

**NO. 25-6138**  
**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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THE BABYLON BEE, LLC, *et al.*

*Plaintiffs-Appellees,*

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,  
*et al.*,

*Defendants-Appellants.*

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**On Appeal from the United States District Court  
for the Eastern District of California,  
No. 2:24-cv-02527-JAM-CKD, Honorable John A. Mendez**

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**BRIEF OF *AMICI CURIAE* MONTANA FIRST AMENDMENT SOCIETY,  
MONTANA PUBLIC POLICY CENTER, AND 1776 FOUNDATION  
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Emily Jones  
Justin Oliveira  
JONES LAW FIRM, PLLC  
115 North Broadway, Suite 410  
Billings, Montana 59101  
(406) 384-7990  
*emily@joneslawmt.com*  
*justin@joneslawmt.com*

*Counsel for Amici Curiae*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), *amici curiae* Montana First Amendment Society, Montana Public Policy Center, and 1776 Foundation certify that they are Montana non-profit organizations with no parent corporations or stockholders. Form 34 disclosure statements are also filed concurrently with this Brief.

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

The Montana First Amendment Society is a Montana nonprofit corporation that exists to promote, educate on, defend, and preserve the rights and liberties guaranteed by the First Amendment of the United States Constitution. The Montana Public Policy Center is a Montana nonprofit corporation that exists to promote public policy solutions that provide increased access to economic opportunities, greater individual freedoms, and encourage greater participation on public matters. 1776 Foundation is a Montana nonprofit corporation that exists to inform and equip the people of Montana to better evaluate policy options that uphold traditional American values, historic civil liberties, the Montana Constitution and the Constitution of the United States of America.

*Amici* submit this brief because California Assembly Bill (“AB”) 2655 implicates foundational questions about the relationship between government power, political speech, and the free marketplace of ideas that courts and scholars have grappled with since the founding of the Republic. *Amici* believe the district court reached the correct result in permanently enjoining AB 2655, and they write to address constitutional dimensions of the statute that bear directly on why the district

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici*, have made a monetary contribution to its preparation or submission. Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

court’s judgment should be affirmed and why AB 2655 would have profound and damaging consequences for First Amendment values in the digital age.

### **SUMMARY OF ARGUMENT**

AB 2655 purports to protect electoral integrity by requiring large online platforms to remove or label “materially deceptive content”—AI-generated or digitally manipulated audio and video—depicting political candidates, elected officials, and elections officials during defined pre-election and post-election windows. *See* Cal. Elec. Code §§ 20511–20516. California enacted AB 2655 in reaction to the spread of political deepfakes during the 2024 election season. But the cure AB 2655 prescribes is in many respects worse than the disease it targets. California claims AB 2655 is a neutral, limited measure targeting only provably false content. The reality is far more dangerous: AB 2655 makes government officials the arbiters of political truth and empowers candidates and elected officials to trigger enforcement against speech that criticizes them.

Although the district court enjoined AB 2655 on Section 230 preemption grounds, the First Amendment independently bars AB 2655. AB 2655 is a content-based restriction on political speech enacted and enforced by government actors—in some cases, the very targets of the speech the law restricts. It compels platforms to act as the government’s editorial agents, removing and labeling speech that

government officials have decided is “deceptive.” That arrangement is constitutionally intolerable for at least three reasons.

First, the First Amendment does not recognize a categorical exception for false political speech, and AB 2655 cannot be squared with that settled principle. The Supreme Court has held that falsity alone does not strip speech of constitutional protection. American political discourse has always traded in exaggeration, caricature, and deliberate distortion—a tradition stretching from the pamphlet wars of the founding era to the digital memes of the present day. AB 2655’s nominal exemption for satire and parody does nothing to protect that tradition in practice: platforms facing the threat of injunctive proceedings must make coverage determinations within hours, under legal compulsion, with no procedural guidance and no pre-removal judicial review. The inevitable result is systematic over-removal of protected political expression.

