

# But It's Written in Pen: The Constitutionality of California's Internet Eraser Law

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*In September 2013, Governor Jerry Brown of California signed Senate Bill 568 (SB 568) into law. SB 568, dubbed California's "Internet Eraser Law," aims to protect California minors from certain online threats through two provisions. The first provision prohibits operators of websites from advertising certain products or services to minors. The second provision, the source of the law's "eraser" nickname, requires operators of websites to allow minors to remove content posted on the website unless the content is anonymized, was posted by a third party, or is required to be maintained by other provisions of law. This Note critiques both provisions of SB 568 on constitutional and policy grounds, concluding that California's Internet Eraser Law should survive any potential constitutional challenges. This Note begins, in Part II, by considering the free speech implications of the first provision of SB 568. Part III considers federal law's potential preemption of the statute, specifically under 47 U.S.C. § 230, and describes the policy flaws in the advertising provision of the law. Part IV explores the dormant commerce clause conflicts in the eraser provision of the law.*

## I. INTRODUCTION

In 2013, Americans grew increasingly wary about personal information stored online. Although many Americans focused their concerns about Internet privacy on intrusions by government agencies,<sup>1</sup> Americans also cast a cautious eye toward private data

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1. See *Fox News Poll: Boston Marathon Bombings*, FOX NEWS (Apr. 17, 2013), <http://www.foxnews.com/politics/interactive/2013/04/17/fox-news-poll-boston-marathon-bombings/> (showing for the first time since September 11, 2001 more Americans stating that they would not give up personal liberties in the interest of increased security (45 percent) compared to those saying they would give up some liberties (43 percent)). See

collectors.<sup>2</sup> With the federal government caught in a controversy regarding its own alleged violations of privacy, state governments, most notably California, aimed to protect consumer privacy in the private marketplace.<sup>3</sup>

California approached the problem of safeguarding Internet privacy in several different ways, but none drew more attention than SB 568.<sup>4</sup> Signed into law on September 23, 2013, SB 568 protects California minors<sup>5</sup> on the Internet in two ways: (1) it restricts the ability of website operators to market certain products and services to minors, and (2) it grants self-identified California minors who are registered users of a website the right to request the removal of personal content posted on that website.<sup>6</sup> Both provisions of the law became operative on January 1, 2015.<sup>7</sup>

The first provision of SB 568 (“the Minor Clause”) targets products and services that, in the view of the California legislature, may be harmful to minors.<sup>8</sup> First, this provision prohibits operators of websites, online services, online applications, or mobile applications from “marketing or advertising specified products or services to a minor.”<sup>9</sup> The law prohibits “an operator from knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile the personal information of a minor for

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also *Washington Post Poll*, WASH. POST (Apr. 18, 2013), [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_20130418.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_20130418.html) (showing that more Americans were concerned with the government going too far in its efforts to prevent terrorist attacks (48 percent) than not going far enough (41 percent)).

2. See Jan Lauren Boyles, Aaron Smith & Marry Madden, *Privacy and Data Management on Mobile Devices*, PEW RESEARCH CNTR (Sept. 5, 2012), [http://pewinternet.org/Reports/2012/Mobile-privacy.aspx?utm\\_source=Mailing+List&utm\\_campaign=2251646e41-Mobile\\_privacy\\_09\\_05\\_2012&utm\\_medium=email](http://pewinternet.org/Reports/2012/Mobile-privacy.aspx?utm_source=Mailing+List&utm_campaign=2251646e41-Mobile_privacy_09_05_2012&utm_medium=email) (showing that a majority of mobile phone users have uninstalled or avoided installing a mobile application due to privacy concerns related to the data collection practices of the application or the company distributing the application).

3. See Michelle Quinn, *California Driving Internet Privacy Policy*, POLITICO (Oct. 8, 2013), <http://www.politico.com/story/2013/10/california-internet-privacy-policy-97964.html>.

4. *Id.* (detailing different laws passed by California in 2013 aimed at internet privacy, including laws targeting “revenge porn,” mobile applications, and data breaches, among others).

5. “Minor” is defined for the purpose of this Note as someone under the age of 18.

6. Emily Shoor, *Internet Eraser Laws: California and Europe Attempt to Reign in Your Online Reputation*, BROOK. J. INT’L., PRACTICUM (Nov. 16, 2013), <http://practicum.brooklaw.edu/articles/internet-eraser-laws-california-and-europe-attempt-reign-your-online-reputation>.

