would be the first of its kind in the United States. However, a similar federal bill was proposed in 2021,[45] and other countries have enacted similar approaches to sustain the viability of news organizations. In response to proponents of the federal bill, the U.S. Copyright Office produced a 2022 report detailing existing federal copyright protections for news content, the advisability of adding new copyright protections and similar protections enacted within the European Union.[46] The office categorized recent international efforts into two models: (1) An "extension of copyright or copyright-like protections;" or (2) "regulation of the terms of competition and negotiation between the publishers and online intermediaries."[47] The first model is an "ancillary copyright" in the content of press publications, such as a "non-waivable right of remuneration" or a two-year right to authorize or prohibit third-party online platforms' reproducing publications or making them available to the public.[48] The latter example of a right does not apply to certain uses or portions of news content, such as "hyperlinking to, without reproducing, news content" and "the use of individual words or very short extracts."[49]

We believe that SB 686 would fall under the second model, which the U.S. Copyright Office characterized as a "competition-law-based approach to addressing the relationship between news publishers and online intermediaries."[50] Critically, the office placed the similar proposed Journalism Competition and Preservation Act of 2021 in that second model. The office also placed in that model a 2021 Australian law that requires Google and Facebook to "negotiate with press publishers over compensation for the value the publishers' stories generate on the two companies' platforms."[51] The report explained that, because the Australian law "is not copyright-based, the bargaining right applies to *all* news content, including headlines and snippets, not just material protected by copyright."[52] Senate Bill 686 likewise includes all news content and sets up a collective bargaining system for digital journalism providers. Although we are not aware of controlling case law distinguishing similar laws along those lines, we think it is possible a court may find the U.S. Copyright Office's characterization of the two models convincing. If so, a court would likely characterize the bill as competition-based rather than copyright-based and hold that the bill is not preempted by the Copyright Act. We note, however, that the office was discussing

[45] The Journalism Competition and Preservation Act of 2021 proposed a four-year safe harbor from antitrust laws for print, broadcast or digital news companies to collectively negotiate with online news content distributors. S. 673, 117th Cong. sec. 2. (2021).
[46] U.S. Copyright Office, *Copyright Protections for Press Publishers* at 3, https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf (June 30, 2022).
[47] *Id.*, Appendix B at 72-73.
[48] *Id.*, Appendix B at 73.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

a federal bill and an international law when characterizing the two approaches to legal protections for press publishers. Therefore, it is unlikely that the office considered potential federal copyright preemption issues facing similar state legislation and, therefore, a court may find the characterization less than compelling.

IV. COMPULSORY BINDING ARBITRATION

Question

"When can a party who did not consent to arbitrate be compelled to have its rights or obligations established in arbitration? In particular, is arbitration under this bill consistent with: Due Process, the First Amendment right to petition the courts, or the separation of powers, by vesting judicial power in a nongovernmental body?"

Short Answer

Senate Bill 686 does not involve arbitration as it is generally understood. Typically, arbitration involves parties who have a legal dispute over a contract, legal claim or right. The obligations imposed under SB 686 do not contemplate parties with a preexisting contract, claim or right,[53] and therefore there would be no legal dispute to submit to arbitration. Rather than impose arbitration to settle a dispute, the bill envisions mediated negotiations to establish rates owed by online platforms. As such, we could find little case law directly on point. However, we think a court is likely to conclude that the binding nature of the arbitration process under SB 686 violates, at minimum, the state constitutional right to a jury trial.

Full Answer

A threshold question is whether the bill actually imposes compulsory, binding arbitration on an online platform in order to have its rights or obligations established. Broadly speaking, when parties consent to binding arbitration, the Supreme Court has recognized a strong presumption in favor of the enforcement of agreements to arbitrate regardless of constitutional rights that were waived pursuant to entering the agreement.[54] However, if online platforms and digital journalism providers are required to enter binding arbitration, we think SB 686 likely violates the parties' constitutional rights, including the right to a jury trial under Article I, section 17, of the Oregon Constitution.[55] Although courts have differed on whether particular state laws imposing compulsory binding arbitration violate the Due Process Clause of the United States Constitution,[56]

[53] Senate Bill 686 does account for the deduction of compensation from an arbitration award under SB 686 for any compensation obtained under a preexisting commercial agreement for access to a digital journalism provider's content, but that provision does not affect our analysis here.

[54] The federal Arbitration Act expressly makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The Supreme Court has described the Act as reflecting "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 346 (2011) (internal citations omitted).

[55] Article I, section 17, of the Oregon Constitution, provides that "[i]n all civil cases the right of Trial by Jury shall remain inviolate."

