CASE NO. 1:24-cv-00576-RP

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WEBSEED, INC. & BRIGHTEON MEDIA, INC,
Plaintiffs,

v.

DEPARTMENT OF STATE, *et al.*,
Defendants.

PLAINTIFFS' OBJECTION TO THE MAGISTRATE JUDGE'S FEBRUARY 24, 2025, REPORT & RECOMMENDATION [D.E. 56]

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I. Specific Identification Of The R&R Findings Or Recommendations To Which Plaintiffs Object

Preliminarily, Plaintiffs specifically identify the Report & Recommendation ("R&R") findings or recommendations to which they object:[1]

(a) At the threshold (infecting each of the following ancillary R&R findings or recommendations), there is the R&R's fundamental misconstruction of the nature of this action.[2] As pleaded (not artfully/evasively, but straightaway), we have a case revolving around the Censorship Industrial Complex (not Platform Defendant contractual breaches in providing, or not, interactive computer services). An approximate four-page summary of what this case is really about (as pleaded in more detail in the Amended Complaint) can be found in Plaintiffs' omnibus response in opposition to the Platform Defendants' transfer motions. *See* [D.E. 49] at 10-14.[3]

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[1] For discussion of such objections, *see* §§III-VI of this Objection, *infra*.

[2] "Ancillary" because this Court does not have to engage in any further R&R analysis (or otherwise) if this Court properly recognizes what this case is actually about, properly recognizing what the Fifth Circuit has recently held in relation to disputes concerning Big Tech that go beyond Big Tech's own interactive computer service provider decisions to (un)publish a user. That is, per the Fifth Circuit (three months ago), a Big Tech lawsuit merely touching publication / computer services decisions somewhere down the proximate causation chain, as just about every Big Tech lawsuit does, does not place the lawsuit in the crosshairs of Platforms' TOS (and, thus, FSCs) concerning the Platform Defendants' ordinary provision of interactive computer services pursuant to their own publication decision-making. Again, here we are not dealing with independent Platform Defendants publication decision-making falling within the four corners of the TOS; rather, here, we are dealing with Platform Defendants publication decision-making severely coerced / induced by the Government Defendants and badly skewed / falsely bolstered by the erroneous user / Information Content Provider ("ICP") "character" / "trustworthiness" reports manufactured by various Government officials and NGOs. The TOS (and FSC found therein) simply do not contemplate Platform Defendants' collusion with the Government and NGOs to trample on users' legal and/or constitutional rights *via* the Platform Defendants carrying out the Government's censorship demands backed by the false "findings" of NGOs (or otherwise).

[3] This Objection is focused mostly on the R&R's most substantive errors, but we would be remiss if this Objection did not also briefly rebut some of the R&R's smaller erroneous findings (and there are several) along the way. For example, at the top of the second page of the R&R [D.E. 56]: "Plaintiffs oppose the motion, arguing broadly that the scope of this case extends 'well beyond the social media services contemplated,'" *id.* at 2 (citing to [D.E. 49 at 6-7]). This facet of Plaintiffs' position is not "argu[ed] broadly," as the R&R erroneously determines; rather, at minimum,

The R&R, however, mischaracterizes this action as merely one concerning the interactive computer services provided (or not) by the Platform Defendants, thereby falling squarely within the four corners of the Platform Defendants' terms of service ("TOS") containing the forum selection clauses ("FSC"s) at issue in the Platform Defendants' September 27, 2024, transfer motions [D.E. 37-39]. While the Magistrate Judge is of the view that any cause of action that perhaps even marginally touches the Platforms' publication decisions (no matter where such marginal contact falls on the proximate causation chain) necessarily falls within the TOS, Fifth Circuit decisions (at the very least) make clear that causes of action that merely touch Platforms' publication decisions (as most matters involving Big Tech necessarily must) do not result in what the R&R recommends; *i.e.*, do not result in forcing the square averment pegs that are Plaintiffs' non-contract claims (necessarily touching publication decisions somewhere down the proximate causation chain) into the round hole that is the TOS-contemplated interactive computer services.

(b) As to ancillary R&R mistake #1, the R&R mistakenly determines the FSCs to be mandatory ("step-one" inquiry) pursuant to: "an FSC is mandatory if it 'affirmatively requires that litigation *arising from the contract* be carried out in a given forum." [D.E. 56] at 3-4 (citing *PCL Civ. Constructors, Inc. v. Arch Ins. Co.*, 979 F.3d 1070, 1073 (5th Cir. 2020)) (emphasis added).

