

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

X CORP.,

 Plaintiff,

 v.

ROBERT A. BONTA, Attorney
General of California, in his
official capacity,

 Defendant.

No. 2:23-cv-01939 WBS AC

MEMORANDUM AND ORDER RE:
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

----oo0oo----

This matter is before the court on plaintiff's motion for a preliminary injunction to enjoin the enforcement of Assembly Bill ("AB") 587¹ upon the grounds that the statute is unconstitutional under the First Amendment and preempted by federal statute. (Docket No. 18.) Because the court finds for the following reasons that plaintiff has failed to establish the

¹ AB 587 has been codified at Cal. Bus. & Prof. Code § 22675 et seq. Because the parties refer to the law as "AB 587" throughout their briefs, the court will refer to the statute as AB 587 for convenience.

1 likelihood of success on the merits, the motion must be denied.
2 See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20-22
3 (2008) (to prevail on a motion for preliminary injunction, a
4 plaintiff must show clearly that it is likely to succeed on the
5 merits).

6 I. First Amendment

7 AB 587 requires that social media companies post their
8 terms of service "in a manner reasonably designed to inform all
9 users of the social media platform of the existence and contents
10 of the terms of service." Cal. Bus. & Prof. Code § 22676(a).
11 The law also requires that such companies submit twice yearly
12 "terms of service reports" to the Attorney General containing,
13 inter alia, the current version of the terms of service for their
14 platform, as well as a description of content moderation
15 practices used by the social media company for that platform,
16 including, but not limited to, how the company addresses (A) hate
17 speech or racism; (B) extremism or radicalization; (C)
18 disinformation or misinformation; (D) harassment; and (E) foreign
19 political interference. See id. § 22677(a).

20 A. The Terms of Service Requirement

21 The "terms of service" as defined in AB 587 appear to
22 bear all of the hallmarks of commercial speech. Under Bolger v.
23 Youngs Drug Products Corporation, 463 U.S. 60 (1983), there is
24 "strong support" for finding that the speech is commercial where
25 "(1) the speech is an advertisement, (2) the speech refers to a
26 particular product, and (3) the speaker has an economic
27 motivation." Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107,
28 1116 (9th Cir. 2021).

1 Although the terms of service may not literally be
2 advertisements in the sense of proposing a commercial
3 transaction, they are directed to potential consumers and may
4 presumably play a role in the decision of whether to use the
5 platform. They refer to the company's product or service, i.e.,
6 the social media platform, and communicate important information
7 concerning the platform and how users may utilize the product.
8 There is also an economic motivation implicated by communicating
9 information about the platform in the company's terms of service
10 -- which social media companies, including X Corp., typically do
11 voluntarily -- so that individuals can decide whether they want
12 to use it.

13 Because the terms of service are part of a commercial
14 transaction and appear to satisfy the Bolger factors, the court
15 will treat the terms of service requirement as a provision
16 requiring commercial speech. Considered as such, the terms of
17 service requirement appears to satisfy the test set forth by the
18 Supreme Court in Zauderer v. Office of Disciplinary Counsel of
19 Supreme Court of Ohio, 471 U.S. 626 (1985), for determining
20 whether governmentally compelled commercial disclosure is
21 constitutionally permissible under the First Amendment. The
22 information required to be contained in the terms of service
23 appears to be (1) "purely factual and uncontroversial," (2) "not
24 unjustified or unduly burdensome," and (3) "reasonably related to
25 a substantial government interest." See Cal. Chamber of Com. v.
26 Council for Educ. & Rsch. on Toxics, 29 F.4th 468, 477 (9th Cir.
27 2022), cert. denied, 143 S. Ct. 1749 (2023).

28 B. The Reporting Requirement

1 The reports to the Attorney General compelled by AB 587
2 do not so easily fit the traditional definition of commercial
3 speech, however. The compelled disclosures are not
4 advertisements, and social media companies have no particular
5 economic motivation to provide them. Nevertheless, the Fifth and
6 Eleventh Circuits recently applied Zauderer in analyzing the
7 constitutionality of strikingly similar statutory provisions
8 requiring social media companies to disclose information going
9 well beyond what is typically considered "terms of service." See
10 NetChoice, LLC v. Att'y Gen. of Florida, 34 F.4th 1196, 1230
11 (11th Cir. 2022), cert. granted in part sub nom. Moody v.
12 Netchoice, LLC, No. 22-277, 2023 WL 6319654 (U.S. Sept. 29,
13 2023), and cert. denied sub nom. Netchoice v. Moody, No. 22-393,
14 2023 WL 6377782 (U.S. Oct. 2, 2023); NetChoice, LLC v. Paxton,
15 446, 485 (5th Cir. 2022), cert. granted in part sub nom.
16 Netchoice, LLC v. Paxton, No. 22-555, 2023 WL 6319650 (U.S. Sept.
17 29, 2023).