Second, government is constitutionally disqualified from serving as the arbiter of political truth. AB 2655 authorizes the very officials depicted in covered speech to report it for removal and to seek injunctive relief against platforms that decline to act. That design gives incumbents a legal mechanism to suppress criticism of themselves during the final months of a campaign. History teaches that government officials invariably exploit authority over political truth to entrench political power. AB 2655 invites precisely that abuse.

Third, the best remedy for false or harmful speech is counterspeech, not censorship—and empirical evidence confirms that the counterspeech remedy works. California has not met—and cannot meet—its burden of demonstrating that AB 2655’s scheme of mandatory removal and platform liability is necessary to serve a compelling interest when less restrictive alternatives are available and demonstrably effective. For these reasons, this Court should affirm the district court’s judgment permanently enjoining AB 2655.

### **ARGUMENT**

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const. Amend. 1; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A government—including a municipal government vested with state authority—“has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Id.* (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563–65, (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 95). Laws that are facially content neutral will nevertheless be considered content-based regulations of speech if they cannot be “justified without reference to the content of the regulated speech,” or were adopted by the government “because of disagreement with the message [the speech] conveys.” *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Such laws—like those that are content based on their face—must also satisfy strict scrutiny.

#### **I. THE FIRST AMENDMENT PROTECTS FALSE AND MISLEADING SPEECH IN POLITICAL DISCOURSE.**

“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). The United States Supreme Court has been “particularly vigilant” to ensure that “individual expressions of ideas remain free from governmentally imposed sanctions.” *Id.* at 51. “The First Amendment recognizes no such thing as a ‘false’ idea.” *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339 (1974)). Quoting Justice Holmes, the Court has noted: “When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own

conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .” *Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

The Court has recognized that “[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office . . . .” *Id.* (citation omitted). Justice Frankfurter said that “one of the prerogatives of American citizenship is the right to criticize public men and measures.” *Id.* (citing *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944)). “Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’” *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *see also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

**A. FALSE, EXAGGERATED, AND HYPERBOLIC SPEECH HAS A LONG, IMPORTANT HISTORY IN AMERICAN POLITICS.**

American democracy was born in an environment of unrestrained—and frequently inaccurate—political expression, fraught with exaggeration, caricature, impersonation, and deliberate distortion. Far from being aberrant, such speech has been recognized as an irreplaceable component of democratic self-governance. The Framers themselves were familiar with—and participants in—a political culture

saturated with pamphlets, broadsides, cartoons, and pseudonymous essays designed to inflame as much as inform. From the earliest days of the Republic, political opponents circulated fabricated “quotes” attributed to candidates. Benjamin Franklin used satirical hoaxes in his newspaper columns to advance political arguments.<sup>2</sup> Benjamin Franklin Bache’s *Aurora* published fabricated dispatches and forged correspondence attributed to George Washington designed to undermine his reputation.<sup>3</sup>

During the election of 1800—one of the most consequential in American history—partisans on both sides engaged in rhetorical excess that would easily qualify as “false” under any conceivable statutory standard.<sup>4</sup> Federalist-aligned newspapers warned that if Thomas Jefferson were elected, he would confiscate Bibles, establish atheism as the national religion, and plunge the country into anarchy and revolution.<sup>5</sup> Republicans portrayed President John Adams as a closet

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<sup>2</sup> Kembrew McLeod, *A true history of fake news: The many identities of Benjamin Franklin*, LITTLE VILLAGE (Jun. 20, 2018), available at <https://tinyurl.com/mwmruevd>.

<sup>3</sup> Benjamin Franklin Bache, The George Washington Presidential Library at Mount Vernon, available at <https://tinyurl.com/tcbfbax7>.

<sup>4</sup> Joanne B. Freeman, *The Presidential Election of 1800: A Story of Crisis, Controversy, and Change*, HISTORY NOW (Fall 2004), available at <https://tinyurl.com/yhse8b6y>.