As to another ancillary mistake spinning out of this ancillary mistake, the R&R wrongly determines that California law was the law to be used, in whole or in part, in resolution of the

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Plaintiffs' responsive brief [D.E. 49] dedicates four pages to summarizing Amended Complaint averments (spanning 89 pages, which such 89 pages were the short and plain version of the overall story per Rule 8, *see* Objection I(e) below) demonstrating what the heart / root of this case is (and is not). And page 2 of the R&R is not the only place where there are findings (or slights) that Plaintiffs supposedly said too little (or nothing at all) as to certain (sub)issues. If this Court agrees that Plaintiffs have said too little (or nothing at all) as to a relevant (sub)issue of the subject transfer motion practice, we respectfully request this Court's affording the alternative relief discussed in Objection I(e) and §VI below.

subject transfer dispute. Both of these ancillary mistakes are predicated on the fundamentally incorrect threshold determination that a dispute "need only touch matters" (a far too wide interpretation / application of "significant relationship") covered by the contract (TOS) in order for an FSC clause embedded within the contract to carry the day.

(c) Next, the R&R examines enforceability, breaking that examination into an "unreasonableness" assessment, and breaking the unreasonableness assessment into "fraud" or "overreach" considerations. Plaintiffs concede that their responsive briefing, *see* [D.E. 49], concerning "fraud" or "overreach" was not entirely clear in delineating between the invalidity of the TOS itself and the invalidity of the associated FSC, which such delineation the R&R takes issue with. But, for reasons discussed herein, whether examining the invalidity of the TOS itself or the invalidity of the FSC embedded therein, the analysis unfolds the same way and arrives at the same end – an unenforceable contract and an unenforceable FSC, if not for the fact that TOS arose out of fraud at the very least (rendering that "contract" of adhesion unconscionable), then for the fact that the FSC are the epitome of overreach if applied as broadly as the R&R recommends.

There cannot be an overreaching FSC clause capturing things like user death (and there have been several such cases over the years where a Platform's publication decisions led to user death). There, the legal duties the Platform owed (or not) to the deceased user are assessed under a wrongful death lens, not a breach of contract (TOS) lens. Just as many Courts (including the Fifth Circuit Court quite recently) have found that non-contract causes of action merely touching upon the Platforms' publication decisions (TOS-oriented decision-making) are not subject to 47 U.S.C. §230 immunity, so too with respect to the unenforceability of FSCs. To say that a FSC concerning the provision of interactive computer services under a TOS captures every cause of

action under the sun so long as somewhere down the proximate causation chain there is a publication-oriented link (what the R&R's findings amount to), is *prima facie* FCS "overreach."

(d) The R&R also examines extraordinary circumstances. The extraordinary circumstances analysis includes an examination of conflicts of law, and Plaintiffs' responsive briefing identified that the internet-related legal playing field in California is not level. Indeed, Mark Zuckerberg (Facebook / Meta) has recently publicly admitted that Meta is moving operations to Texas because of the perceived bias lacing California courts. And, indeed, X has already moved to Texas.

(e) The R&R's recommendation (immediate transfer to California sans more) was draconian. At the very least, where the R&R took issue with Plaintiffs purportedly having said too little (or nothing) in the Amended Complaint and/or the responsive brief [D.E. 49] as to a particular (sub)issue, justice compels affording Plaintiffs leave to (1) amend the Amended Complaint to make averments that would bear on forum (in part or in whole) even more detailed,[4] or (2) put forth a more detailed responsive brief [D.E. 49], as Plaintiffs chose (with the good faith intention of not overly burdening the Court with this forum dispute) to file a 20-page omnibus response addressing all three Platforms' transfer motions, rather than three 20-page responsive briefs (totaling 60 pages). In the Amended Complaint and/or omnibus response, we easily could have said far more – but, as always, there was the omnipresent fine line of how much to say in pleadings and/or briefs, as Defendants are quick to jump on the Rule 8 shotgun bandwagon.

[4] Again, since the time this litigation commenced, a lot more information has surfaced surrounding the partnerships between Government and private parties that have influenced widespread censorship. We would love the opportunity to add in hundreds of pages of allegations concerning the Censorship Industrial Complex that we have learned over the past approximate ten months since filing. Such additional further averments would illustrate what should already be clear – ***this case arises out of the Censorship Industrial Complex, not the Platform Defendants' TOS / FSC.***

Regarding Plaintiffs' ability to say more about the true wrongdoing heart of this litigation, one need only look to a similar action filed by undersigned counsel in the Middle District of Tennessee court. The Plaintiffs in that Tennessee case (filed approximately seven months after this action, with undersigned counsel thereby possessing seven extra months of knowledge as to the Censorship Industrial Complex at the heart of this litigation) put forth a 317-page Amended Complaint, with at least thirty pages dedicated to Zuckerberg's public admissions concerning the Censorship Industrial Complex and California court bias. *See Cancer Step Outside the Box, LLC, et al. v. Dept. of State, et al.*, No. 3:24-cv-01465 (M.D. Tenn.), [D.E. 7]. Here, the Amended Complaint (concerning the same root Government / Big Tech / NGO conspiratorial censorship scheme at issue in the Tennessee matter – the Censorship Industrial Complex) only totals 89 pages.

