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20 ***Pro hac vice application forthcoming*

21 **UNITED STATES DISTRICT COURT**
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

23 **The Babylon Bee, LLC, and Kelly**
24 **Chang Rickert,**

25 *Plaintiffs,*

26 v.

27 **Robert A. Bonta, et al.,**

28 *Defendants.*

Civil No. 2:24-cv-08377-FMO-DTB

Memorandum in Support of
Plaintiffs' Application for
Temporary Restraining Order,
or Alternative Motion for
Expedited Preliminary
Injunction

Date: Thursday, October 10, 2024

Time: 10:00 a.m.

Courtroom: 6D

Judge: Fernando M. Olguin

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28

INTRODUCTION

1
2 In the name of protecting democracy, California enacted AB 2839,
3 which outlaws anyone from posting or reposting “materially deceptive”
4 political content online, including content that harms candidates’ electoral
5 chances. That reaches far beyond “deepfake” content and makes it harder for
6 people to criticize politicians, lampoon candidates, and engage in fulsome
7 political debate. By singling out and censoring political speech, California
8 hasn’t saved democracy—it has undermined it. The First Amendment does
9 not brook appeals to “enhancing the ability of ... citizenry to make wise
10 decisions by restricting the flow of information to them.” *Eu v. S.F. Cnty.*
11 *Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (cleaned up).
12

13
14 AB 2839 particularly harms Plaintiffs The Babylon Bee and Kelly
15 Chang Rickert. They each publish and republish satirical material online
16 about politicians, elections, and cultural issues. For Plaintiffs, satire and
17 parody prove points about reality that often cannot be communicated in a
18 serious tone. But their expression—and similar expression by millions of
19 others—is now illegal in California. Worse, AB 2839 allows government
20 officials, aggrieved politicians, and *anyone else who sees the forbidden*
21 *content* to sue. With today’s political polarization, that will chill more speech.
22

23 Democracy does not need laws like AB 2839. Existing doctrine already
24 punishes truly defamatory or deceptive content. And “[o]ur constitutional
25 tradition stands against the idea that we need Oceania’s Ministry of Truth.”
26 *United States v. Alvarez*, 567 U.S. 709, 723 (2012). AB 2839 should be
27 enjoined facially and as-applied to The Bee and Rickert.
28

STATEMENT OF FACTS

1
2 The Babylon Bee regularly publishes satirical articles and videos on its
3 website each week, and it also posts those materials on its social media
4 accounts. Compl. ¶¶ 1, 11. Across its website and social media accounts—
5 including X, Facebook, Instagram, and YouTube—The Bee attracts millions
6 of viewers each month. Compl. ¶¶ 11–12, 43. The Bee creates content about
7 many topics, including politicians, candidates, elections, and California.
8 Compl. ¶¶ 51–52. The Bee often digitally alters pictures or videos to increase
9 the satirical effect. Compl. ¶¶ 55, 58, 61. Sometimes, The Bee’s satirical
10 content so closely mirrors reality that people have questioned whether it is
11 true. Compl. ¶¶ 68–69.

12
13 Like most other satirists, The Bee creates satire that it knows is “not
14 literally true.” Compl. ¶¶ 65–66. But by juxtaposing its satirical content with
15 reality, The Bee hopes to encourage viewers to think more deeply about
16 issues and to take appropriate action to remedy the harms, dangers, or bad
17 ideas The Bee’s satire exposes. Compl. ¶ 64. The Bee has been subjected to
18 censorship and significant criticism before. Compl. ¶¶ 72–75, 78.

19
20 Kelly Chang Rickert lives in California. Compl. ¶ 100. Like many, she
21 shares her views on politics, elections, politicians, candidates, social issues,
22 and other topics through her various social media accounts. Compl. ¶ 115.
23 Rickert also writes blog posts about these topics on a website she curates
24 and operates. Compl. ¶¶ 104–10. Across her social media accounts and blog,
25 Rickert communicates to tens of thousands of subscribers and followers.
26
27 Compl. ¶¶ 111, 113–14.
28

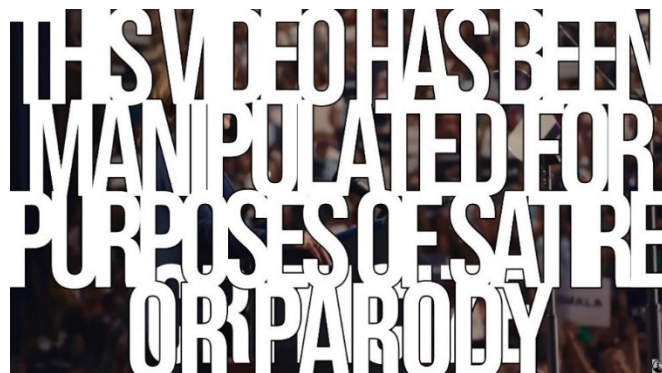
1 Especially during the political season, The Bee and Rickert desire to
2 express their views on politics, elections, and candidates through satire,
3 parody, and other postings. But AB 2839 burdens those communications
4 with threats of significant penalties.

5
6 On September 17, 2024, California enacted AB 2839. The law took
7 immediate effect and applies to The Bee and Rickert now. Compl. ¶ 115. It
8 prohibits any “person” or “entity” from knowingly distributing “an
9 advertisement” or “election communication” containing “materially deceptive
10 content” for a period between 120 days before and 60 days after an election.
11 Cal. Elec. Code § 20012(b)(1), (c). “Election communication” includes “any
12 general or public communication” that is “distributed through the internet”
13 or via “text” and that “concerns” “[a] candidate for office or ballot measure,”
14 “[v]oting or refraining from voting in an election,” or “[t]he canvass of the
15 vote.” *Id.* § 20012(f)(5). And “materially deceptive content” means “audio or
16 visual media that is digitally created or modified ... such that it would
17 falsely appear to a reasonable person to be an authentic record of the content
18 depicted.” *Id.* § 20012(f)(8)(A)–(B).