7. CAL. BUS. & PROF. CODE §§ 22580–81 (2013).

8. *Id.*

9. *Id.*

the purpose of marketing or advertising specified types of products or services.”<sup>10</sup>

The law encompasses numerous products and services. The advertising prohibition of SB 568<sup>11</sup> includes: alcoholic beverages; firearms and handguns; ammunition; aerosol containers of paint, etching cream, and other materials potentially used for graffiti; tobacco products and electronic cigarettes; BB guns; fireworks; ultraviolet tanning devices; dietary supplements; lottery tickets; tattoos; and obscene material.<sup>12</sup> Marketing or advertising is defined in the law as “mak[ing] a communication to one or more individuals, or [arranging] for the dissemination to the public of a communication, about a product or service the primary purpose of which is to encourage recipients of the communication to purchase or use the product or service” in “exchange for monetary compensation.”<sup>13</sup> The provision allows an exemption for marketing and advertising that is incidentally placed or embedded in online content if such placement is not distributed by the primary operator of the website.<sup>14</sup>

The second provision,<sup>15</sup> the “Internet Eraser” provision, is vastly more complex. Under this provision, operators of Internet websites, online services or applications, and mobile applications that are either “directed to minors” or whose operators “[have] actual knowledge that a minor is using” the service must “permit a minor who is a registered user . . . to remove or, if the operator prefers, to request and obtain removal of, content or information posted.”<sup>16</sup> Although the law is aimed particularly at social networking sites, users may request the removal of any material that they, themselves, posted online. Internet operators must also provide notice and clear instructions to users who are minors to guide them through the removal process.<sup>17</sup> Additional notice must be provided to minors to inform them that the procedures mandated by the law “[do] not ensure complete or comprehensive removal of the content or information posted.”<sup>18</sup>

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10. *Id.*

11. CAL. BUS. & PROF. CODE § 22580 (West 2013).

12. *Id.* at § 22580(i).

13. *Id.* at § 22580(j).

14. *Id.* at § 22580(k).

15. CAL. BUS. & PROF. CODE § 22581 (West 2013).

16. *Id.* at § 22581(a)(1). The term “registered user” is undefined in the statute.

17. CAL. BUS. & PROF. CODE § 22581.

18. *Id.* at § 22581(a)(4).

The Internet Eraser section includes several exemptions. First, the above provisions are not applied when a “provision of federal or state law requires the operator . . . to maintain the content or information.”<sup>19</sup> This is designed to cover information used in the course of a federal or state investigation. Second, the provisions do not apply when “content or information was stored on or posted . . . by a third party other than the minor . . . including any content or information posted by the registered user that was stored, republished, or reposted by the third party.”<sup>20</sup> Third, content that is made anonymous by the operator is protected from the provisions of the law.<sup>21</sup> Fourth, the content does not have to be removed if minors do not follow the removal instructions provided by the operator and moderator.<sup>22</sup> Finally, the eraser provisions are not available to the minor if he or she receives compensation for providing the content.<sup>23</sup>

The media greeted the bill’s passage with a mixture of skepticism and praise. Forbes Magazine called the bill “mockable,” “puzzling,” and an ill-advised attempt to “rewrit[e] history.”<sup>24</sup> Advocates for the law, however, claim that the law’s protections represent an important milestone and could lead to future privacy protections for minors on the Internet.<sup>25</sup> Although the debate over the law’s wisdom from a policy standpoint continues to rage, an even more fundamental question exists: whether the statute is constitutional. This Note seeks to answer that question.

This Note closely examines the legal foundations of SB 568’s provisions in order to determine if there are any cracks. Part II begins by considering the free speech implications of the first provision of SB 568, arguing that the prohibitions on advertising certain products and services to minors are permissible restrictions of the free speech rights of advertisers and online service providers. Part III considers the statute’s potential preemption by 47 U.S.C. § 230, a federal law that governs product adver-

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19. *Id.* at § 22581(b)(1).

20. *Id.* at § 22581(b)(2).

21. *Id.* at § 22581(b)(3).

22. *Id.* at § 22581(b)(4).

23. *Id.* at § 22581(b)(5).

24. See Eric Goldman, *California’s New ‘Online Eraser’ Law Should Be Erased*, FORBES (Sept. 24, 2013, 1:35 PM), <http://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased/>.

25. See Somini Sengupta, *Sharing with a Safety Net*, N.Y. TIMES (Sept. 19, 2013), [http://www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html?\\_r=0](http://www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html?_r=0).

tisement through the Internet. Part IV concludes by exploring the dormant Commerce Clause flaws in the Eraser provision of the law, arguing that SB 568 is not an impermissible burden on interstate commerce.

## II. THE ADVERTISING PROHIBITIONS IN SB 568 DO NOT VIOLATE THE FIRST AMENDMENT

The first provision of SB 568 is troubling due to its prohibition of certain online advertisements, especially those for legal products. Commercial speech, such as advertising, is constitutionally protected with limited exceptions.<sup>26</sup> However, state and local governments often have compelling police power interests derived from the public welfare, health, and safety of their citizens to regulate commercial speech. These regulations are subjected to a less demanding standard of review than that used for non-commercial speech.<sup>27</sup> In assessing restrictions on commercial speech, the Court turns to the four-part test of *Central Hudson Gas & Electric Corporation v. Public Service Commission*,<sup>28</sup> as it has been interpreted by several subsequent decisions.<sup>29</sup>

A recent Fourth Circuit decision outlines the modern *Central Hudson* test and provides the framework for analyzing a potential First Amendment claim against SB 568. The case, *Educational Media Company at Virginia Tech. v. Insley*,<sup>30</sup> involved a Virginia regulation that restricted the printing of alcohol advertisements in college newspapers. While the district court upheld the restrictions given Virginia's interest in combatting underage and excessive drinking on campuses, the Fourth Circuit reversed that decision, finding the restriction too broad to withstand the First Amendment challenge brought by a group of college newspapers.<sup>31</sup> Applying the *Central Hudson* test, the Fourth Circuit stated that:

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26. See *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that there is constitutional protection for commercial speech).

27. Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1, 7–8 (1997).

28. 509 U.S. 418, 424 (1993).

29. See, e.g., *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996); *United States v. Edge Broadcasting Company T/A Power 94*, 509 U.S. 418 (1995) (applying the *Central Hudson* test to federal statutes prohibiting the broadcast of lottery advertising).

30. *Educ. Media Co. at Va. Tech. v. Insley*, 731 F.3d 291 (4th Cir. 2013).

31. *Id.* at 294.

[A] regulation of commercial speech will be upheld if 1) the regulated speech concerns lawful activity and is not misleading; 2) the regulation is supported by a substantial government interest; 3) the regulation directly advances the interest; and 4) the regulation is not more extensive than necessary to serve the government's interest.<sup>32</sup>

All four of the above factors must be satisfied for a regulation to survive the test.<sup>33</sup> Although the test is generally considered a form of intermediate scrutiny, it is possible that an even stricter level of scrutiny may apply under the Supreme Court's decision in *Sorrell v. IMS Health*. With the state of the doctrine unclear after *Sorrell*, the Fourth Circuit's framework in *Insley* represents the most current understanding of acceptable restrictions on commercial speech.

In *Insley*, the government did not contest that the first criterion of the *Central Hudson* test was satisfied. Considering that a significant population of the newspapers' readers could legally consume alcohol, it would have been difficult for the government to credibly argue that the advertisements did not concern lawful activity.<sup>34</sup> The petitioners did not contest the second prong of the test, which concerns the government's interest in regulating the speech, due to the clear, demonstrated interest of the government in reducing excessive drinking on college campuses.<sup>35</sup>

The third prong, however, received greater attention. This part of the test asks whether the challenged regulation advances the government's interest in the regulation<sup>36</sup> and places the burden on the government to establish the value of a regulation of commercial speech.<sup>37</sup> The Fourth Circuit found that this prong was satisfied due to the correlation between advertising and demand for a product. The court was also persuaded by the fact that alcohol distributors wanted to place advertisements in college papers, which suggested that the correlation between supplier advertising and consumer demand is strong.<sup>38</sup> The Fourth

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32. *Id.* at 298 (citing *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

33. *Id.*

34. *See id.*

35. *See id.*

36. *Educ. Media Co. at Va. Tech. v. Insley*, 731 F.3d 291, 299 (4th Cir. 2013).

37. *Id.*

38. *Id.* at 299–300.

Circuit thus ruled that the prohibition on alcohol advertisements in college newspapers was sufficiently related to the government's interest in reducing drinking on college campuses.

However, under the fourth prong of the *Central Hudson* test, the regulation at issue must be narrowly tailored to protecting the government interest at stake.<sup>39</sup> The Fourth Circuit found that Virginia's regulation failed that requirement because it "prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume."<sup>40</sup>

#### A. THE *CENTRAL HUDSON* TEST AS APPLIED TO THE ADVERTISING PROVISION OF SB 568

Similar to *Insley*, a potential claim against this provision of SB 568 will likely be brought by a website operator who wishes to display some of the prohibited advertisements to minor users of the operator's Internet website or application. However, there are a number of key factors that distinguish SB 568 from the Virginia law at issue in *Insley*. First, the advertisement prohibitions involved in SB 568 are directed only toward California minors, a class legally distinct from the college-age population targeted by the advertisements in *Insley*. Additionally, it is already illegal to sell any of the products prohibited by SB 568 to California minors.<sup>41</sup> This is distinct from the prohibitions in *Insley*, which banned ads targeting a population that could legally purchase and consume the products advertised. Since SB 568 only pertains to advertisements on websites, there is more potential to narrow the focus of the prohibitions to ensure that only vulnerable groups are subject to the advertising restrictions. Thus, under the crucial fourth prong that considers whether the law is sufficiently narrow to withstand a First Amendment challenge, SB 568 seems much more narrow than the regulations at issue in *Insley*.

Even so, it is nonetheless possible that SB 568 is still not precise enough to withstand a challenge. According to *Board of Trustees of the State University of New York v. Fox*, to satisfy the

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39. *Id.* at 300.

40. *Id.* at 301.

41. *See, e.g.*, CAL. PENAL CODE § 308 (West 2014) (provision declaring it illegal to sell cigarettes to a minor).

final prong, a challenged law must provide “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”<sup>42</sup> Given the great interest California has in keeping its minors safe while they use the Internet, a court could conceivably find SB 568’s restrictions to be proportional to the interest served.

Since SB 568 only applies to Internet users who identify as minors when they register for website services, the law will still allow advertisements to reach individuals who the State has a less compelling interest to protect, such as adult Internet users. Because websites and applications can distinguish between their users who require additional protections and those who do not — an essential feature that separates Internet operators from the newspaper publishers in *Insley*, for example — the fit of SB 568’s advertising prohibitions is sufficiently tailored to satisfy the fourth prong of the *Central Hudson* test.