<sup>5</sup> Daniel L. Dreisbach, *The Wall of Separation*, CHRISTIAN HISTORY #99, available at <https://tinyurl.com/4k5ajhkw>.

monarchist who wanted a hereditary presidency,<sup>6</sup> labeling him the champion of rank, titles, and hereditary distinctions.<sup>7</sup> Such claims, however lacking in veracity, reflected genuine political anxieties, sharpened public debate, and forced voters to engage with the fundamental question of what kind of republic they wished to inhabit. The election is rightly regarded as one of the greatest triumphs of the American democratic experiment.

The tradition continued vigorously through the nineteenth and twentieth centuries. Abraham Lincoln was depicted by confederates as a “tyrant,” a “fiend,” and a “monster.”<sup>8</sup> In speeches, sermons, songs, books, magazines, newspapers, pamphlets, and broadsides, they also portrayed him as a “simpleton, a buffoon, a drunkard, a libertine, a physical coward, and a pornographic story-teller.”<sup>9</sup> Political cartoonists like Thomas Nast depicted Tammany Hall’s Boss Tweed as a bloated tyrant; abolitionists printed handbills portraying slaveholders in inflammatory false

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<sup>6</sup> Ray Tyler, *Sedition Act of 1798*, TEACHING AMERICAN HISTORY BLOG (July 15, 2022), available at <https://tinyurl.com/2kecz69y>.

<sup>7</sup> MERRILL D. PETERSON, *ADAMS AND JEFFERSON: A REVOLUTIONARY DIALOGUE*, The University of Georgia Press (1976), available at <https://tinyurl.com/yna5we74>.

<sup>8</sup> Don E. Fehrenbacher, *The Anti-Lincoln Tradition*, JOURNAL OF THE ABRAHAM LINCOLN ASSOCIATION, 6–28 (1982), available at <http://hdl.handle.net/2027/spo.2629860.0004.103>.

<sup>9</sup> *Id.*

tableaux; and competing political parties produced lithographs showing their opponents engaged in imaginary crimes.<sup>10</sup>

Andrew Jackson's opponents accused him of murder, bigamy, and cannibalism.<sup>11</sup> Mark Twain wrote devastating political satire grounded in exaggeration and fabrication.<sup>12</sup> In the twentieth century, Franklin Roosevelt was accused of being a communist puppet, a dictator, and mentally incompetent. Lyndon Johnson's presidential campaign aired the infamous "Daisy" advertisement, suggesting that Barry Goldwater would trigger nuclear war.<sup>13</sup>

The Founders' generation did not merely practice unconstrained political speech—they also tested the limits of government authority to suppress it, providing a direct historical precedent for understanding the dangers of laws like AB 2655. The Sedition Act of 1798 made it a crime to publish "false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States" "with intent to defame" or to bring them "into contempt or disrepute." The Act was enforced

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<sup>10</sup> Anne DiFabio, *Thomas Nast takes down Tammany: A cartoonist's crusade against a political boss*, MUSEUM OF THE CITY OF NEW YORK (Sep. 24, 2013), available at <https://tinyurl.com/muxc3zt8>.

<sup>11</sup> Greg Beyer, *Andrew Jackson's Genocidal Legacy*, THE COLLECTOR (Mar. 8, 2024), available at <https://tinyurl.com/3tvzwsaj>

<sup>12</sup> ENCYCLOPEDIA BRITANNICA, MARK TWAIN, available at <https://tinyurl.com/f3ttm2uy>.

<sup>13</sup> DENNIS KAVANAGH, *ELECTION CAMPAIGNING—THE NEW MARKETING OF POLITICS*, Wiley-Blackwell (1995).

exactly as one would predict: the Adams administration prosecuted more than twenty editors and publishers, nearly all of them critics of the Federalist administration, while Republican opponents of Federalist policy were left untouched.<sup>14</sup> Jefferson pardoned all those convicted under the Act and allowed it to lapse.