19
20
21 AB 2839 only bans “materially deceptive content” related to certain
22 subjects: (1) content portraying a “candidate” or “elected official” saying or
23 doing something he or she did not say or do “if the content is reasonably
24 likely to harm the reputation or electoral prospects of a candidate,” *id.*
25 § 20012(b)(1)(A), (C); (2) content portraying an “elections official” or “elected
26 official” saying or doing something he or she did not say or do if the content
27 is “reasonably likely” to “falsely undermine confidence in the outcome of one
28

1 or more election contests,” *id.* § 20012(b)(1)(B)–(C); and (3) content
2 portraying a ballot, voting site, or other election-related property or
3 equipment “if the content is reasonably likely to falsely undermine
4 confidence in the outcome of one or more election contests,” *id.*
5 § 20012(b)(1)(D).
6

7 AB 2839 requires “satire or parody” about these subjects to be labeled
8 with this disclosure: “This [image, audio, or video] has been manipulated for
9 purposes of satire or parody.” *Id.* § 20012(b)(3). The label must be “no
10 smaller than the largest font size of other text appearing in the visual
11 media.” *Id.* § 20012(b)(2)(B). For context, the images below apply the
12 required label to content The Bee has posted and still footage of a video
13 Rickert wants to post. Compl. ¶¶ 264–65.
14



1 If The Bee or Rickert post prohibited content without this label, *anyone*
2 *who views it* could subject them to court proceedings, “injunctive or other
3 equitable relief,” “attorneys’ fees and costs,” and “general or special
4 damages.” Cal. Elec. Code § 20012(d)(1)–(2). Though AB 2839 broadly
5 applies to Plaintiffs and burdens their speech with the threat of these
6 penalties, it also contains inexplicable exemptions that undermine
7 California’s asserted purposes. *E.g., id.* § 20012(e).

9 Despite the substantial risk of harm, The Bee is continuing to publish
10 content that appears to qualify as “materially deceptive” under AB 2839.
11 Compl. ¶ 266. And because projecting a punchline ruins satire and parody,
12 The Bee will not include the required satire or parody label. *Id.* So The Bee
13 is arguably violating AB 2839. For her part, Rickert is refraining from
14 posting content that violates or may violate AB 2839 because she desires to
15 avoid the law’s crippling penalties. Compl. ¶ 267.

17 California foresaw the burdens its law imposes on speech and passed it
18 anyway. The legislature recognized that AB 2839 regulates “political
19 speech,” “implicate[s] the protections of the First Amendment,” is subject to
20 strict scrutiny, and would “certainly be the target of immediate litigation.”
21 Compl. ¶¶ 161–70. During the legislative process, Governor Newsom
22 tweeted that it should be “illegal” to post a video parodying a Democratic
23 presidential candidate. Compl. ¶ 151. After this, the legislature removed AB
24 2839’s “satire or parody” exemption. Compl. ¶ 168. And, even now, California
25 is defending its authority under AB 2839 to regulate core political speech—
26 including parody and satire.
27
28

1 By design, AB 2839 chills, restricts, and burdens political speech. With
2 just weeks left before a national election, The Bee and Rickert request an
3 expedited preliminary injunction to protect their freedom to engage in
4 critical political discussions and contribute their views to the marketplace of
5 ideas without AB 2839’s threat of government punishment and censorship.
6

7 ARGUMENT

8 AB 2839 regulates speech based on content and viewpoint in violation
9 of the First Amendment. And its vague provisions empower California to
10 silence views with which it disagrees. For these reasons, Plaintiffs will likely
11 succeed on their First and Fourteenth Amendment claims, and they meet
12 the other preliminary-injunction factors. At the very least, Plaintiffs
13 demonstrate “serious questions going to the merits” and “hardships” that tip
14 “sharply” in their favor. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d
15 1281, 1291 (9th Cir. 2013) (citation omitted). *See also Stuhlbarg Int’l Sales*
16 *Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting
17 analysis for a temporary restraining order is “substantially similar”).
18

19 I. Plaintiffs will likely succeed on the merits.

20 AB 2839 unconstitutionally regulates speech and is impermissibly
21 vague. Plaintiffs are likely to succeed in their challenges against it.
22

23 A. AB 2839 unconstitutionally regulates speech.

24 AB 2839 both compels and restricts speech based on its content and
25 viewpoint. It also discriminates against particular speakers. AB 2839
26 therefore must satisfy strict scrutiny. *Green v. Miss U.S. of Am., LLC*, 52
27
28

1 F.4th 773, 791 (9th Cir. 2022); *Boyer v. City of Simi Valley*, 978 F.3d 618,
2 621 (9th Cir. 2020). It cannot meet that standard and should be enjoined.

3 **1. AB 2839 restricts political speech.**

4 “Political speech ... is at the core of what the First Amendment is
5 designed to protect.” *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (cleaned
6 up). “The First Amendment affords the broadest protection” to speech about
7 political candidates, ballot measures, and controversial political topics “to
8 assure the unfettered interchange of ideas for the bringing about of political
9 and social changes desired by the people.” *McIntyre v. Ohio Elections*
10 *Comm’n*, 514 U.S. 334, 346 (1995) (cleaned up).

11
12
13 These protections include parody, satire, and political cartoons that
14 have long “played a prominent role in public and political debate.” *Hustler*
15 *Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988). “Parody is regarded as a form of
16 social and literary criticism, having a socially significant value as free
17 speech under the First Amendment.” *Dr. Seuss Enters., L.P. v. Penguin*
18 *Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

19
20 But AB 2839 explicitly restricts protected political speech. The law
21 prohibits *any* “materially deceptive” public communications containing an
22 image, video, or recording that portrays a candidate or elected official doing
23 or saying things he or she didn’t do or say and that is likely to harm a
24 candidate’s reputation or electoral prospects. Cal. Elec. Code
25 § 20012(b)(1)(A), (C).