II. Legal Standards

Regarding transfer standards, Plaintiffs hereby fully incorporate herein by reference the "Legal Standards" section of their responsive brief [D.E. 49]. Regarding this Court's review of the R&R and this Objection, Federal Rule of Civil Procedure 72 prescribes the review standard.[5]

III. Mandatory v. Permissive FCS Analysis (R&R [D.E. 56], § B, 7-12)

The R&R is wrong in a few different places within its §B "Mandatory v. Permissive" FSC analysis. As mentioned toward the top of this brief, all of the R&R wrongs in this regard flow from the misconception that the nature of this action "arises out of" (stems from) contract simply because a fraction of the Defendants involved at some point on the causal chain carried out a

[5] Plaintiffs submit that the transfer decision, in this matter, is dispositive in nature because sending this matter off to a Big Tech biased California court almost inevitably ensures Plaintiffs will not succeed on the merits (or will unnecessarily struggle mightily, at great added time / expense). Indeed, again, Zuckerberg has recently admitted that Meta is moving operations to Texas because of the perceived Big Tech bias within the California court system. Plaintiffs accordingly suggest that Rule 72(b)(3) prescribes this Court's review standard. But, under either review standard (the other being prescribed by Rule 72(a)), this Court's overarching aim is to evaluate R&R errors.

fraction of the activity making up the greater wrong complained of by Plaintiffs ((un)publication activities contemplated by the TOS but representing a small portion of the overarching Censorship Industrial Complex). Indeed, the very first paragraph of the R&R immediately starts to wrongly frame this case as one predicated on "shadow-banning," "delisting," *et cetera*. [D.E. 56] at 1-2.

A. Discussion Of Objection I(a) – The Platform Defendants' Transfer Motions Fail At The "What This Case Is Really About" Threshold

As stated in §I(a) of this Objection, Plaintiffs object to the central R&R finding that this case arises out of the TOS / "contract" simply because the Platform Defendants at some point on the causation chain decided to unpublish Plaintiffs (not *via* their own decision-making, but *via* the conspiracy and severe coercion of the Government Defendants). The nature of the action analysis is the Court's threshold determination in the FSC-oriented transfer analysis; *i.e.*, if this Court properly determines that this action does not revolve around the Platform Defendants' limited independent publishing decisions in the provision of interactive computer services within the scope of the TOS but instead revolves around the far broader Censorship Industrial Complex, then the FSCs found in the TOS necessarily do not apply. *See* [D.E. 56] at 3 ("[a]n FSC is mandatory if it 'affirmatively requires the litigation *arising from the contract* be carried out in a given forum,'" citing *PCL Civil Constructors, Inc.*, 979 F.3d at 1073 (emphasis added)).

Once more, the heart of this lawsuit does not revolve around Big Tech's scheme to censor through Big Tech's provision of interactive computer services or own publication decision-making; *i.e.*, does not "aris[e] from the contract." This lawsuit revolves around a censorship scheme (joint participation or inextricably intertwined scheme, at the very least) spearheaded by the Government Defendants, carried out by Big Tech Defendants under the Government's immense coercion and bolstered by the false and fabricated reporting of the NGO Defendants. We now expound on our objections.

The scope of this case facially extends well beyond the social media services contemplated by the TOS – this is clearly not a contractual dispute involving Big Tech's ordinary provision of interactive computer services contemplated within the TOS. Instead, this case centers entirely on significant Constitutional and antitrust violations by Defendants, including Government-coerced censorship and anti-competitive practices, which fall entirely outside the scope of the Platforms' services "contract." Put differently, the thrust of this case is not about the Platforms' routine interactive computer services contemplated by a provider's TOS pursuant to 47 U.S.C. §230(c)(1)-(2); rather, the heart of this case is about the Platforms' being heavily coerced and fully directed by (likely in conspiratorial fashion) Government Defendants to eliminate Plaintiffs' speech and press *via* censorship (prior restraint of Plaintiffs' individual civil liberties) bolstered by fabricated "disinformation" / "misinformation" character data hoked up by NGOs (*e.g.*, NewsGuard, GDI, ISD) at the Government Defendants' behest. Had this been a case featuring only content-filtering and/or only involving Big Tech Defendants and their standard provision of interactive computer services (and, therefore, within the gambit of 47 U.S.C. §230(c)), the Platforms' argument (that their conduct falls under their TOS and its FSCs) might have had some merit. Not so here.