[56] *Compare Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (upholding state law requiring fire insurance policies to provide for compulsory binding arbitration where the procedure "is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard"); with *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 134 (1993) (holding that a law violated Due Process because it required arbitration of dispute and did not provide for judicial review).

we think it is significant that online platforms lack substantial appeal rights under the arbitration option in section 2 (2) of SB 686, and the other option is to pay at least $122 million annually.[57]

Oregon courts have held that statutes that try to force parties into binding arbitration violate the right to a jury trial in Article I, section 17, of the Oregon Constitution. In *Molodyh*, the Oregon Supreme Court upheld a law providing a permissive arbitration process—i.e., wherein one party may unilaterally make the arbitration process mandatory for both parties.[58] In that case, the court determined that arbitration would be mandated for both parties but only binding on the electing party.[59] In contrast, in *Foltz*, the court held that a state law requiring arbitration of disputes over the amount or denial of certain insurance benefits violates the right to a jury trial under Article I, section 17, of the Oregon Constitution.[60] The court explained that whether a plaintiff voluntarily requested arbitration under the law at issue is not dispositive because the plaintiff was required to arbitrate under the statute.[61] Ultimately, the court held that the law was able to be saved by severing the later-enacted provision requiring that such arbitration be binding on the parties.[62]

Under SB 686, online platforms have a choice—they may elect to pay digital journalism providers at least $122 million annually under section 2 (1) or submit to binding arbitration to determine how much they must pay digital journalism providers under section 2 (2). Given that choice, it is possible that a court would conclude that SB 686 is more comparable to *Molodyh* than to *Foltz*. However, we think a court is more likely to conclude that there is no choice at all—to dispute the amount owed, whether $122 million or otherwise, online platforms must elect the option under section 2 (2). The binding nature of any arbitration to dispute the amount owed leaves no ability to seek substantive judicial review of the determined amount. Thus, we believe that the binding arbitration process violates, at the very least, the state constitutional right to a jury trial.

V. DORMANT COMMERCE CLAUSE

Question

"Does this bill run into problems with the United States Constitution's rules about interstate commerce by making big online platforms, which operate across the whole country and beyond, pay money just to support Oregon's journalism or a state group? *Specifically: Is it okay for Oregon to put this burden on companies that do business nationwide when the benefits mostly stay in Oregon?*"

Short Answer

We understand your questions to ask: (1) whether the dormant Commerce Clause prohibits Oregon from creating laws that confer a purely in-state benefit when interstate companies conduct business in Oregon; and (2) how a court would weigh the particular burdens on interstate commerce and local benefits of SB 686 in the context of the dormant Commerce Clause. The answer to the first question is no. The answer to the second question is that courts may balance economic and noneconomic benefits and burdens of a state law, but it remains unclear under recent dormant Commerce Clause case law what benefits and burdens are valid

[57] Senate Bill 686 provides very limited appeal rights. Under section 5 (7)(d), "[a]ny party to the arbitration proceeding may elect to appeal the decision of the arbitration panel on the grounds of a procedural irregularity."
[58] *Molodyh v. Truck Insurance Exchange*, 304 Or. 290 (1987).
[59] *Id.* at 299.
[60] *Foltz v. State Farm Mut. Auto Ins. Co.*, 326 Or. 294, 302 (1998).
[61] *Id.*
[62] *Id.* at 302-303.

and how courts will assign respective weights. There are likely good arguments on both sides of this issue.

Full Answer

It is often difficult to predict the outcome of a challenge under the dormant Commerce Clause because the analytical test is fact-intensive and affords courts discretion to weigh competing interests. Here, we give an overview of dormant Commerce Clause analysis and briefly discuss potential arguments about whether SB 686 unconstitutionally imposes a burden on interstate commerce.

A. Dormant Commerce Clause

In general, the State of Oregon has broad authority to regulate conduct within its territorial borders. However, that authority is constrained by the United States Constitution, federal law and treaties. Courts have long recognized that the Commerce Clause of the United States Constitution encompasses a dormant provision that limits a state's authority to create laws that discriminate against or burden the flow of interstate commerce.[63] Dormant Commerce Clause jurisprudence "is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[64] "[E]conomic protectionism, or discrimination, 'simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[65]

Traditionally, under the dormant Commerce Clause, a law that "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect . . . is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'"[66] Importantly, "any notion of discrimination [under dormant Commerce Clause analysis] assumes a comparison of substantially similar entities."[67] Senate Bill 686 does not engage in forbidden discrimination against interstate commerce because it is not a regulatory measure designed to benefit in-state "covered platforms" by burdening out-of-state competitors. In other words, SB 686 does not facially discriminate against out-of-state actors because the bill would impose an equal burden on in-state and out-of-state "covered platforms."