26
27 This prohibition covers parody and satire. By their nature, parody and
28

1 satire often portray political candidates doing or saying things that they
2 didn't actually do or say. And AB 2839 isn't limited to content that *actually*
3 fools people. Instead, it covers *any* image, video, or recording that is merely
4 realistic in *some* aspect. The text exempts parody and satire only "if the
5 communication includes a disclosure." Cal. Elec. Code § 20012(b)(3). That
6 disclosure must satisfy onerous requirements, including specific words, font
7 sizes, and duration limits. That further compounds the statute's
8 constitutional infirmities by compelling speech. *Infra* § I.A.2.

9
10 Rather than limiting the law to real harms, like media that *actually*
11 deceives or *actually* affects how a citizen might vote, the law prohibits any
12 media that is "likely to harm a candidate's ... electoral prospects." But that's
13 exactly the point of parody. They're part of our "thoroughly democratic"
14 tradition of "hav[ing] the high-and-mighty lampooned and spoofed." *Falwell*
15 *v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from
16 denial of rehearing). California seemed to recognize this in AB 2655 (the
17 other statute challenged in this case, though not in this motion), which
18 contains an explicit carveout for "[m]aterially deceptive content that
19 constitutes satire or parody." Cal. Elec. Code § 20519(c). Yet with AB 2839,
20 the legislature recognized the burdens on free speech and nonetheless
21 removed an explicit carveout for satire and parody. Compl. ¶¶ 161–70. That
22 shows California's intentional choice to cover satire and parody. *See Meghriq*
23 *v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (noting intentional legislative
24 action when Congress used language in one statute but omitted that
25 language in another statute).
26
27
28

1 Consider the fictitious Kamala Harris campaign ad created by a social
2 media user called “Mr. Reagan.” It used generative-AI to portray Harris
3 saying things she did not say to criticize her candidacy and policy positions.
4 Compl. ¶¶ 147–49. And although the video was labeled “PARODY,” that’s
5 not enough; California requires a specifically worded disclosure, written in a
6 font at least as large as the largest font otherwise in the video, appearing
7 throughout the video’s duration. Cal. Elec. Code § 20012(b)(1)(A). Because
8 the video did not attach the *correct* disclaimer, it violates the law. California
9 agrees that this is emblematic of prohibited speech; twice Governor Newsom
10 said that Mr. Reagan’s satire was prohibited. Compl. ¶ 151.

11
12 The law likewise targets satirical content that Plaintiffs have posted
13 and want to continue posting. For example, The Bee recently created a
14 similarly fictitious campaign ad of Governor Newsom endorsing Kamala
15 Harris. Compl. ¶ 47. It used generative-AI to make Newsom’s voice appear
16 “authentic.” Cal. Elec. Code § 20012(f)(8)(A). And it mocks the Democratic
17 Party’s position on issues like immigration—in a way that is “reasonably
18 likely to harm the ... electoral prospects of” Harris. Because The Bee posted
19 this video without a disclaimer, it appears to violate the law.
20
21

22 Additionally, The Bee created the two digitally altered images below.
23 See Compl. ¶ 54.
24
25
26
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Trump Prepares For Debate Against Kamala By Going To Bar And Arguing With Drunks

POLITICS - Sep 5, 2024 - BabylonBee.com
Click here to view this article with reduced ads.



Kamala Responds To Criticism Over Lack Of Policies By Posting Another Truck Stop Junk Food Video

POLITICS - Sep 6, 2024 - BabylonBee.com
Click here to view this article with reduced ads.



Because both use modified images and are “reasonably likely to harm the ... electoral prospects of” Harris, they, too, violate AB 2839.

AB 2839 similarly applies to several political comments Rickert wants to post. She did not share Mr. Reagan’s Harris parody video or a digitally modified video showing Harris asking immigrants to vote, even though she otherwise would have. Compl. ¶¶ 121–27. Nor did she share the following fictitious images of Donald Trump with the caption: “This is the strategy to get Kamala Harris elected—political retaliation” or something materially similar. Compl. ¶¶ 131–33.



1 **2. AB 2839 compels speech by requiring disclaimers.**

2 Not only does AB 2839 restrict speech—it also compels it. The state
3 compels speech when it requires someone to say something that affects the
4 speaker’s message. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023);
5 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–
6 73 (1995). A speaker’s right to tailor its speech applies “equally to state-
7 ments of fact the speaker would rather avoid.” *Hurley*, 515 U.S. at 573.

8 These principles apply to forced disclaimers. Requiring pregnancy
9 clinics to post “government-scripted” notices about the services they provide
10 compels speech. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755,
11 777 (2018) (“*NIFLA*”). So does forcing professional fundraisers to disclose
12 what percentage of donations go to charitable causes. *Riley v. Nat’l Fed’n of*
13 *the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988) (“[W]e would not
14 immunize a law ... requiring a speaker favoring an incumbent candidate to
15 state during every solicitation that candidate’s recent travel budget.”).