18 Following the lead of the Fifth and Eleventh Circuits,
19 and applying Zauderer to AB 587's reporting requirement as well,
20 the court concludes that the Attorney General has met his burden
21 of establishing that that the reporting requirement also
22 satisfies Zauderer. The reports required by AB 587 are purely
23 factual. The reporting requirement merely requires social media
24 companies to identify their existing content moderation policies,
25 if any, related to the specified categories. See Cal. Bus. &
26 Prof. Code § 22677. The statistics required if a company does
27 choose to utilize the listed categories are factual, as they
28 constitute objective data concerning the company's actions. The

1 required disclosures are also uncontroversial. The mere fact
2 that the reports may be “tied in some way to a controversial
3 issue” does not make the reports themselves controversial. See
4 CTIA - The Wireless Ass’n v. City of Berkeley (“CTIA II”), 928
5 F.3d 832, 845 (9th Cir. 2019).

6 While the reporting requirement does appear to place a
7 substantial compliance burden on social medial companies, it does
8 not appear that the requirement is unjustified or unduly
9 burdensome within the context of First Amendment law. “A
10 disclosure is ‘unduly burdensome’ when the [disclosure]
11 ‘effectively rules out’ the speech it accompanies.” Nationwide
12 Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 734 (9th Cir. 2017)
13 (quoting Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of
14 Accountancy, 512 U.S. 136, 146 (1994)). Plaintiff argues that
15 adopting the specified content categories and creating mechanisms
16 to monitor the required metrics would require a vast expenditure
17 of resources, rendering the reporting requirement unduly
18 burdensome. However, AB 587 does not require that a social media
19 company adopt any of the specified categories. See Cal. Bus. &
20 Prof. Code § 22677. Further, Zauderer is concerned not merely
21 with logistical or economic burdens, but burdens on speech.

22 Finally, the court concludes that the Attorney General
23 has met his burden of showing that the compelled disclosures are
24 reasonably related to a substantial government interest in
25 requiring social media companies to be transparent about their
26 content moderation policies and practices so that consumers can
27 make informed decisions about where they consume and disseminate
28 news and information. See Nationwide, 873 F.3d at 733-35. This

1 interest is supported by the legislative history. See, e.g.,
2 Cal. Assembly, Rep. of Comm. on Priv. & Consumer Prot., 2021-22
3 Sess. (AB 587), at 1 (Mar. 25, 2021) (AB 587 “seeks transparency
4 by requiring social media companies to post their ‘terms of
5 service’ . . .”). The state’s transparency interest is “more
6 than trivial,” see CTIA II, 928 F.3d at 844, because social media
7 content moderation is a topic of public concern.

8 II. Preemption

9 Plaintiff also argues that AB 587 is preempted by the
10 Communications Decency Act (“CDA”), 47 U.S.C. § 230.
11 Specifically, plaintiff points to section 230(c), which provides:
12 “No provider or user of an interactive computer service shall be
13 held liable on account of any action voluntarily taken in good
14 faith to restrict access to or availability of material that the
15 provider or user considers to be obscene, lewd, lascivious,
16 filthy, excessively violent, harassing, or otherwise
17 objectionable, whether or not such material is constitutionally
18 protected.” Id. § 230(c)(2)(A). The purpose of section 230(c)
19 “is to provide ‘protection for “Good Samaritan” blocking and
20 screening of offensive material.’ That means a website should be
21 able to act as a ‘Good Samaritan’ to self-regulate offensive
22 third party content without fear of liability.” Doe v. Internet
23 Brands, Inc., 824 F.3d 846, 851-52 (9th Cir. 2016) (quoting 47
24 U.S.C. § 230(c)).

25 The CDA “explicitly preempts inconsistent state laws,”
26 HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 681
27 (9th Cir. 2019), providing that “no liability may be imposed
28 under any State or local law that is inconsistent with [section

1 230],” 47 U.S.C. § 230(e)(3).

2 Plaintiff argues that the CDA preempts AB 587 on
3 theories of both conflict and express preemption. “Although
4 express and conflict preemption are analytically distinct
5 inquiries, they effectively collapse into one when the preemption
6 clause uses the term ‘inconsistent.’ Under either approach, the
7 question is whether state law stands as an obstacle to the
8 accomplishment and execution of the full purposes and objectives
9 of Congress.” Jones v. Google LLC, 73 F.4th 636, 644 (9th Cir.
10 2023) (internal quotation marks and citations omitted).

11 AB 587 is not preempted. Plaintiff argues that “[i]f X
12 Corp. takes actions in good faith to moderate content that is
13 ‘obscene, lewd, lascivious, filthy, excessively violent,
14 harassing, or otherwise objectionable,’ without making the
15 disclosures required by AB 587, it will be subject to liability,”
16 thereby contravening section 230. (Pl.’s Mem. (Docket No. 20) at
17 72.) This interpretation is unsupported by the plain language of
18 the statute. AB 587 only contemplates liability for failing to
19 make the required disclosures about a company’s terms of service
20 and statistics about content moderation activities, or materially
21 omitting or misrepresenting the required information. See Cal.
22 Bus. & Prof. Code § 22678(2). It does not provide for any
23 potential liability stemming from a company’s content moderation
24 activities per se. The law therefore is not inconsistent with
25 section 230(c) and does not interfere with companies’ ability to
26 “self-regulate offensive third party content without fear of
27 liability.” See Doe, 824 F.3d at 852. Accordingly, section 230
28 does not preempt AB 587.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary injunction (Docket No. 18) be, and the same hereby is, DENIED.

Dated: December 28, 2023



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE