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PERSPECTIVE

California's business reporting law for social media companies raises First Amendment issues

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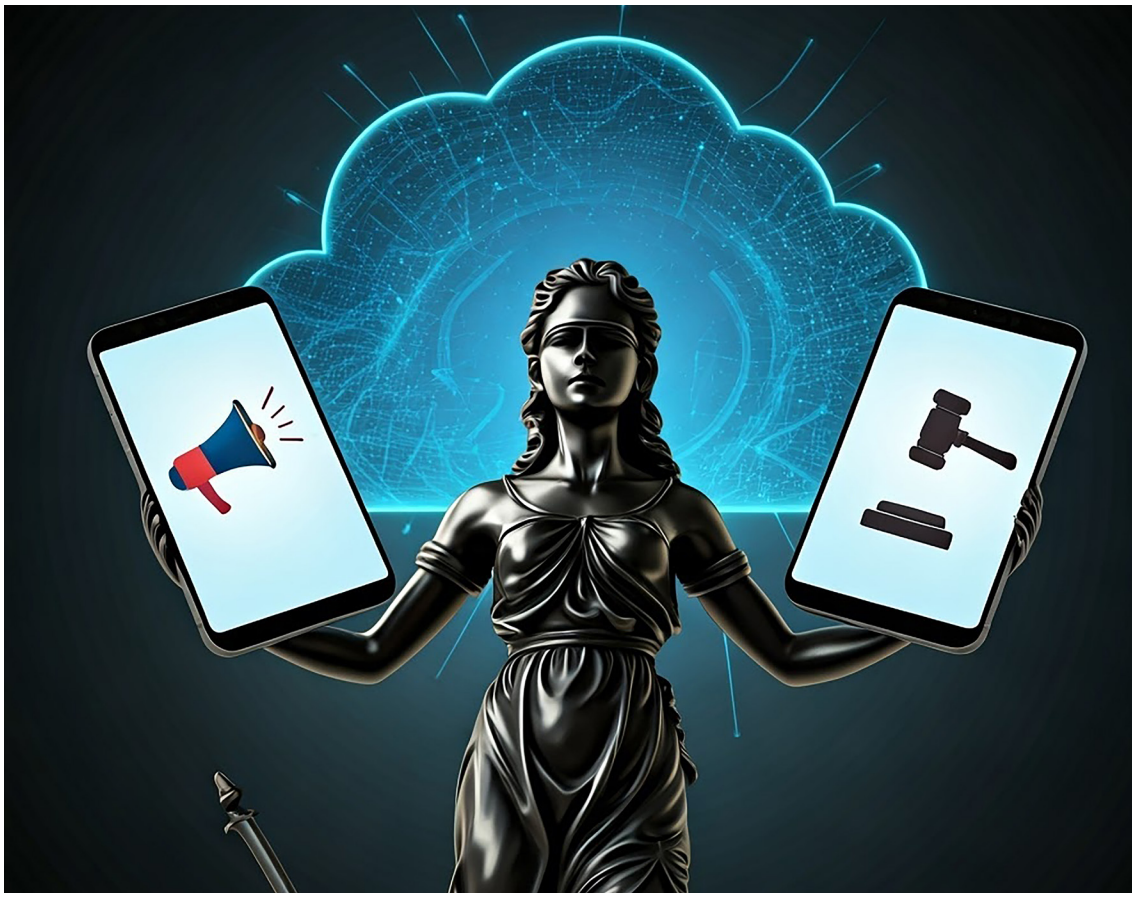

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The recent 9th Circuit case of *X Corp. v. Bonta* tackles the messy issue of what constitutes a "standard business report" in the space of social media content moderation – and whether compelling platforms to disclose their definitions and moderation practices (if any) regarding controversial categories of content violates their First Amendment rights.

In 2022, Gov. Gavin Newsom signed Assembly Bill 587, which required the largest social media platforms (Facebook, X, etc.) to submit to the State semiannual reports about their terms of service and their content-moderation practices. Among other things, AB 587 required platforms to describe how, if at all, they define six categories of content – hate speech or racism, extremism or radicalization, disinformation or misinformation, harassment, foreign political interference, and controlled substance distribution – and to explain how, if at all, they moderate these categories of content.

X Corp. filed suit seeking an injunction barring enforcement of the law and a judicial declaration that AB 587 violates the company's First Amendment rights by unconstitutionally compelling X Corp.'s non-commercial speech.

In response, the government argued that AB 587 is a standard business reporting law with a proper purpose: to ensure transparency by social media companies about their policies and practices. The government claimed that AB 587 regulated commercial speech and was therefore subject to a lesser standard of constitutional scrutiny.

The district court sided with the government, finding that AB 587 was constitutional under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Supreme Court's test for compelled commercial speech. According to the district court, AB 587 merely required speech that is "purely factual" and "uncontroversial" because it didn't require social media companies to adopt any of the six categories of speech, only to identify any existing content moderation policies related to those categories. The district court reasoned that the "mere fact that the reports may be tied in some way to a controversial issue does not make the reports themselves controversial."

But the 9th Circuit disagreed. It held that parts of AB 587 "require a company to recast its content-moderation practices in language prescribed by the State, implicitly opining on whether and how certain controversial categories of content should be moderated." Put differently, the 9th Circuit reasoned that AB 587 would essentially force

social media companies to either tell the public, "Here's what we think 'hate speech' means and how it should be enforced," or "We don't moderate 'hate speech,'" or "We moderate 'hate speech' but we don't define it" – and that this was compelled disclosure of opinions that the platforms had chosen not to share, in violation of their First Amendment rights.

The 9th Circuit noted a distinction between classic commercial speech – which proposes or communicates the terms of an actual or potential commercial transaction – and the types of reports required by AB 587, which, in the court's view, "go further" by "express[ing] a view about those terms by conveying whether a company believes certain categories should be defined and proscribed."

The court also noted that the reports are not advertisements and that a social media company has no economic motivation in generating their content. The court suggested (without deciding) that while some business reporting may be appropriate in this space – for example, requiring platforms to disclose information about rule changes or to provide high-level statistics about moderation efforts – that AB 587 went too far by compelling companies to convey their thoughts on sensitive matters selected by the state. The court enjoined the reporting requirements but left open the possibility that other portions of the law could survive on remand.

While at first blush, it might seem odd that business reporting would implicate the First Amendment, *X Corp. v. Bonta* highlights that when it comes to speech issues, the devil is in the details. Consider, as the 9th Circuit did, a post citing angry rhetoric from on-campus protests (which could implicate "hate speech"), or a post about election fraud (which could implicate"misinformation").AB587 would, in a roundabout way, require X Corp. to take a public stand on these "intensely debated and politically fraught topics" (as the 9th Circuit put it) by forcing disclosure to the state of information about how the company categorizes and treats this content. A rough analogy might be a census worker knocking on your door and asking you to disclose not only your race and sex, but how you define racism and gender. This implicates your free speech rights and illustrates why the 9th Circuit struck a law that would create a similar constitutional concern for corporations.

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