16 California’s forced disclaimers also unconstitutionally compel speech.
17 Every satirical or parodic meme that is “materially deceptive” about political
18 candidates or elected officials must include a disclaimer—meeting onerous
19 font, duration, and repetition requirements—saying the image “has been
20 manipulated for purposes of satire or parody.” Cal. Elec. Code § 20012(b)(3).
21 Covered satire or parody that wants to escape the prohibition must parrot
22 the government’s own words.
23
24
25
26
27
28

1 AB 2839 thus forces Plaintiffs to say things they otherwise don't want
2 to say. Take The Bee's fake campaign ad of Governor Newsom endorsing
3 Kamala Harris. It depicts alternating images of smiling citizens and trash-
4 littered streets, overlaid with Newsom's voice boasting about California's
5 homelessness and drug epidemics. *See* Compl. ¶ 47. To avoid liability under
6 AB 2839, The Bee would have to include California's disclaimer, which
7 would ruin the "perception of incongruity" that gives the video its comedic
8 effect. Gilbert Highet, *THE ANATOMY OF SATIRE* 72 (1962) ("[S]ome of the best
9 material parodies are those which might, by the unwary, be accepted as
10 genuine work."). "Parody needs to mimic an original to make its point."
11 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994). And it's
12 "the pretense of reality" juxtaposed with the patently absurd that allows
13 parody to "convey an underlying critical message" in a humorous way. *Farah*
14 *v. Esquire Mag.*, 736 F.3d 528, 537 (D.C. Cir. 2013) (citation omitted).

17 Parody doesn't need a disclaimer to receive First Amendment
18 protection. It has the same "socially significant value as" other protected
19 speech. *Dr. Seuss*, 109 F.3d at 1400. And courts regularly distinguish
20 between protected parody and unprotected libel, defamation, and copyright
21 infringement—*without* requiring a disclaimer. *E.g.*, *Farah*, 736 F.3d at 539
22 (rejecting defamation claim against parody); *Mattel, Inc. v. Walking*
23 *Mountain Prods.*, 353 F.3d 792, 811 (9th Cir. 2003) (rejecting copyright
24 infringement claim against satire). So AB 2839 is both unnecessary and
25 unconstitutional.
26

27
28 "The predictable result" of forced disclaimers is that many speakers

1 will “refrain” from saying anything at all. *Riley*, 487 U.S. at 800. But “[t]he
2 preferred First Amendment remedy” for disfavored speech is “more speech,
3 not enforced silence.” *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (cleaned up).

4 **3. AB 2839 classifies by content, viewpoint, and speaker.**

5 AB 2839 triggers strict scrutiny for at least three different reasons.
6 First, it facially regulates based on content because the “law applies to
7 particular speech because of the topic”—political candidates and elected
8 officials. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It also compels
9 unwanted content, forcing satirists to include dictated disclaimers, which
10 “necessarily alter[] the content of [their] speech.” *Riley*, 487 U.S. at 795.
11

12 Second, AB 2839 regulates based on viewpoint, an “egregious form of
13 content discrimination.” *Rosenberger v. Rector and Visitors of Univ. of Va.*,
14 515 U.S. 819, 829–830 (1995). Political content that is “positive about a
15 person” is allowed (if it doesn’t harm another candidate), but “derogatory”
16 political content is not. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) (cleaned
17 up). That is the “essence of viewpoint discrimination.” *Id.* (citation omitted).
18 Edited memes depicting Donald Trump praying are arguably allowed, while
19 memes of Trump running from police are not. Compl. ¶ 132.
20

21 Third, AB 2839 imposes different disclaimer requirements based on
22 speaker identity. *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d
23 1062, 1071–72 (9th Cir. 2020) (explaining law favored “particular speakers”).
24 The Supreme Court is “deeply skeptical of laws that distinguish among
25 different speakers” because they suggest the government is favoring
26
27
28

1 speakers “whose messages are in accord with its own views.” *NIFLA*, 585
2 U.S. at 777–78 (cleaned up). Under AB 2839, broadcasters like CNN or Fox
3 must explain that a video or image is inaccurate but can do so in their own
4 words. Cal. Elec. Code § 20012(e)(1). But candidates for office and everyday
5 internet trolls must include disclaimers that match the State’s word, font,
6 and duration requirements, *id.* § 20012(b)(2)–(3), thus “drown[ing] out’
7 Plaintiffs’ messages,” *Am. Beverage Ass’n v. City & Cnty. of S.F.*, 916 F.3d
8 749, 757 (9th Cir. 2019) (cleaned up).

10 **4. AB 2839 fails strict scrutiny and is a historical**
11 **anomaly.**

12 Because AB 2839 targets speech based on content, viewpoint, and
13 speaker, it is “presumptively unconstitutional.” *Reed*, 576 U.S. at 163. That
14 presumption is heightened here, where California explicitly regulates core
15 political speech. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010)
16 (suggesting “political speech simply cannot be banned or restricted as a
17 categorical matter”). At minimum, AB 2839 must either satisfy rigorous
18 means-end scrutiny, *Reed*, 576 U.S. at 173, or fit within “well-defined and
19 narrowly limited classes” that have not received protection historically,
20 *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). It can do neither.

23 **a. California need not regulate speech based on**
24 **content or viewpoint to achieve its interests.**

25 California asserts it has a “compelling interest in protecting free and
26 fair elections.” Cal. Elec. Code § 20012(a)(4). But that interest does not
27 justify “selective limitations upon speech.” *R.A.V. v. City of St. Paul*, 505
28

1 U.S. 377, 392 (1992).

2 *R.A.V.* proves the point. The Court there invalidated a law against
3 certain race-based hate crimes. *Id.* at 380. The state’s interest in protecting
4 “basic human rights” was undoubtedly compelling. *Id.* at 395. But the law’s
5 content-based distinctions were not necessary to prohibit “reprehensible”
6 acts like cross burnings. *Id.* at 395–96. Instead, “the only interest
7 distinctively served by the content limitation” was displaying the city’s
8 “special hostility towards the particular biases thus singled out.” *Id.* at 396.