Analysis under the other three prongs of the *Central Hudson* test indicates that SB 568 will survive a constitutional challenge. The first prong, concerning whether the First Amendment protects the restricted expression, asks whether the commercial speech deals with lawful activity and whether the communication is misleading.<sup>43</sup> All of the products or services included in SB 568 are lawful for at least some segment of the California population, and, for the purpose of analysis, it can be assumed that the advertisements featuring these products and services would not be misleading. Under California law, however, all of the products and services targeted by SB 568 have restrictions on their use by minor citizens.<sup>44</sup> But this fact alone, however, should not necessarily remove First Amendment protections — minors can obtain many of the products and services through parental consent. For example, BB guns may be purchased by an adult and then possessed and operated by a minor, but may not be purchased by a minor outright.<sup>45</sup> Since the advertisements would presumably be for the products and services themselves, which are legal (only the act of purchasing without parental consent, for many of the

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42. 492 U.S. 469, 480 (1989).

43. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

44. *See, e.g.*, CAL. PENAL CODE § 308(b) (West 2014).

45. CAL. PENAL CODE §§ 12550–12556 (West 2014).



products and services is illegal), the first prong of the test will likely survive a challenge.

The second prong of the test implicates the government's interest supporting the prohibitions imposed by SB 568.<sup>46</sup> For the government to succeed, it must assert a "substantial interest" in regulating the activity in question.<sup>47</sup> The Supreme Court has recognized that the protection of minors from potentially harmful products and services conveyed through the web is a substantial government interest.<sup>48</sup> Given that the state of California has already passed laws restricting access to the products and services covered by SB 568 to minors and none of those laws have yet been successfully challenged through litigation, the State has established its interest in limiting online exposure of these products to its minors.

The third prong asks whether the challenged regulation directly advances the government's interest at issue in the regulation.<sup>49</sup> This element places the burden on the government to establish the efficacy of a regulation of commercial speech.<sup>50</sup> This showing is "not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."<sup>51</sup> It is easy to imagine how the California government would satisfy this burden in a challenge to SB 568: many studies of the impact of advertising demonstrate that youth exposure to advertising increases consumption of alcohol and other products.<sup>52</sup> Due to the demonstrated health risks of drinking alcohol and using the other products covered by SB 568,<sup>53</sup> the government can argue that it has a standard police-power interest in limiting the exposure of advertisements for the products

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46. *Central Hudson*, 447 U.S. at 566.

47. *Id.*

48. *See, e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (overturning as overbroad a law that limited transmission of potentially offensive material over the Internet but recognizing the substantial interest the government has in protecting minors).

49. *Educ. Media Co. at Va. Tech v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013).

50. *Id.* at 299.

51. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

52. *See, e.g.*, Henry Saffer, *Alcohol Advertising and Youth*, NAT'L BUREAU OF ECON. RESEARCH (2002), <http://www.collegedrinkingprevention.gov/supportingresearch/journal/saffer.aspx> (last visited Apr. 13, 2015).

53. *See, e.g.*, *Underage Drinking*, THE NAT'L INST. OF HEALTH (Jan. 2006), available at <http://pubs.niaaa.nih.gov/publications/AA67/AA67.htm>.

and services covered by SB 568 to minors. Circumscribing the capacity for website operators to target minor users will likely directly reduce the incidents of underage drinking, or use of other illegal products by minors, in California.

While there is a strong connection between advertising and certain other products and services targeted under SB 568, most notably tobacco,<sup>54</sup> the link is not as apparent for all of the covered products. It may indeed be the case that the unsupervised purchase of a BB gun could be dangerous to a minor, but the connection between BB gun advertisements and increased use of BB guns is not as well documented as the connections observed with tobacco and alcohol advertisements. California would likely have to establish that the advertisement restrictions imposed by SB 568 have a direct relationship to the important interest of protecting minors in California. But given the numerous studies showing that individuals are receptive to and influenced by online advertisements in general,<sup>55</sup> this will likely not be a difficult burden for California to meet.

SB 568's provisions limiting the display of online advertisements to minors are likely to survive any First Amendment challenges. Although it is possible that the analysis of *Central Hudson's* four factors could vary depending on the specific advertisement involved in challenging the law, it is likely that the provision will stand, at least as applied to most covered products. Due to SB 568's severability provision, and the fact that any individual prohibition on a particular product or service will likely not be enough to require the provision to be struck down altogether,<sup>56</sup> then any particular provisions that are overturned will be on an as-applied basis. This should allow the remaining provisions of the law to survive if any single provision is overturned.

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54. See, e.g., Press Release, Campaign for Tobacco-Free Kids, New Study Shows Tobacco Advertising Impacts Kids More Than Adults; Three-Quarters of Teens Also Say It Is Easy for Minors to Buy Cigarettes (Apr. 5, 2000), available at [http://www.tobaccofreekids.org/press\\_releases/post/id\\_0253](http://www.tobaccofreekids.org/press_releases/post/id_0253).