The Supreme Court later recognized that the Sedition Act of 1798, though “never tested in this Court, [was] generally held to be inconsistent with the First Amendment by the court of history,” and it “first crystallized a national awareness of the central meaning of the First Amendment.” *Sullivan*, 376 U.S. at 273, 276 (1964). That “central meaning” is precisely what AB 2655 violates: the principle that government officials may not appoint themselves arbiters of what political speech about themselves is too “false” to be permitted.

The Supreme Court has long recognized that political speech “occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). That protection extends to speech that is uncomfortable, offensive, and factually inaccurate, because the alternative—a regime in which the government determines which political statements are sufficiently true to be permitted—is the real threat to democracy. Digitally altered imagery is not a novel

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<sup>14</sup> Peter McNamara, *Sedition Act of 1798*, FREE SPEECH CENTER (Aug. 3, 2023), available at <https://tinyurl.com/48xx6fer>.

concept but a technological amplification of a centuries-old practice. Political actors have manipulated photographic and audio records since those technologies emerged. Abraham Lincoln’s most iconic portrait combines his head with the body of statesman John C. Calhoun, a composite assembled to create statesman-like imagery of Lincoln after his assassination.<sup>15</sup>

The digital era has introduced new dimensions to this long-standing tradition. Political memes, viral social media posts, and digitally manipulated images—including “deepfakes”—now constitute a significant portion of political expression. During the 2024 election cycle, manipulated media became a regular feature of political discourse. Digital edits and memes circulated widely on social media platforms, some clearly satirical, others more ambiguous. The line between parody and deception is inherently blurry in the political context—and that ambiguity is a feature, not a bug, of robust political debate. A statute that attempts to draw a bright line between “true” and “false” political speech necessarily sweeps in enormous quantities of protected expression, including satire, parody, hyperbole, and rhetorical overstatement that no reasonable listener would take as a literal statement of fact.

Importantly, while AB 2655 purports to exempt satire and parody, the exemption is practically precarious. The exemption is a bare definitional carve-out:

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<sup>15</sup> Michael Waters, *The Great Lengths Taken to Make Abraham Lincoln look Good in Portraits*, ATLAS OBSCURA (Jul. 12, 2017), available at <https://tinyurl.com/4xhe73ut>.

it contains no procedural mechanism, no safe harbor, and no guidance for platforms attempting to apply it in real time. Under section 20515(a), a platform must respond to any report within 36 hours. Under sections 20513(b) and 20514(b), if the platform determines that reported content meets the statute’s requirements, it must remove or label that content within 72 hours of the report. A platform that incorrectly concludes that content is covered—and removes protected satire—has suppressed First Amendment-protected speech. A platform that incorrectly concludes that content is exempt as satire—and declines to act—faces a potential lawsuit in which a candidate, elected official, or government attorney seeks injunctive relief.

Although section 20515(b) and section 20516 require the plaintiff in any such enforcement action to prove the violation by clear and convincing evidence, that protection runs to the platform at trial; it does not eliminate the costs and litigation exposure of defending such a suit. Those litigation costs are themselves a powerful incentive to over-remove. A platform that receives a flood of reports from an incumbent official during the course of a campaign cannot realistically risk litigating each one. The expedient response is to remove and label, regardless of whether the underlying content is protected. The chilling effect on political satire and parody—precisely the forms of speech that AB 2655’s exemption ostensibly protects—would be severe. As the Supreme Court has noted:

“When one must guess what conduct or utterance may lose him his position, one necessarily will ‘steer far wider of the unlawful

zone[.]’ For ‘the threat of sanctions may deter . . . almost as potently as the actual application of sanctions.’ The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”

*Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)); see also *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Cramp v. Bd. of Public Instruction*, 368 U.S. 278 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

American political speech has always been characterized by rough-and-tumble dialogue that regularly trades in overstatement, distortion, and factual inaccuracy. Satirical and parodic political expression—forms of speech that often draw on false or misleading premises—have been equally important. The First Amendment was not ratified to protect only accurate, polite, or uncontested political speech. It was ratified by people who understood that the government’s power to define political truth is the power to entrench political control. California’s attempt to sanitize political discourse in the final months before an election is not a modest regulation of a new technology. It is a direct assault on a tradition as old as the Republic.