9
10 Other courts have applied *R.A.V.* to invalidate content-based election
11 laws like California’s. For example, in *Grimmett v. Freman*, the Fourth
12 Circuit held unconstitutional a North Carolina law that prohibited false
13 “derogatory reports” about political candidates that were “calculated or
14 intended to affect the chances of such candidate for nomination or election.”
15 59 F.4th 689, 691 (4th Cir. 2023). That law only covered false statements
16 about certain political subjects, “of a particular nature[,] or made with a
17 particular intent.” *Id.* at 694. That ran “headlong into *R.A.V.*” *Id.*

18
19 California repeats the same mistake. Start with its prohibition on false
20 content “likely to harm the ... electoral prospects of a candidate.” Cal Elec.
21 Code § 20012(b). That does not prohibit *all* false content—only false content
22 that includes “statements about a certain subject”—candidates for office.
23 *Grimmett*, 59 F.4th at 694. And AB 2839 applies only to statements “of a
24 particular nature”—content likely to harm a candidate’s election prospects.
25 *Id.* So “speakers may lie with impunity about businesspeople, celebrities,
26 purely private citizens, or even government officials” who are not candidates
27
28

1 for office. *Id.*

2 The prohibition on false content that harms a candidate’s reputation is
3 similarly flawed. “[D]amage to reputation is, of course, the essence of libel.”
4 *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). But AB 2839 prohibits
5 libel only against political candidates. While “the government may proscribe
6 libel,” “it may not make the further content discrimination of proscribing
7 only libel critical of” political figures. *R.A.V.*, 505 U.S. at 384; *Grimmett*, 59
8 F.4th at 694; *Chaker v. Crogan*, 428 F.3d 1215, 1226–27 (9th Cir. 2005).

9 “As in *R.A.V.*,” AB 2839’s “limitation to speech addressing only certain
10 topics renders it facially unconstitutional.” *Grimmett*, 59 F.4th at 696. “The
11 dispositive question ... is whether content discrimination is reasonably nece-
12 ssary to achieve” California’s interest in preserving free and fair elections.
13 *Id.* (citation omitted). “Here, it plainly is not because [a law] not limited to
14 speech about current political candidates would have precisely the same
15 beneficial effect.” *Id.* (cleaned up).

16
17
18 **b. AB 2839 is underinclusive.**

19 “Underinclusiveness can ... reveal that a law does not actually advance
20 a compelling interest.” *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449
21 (2015). Here, AB 2839’s content discrimination proves that it is fatally
22 underinclusive, raising “doubts about whether the government is in fact
23 pursuing the interest it invokes, rather than disfavoring a particular
24 speaker or viewpoint.” *Id.* at 448 (cleaned up).

25
26
27 Again, start with AB 2839’s narrow focus on deceptive content
28

1 portraying only political candidates, elected officials, election officials, or
2 voting mechanisms. Countless election-related deepfakes like ones portray-
3 ing “Swifties for Trump” are allowed so long as they do not depict a
4 candidate, official, or voting mechanism. Donald J. Trump
5 (@realDonaldTrump), Truth Social (Aug. 18, 2024), <https://bit.ly/4drwhZA>.
6 So are many other false claims that “undermine the perception of electoral
7 integrity”—such as allegations about Russian disinformation—so long as
8 they do not specifically reference a candidate, ballot measure, or voting.
9 *Grimmett*, 59 F.4th at 696 n.9. If the State’s goal is to protect election
10 integrity, prohibiting satirical memes while failing to regulate deepfakes
11 that *actually* fool people makes little sense. *Id.*

14 Also consider AB 2839’s broad exemption for “interactive computer
15 service[s],” which “does not impose liability” on them. Cal. Elec. Code
16 § 20012(e)(4) (citing 47 U.S.C. § 230(f)(2)). Though the companion bill, AB
17 2655, regulates “large online platform[s]” with at least 1 million California
18 users, Cal. Elec. Code § 20512(h), all interactive computer services with less
19 than 1 million California users escape any regulation under these two bills.
20 This leaves a massive (and inexplicable) gap in California’s efforts to address
21 the alleged ills that it seeks to remedy through censorship.

23 Add to this that AB 2839 imposes different requirements on different
24 speakers. Candidates can post fake content positively portraying themselves
25 by attaching a short disclaimer. *See* Cal. Elec. Code § 20012(b)(2). Broad-
26 casters can share prohibited content with a disclaimer in their own words
27 rather than California’s. *Id.* § 20012(e)(1). And “broadcast stations” and
28

1 “internet websites” that distribute but do not create prohibited content are
2 exempt from “general or special damages.” *Id.* § 20012(d)(2)(B). But Plain-
3 tiffs can create similar content only if it is parody or satire and includes the
4 prescribed disclaimer. If California’s goal is to safeguard its elections, that
5 makes little sense. Politicians and large media giants promoting “self-
6 aggrandizing falsehoods” are just as likely to undermine elections as citizens
7 posting similar content. *Grimmett*, 59 F.4th at 696 n.9; *accord Rickert v.*
8 *State, Pub. Disclosure Comm’n*, 168 P.3d 826, 831–32 (Wash. 2007).

9
10 **c. AB 2839 is both overinclusive and overbroad.**

11 To pass means-end scrutiny, a speech regulation must not “burden
12 substantially more speech than is necessary.” *Comite de Jornaleros de*
13 *Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011)
14 (en banc) (citation omitted). Yet AB 2839 sweeps in too much protected
15 speech. Instead of regulating deepfakes that fool people, the law regulates “a
16 substantial quantity” of protected speech “that does not create the same
17 evils.” *Id.* at 947 (citation omitted). California could easily carve out comedic
18 social criticism just like AB 2655 does. Cal. Elec. Code. § 20519(c).
19
20

21 This overinclusiveness also violates the overbreadth doctrine. “[A]
22 statute is facially invalid if it prohibits a substantial amount of protected
23 speech” relative to its “plainly legitimate sweep.” *United States v. Williams*,
24 553 U.S. 285, 292 (2008). Overbreadth turns on whether the law’s “applica-
25 tions to protected speech ... swamp its lawful applications.” *United States v.*
26 *Hansen*, 599 U.S. 762, 774 (2023).
27
28

1 AB 2839’s applications do. The most obvious examples are satire and
2 parody—content protected under the First Amendment. *See Hustler Mag.*,
3 485 U.S. at 54–56. The law covers Mr. Reagan’s satirical video about Kamala
4 Harris, even though it’s labeled “PARODY,” and The Bee’s satirical video of
5 Governor Newsom mockingly endorsing Harris. It even sweeps in a satirical
6 article titled “Hillary Clinton Meets With Kamala To Help Her Improve Her
7 Black Accent” because of the digitally modified image of Harris and Clinton.
8 Compl. ¶ 57.