The allegations (and causes of action) of the Amended Complaint go well beyond the social media / interactive computer services spelled out in the Platforms' so-called "contracts" labeled TOS, so much so that the computer services themselves are a distant afterthought. Google's motion to transfer correctly notes that the Amended Complaint *does not allege a breach of contract cause of action* (see [D.E. 37] at 6-7). Yep, because, again, this action has nothing to do with a contract (*i.e.*, this case does not fall under any cause of action arising out of or relating to the Platforms' TOS containing the forum selection clauses), because it involves far more than the Platforms' interactive computer services and importantly includes more entities. Even the very first sentence

of the R&R properly recognizes what this case is about: Plaintiffs "initiated this suit based on Defendants' alleged participation in a scheme by the United States Government to 'silence [Plaintiffs'] competitive COVID-related speech.'" [D.E. 56] at 1. And, yet, the R&R (in illogical and internally contradictory fashion) then proceeds to reframe Plaintiffs' case as one arising purely out of the TOS "contract," wrongly assuming that because the alleged Government censorship occurred on the Big Tech Defendants' platforms, the claims must "stem from" the TOS.

Nowhere do the subject TOS "contract" with Plaintiffs concerning other parties (Government) leaning on Big Tech to censor the voice of Plaintiffs and cripple their businesses in the process. Similarly, nowhere do the subject TOS contract with Plaintiffs concerning other parties (NGOs, both domestic and foreign) providing Big Tech with false user character reports supposedly warranting censorship (deprivation of free speech / press).

As to the Magistrate Judge's threshold assessment of what kind of case this is, it appears that the R&R mostly went awry in way-too-broadly construing the "significant relationship" test, wrongly concluding that any matter that somehow even marginally touches Big Tech's publication decision (no matter how far down the proximate causation chain that touching falls) must absolutely be considered a pure publishing case arising out of the subject TOS.

On December 19, 2024, the Fifth Circuit addressed a functionally equivalent (in that the true nature of a Big Tech action was analyzed in the §230 immunity vein, just as this Court's "step one" FSC applicability analysis must concern the true nature of this litigation) in its *A.B. v. Salesforce, Inc.*, 123 F.4th 788 (5th Cir. 2024) decision and held that a claim does not treat the defendant as a publisher or speaker simply because publication is part of the causal chain. *See id.* at 794-797. Put differently, and contrary to the R&R, the mere fact that Plaintiffs were on privately owned platforms and put forth third-party content on same does not mean that Plaintiffs' claims

automatically "arise out of" the TOS and are subject to the FSCs embedded therein. The *Salesforce* decision undermines the R&R's reframing a massive censorship scheme involving multiple parties as a mere contractual dispute concerning just Big Tech and just their provision of interactive computer services. Per the Fifth Circuit, this lawsuit's addressing publication somewhere down the causal chain does not render this matter a plain publication case subject to §230 immunity considerations (and FSC considerations). Even California's federal courts recognize that the application (or not) of a FSC requires analysis of whether Plaintiffs' "claims require interpretation of the contract" within which the FSC is found. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). *The prospective trier of fact in this matter will NOT have to interpret the TOS in order to resolve the causes of action pleaded by Plaintiffs.*

The R&R's threshold determination that this case is a contract case simply because somewhere down the causation chain the Platform Defendants engaged in unpublishing contradicts the Fifth Circuit Court's *Salesforce* decision. The FSCs cannot apply because Plaintiffs' claims: (1) do not "arise out of" contractual rights, (2) do not "arise out of" enforcement or breach of the TOS, and (c) exist independently of any contractual "agreements" between the parties. By misconstruing Plaintiffs' constitutional, anti-trust, and statutory causes of action, the R&R improperly allows the TOS to dictate forum for all matters involving Big Tech platforms, even for causes of action having nothing to do with the interpretation or effectuation of a contract (TOS) and even for parties not subject to the TOS (Government and NGOs), thereby improperly expanding the FSCs' reach far beyond their scope. *Overreach*, as discussed further below.

B. Discussion Of Objection I(b) – The R&R Is Mistaken In Applying CA Law

The Magistrate Judge opines as follows: "under the most-significant relationship test, contractual (here, TOS) choice-of-law provisions will apply to claims pertaining to the contract."

[D.E. 56] at 8. This is one of the "ancillary" R&R errors mentioned above. "Ancillary" because this Court does not have to get into the assessment of whether California law or Texas law applies if this Court properly determines at "step-one" that Plaintiffs' claims most significantly relate to the Censorship Industrial Complex spearheaded by the Government Defendants and carried out by the Platforms Defendants per immense Government coercion / pressure / participation and equipped with false character reports manufactured by the NGO Defendants at the Government Defendants' behest; *i.e.*, properly determines that the claims of this action do not most significantly relate to the Platform Defendants' contractual breaches in not providing TOS-prescribed interactive computer services provision (again, as Google's transfer motion rightly points out – there are no breach of contract claims included in the Amended Complaint).