#### **B. NO CATEGORICAL EXCEPTION EXISTS FOR FALSE SPEECH.**

Not only has false speech been a hallmark of political debate in American history, but also the Supreme Court has squarely held that there is no categorical

First Amendment exception for false statements of fact in the political context. *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (“The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection”). In *Alvarez*, the Court struck down the Stolen Valor Act, which criminalized false claims about receiving military decorations. *Id.* at 729–30. The Court rejected “the notion that false speech should be a general category that is presumptively unprotected,” and noted that:

“Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.’ The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.”

*Id.* at 722 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792 (2011)).

The *Alvarez* plurality’s survey of First Amendment doctrine confirmed that false speech loses protection only when it fits within established, narrowly defined categories, such as defamation, fraud, perjury, and false statements to government officials. *Id.* at 719–20. Outside those categories, “the First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Gertz*, 418 U.S. at 341. As the Court explained in *Alvarez*:

“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the

simple truth. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence”). The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market,’ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”

567 U.S. at 727–28.

AB 2655 cannot be reconciled with these principles. Content covered by the statute need not be defamatory, it need not cause cognizable reputational harm, it need not be fraudulent or perjurious. It can simply be political speech, in digital form, depicting public figures on matters of the highest public concern. That is the core of what the First Amendment protects, not the periphery. The *Alvarez* plurality held that the government cannot remove a category of speech from First Amendment protection simply by identifying the harms that speech causes, absent a historical tradition supporting such exclusion. Political deepfakes do not fall within a historically recognized category of unprotected expression. No tradition of proscription supports treating digitally manipulated political imagery as categorically outside the First Amendment’s protection. Moreover, as discussed

below, the empirical evidence on counterspeech and media literacy demonstrates that less restrictive alternatives exist and are effective.

**C. AB 2655 IS A CONSTITUTIONALLY INFIRM CONTENT-BASED RESTRICTION.**

AB 2655 is a content-based restriction on political speech because it applies to particular speech because of the topic discussed or the viewpoint expressed. *See Reed*, 576 U.S. at 163. Additionally, AB 2655 requires a government official to examine the content of the speech to determine whether the law applies. AB 2655 fails constitutional muster at every level: an official must read the speech to determine whether it depicts a covered person, assess whether it portrays that person as doing or saying something they did not do or say, and evaluate whether the depiction would strike a reasonable person as authentic. Every element of the statutory definition requires content-specific inquiry. That is the paradigm case of a content-based restriction under *Reed*.

AB 2655 is additionally subject to heightened scrutiny because it discriminates on the basis of both content and speaker identity. In *Sorrell*, the Court held that a law imposing burdens based on the content of speech and the identity of the speaker warrants heightened judicial scrutiny. 564 U.S. at 567. AB 2655 targets a specific class of speakers—large online platforms—and regulates only specific categories of content—digitally altered depictions of candidates, elected officials, and elections officials. That combination of content-based and speaker-based

discrimination places AB 2655 in the most constitutionally suspect category of speech regulation.

AB 2655 cannot survive strict scrutiny. The means California has chosen are not narrowly tailored to serve its stated compelling interest of free and fair elections. A law that deputizes the very officials depicted in covered speech to initiate its removal, that imposes liability on platforms for editorial judgments made under a 72-hour clock, and that sweeps in substantial quantities of protected satire, parody, and hyperbole is not a surgical instrument—it is a blunt instrument applied to one of the most protected categories of speech the First Amendment recognizes.