55. See, e.g., Lucia Moses, *Online Video Ads Have Higher Impact Than TV Ads*, ADWEEK (May 1, 2013, 6:39 AM), <http://www.adweek.com/news/advertising-branding/online-video-ads-have-higher-impact-tv-ads-148982>.

56. It is difficult to imagine the reasoning behind overturning the ban on all of the products covered by SB 568 if only one of the products must be overturned. Since the analysis varies widely depending on the specifics of the advertisement and the product being advertised, portions of SB 568 will likely survive an as-applied challenge.

### III. SB 568 IS NOT PREEMPTED BY FEDERAL LAW

In 1996, Congress enacted 47 U.S.C. § 230 (“Section 230”). Section 230 states that website operators cannot be held liable for user-generated content or third-party content hosted on their websites.<sup>57</sup> SB 568, however, seeks to do just that. The bill will hold website operators responsible for third party advertisements hosted on the operator’s website, which presents potential issues of federal preemption.

It is a long-established principle, derived from the supremacy clause of the Constitution, that if a state law is contrary to a federal law, the federal law preempts the state law.<sup>58</sup> There are three alternative tests used to determine whether a state law contradicts a federal law and is, therefore, preempted.<sup>59</sup> Under the first test, called the express preemption test, a court considers whether Congress explicitly declared that its enactments preempt state law.<sup>60</sup> The second test, the field preemption test, considers whether Congress intended to occupy the field subject to regulation and impliedly preempted offending state law.<sup>61</sup> The final test, the conflict preemption test, asks whether compliance with both the federal and state laws would be impossible or if the state law at issue is an obstacle to the goals of Congress.<sup>62</sup> The tests are intended to answer the overall question of whether Congress sought to preempt state laws affecting the same area targeted by a federal statute. If the answer to this question is yes, all three of the tests will typically deem the state regulation to be preempted by the federal statute.<sup>63</sup> Applying all three tests to SB 568 indicates that Congress did not intend to preempt legislation similar to SB 568 when it passed Section 230 in 1996.

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57. 47 U.S.C. § 230; *See also* Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. § 230’s Immunity* (Santa Clara Univ. Sch. of Law Legal Stud. Res. Papers Series Paper No. 23-13, 2013), *available at* <http://ssrn.com/abstract=2287622>.

58. *See, e.g.*, HARRY D. MILLER & MARVIN B. STARR, 1 CAL. REAL EST. DIGEST, CONSTITUTIONAL LAW § 34 (3d ed., 2013).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

### A. THERE IS NO EXPRESS PREEMPTION OF SB 568

Neither Section 230 nor any other federal legislation expressly preempts legislation similar to SB 568.<sup>64</sup> A typical express preemption clause will look similar to the one at issue in *Boggs v. Boggs*, which states that the Act “shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan.”<sup>65</sup>

Section 230 lacks any statement similar to the one in *Boggs*. In fact, Section 230 suggests the opposite, stating that “nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>66</sup> Accordingly, Section 230 does not expressly preempt SB 568. However, it must still be determined whether SB 568 is preempted by implication or by conflict preemption.

### B. THERE IS NO IMPLIED PREEMPTION OF SB 568

The test for implied preemption is more difficult to articulate than the test for express preemption. The First Circuit has stated that implied preemption “has a certain protean quality, which renders pigeonholing difficult.”<sup>67</sup> Implied preemption contains within it both field and conflict preemption principles.<sup>68</sup> Field preemption “reflects the view that Congress’s intent to occupy a given field can be inferred from the pervasiveness of federal regulation and/or the dominance of the federal interest in a particular area of legislative activity.”<sup>69</sup> Relatedly, the concept of conflict preemption encompasses “the idea that congressional intent also can be deduced from circumstances such as inconsistency or impossibility.”<sup>70</sup> Both tests should be applied to assess the relationship between SB 568 and Section 230.

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64. 47 U.S.C. § 230 (2012).

65. *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (citing 29 U.S.C.A. § 1144(a) (West 2006)).

66. 47 U.S.C.A § 230(e)(3) (West 1998) (describing the effect of Section 230 on other laws).

67. *French v. Pan Am Express, Inc.*, 869 F.2d 1, 2 (1st Cir. 1989).

68. *Mass. Ass’n of Health Maint. Org. v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999).

69. *Id.* (citing *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947)).

70. *Id.* at 179 (citing *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992)).

### 1. *SB 568 Passes the Field Preemption Test*

Field preemption doctrine requires that state laws must give way to a federal law with “the intent to displace state law altogether,” which can be inferred from a “framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”<sup>71</sup>

There is no such pervasive framework of regulation in this case. In a case involving a field which the States have traditionally occupied, there must be a “clear and manifest purpose of Congress” to supersede the state law at issue through a pervasive regulatory structure that leaves no room for states to supplement the federal regulations.<sup>72</sup>

Section 230 does not create such a pervasive regulatory structure. In fact, the language in Section 230(e)(3) indicates that Congress intended Section 230 to act as a supplement to state regulations aimed at protection for private blocking and screening of offensive material over the Internet in that Section 230 would not prevent states from enacting laws consistent with Section 230.<sup>73</sup> Federal regulation, in general, often leaves room for states to regulate the Internet according to their own policy preferences.<sup>74</sup> SB 568’s purpose of enhancing the health, safety, and welfare of California’s minors will also enhance its case against field preemption due to the fact that there must be a “clear and manifest purpose of Congress” to supersede the regulation in circumstances where the field being regulated is an area that traditionally belongs to the States.<sup>75</sup> Given the absence of any clear and manifest purpose by Congress, SB 568 is likely to survive this test.