California law should not have been the Magistrate Judge's choice of law because *the claims here do not bear significantly on the TOS.* Once more, the claims at issue here do not touch upon the Platform Defendants' own, independent (un)publishing decision-making contemplated by the TOS containing the FSC. And, once more, even if the Platform Defendants' (un)publishing decision-making was somehow considered its own (it was / is not, the decision-making, as admitted by Zuckerberg quite recently, was the product of immense Government coercion and bolstered by false NGO reporting), the (un)publishing activities of the Platform Defendants fall way too far down the causation chain for the FSC to credibly capture same.

The TOS simply do not contemplate Government publishing / censorship decisions predicated on false, Government-induced character reporting from the NGO Defendants and carried out by the Platform Defendants pursuant to immense Government coercion and pervasive entwinement. The (conspiratorial) Censorship Industrial Complex is the undeniable core of Plaintiffs' Amended Complaint and Plaintiffs do not allege that the Platform Defendants engaged

in their own, independent good faith and Good Samaritan publication decision-making. At all times, the Plaintiffs allege that the Platform Defendants were the lackies (or aiders and abettors) of the U.S. Government in the Censorship Industrial Complex at the heart of the subject lawsuit; that is, the Amended Complaint clearly and consistently alleges that the Platform Defendants submissively and blindly followed the orders of the U.S. Government, often to gain an advantage or be seen as loyal (which is the definition of a "lackey").

Regarding Big Tech's blind submission to the Government in relation to the Censorship Industrial Complex at issue in the subject lawsuit, roughly seven months after this litigation commenced, Zuckerberg (Facebook / Meta) publicly admitted in numerous interviews that the U.S. Government under the Biden Administration made Big Tech their censorship lackey. Followed by the typical Zuckerberg / Facebook / Meta chatter of "we are so sorry, that was not right, we will try to do better." Indeed, during his interviews, Zuckerberg admits that what the Government coerced Big Tech into doing within the Censorship Industrial Complex was, in fact, "illegal."[6] Where, for example, in the Westlaw ether is there legal support (or where in the TOS is there contractual support) for the notion that the State can abrogate the rights of U.S. Citizens (*e.g.*,

[6] The Zuckerberg public admissions discussed herein can be found at:

https://www.pbs.org/newshour/politics/zuckerberg-says-the-white-house-pressured-facebook-to-censor-some-covid-19-content-during-the-pandemic

https://www.facebook.com/watch/?v=1525382954801931 The transcript of this video can be found at https://www.techpolicy.press/transcript-mark-zuckerberg-announces-major-changes-tometas-content-moderation-policies-and-operations/

Upon request, we would happily supply the Court with the approximate 30-page Zuckerberg admission excerpt from the aforementioned Middle District of Tennessee Amended Complaint.

free speech / press) through the State-induced publication / censorship activities of Big Tech? Nowhere. Once more, given this action does not "arise out of" the TOS "contract," the FSCs embedded within those TOS do not reach so far as to capture the Censorship Industrial Complex (and related causes of action) at the heart of this lawsuit.

Where, as another example, does case law or the TOS ("contract") contemplate Big Tech's involvement in a pervasive, deeply rooted Censorship Industrial Complex orchestrated by the U.S. Government? Nowhere. That is because the Censorship Industrial Complex (wherein Big Tech played a part in carrying out the Government's publishing / censorship decisions, not Big Tech's own publishing / censorship decisions) around which the subject lawsuit revolves was flat illegal (as Zuckerberg has publicly admitted), and one cannot contract as to illegalities; *i.e.*, the illegalities implicated by Plaintiffs' Censorship Industrial Complex lawsuit are not contractual wrong arising out of the TOS; *i.e.*, the censorship scheme at the heart of this lawsuit falls outside the scope of the ordinary provision of interactive computer services contemplated by the TOS. Given this lawsuit does not "arise out of" the TOS, the breadth of the FSCs does not reach this matter.

If the TOS contemplate Government-induced censorship (nope), they are unconscionable, unconstitutional, and void, rendering the FSCs untenable. If the TOS do not contemplate such censorship (yep), then the TOS are inapplicable and the FSCs are irrelevant. This Catch-22 is irreconcilable. Either way under the Catch-22, the FSCs cannot shop this suit into Big Tech's honey hole forum (the California court system).

FSCs do not govern disputes where the claim exists independently of the contractual obligations. The trier of fact will not have to engage in an assessment of: (1) existence of a valid contract (offer, acceptance, consideration, mutual assent, *et cetera*), (2) (non-)performance under the contract, (3) breach of the contract, and (4) damages resulting from the breach; *i.e.*, the trier of

fact will not assess breach of contract cause of action elements because this litigation does not "arise out of" contract. Moreover, in adjudicating the causes of action that Plaintiffs did advance (regarding the Censorship Industrial Complex), the trier of fact will not somehow have to engage in interpretation of the TOS. Without "arising out of" and/or without "interpretation of," the TOS mean diddly squat to the disposition of this action. And with the TOS bearing no relevance to the disposition of this matter, FSCs found within such TOS are inoperative.