The constitutional deficiencies of AB 2655 are compounded by the prior-restraint-adjacent effect it produces in practice. While AB 2655 is formally structured as a liability scheme rather than a classic prior restraint, its effect is functionally indistinguishable. A law that requires a platform to remove or label political speech within 72 hours of a complaint—before any judicial determination that the speech is unprotected—operates as government-compelled removal of expression in advance of an adjudication on the merits. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the

validity of the restraint.”) (citing *Near v. Minnesota*, 283 U.S. 697 (1931); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *Schneider v. State*, 308 U.S. 147, 164 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Niemothko v. Maryland*, 340 U.S. 268, 273 (1951); *Kunz v. New York*, 340 U.S. 290 (1951), *Staub v. Baxley*, 355 U.S. 313, 321 (1958); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

The threat of liability for failing to remove within 72 hours operates as a structural coercion to suppress: faced with the prospect of injunctive proceedings brought by the very official depicted in the speech, platforms will be pressured to remove and label regardless of whether the content is actually unprotected. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (a system of prior restraint avoids constitutional infirmity only under procedural safeguards designed to obviate the dangers of censorship). This structural compulsion to over-remove is not an unintended byproduct of AB 2655—it is the statute’s operative mechanism. A platform that cannot realistically litigate every complaint filed by an incumbent official during a campaign will default to removal. Political speech about those officials disappears before the voters it was intended to reach can evaluate it.

False or misleading political speech serves recognized social value even when it is wrong. Exaggerated political ads, satirical news programs, and hyperbolic social media posts all create opportunities for public rebuttal, fact-checking, community deliberation, and the development of media literacy skills that make citizens more

resilient over time. Removing false political speech from circulation—and removing it on the say-so of those targeted by the speech—eliminates these countervailing benefits while imposing speech costs that the First Amendment was designed to prevent.

## II. HISTORY WARNS AGAINST THE DANGERS OF GOVERNMENT POLICING OF MISINFORMATION.

The Supreme Court’s First Amendment jurisprudence rests in part on a deep institutional skepticism about the government’s capacity to identify political truth. As Justice Kagan has noted: “[T]his Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to ‘un-bias’ what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 719 (2024). This insight reflects centuries of hard-won experience.

The government’s record as arbiter of political truth is, charitably characterized, dismal. Historically, governments that have arrogated to themselves the power to police political misinformation have ended by policing political opposition.<sup>16</sup> For example, the Catholic Church, England under Henry VIII, the Soviet Union, Nazi Germany, and the European Union have each prohibited various

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<sup>16</sup> See Jacob Mchangama, *Censorship won’t cure disinformation*, FIRE (May 13, 2022), available at <https://tinyurl.com/bdhc8yjd>.

forms of “false information.”<sup>17</sup> Henry VIII prohibited publications containing “open and manifest errors and slanders” contravening “the dignity and authority royal of the king’s majesty.”<sup>18</sup> Lenin—once jailed himself for radical opinions under the Tsar—had no intention of being more permissive toward his own opponents once in power.<sup>19</sup> Hitler demanded state control of the press to silence the “lying” enemies of the people.<sup>20</sup> In each case, the stated justification was fighting falsehood, and in each case, the actual target was political opposition.<sup>21</sup>

In the United States, the Postmaster General during World War I used authority over the mail to suppress newspapers he considered subversive—a power applied overwhelmingly against socialist and anti-war publications.<sup>22</sup> The House Un-American Activities Committee’s investigations were ostensibly directed at identifying communist propaganda but functioned primarily to blacklist political dissidents.<sup>23</sup> More recently, the COVID-19 pandemic produced well-documented instances in which government agencies pressured social media platforms to remove speech that was at the time labeled “disinformation” but subsequently proved

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Surveillance and Censorship*, THE LIBRARY OF CONGRESS EXHIBITION ON WWI, available at <https://tinyurl.com/bdw3sf9n>.