9
10 Aside from satire and parody, AB 2839 prohibits vast amounts of other
11 protected speech. It seemingly bans a Kamala Harris image that attributes
12 nonsense statements to her like: “Stock Market might not be up, but up isn’t
13 down, and down is not up, so what goes down is not up.” Compl. Ex. 4 at 27.
14 It also forbids misleadingly edited videos, like a montage of Harris’s
15 statements about rising grocery prices. il Donaldo Trumpo (@PapiTrumpo),
16 X (Aug. 16, 2024), <https://perma.cc/GJS9-KA7X>. Adding the text “WE DID
17 THAT JOE” is also off limits because it appears like Harris *admitted* that
18 the Biden-Harris Administration caused rampant inflation. Or take the false
19 claim that Donald Trump called Neo-Nazis “very fine people.” Taija
20 PerryCook, *No, Trump Did Not Call Neo-Nazis and White Supremacists*
21 *‘Very Fine People’*, Snopes (June 21, 2024), <https://perma.cc/PFB4-F4CT>.
22 Anyone sharing a selectively edited clip claiming that Trump supports Neo-
23 Nazis violates AB 2839.

24
25
26
27 The broad definition of “election communication” extends AB 2839’s
28 reach in staggering ways. It covers “any general or public communication”

1 sent through “text” or the “internet” that addresses a “candidate,” “ballot
2 measure,” or “voting.” Cal. Elec. Code. § 20012(f)(5). That includes general
3 posts on private social media accounts and text messages to groups. This,
4 too, demonstrates AB 2839’s vast overinclusiveness. *Comite*, 657 F.3d at 949.

5
6 What’s more, AB 2839’s liberal enforcement provisions are a recipe for
7 chilling untold amounts of speech, including speech that does not clearly fall
8 within the statute. *Infra* § I.C (explaining vagueness). It isn’t just defamed
9 candidates or elected officials who can sue—any “recipient of materially
10 deceptive content” can “seek injunctive or other equitable relief.” Cal. Elec.
11 Code § 20012(d)(1). That includes any “person who views, hears, or
12 otherwise perceives” the content. *Id.* § 20012(f)(9). This drastically increases
13 the chances that satirical articles will lead to a lawsuit, regardless of
14 whether they fall under AB 2839’s scope. But as soon as such a suit is filed,
15 “[a]t that point ... damage is done.” *281 Care Comm. v. Arneson*, 766 F.3d
16 774, 792 (8th Cir. 2014). Thus, AB 2839 is “overbroad because ... there is
17 nothing to prohibit the filing of a complaint against speech that may later be
18 found wholly protected.” *Id.*

19
20
21 Given its breadth, AB 2839’s “unconstitutional applications
22 substantially outweigh its constitutional ones.” *Moody v. NetChoice, LLC*,
23 144 S. Ct. 2383, 2397 (2024).

24 **d. California ignored less restrictive alternatives.**

25
26 California had many alternative ways to protect its elections. AB 2839
27 is not “the least restrictive means among available, effective alternatives.”
28

1 *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Nor can California prove it
2 considered alternatives or found them ineffective. *McCullen v. Coakley*, 573
3 U.S. 464, 494 (2014).

4 To start, California could limit AB 2839’s reach to conduct that
5 *actually* misleads voting citizens, whether inducing them to stay home on
6 election day or duping them into voting for the “wrong” candidate. *E.g.*, 47
7 C.F.R. § 73.1217 (prohibiting false broadcasts that foreseeably “cause
8 substantial public harm” and do “in fact directly cause” harm).

9
10 Or California could create a “Government-created database” that
11 tracks deepfakes and “verif[ies] and expos[es] false claims.” *Alvarez*, 567
12 U.S. at 729. Similarly, California could seek to counter deceptive speech with
13 speech of its own, like an educational campaign on how to spot deceptive
14 deepfakes. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507
15 (1996) (citing “educational campaigns” as alternative to First Amendment
16 restriction). “[T]he ordinary course in a free society” is to remedy false
17 speech with “speech that is true.” *Alvarez*, 567 U.S. at 727. “Especially as to
18 political speech, counterspeech is the tried and true buffer and elixir.” *281*
19 *Care Comm.*, 766 F.3d at 793. Governor Newsom already fact-checks
20 statements on his social media account and on his website.¹ Plenty of media
21
22
23
24
25

26 ¹ Gavin Newsom (@GavinNewsom), X (Sept. 17, 2024),
27 <https://perma.cc/Q2DN-6JCG>; *ICYMI: Big Oil Misleading Californian*
28 *(Again)*, *Fact Check Finds*, Governor Gavin Newsom (Feb. 2023),
<https://perma.cc/LLW6-FXLH>.