Here, Plaintiffs' claims arise from Government-directed Censorship Industrial Complex, not from any TOS-oriented contractual rights. The FSCs do not apply here because the Amended Complaint's allegations and claims do not arise from the Platform Defendants' own publication decision-making made in the ordinary course of interactive computer service provision.

Moreover, in the public policy vein (which bears somewhat on whether California or Texas law should have been used in the R&R, in whole or in part, to resolve the subject transfer dispute), even California courts (but not the R&R) realize that Texas has a strong policy interest in making sure its citizens enjoy its statutory protections that do not exist in California (*e.g.*, TX HB 20):

> It is equally undeniable that enforcing the contractual choice of California law would be contrary to this policy in the starkest way possible. Facebook tries to downplay the conflict as merely the loss of a claim. … But if California law is applied, the Illinois policy of protecting its citizens' privacy interests in their biometric data, especially in the context of dealing with 'major national corporations' like Facebook, would be written out of existence. That is the essence of a choice-of-law conflict. … The conflict is all the more pronounced because California has no law or policy equivalent to BIPA. Unlike Illinois, California has not legislatively recognized a right to privacy in personal biometric data and has not implemented any specific protections for that right or afforded a private cause of action to enforce violations of it. ...
>
> Illinois' greater interest in the outcome of this BIPA dispute is also readily apparent. The fundamental question on this point is 'which state, in the circumstances presented, will suffer greater impairment of its policies if the other state's law is applied.' … The answer here could not be clearer. Illinois will suffer a complete negation of its biometric privacy protections for its citizens if California law is applied. In contrast, California law and policy will suffer little, if anything at all, if

> BIPA is applied. Facebook makes the implausible argument that California has the superior interest of needing to provide 'certainty and predictability to technology companies like Facebook' by 'enforcing choice-of-law provisions.' This makes little sense. If the chosen state's interest in enforcing a choice-of-law provision alone were enough to trump the interest of the non-chosen state, Section 187 would largely be a nullity. And while California 'certainly has a significant general interest in enforcing contracts executed...by its citizens,' Illinois has 'a substantial, case-specific interest in protecting its resident[s]...from losing statutory protections." *Bridge Fund Capital Corp.*, 622 F.3d at 1004; *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir.2012) ("California's interest in applying its law to residents of foreign states is attenuated.").

In re Facebook Biometric Information Privacy Litigation, 185 F.Supp.3d 1155, 1169-1170 (N.D. Cal. 2016) (internal citations omitted) (properly deciding to apply Illinois law rather than California law). Here, Texas has a substantial, case specific interest in protecting citizens from losing statutory protection. Here, for example, Texas HB 20 concerning social media censorship.[7]

California does not have the statutory protection (HB 20) that Texas has for the benefit of Texas citizens. While Defendants will in no way suffer if HB 20 is applicable because this matter is properly kept in Texas and resolved pursuant to Texas law, Plaintiffs (Texas citizens) would suffer a great deal if they lose Texas statutory protection (HB 20) by this Court's wrongly shipping this matter off to California and opining that California law applies in the process. *If this matter is transferred to California and subject to California law, HB 20 "would largely be a legal nullity;" i.e., "a complete negation of [Texas' HB 20] protections for its citizens" would result.*

IV. Enforceability Analysis (R&R [D.E. 56], § C, 12-15)

Again, we should not even be here in the analysis – the entire FSC applicability assessment should end with the proper determination that the Censorship Industrial Complex (conspiracy, or joint participation at minimum) at the heart of this lawsuit does not arise out of Big Tech's TOS.

[7] HB 20 is shortform for the Discourse on Social Media Platforms statute is codified within §§143A.001-143A.008 of the Texas Statutes. And HB 20 is the impetus of Plaintiffs' Count VII.

But, we will continue to point out ancillary R&R errors in an abundance of caution. As noted in Objection I(c), the R&R is mistaken in the "overreach" vein of the enforceability analysis.

If this Court were to endorse the R&R determination that the subject FSC reach Plaintiffs' claims independent of the TOS "contract," such endorsement would contravene the Fifth Circuit's three-month-old *Salesforce* decision (at minimum). If flawed R&R is adopted, there will be an appellate court reversal and remand, delaying justice, wasting resources, and reaffirming *Salesforce*. Notably, the Fifth Circuit's *Salesforce* ruling, which involved a *de novo* analysis of the statutory text, was necessitated by the inconsistent case law originating from California, where courts have repeatedly relied on the same kind of erroneous reasoning found in the R&R.