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71. *Ariz. v. United States*, 132 S. Ct. 2492, 2501 (2012) (citing *Rice*, 331 U.S. at 230).

72. *Ariz.*, 132 S. Ct. at 2502 (citing *Rice*, 331 U.S. at 230).

73. 47 U.S.C.A. § 230(e)(3) (West 1998).

74. See, e.g., *Does the US CAN-SPAM Act Preempt Spam-Related State Regulations?*, INTERNET BUS. LAW SERVS. [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?s=latestnews&id=2052](http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2052) (last visited Feb. 25, 2015) (explaining that in spite of federal laws limiting the ability to transmit spam email messages, several courts have permitted state regulations that are more restrictive against spam emails than the federal laws to coexist and supplement the federal framework).

75. *Ariz.*, 132 S. Ct. at 2502 (citing *Rice*, 331 U.S. at 230).

## 2. *SB 568 Passes the Conflict Preemption Test As Applied in the Majority of Cases*

Conflict preemption occurs where federal and state laws are incompatible due to state law blocking the achievement of federal objectives or goals.<sup>76</sup> The Supreme Court has said that the test for such preemption is whether “it is impossible for a private party to comply with both state and federal requirements.”<sup>77</sup>

It is easy to see how a company could comply with both Section 230 and SB 568. The only obligation placed on computer service operators under Section 230 is that they must “at the time of entering an agreement with a customer for the provision of interactive computer service . . . notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors.”<sup>78</sup> This goal seems to avoid conflict with SB 568 and, in fact, can further the interest of protecting minors using the Internet in California.

Members of the media have suggested that a more troubling conflict exists in 47 U.S.C. § 230,<sup>79</sup> however, which states in part that “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.”<sup>80</sup> While this section presents Congress’ intention to limit the states’ ability to hold website operators liable for the advertisements hosted on their sites, SB 568 would work directly to hold such operators liable if they host advertisements depicting any of the prohibited products or services on their websites. Since the passage of Section 230 in 1996, courts have “interpreted Section 230’s immunity broadly.”<sup>81</sup>

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76. *Testimony Concerning the Federalism Accountability Act: Hearing on S. 1214 Before the S. Comm. on Governmental Affairs*, 106th Cong. (1999) (Statement of Randolph D. Moss, Acting Assisting Attorney General, O.L.C.).

77. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

78. 47 U.S.C. § 230(d) (2012).

79. Eric Goldman, *California’s Latest Effort to Protect Kids Online is Misguided and Unconstitutional*, FORBES (Sept. 30, 2013), <http://www.forbes.com/sites/ericgoldman/2013/09/30/californias-latest-effort-to-protect-kids-online-is-misguided-and-unconstitutional/>.

80. 47 U.S.C. § 230(c)(1).

81. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (“Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.”).

For example, in *M.A. v. Village Voice Media Holdings*, a case involving the website Backpage.com, the District Court for the Eastern District of Missouri found that the operators of that website could not be held liable for advertisements for child prostitution services it hosted because of preemption by Section 230.<sup>82</sup> This suggests that courts would look unfavorably on attempts to apply SB 568 to websites that host third-party advertisements on their websites or within their mobile or Internet applications and services.

While it is easy to see how websites could mount a substantial attack against SB 568 as applied to advertisements hosted by third parties on their website, it is less clear that website operators could successfully challenge SB 568 as applied to advertisements for products and services that they themselves post on their own websites in the hope of receiving advertising revenue. The *Village Voice* case dealt with a classifieds-type website where the website operator did not receive any direct revenue from hosting the advertisement. SB 568 would likely be struck down as preempted if it were applied to a similar case. However, if an operator itself posted an advertisement at the behest of a commercial manufacturer, or if a service provider who offered one of the products or services regulated by SB 568 posted an advertisement with the intention of profiting, it is less clear that the protections of Section 230 would apply, as the website operator would be the primary actor (Section 230 only protects against liability from the postings of third parties). Thus, while SB 568 is preempted in the narrow case of third-party advertisements, like the Craigslist or Backpage model, the prohibitions of such advertisements in the traditional model of Internet advertisements — such as hosted banner images or pop-up advertisements — will still survive.

#### IV. SB 568 DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

A final attack on SB 568 might posit that the law violates the dormant Commerce Clause. Broadly speaking, the dormant Commerce Clause prevents states from passing regulations that

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82. *M.A. v. Village Voice Media holdings LLC*, 809 F. Supp. 2d 1041, 1048 (E.D. Mo. 2011).

unduly burden interstate commerce.<sup>83</sup> This differs from the preemption analysis in that no federal law is required for a violation of the dormant Commerce Clause to exist — instead, the consideration is whether a state law unduly restricts commerce between the states. Several lines of doctrine in the dormant Commerce Clause area relate to state regulation of the Internet and are relevant to SB 568.