1 outlets do this, too.² In fact, The Bee has been subject to much fact-checking
2 in the past, like a *USA Today* article saying that “[a] satirical article about
3 the 9th Circuit ‘overturning’ Supreme Court Justice Ruth Bader Ginsburg’s
4 death has no basis in fact.” Compl. ¶¶ 83–86 & n.7. If media outlets have
5 time to fact-check articles like these, there’s little reason to doubt that
6 California can publicly debunk false claims that pose a real threat.
7

8 Alternatively, California could limit potential plaintiffs to political
9 candidates actually harmed by unprotected false speech. This would mirror
10 defamation law, which permits claims only by the person harmed—not
11 anyone who hears the defamation. *See* Restatement (Second) of Torts § 564A
12 (1977). That alternative would decrease the risk of frivolous lawsuits and
13 reduce the potential to chill speech.
14

15 **e. AB 2839 is a historical anomaly.**

16 AB 2839 is a historical anomaly that finds no footing “in a tradition of
17 regulation going back to the Founding.” *Upsolve, Inc. v. James*, 604 F. Supp.
18 3d 97, 116 (S.D.N.Y. 2022); *accord NIFLA*, 585 U.S. at 767; *N.Y. State Rifle*
19 *& Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24–25 (2022). The list of unpro-
20 tected speech has been “tightly limited” to “defamation, incitement, fraud,
21 and obscenity.” *Upsolve*, 604 F. Supp. 3d at 116. AB 2839 goes far beyond
22 that list.
23

24
25 ² *Reuters Fact Check*, Reuters (Sept. 2024), <https://bit.ly/3TT2Ad4>;
26 *Scorecard*, PolitiFact, <https://perma.cc/3QN9-DZQ2>; *Locations: California*,
27 *FactCheck.org* (June 18, 2024), <https://perma.cc/9X6L-9DNA>; Melissa
28 Goldin, *Fact Focus: A look at false claims made by Trump in California*,
Associated Press (Sept. 13, 2024), <https://bit.ly/4eKNSg5>.

1 The law covers much speech that is not defamatory, including parody
2 that undermines a candidate’s election chances. Nor is it limited to speech
3 that intends to or accomplishes fraud. Instead, California’s law prohibits
4 speech that could be *perceived* to communicate a lie, even if the speaker’s
5 intent is to criticize rather than deceive and even when a speaker gains no
6 economic benefit. Because even intentional lies are protected speech, *see*
7 *Alvarez*, 567 U.S. at 717–18, California’s law falls far outside of the First
8 Amendment’s historical bounds.
9

10 **B. AB 2839 is vague, facially and as-applied.**

11 Due process prevents the government from enacting a law so vague
12 that “its prohibitions are not clearly defined.” *Grayned v. City of Rockford*,
13 408 U.S. 104, 108 (1972). To satisfy due process, a law must provide notice of
14 what is prohibited and be sufficiently precise so “those enforcing the law do
15 not act in an arbitrary or discriminatory way.” *FCC v. Fox Television*
16 *Stations, Inc.*, 567 U.S. 239, 253 (2012).
17
18

19 Vague laws “raise[] special First Amendment concerns” because they
20 empower the government to silence viewpoints with which it disagrees. *Reno*
21 *v. ACLU*, 521 U.S. 844, 871–72 (1997). When “[d]efinitions of proscribed
22 conduct ... rest wholly or principally on the subjective viewpoint of a law
23 enforcement officer,” such laws “run the risk of unconstitutional murkiness.”
24 *Edge v. City of Everett*, 929 F.3d 657, 666 (9th Cir. 2019). “These concerns
25 are magnified even further when a law regulates political speech, which
26 ‘occupies the highest rung of the hierarchy of First Amendment values.’”
27
28

1 *Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022) (quoting *Snyder v.*
2 *Phelps*, 562 U.S. 443, 452 (2011)). So “where First Amendment freedoms are
3 at stake, a [] ... great[] degree of specificity and clarity of laws is required.”
4 *Edge*, 929 F.3d at 664 (cleaned up).

5
6 Multiple ambiguities in AB 2839 offend these principles and make AB
7 2839 both facially vague and overbroad for the same reasons. *See Nunez by*
8 *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (“In a facial
9 vagueness challenge, the ordinance need not be vague in all applications if it
10 reaches a substantial amount of constitutionally protected conduct.”)
11 (cleaned up). While AB 2839 appears to cover many of Plaintiffs’ actual and
12 desired posts, its vague text also invites unbridled enforcement discretion.
13 That gives Plaintiffs little notice about what posts actually cross the line.
14 Plaintiffs thus raise both as-applied and facial vagueness and overbreadth
15 arguments. *See Act Now to Stop War & End Racism Coal. & Muslim Am.*
16 *Soc’y Freedom Found. v. Dist. of Columbia*, 846 F.3d 391, 410 (D.C. Cir.
17 2017) (allowing as-applied First Amendment and facial vagueness
18 arguments when law provided “standardless enforcement discretion”).
19
20

21 AB 2839’s problems start with malleable terms like “materially
22 deceptive.” Cal. Elec. Code. § 20012(f)(8)(A). The law says this means
23 intentionally created content that makes the subject “falsely appear to a
24 reasonable person to be an authentic record of the content depicted.” *Id.* But
25 how is a satirist, blogger, or social media user supposed to know what
26 political satire or parody will appear authentic? Considering that some of
27 The Bee’s posts are fact-checked but many of them are not, Compl. ¶¶ 78–86,
28

1 it's impossible to know what a reasonable person would think about whether
2 the content appears authentic. Snopes, for instance, thought it necessary to
3 “fact-check” this satirical post The Bee wrote about United States
4 Representative Alexandria Ocasio-Cortez. Compl. ¶¶ 83, 237.

Ocasio-Cortez Appears On 'The Price Is Right,' Guesses Everything Is Free

POLITICS - Apr 12, 2019 - BabylonBee.com

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15 If Ocasio-Cortez were a California candidate, an enforcement official would
16 seemingly have discretion to determine that this post violates AB 2839.

17 Also consider statutory phrases like “reasonably likely to harm the
18 reputation or electoral prospects of a candidate.” Cal. Elec. Code
19 § 20012(b)(1)(A), (C). Terms like “likely to harm” are vague. Fictitious
20 memes of Trump rescuing kittens and pets could be “likely to harm” Harris’s
21 prospects because they make Trump seem more sympathetic. *Cf. Flomo v.*
22 *Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1022 (7th Cir. 2011)
23 (observing that a law prohibiting practices “likely to harm” was “pretty
24 vague, in part because no threshold of actionable harm is specified”). So
25 could the following digitally altered image because it falsely conveys that a
26 popular celebrity endorses Trump. Compl. ¶ 247.
27
28



Again, bloggers and social media users are left to guess what California enforcement officials will think.