<sup>23</sup> Renee DiResta, *Process as Punishment: An American History of Political Spectacle*, LAWFARE (Apr. 14, 2025), available at <https://tinyurl.com/4duccdve>.

credible—including discussion of the lab-leak hypothesis, the limited effectiveness of outdoor masking, and the durability of natural immunity. *See Missouri v. Biden*, 83 F.4th 350, 358–66 (5th Cir. 2023) (finding that the White House, the Surgeon General, the CDC, and the FBI violated the First Amendment by encouraging and coercing social media companies to engage in censorship), *rev'd on standing grounds sub nom. Murthy v. Missouri*, 603 U.S. 43 (2024).

The institutional incompetence of government as arbiter of political truth is structural. Government actors have political interests in particular truths prevailing. They lack the epistemic tools to distinguish between genuinely false speech and unpopular-but-true speech, between satire and deception, and between strategic manipulation and genuine artistic expression. The Supreme Court's recognition of this structural problem underlies much of its political speech jurisprudence. *See, e.g. Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”) (citing *Sullivan*, 376 U.S. at 266, 269; *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Roth v. United States*, 354 U.S. 476, 484 (1957)). Justice Alito stated that laws restricting

false statements about issues of public concern, including religion and history, would present “a grave and unacceptable danger of suppressing truthful speech.” *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting). “The point is not that there is no such thing as truth or falsity in these areas or that the truth is impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.” *Id.* at 751–52 (Alito, J., dissenting).

The Court has long understood that the remedy for dangerous political speech is more speech—debate, refutation, and the judgment of an informed electorate. “Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). AB 2655 forecloses that remedy before the electorate can exercise it. The First Amendment forbids this.

### **III. COUNTERSPEECH, NOT CENSORSHIP, IS THE CONSTITUTIONAL REMEDY TO MISINFORMATION.**

The remedy for false or harmful speech is more speech, not enforced silence. This principle—sometimes called the “counterspeech doctrine”—has roots in Justice Brandeis’s concurrence in *Whitney*: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” 274 U.S. at 377 (Brandeis, J., concurring). The Court has reaffirmed this principle. *See Alvarez*, 567

U.S. at 727 (“The remedy for speech that is false is speech that is true.”); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74–75 (1983).

Defendants-Appellants contend that political deepfakes are uniquely harmful because they spread faster than truth can follow. But even if accurate, it does not justify suppression. Nor does the practical challenge of counterspeech in the digital environment distinguish this case from the historical context in which the counterspeech doctrine developed. *See Alvarez*, 567 U.S. at 726 (rejecting the government’s argument that counterspeech was inadequate to remedy harm caused by the Stolen Valor Act).

Counterspeech mechanisms in the digital environment are robust, rapid, and uniquely well-suited to combating the harms AB 2655 purports to address. Digital platforms provide for near-instantaneous fact-checking, public correction, virality of debunking content, and user-generated labeling. Professional fact-checking organizations—PolitiFact, FactCheck.org, the Associated Press Fact Check team, Snopes, and others—regularly produce debunking content that reaches millions of users within hours of a false claim going viral. These organizations operate without government compulsion and without the selective-enforcement risks that AB 2655 creates. Additionally, platform-based counterspeech tools have expanded dramatically in the years since AB 2655 was enacted. X Corp., YouTube, Meta’s platforms, and TikTok all employ combinations of automated detection, human

review, user reporting, and content labeling to identify and add context to potentially misleading content—without mandating removal. These voluntary measures, taken by platforms in their own editorial discretion, are the constitutionally appropriate mechanism for managing misleading content. They do not require state compulsion and do not carry the structural enforcement risks that AB 2655 creates.