Strict scrutiny under the dormant Commerce Clause applies to state laws that are facially discriminatory.<sup>84</sup> Such a law might, for example, unduly favor the products of one state at the expense of all other states. Since the Federal government reserves the right to regulate commerce between the states, state laws that openly favor one state, or a group of states, over other states will be found to violate the dormant Commerce Clause and be struck down by the courts.

For state laws that are nondiscriminatory on their face but still influence interstate commerce, the Supreme Court applies the balancing test articulated in *Pike v. Bruce Church, Inc.* Under this test, a court will uphold a state statute if “the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>85</sup> This test requires courts to balance local police-power interests of the regulating intrastate activity on one hand against the burdens the state statute imposes on commerce between the states on the other hand. The regulating state faces a high burden to overcome, however, in showing that the impact on interstate commerce is only incidental.<sup>86</sup>

Extraterritorial legislation can also be invalidated under the dormant Commerce Clause doctrine. Here, the Court considers “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State,” and invalidates any regulations that have such an effect.<sup>87</sup> This restriction imagines a state regulation that is focused primarily outside of its boundaries. Since states traditionally only have power to regulate in the

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83. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

84. See, e.g., *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951).

85. *Pike*, 397 U.S. at 142.

86. *Id.*

87. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).



interest of their own citizens, laws without any nexus of localized interest as well as laws whose primary purpose is to restrict extraterritorial conduct typically violate the dormant Commerce Clause.

The dormant Commerce Clause doctrine is frequently applied to regulations governing pornographic communication with minors.<sup>88</sup> The cases here demonstrate the unique characteristics of the Internet that influence dormant Commerce Clause decisions. First, information posted on the Internet is simultaneously accessible to Internet users worldwide.<sup>89</sup> Second, Internet users cannot determine the age, geographic location, or other identifying characteristics of fellow users unless those users provide such information.<sup>90</sup> These unique characteristics of the Internet may influence how courts apply the dormant Commerce Clause doctrine outlined above to SB 568 and other similar legislation.<sup>91</sup>

#### A. SB 568 DOES NOT FACIALLY VIOLATE THE DORMANT COMMERCE CLAUSE

Facial discrimination against out-of-state commercial activity is subject to strict scrutiny under the dormant Commerce Clause.<sup>92</sup> For example, in *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon*, the Court overturned an Oregon law that charged different rates on the disposal of solid waste generated in other states than it did on the disposal of solid waste generated within Oregon's borders.<sup>93</sup> Applying "the strictest scrutiny," the Court required Oregon to meet a burden of justification "so heavy that facial discrimination by itself may be a fatal defect," which it was unable to do.<sup>94</sup>

However, courts will sometimes allow facially discriminatory state laws to stand if the state can present a compelling reason. In *Maine v. Taylor*, for instance, the Supreme Court upheld a ban

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88. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001).

89. *Id.* at 791.

90. *Id.*

91. *See id.*

92. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (invalidating an Oklahoma ordinance that banned the export of minnows from Oklahoma to other states on the grounds that the ban served no legitimate police power or economic interest).

93. 511 U.S. 93 (1994).

94. *Id.* at 101.

on importing live baitfish from out of state.<sup>95</sup> The Court in *Taylor* was persuaded by the state's argument that its unique species of wild fish would be harmed by parasites that could be transferred through the baitfish the plaintiffs sought to import.<sup>96</sup> Because there were no less discriminatory means of protecting the native Maine fish from the parasites, the Court upheld the ban.<sup>97</sup>

SB 568 does not discriminate between Internet companies operating in California and those operating in other states.<sup>98</sup> Instead, SB 568 applies equally to all Internet operators active within California borders, regardless of the location of the company's headquarters. Although SB 568 protects only California minors, the dormant Commerce Clause focuses on who is burdened by and what constitutes the regulation rather than who receives the benefits of the regulation — presumably the citizens. Given that SB 568 does not discriminate between the parties it regulates, it is not a facial violation of the dormant Commerce Clause.

#### B. SB 568 SURVIVES THE *PIKE* BALANCING TEST

Since SB 568 is not facially discriminatory against out-of-staters, courts would consider whether the statute burdens interstate commerce. If it does, the court would evaluate the burden under the Supreme Court's balancing test articulated in *Pike v. Bruce Church*.<sup>99</sup> Since laws that do not discriminate on their face burden those inside and those outside of a state evenly, the scrutiny applied to these laws is less strict than the scrutiny applied to facially discriminatory laws.<sup>100</sup> A state law that is nondiscriminatory on its face yet still interferes with commerce between the states to a certain extent is constitutional if it is supported by a legitimate state interest and only incidentally affects interstate commerce.<sup>101</sup> A nondiscriminatory state law that places a burden on interstate commerce is unconstitutional if the burden on inter-

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95. 447 U.S. 131 (1986).

96. *Id.* at 148.

97. *Id.*

98. CAL. BUS. & PROF. CODE § 22580 (West 2013).

99. 397 U.S. 137 (1970).