Equally problematic is the statutory language singling out content that is “reasonably likely to falsely undermine confidence in the outcome” of an election. Cal. Elec. Code § 20012(b)(1)(C). Consider one video posted by the Republican National Committee that contains “12 Minutes of Democrats Denying Election Results,” featuring elected officials denying the legitimacy of Donald Trump’s presidency because of Russian disinformation. Compl. ¶ 245. That might “falsely undermine confidence” in the outcome of an election. The answer, once again, depends on whether the enforcement official perceives the video as sufficiently “deceptive.”

At bottom, what’s deceptive or “‘misleading’ is unconstitutionally vague and in the eyes of the beholder.” Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Mont. L. Rev. 53, 71–72 (2013) (targeting “‘deceptive’ or ‘misleading’ election speech ... could chill legitimate speech given the elasticity of the terms”). AB 2839 cannot build a speech-

1 targeting enforcement scheme on such an amorphous premise. Its vague
2 prohibitions “contain[] more than the possibility of censorship through
3 uncontrolled discretion.” See *Forsyth Cnty. v. Nationalist Movement*, 505
4 U.S. 123, 133 (1992). “Uncertain meanings inevitably lead citizens to ‘steer
5 far wide of the unlawful zone’ ... than if the boundaries of the forbidden
6 areas are clearly marked.” *Grayned*, 408 U.S. at 109 (citation omitted).

8 That chilling of speech has been established here. Rickert wants to post
9 certain political speech, including parody and satire, but fears that doing so
10 will violate the law. Compl. ¶¶ 119–28; *Isaacson v. Mayes*, 84 F.4th 1089,
11 1097 (9th Cir. 2023) (explaining that if a regulation’s prohibitions are
12 “vague, then cautious over-compliance is a logical result fairly traceable to
13 the statute”). For instance, Rickert has refrained from sharing the following
14 AI-generated images depicting Harris dressed in a Politburo outfit or
15 standing at the Democratic National Convention with the Soviet Union flag
16 on prominent display. Compl. ¶¶ 119–28.



1 These images, while not “factually true,” send messages that Rickert
2 wants to convey about Harris’s policy plans. But those are messages that AB
3 2839’s vagueness would allow government officials to censor.

4 **II. Plaintiffs meet the remaining factors for a temporary**
5 **restraining order or preliminary injunction.**

6 Plaintiffs satisfy the remaining factors for immediate injunctive relief.
7 “It is axiomatic that [t]he loss of First Amendment freedoms, for even
8 minimal periods of time, unquestionably constitutes irreparable injury.”
9 *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*,
10 82 F.4th 664, 694 (9th Cir. 2023) (en banc) (cleaned up). Such a loss of First
11 Amendment rights is undoubtedly occurring because Rickert is reasonably
12 chilling her speech now. Alternatively, First Amendment rights are so
13 precious that merely demonstrating a “colorable First Amendment claim” is
14 sufficient to show a likelihood of irreparable injury. *Am. Beverage*, 916 F.3d
15 at 758. Plaintiffs have easily satisfied that lesser showing.

16
17
18 Moreover, raising “serious First Amendment questions compels a
19 finding that ... the balance of hardships tips sharply in Plaintiffs’ favor.” *Id.*
20 (cleaned up). “[I]t is always in the public interest to prevent the violation of a
21 party’s constitutional rights.” *Id.* (citation omitted). And given “our profound
22 national commitment to ... uninhibited, robust, and wide-open” political
23 debates, the public interest lies in protecting political speech. *Fed. Election*
24 *Comm’n v. Cruz*, 596 U.S. 289, 302 (2022) (citation omitted).

25
26 **CONCLUSION**

27 The Court should grant Plaintiffs’ requested injunction.
28

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs, certifies that this brief contains 6,438 words, which complies with the word limit of L.R. 11-6.1.

DATED: October 1, 2024

/s/ David A. Shaneyfelt
David A. Shaneyfelt
Counsel for Plaintiffs

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PROOF OF SERVICE

I, David A. Shaneyfelt, am over the age of 18 years and not a party to the within action. My business address is 24005 Ventura Blvd., Calabasas, CA 91302.

On October 1, 2024, I electronically filed Memorandum in Support of Plaintiffs’ Application for Temporary Restraining Order, or Alternative Motion for Expedited Preliminary Injunction with the Clerk of Court using the CM/ECF system. Pursuant to L.R. 5-3.2.1, the CM/ECF system automatically generates a “Notice of Electronic Filing” (“NEF”) at the time a document is filed with the system; service with this electronic NEF constitutes service pursuant to the Federal Rules of Civil Procedure, and the NEF itself constitutes proof of service for individuals so served.

In addition, pursuant to L.R. 5-3.2.1, I will serve via process server the foregoing document as well as the Verified Complaint and attached exhibits by process server addressed to the following persons not registered for the CM/ECF system and notify the Court once these persons have been served:

<p>Rob Bonta, in his official capacity as Attorney General of the State of California State of California Dept. of Justice 1300 "I" Street, Sacramento, CA 95814-2919</p>	<p>Shirley N. Weber, in her official capacity as California Secretary of State 1500 11th Street Sacramento, CA 95814</p>
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In addition, my co-counsel will email the foregoing documents to counsel for Defendants Bonta and Weber as laid out in his declaration filed in support of this motion.

1 I declare under penalty of perjury that the foregoing is true and
2 correct.

3 /s/ David A. Shaneyfelt
4 David A. Shaneyfelt
5 Counsel for Plaintiffs
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