Labeling—as opposed to removal—is itself a form of counterspeech that preserves the underlying expression while adding contextualizing information. AB 2655 contemplates a labeling scheme but makes it contingent on a platform’s legal obligation to comply with a government-mandated standard, not the platform’s own editorial judgment. The Constitution permits platforms to voluntarily label content as misleading; it does not permit the government to compel those labels on pain of legal liability. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that the government cannot compel individuals to disseminate messages with which they disagree); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (“a speaker has the autonomy to choose the content of his own message”). The compelled-speech problem infects both the removal and labeling requirements of AB 2655.

The effectiveness of counterspeech in digital environments is supported by a growing body of empirical evidence. Studies of Twitter and Facebook data during the 2016 and 2020 elections found that debunking content spread through the same

networks as the original misinformation, and that users who saw both the false claim and the correction showed measurable belief correction.<sup>24</sup> <sup>25</sup> Research on the so-called “backfire effect”—the theory that corrections of political misinformation would paradoxically strengthen false beliefs—has not been confirmed in large-scale replication studies. One study found no systematic backfire effect and confirmed that fact-checks and corrections generally move belief in the accurate direction.<sup>26</sup>

These findings bear directly on the justifications California advanced for AB 2655. If counterspeech is effective—and the evidence strongly suggests it is—then the state cannot demonstrate that content removal is necessary to serve its interest in accurate political information. Where less restrictive alternatives exist and are effective, the government cannot choose the most speech-restrictive option available. *See United States v. Playboy Entertainment Grp.*, 529 U.S. 803, 816 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”) (citing *Greater New Orleans*

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<sup>24</sup>See Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, 41 POL. BEHAVIOR 135–163 (2019), available at <https://tinyurl.com/y7kjrten> (finding that corrections do not trigger a backfire effect and generally nudge citizens toward the corrected fact).

<sup>25</sup> See also Brendan Nyhan et al., *Taking Fact-Checks Literally But Not Seriously? The Effects of Journalistic Fact-Checking on Factual Beliefs and Candidate Favorability*, 42 POL. BEHAVIOR 939 (2020), available at <https://tinyurl.com/yea28cp8> (finding that journalistic fact-checks improved accuracy of factual beliefs even among a candidate’s own supporters, even if they had no measurable effect on candidate favorability).

<sup>26</sup> See Wood & Porter, *supra* note 24.

*Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999); *Reno v. Am. Civil Liberties Un.*, 521 U.S. 844, 879 (1997) (“The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . .”); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (“The State bears the burden of justifying its restrictions . . . .”).

The counterspeech doctrine is not a counsel of passivity. It reflects a considered constitutional judgment, refined across two centuries of experience, that the dangers of government-managed political discourse exceed the dangers of political falsehood. That judgment does not become less sound because the falsehoods now travel faster. Speed of propagation is not a constitutional exception.

### **CONCLUSION**

A law that empowers government officials to remove political speech about themselves, that has no meaningful remedy for selective enforcement, and that ignores less restrictive alternatives cannot survive constitutional scrutiny. The proper response to false political speech—as the Founders understood and as modern empirical research confirms—is the marketplace of ideas, not a government-mandated content removal regime. False, exaggerated, and manipulated political speech has been part of democratic discourse since the founding era. The Constitution tolerates it not because it is desirable, but because the alternatives—

government arbiters of political truth, government officials policing images of themselves, platforms compelled to remove speech on a short government clock—are far more dangerous to democracy. If the voters of California are concerned about political deepfakes, the answer is education, counterspeech, and voluntary platform labeling, not a regime that gives California’s politicians a legal mechanism to silence their critics. The district court’s judgment permanently enjoining AB 2655 should be affirmed.

RESPECTFULLY SUBMITTED this 18th day of March 2026.

*/s/ Emily Jones*

Emily Jones

Justin Oliveira

JONES LAW FIRM, PLLC

115 North Broadway, Suite 410

Billings, MT 59101

(406) 384-7990

*emily@joneslawmt.com*

*justin@joneslawmt.com*

*Counsel for Amici Curiae*

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