100. *See id.* at 142.

101. *Id.*

state commerce is plainly excessive in relation to the local benefits provided by the regulation.<sup>102</sup>

A key step in the analysis is determining whether the regulated activity is local or national in nature. If a regulated activity is national in scope, courts are less willing to uphold the regulation. For example, in *Southern Pacific v. Arizona*, the Court invalidated an Arizona law that limited the length of trains in the state to seventy freight cars.<sup>103</sup> The Court found that train length is an aspect of interstate commerce that is national in scope and requires uniform regulation.<sup>104</sup> Conversely, courts are more willing to uphold regulations that serve a distinct, local purpose. In *Coolley v. Board of Wardens*, the Court upheld a Pennsylvania regulation that required ships coming into local harbors to take on local pilots.<sup>105</sup> The Court found that the Pennsylvania law, while burdensome, substantially advanced the state's police power interest in ensuring that ships entering its waters were familiar with the specific intricacies and needs of local harbors.<sup>106</sup> States must demonstrate that these types of regulation are tied to their local interests, or else courts may be likely to overturn them.<sup>107</sup>

SB 568 places a clear burden on interstate commerce. Its regulations apply to Internet operators located outside of California, and the additional requirements it places on Internet operators are burdensome. Compelling Internet operators to meet these requirements will increase the costs associated with operating their Internet businesses within California. However, California's interest here is great. Given the profound impact advertising can have on the consumption habits of minors, preventing them from seeing these advertisements online may reduce risky behaviors.<sup>108</sup> The link between California's interest and SB 568 is clear: through SB 568's regulations, California will limit how frequently its minors are exposed to advertisements that promote

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102. *Id.*

103. 325 U.S. 761, 783–84 (1945).

104. *Id.* at 775.

105. 53 U.S. 299 (1851).

106. *Id.*

107. *See, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981) (invalidating an Iowa law that prohibited 65-foot tractor trailers from operating on highways within the state on the grounds that Iowa failed to establish that 65-foot tractor trailers were sufficiently more dangerous than the 55-foot trailers permitted under the regulation).

108. *See, e.g.*, *Alcohol Marketing and Children*, INST. OF ALCOHOL STUDIES, <http://www.ias.org.uk/Alcohol-knowledge-centre/Marketing/Factsheets/Alcohol-marketing-and-children.aspx> (last visited Feb. 26, 2015).

dangerous products, services, and activities. In turn, the state can reduce the use of these products, service, and activities and thereby increase the health, safety, and welfare of California citizens. SB 568 should therefore survive a *Pike* challenge.

### C. SB 568 IS EXTRATERRITORIAL LEGISLATION

Critics of SB 568 claim that the most troubling provision of the law may come from the hypothetical case in which, for example, an Internet operator based in Florida wants to operate in California. The same operator then works with an advertising service located in Massachusetts and tells the advertising service to block ads for items restricted by SB 568 due to the fact that the Florida operator's website has minor users who may live in California.<sup>109</sup> This hypothetical would lead to dormant Commerce Clause issues because it would implicate SB 568, a California law, in the interactions of two commercial entities, neither of which are located within California. In *Healey v. Beer Institute*, the Supreme Court held that the state legislation cannot have the practical effect of regulating conduct outside of the state.<sup>110</sup> This poses a problem for SB 568.

While many Internet operators would be able to identify their users' locations based on information provided by Internet Service Providers (ISPs) or through self-reporting, some companies may not have this capability. Such websites would then have to limit their advertisements on website hits that occur within California, thus tying the regulations of SB 568 to the welfare of California citizens, which is required under dormant Commerce Clause doctrine. However, the ISP method of determining location is a rough approximation and can lead to websites over-including citizens of states other than California — thus applying the restrictions of SB 568 outside of California and violating the dormant Commerce Clause — or under-including and not applying the restrictions to applicable citizens within California, thereby violating SB 568. This ambiguity may mean that SB 568 would likely be unconstitutional as applied in this specific situa-

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109. Eric Goldman, *California's Latest Effort to Protect Kids Online is Misguided and Unconstitutional*, FORBES (Sept. 30, 2013), <http://www.forbes.com/sites/ericgoldman/2013/09/30/californias-latest-effort-to-protect-kids-online-is-misguided-and-unconstitutional/>.

110. 491 U.S. 324, 336 (1989).

tion where it is impossible for the Internet operator to locate its users.

## V. CONCLUSION

Given the strong interest California has in protecting its minors from dangerous products, SB 568's advertising regulations included in the first provision will likely survive First Amendment challenges. Similarly, SB 568 does not present any fatal preemption problems.

Though constitutional on other grounds, a challenge to SB 568 brought by the right plaintiffs could lead to the eventual demise of some of its provisions under the dormant Commerce Clause. Such a circumstance would require a website operator that is located outside of California to be working in conjunction with an advertising service that is also based outside of California. It would also require the operator to be unable to distinguish California minor users from users in other states and thus apply the regulations of SB 568 in situations in which California is not implicated at all. This seems an unlikely scenario that could only result in an as-applied invalidation of SB 568. SB 568, then, appears to be a constitutionally sound piece of legislation.