V. Extraordinary Circumstances Analysis (R&R [D.E. 56], § D, 15-18)

We do not necessarily quarrel with the R&R determination that several of the extraordinary circumstances are neutral / a toss-up, except with respect to R&R's contention that Plaintiffs did not identify conflicts in the law between Texas and California. So, Plaintiffs' Objection I(d) does not revisit assessments like Court congestion or the superiority of one court over another as it concerns familiarity with constitutional law or what not. We will, however, continue to vehemently dispute the R&R notion that germane California law does not conflict with germane Texas law and/or the R&R notion that Plaintiffs will receive a fair shake (justice / day in court) in California. Because, as stated in Plaintiffs' omnibus response in opposition to the Defendant Platforms' transfer motions, there is a very high likelihood that the Plaintiffs will be short-shrifted in the California court system by a judiciary bent on protecting its Silicon Valley comrades at most (if not all) costs. Any legal practitioner who opines that the California court system offers a fair shake to those litigating against Big Tech simply is not abreast of evolving case law and/or legal trends. Indeed, once again, even Zuckerberg (Facebook / Meta) has recognized the California court

system's Big Tech bias, admitting that Meta is moving operations to Texas because of this. And, again, X is already in Texas … presumably for similar reasons.

There is a reason why Ninth Circuit (California) prerogatives as to internet law (*e.g.*, 47 U.S.C. § 230) are being eviscerated by sister circuit courts; *e.g.*, the Third Circuit (*see, e.g.*, *Anderson v. TikTok, Inc.*, No. 22-3061, 2024 WL 3948248 (3d Cir. Aug. 27, 2024)), the Fourth Circuit (*see, e.g., Henderson v. The Source for Public Data, L.P., et al.*, 53 F.4th 110 (4th Cir. 2022)), and the Fifth Circuit (*see, e.g., A.B. v. Salesforce, Inc.*, 123 F.4th 788 (5th Cir. 2024)). The reason is that California courts, by and large, selectively mishandle legal disputes involving Big Tech, consistently favoring these companies regardless of the applicable procedure, statutory text, congressional intent, constitutional protections, or the actual merits of the case.

And, as discussed in §III above, there is California and Texas law conflict; *e.g.*, Texas offers more statutory protection against social media censorship (*because Texas has a great interest in, and associated public policy concerning, social media censorship abuse*). Again, the most glaring example of such is Texas HB 20, a very appropriate law handed down by the Texas legislature with no such equivalent found in California's statutes (*because California could care less if its Big Tech comrades censor out-of-staters into oblivion*). *Again, if this matter is transferred to California and subject to California law, HB 20 "would largely be a legal nullity."*

The high likelihood that Plaintiffs will experience injustice in California (whether because of the California court system's Big Tech bias and/or because of being stripped of Texas' statutory protections such as HB 20) is further bolstered by the reality that, if this Court wrongly sends this matter to California, this Court is wrongly determining that Plaintiffs' lawsuit arises out of the ordinary interactive computer services (and ordinary interactive computer services provision terms) contemplated by the TOS. If that is the case, there is a very high probability that the Ninth

Circuit will wrong Plaintiffs just as it has wronged countless other users over the years with respect to §230 "immunity." Just as the Fifth Circuit Court in *Salesforce* recognized with respect to §230 (that is, Platform Defendants' cannot enjoy §230 immunity where the wrongs complained of arise out of something other than the run-of-the-mill interactive computer services contemplated by the service provider's TOS), so too should this Court recognize with respect to the viability of the FSCs (that is, Platform Defendants cannot get away with their intentional forum shopping efforts aimed at getting this action moved into its highly biased (and dysfunctional, we submit) California home court system because the Censorship Industrial Complex at the heart of the subject lawsuit simply does not arise out of breach of contractual / TOS terms setting forth the Platform Defendants' rights and the Plaintiffs' rights, or lack thereof, within the dynamic of the Platform Defendants' providing interactive computer services and the Plaintiffs' utilizing such services).

One more time – even Zuckerberg (Facebook / Meta) has admitted in the recent interviews noted above that Meta is relocating to Texas because of the perceived bias of the California court system. *See* the materials cited in n. 6, *supra*. And Twitter / X has already relocated to Texas. Even the Platforms recognize that California courts have gone awry in consistently favoring Big Tech.

The R&R is amiss with respect to the page 18 assertion that Plaintiffs did not identify conflict of law, the R&R is amiss in failing to recognize how messed up and inconsistent the California court system really is when it comes to internet-related law, and the R&R is amiss in discrediting Texas' public policy interests in ensuring its citizens are not deprived of the statutory social media censorship protections afforded by the Texas legislature (HB 20). The R&R's failure to recognize how unlevel, biased the California court system is in favor of Big Tech litigants is the product of the Magistrate Judge's unfamiliarity with or misconstruction of (a) California Big Tech case law, (b) Fifth Circuit decisions such as the very recent *Salesforce* decision, which, again, such

decisions would not even be necessary if the Ninth Circuit had not so badly mucked up internet law, and/or (c) Texas statutes and the desire of the Texas legislature (and Texas citizenry who elected the Texas legislature) to afford statutory protection (not found in California) against social media censorship to maintain a vibrant, diverse social media discourse.