However, under *Pike v. Bruce Church*, a law that is not discriminatory on its face or in its practical effect, but nevertheless imposes a burden on interstate commerce, will be invalidated if the burden is "clearly excessive in relation to the putative local benefits."[68] The Supreme Court has clarified that, where a state statute is facially neutral, the *Pike* test provides an alternative method to identify purposeful discrimination against out-of-state economic interests.[69] A court may balance economic and noneconomic benefits and burdens under dormant Commerce Clause analysis.

B. Application to SB 686

If SB 686 were subject to a dormant Commerce Clause challenge, we believe proponents of the bill might argue that SB 686 aims to serve multiple local benefits, including stimulating

[63] *Or. Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994).
[64] *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 910 (9th Cir. 2018), *quoting Dep't. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008) (internal quotation marks omitted).
[65] *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013), *quoting Or. Waste Sys.*, 511 U.S. at 99.
[66] *Rocky Mt. Farmers Union*, 730 F.3d at 1087, *quoting Maine v. Taylor*, 477 U.S. 131, 138 (1986).
[67] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).
[68] *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).
[69] *National Pork Producers Council v. Ross*, 598 U.S. 356, 380 (2023).

Oregon's news media workforce and providing Oregon residents with access to media coverage of local news. Opponents of SB 686 might argue that online platforms would be unduly burdened by having to tailor their software to users depending on their state. Some have argued that geolocation technology would be an easy way for online platforms to accomplish said tailoring,[70] but others have asserted that such location-based tailoring would involve erosion of users' privacy protections.[71] Senate Bill 686 does not explain how an online platform would determine whether content was accessed "for an Oregon audience," but we think online platforms would likely use geolocation technology to make that determination.

We caution that this is an evolving area of law and we cannot predict with confidence how a court would weigh potential burdens on interstate commerce and local benefits. In a 2023 case, *National Pork Producers Council v. Ross*,[72] the Supreme Court itself could not agree on the precise articulation of the *Pike* test, nor its application.[73] *Ross* involved a California law that prohibited the sale of pork from animals confined in a manner inconsistent with California standards. In challenging the law under the dormant Commerce Clause, trade associations argued that the law had an unconstitutional practical effect outside of California because the law, in practice, forced hog farmers across the country to comply with California standards even though 87 percent of the pork produced in the country is consumed outside of California. In upholding the statute, the Court explained that there is no per se rule under the dormant Commerce Clause that prohibits enforcement of state laws that have practical effects on commerce outside of a state if the state laws do not purposefully discriminate against out-of-state economic interests.[74] Here, although it remains unclear how a court would weigh the particular burdens on interstate commerce and local benefits of SB 686 in the context of the dormant Commerce Clause, *Ross* stands for the proposition that the dormant Commerce Clause does not per se invalidate state laws that regulate goods or companies within their own borders but create "ripple effects beyond their borders."[75]

We hope this opinion answers your questions. Please let us know if you have any additional questions.

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[70] *See, e.g.,* Jack L. Goldsmith and Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 Tex. L. Rev. 1083 (2023) (arguing that online platforms can implement geolocation to determine where users are and then apply software differently to users depending on their state as a means of addressing Dormant Commerce Clause challenges).

[71] *See, e.g.,* Ayesha Rasheed, *Dormant Commerce Clause Constraints on Social Media Regulation*, 25 Yale J.L. & Tech Special Issue 101, 118-119 (2023) (arguing that "[b]y potentially forcing companies to unconstitutionally collect government-issued identification from users, excluding residents from accessing goods and services facilitated by social media across state lines and severely eroding individuals' privacy in ways that may violate state law, geolocation as a solution creates additional burdens on interstate commerce that make it less likely to outweigh putative local benefits").

[72] 598 U.S. 356 (2023).

[73] *See id.* at 106, n.13 ("Across the many opinions in [*Ross*], Justices Thomas, Gorsuch, and Barrett seem to believe that courts cannot and should not attempt balancing under *Pike*. However, a majority— Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Kavanaugh, and Jackson—think that courts can consider *Pike* claims and balance a law's economic burdens against its noneconomic benefits, even if (as in *Ross*) challengers do not contend that the law has a discriminatory purpose. Confusingly, when applying *Pike*, those same six justices could not agree on how the challengers' claims would fare. Four Justices (Thomas, Sotomayor, Kagan, and Gorsuch) felt plaintiffs failed to show how Proposition 12 substantially burdened interstate commerce, while Chief Justice Roberts and Justice Kavanaugh took the opposite view.").

[74] *Ross*, 598 U.S. at 390-391.

[75] *Id.*

provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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