VI. Alternative Relief

As noted in Objection I(e), the R&R recommendation to immediately transfer to California was hasty at best and a miscarriage of justice at worst. There was no evidentiary hearing (or any hearing), which was the Magistrate Judge's Rule 72 rights. There was no suggestion of heightened FSC scrutiny given the adhesive nature of the TOS. And the R&R is replete with (erroneous) jabs that Plaintiffs have not discussed a particular (sub)issue thoroughly enough or at all.

The Magistrate Judge's lack of due diligence (combined with the fact that Plaintiffs chances to succeed on their righteous merits will decrease dramatically if this action is shipped off to Big Tech's playground – the Northern District of California) was erroneous. If the Magistrate Judge really felt that Plaintiffs said too little about what their case arises out of (in the Amended Complaint or in the omnibus response to the Platform Defendants' transfer motions), justice militates toward affording Plaintiffs leave to amend to say more or be clearer as to the Censorship Industrial Complex (not the TOS) being the core of this lawsuit. Justice does not lend credence to the Magistrate Judge's recommendation – crush Plaintiffs (as to the merits, make no mistake about it) by sending them off the internet's Big Tech lion's den (the California court system).

VII. Conclusion

Imagine a tenant in an apartment complex owned by a mega-corporation. The lease outlines standard terms (*e.g.*, rent payments, maintenance obligations, and conduct restrictions). One day, the landlord unexpectedly evicts the tenant mid-month, citing a vague provision allowing removal

of tenants deemed "potentially harmful." Later, the tenant discovers the city government pressured the landlord to evict because the government (or its minion NGOs) found him undesirable (perhaps due to political beliefs, race, or other protected characteristics). The landlord then uses the lease as a false pretext (as part of its scheme and to maintain favor with the government) to conceal that the eviction resulted from neither an independent landlord decision nor any actual lease violation, but, rather, a directive from the government. The tenant's prospective action concerning the government's illegal collusion with the mega-corporation landlord by no means will arise out of the terms of the rental lease, as the eviction was not the result of things like rent payment, maintenance obligations, or conduct restrictions; *i.e.*, the prospective action will not take issue with a breach of the lease contract and the trier of fact will not have to engage in an interpretation of the lease contract, as the conspiracy / collusion litigation will not arise out of the lease contract.

Same here. The Platform Defendants = landlords, the platforms = apartments, the Plaintiffs = platform tenants / users, and the TOS = lease. The Government Defendants, vis-à-vis the Censorship Industrial Complex, effectuated the eviction of Plaintiffs from the platforms so as to, among other things, quash Plaintiffs' speech / press (in contravention of the First Amendment). The TOS does not contemplate Government-inspired eviction (in particularly when underlain by motives that contravene the Constitution; *e.g.*, deprivation of free speech / press), just like a rental property lease agreement does not contemplate Government-inspired eviction.

The R&R fundamentally misrepresents the nature of this lawsuit (the core issues), conflating a Government-orchestrated censorship scheme with a mere contract dispute over TOS. The property rental lease itself is irrelevant to whether the Government conspired with the landlord to unlawfully target specific tenants, just as TOS (and FSCs embedded therein) are irrelevant when Big Tech censorship is directed by Government and/or coordinated with private NGOs. The FSCs

do not apply to Plaintiffs' extra-contractual claims, especially given Government's constitutionally repugnant wrongdoing is inextricably intertwined with that extra-contractual conduct.

WHEREFORE, for all of the foregoing reasons (whether considered separately or together), Plaintiffs respectfully request entry of an Order (a) sustaining their objections and reversing the R&R, thereby maintaining jurisdiction in this Court, and/or (b) affording any other relief the Court deems equitable, just, or proper.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Objection complies with Local Rule CV-7, as this Objection does not exceed twenty (20) pages. And, through conferral, the parties have agreed that the ordinary page limits specified in Local Rule CV-7 (20 pages for opening brief, 20 pages for responsive brief(s), and 10 pages for reply brief(s)) apply. Moreover, this Objection complies with the typeface and type style requirements of Local Rule CV-10, this brief has been prepared in a proportionately double-spaced typeface using Times New Roman 12-point font.

Dated: March 21, 2025.

Respectfully Submitted,

/s/ Jeffrey L. Greyber
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and

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2025, I electronically filed the foregoing with the Court by using the applicable CM / ECF system. Participants in the case who are registered CM / ECF users will be served by the CM / ECF system.

/s/ Jeffrey L. Greyber
Jeffrey L. Greyber, Esq.