No. 25-6138

In the United States Court of Appeals for the Ninth Circuit

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.

On Appeal from the United States District Court
for the Eastern District of California, No. 2:24-cv-2527-JAM-CKD
The Honorable **John A. Mendez**, District Judge, Presiding.

BRIEF OF PROFESSOR RUSSELL L. WEAVER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Constitutional Provisions:

Statutes:

Other Authorities:

INTEREST OF AMICUS CURIAE[1]

Amicus curiae is Russell L. Weaver, Professor of Law and Distinguished University Scholar at the University of Louisville Louis D. Brandeis School of Law. Over the decades, Professor Weaver has authored innumerable books and articles about the First Amendment and the U.S. Constitution. Because Professor Weaver writes and teaches about the First Amendment, he has an interest in the sound development of doctrine in this area. Professor Weaver is particularly troubled by the State of California's totalitarian capture of the freedom of speech via its enactment of AB 2655. Through this brief, Professor Weaver wishes to provide insights to the Court on the issues presented by this appeal.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties to this appeal have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than Professor Weaver or his counsel contributed money that was intended to fund preparing or submitting the brief. *See* FED. R. APP. P. 29(a)(4)(E).

INTRODUCTION

This appeal concerns a California law (AB 2655) which mandates that large online platforms (like appellees X Corp., Rumble Inc., and Rumble Canada, Inc.) police their platforms for political speech which is "digitally created or modified"—including "deepfakes and the output of chatbots"—when such political speech "would falsely appear to a reasonable person to be an authentic record." Cal. Elec. Code § 50512(i)(1). The law is unquestionably unconstitutional.

Within 120 days of an election and through the election date (or, in some cases, through 60 days after the election date), AB 2655 requires that large online platforms (1) identify and remove so-called "materially deceptive content" about "candidate[s] for elective office" and "elected official[s]"; (2) label certain content as "materially deceptive"; and (3) provide a mechanism for users to report "materially deceptive content" to the platform for removal or labeling. Cal. Elec. Code §§ 20513–20515. When content is subject to removal or labeling (in the eyes of California), the large online platform must remove or label said content within just three days. Cal. Elec. Code §§ 20513(b), 20514(b)–(c). Further, such content is subject to immediate re-removal or re-labeling once it is determined that such content has been reposted. Cal. Elec. Code § 20513(c).

AB 2655 entrusts enforcement authority to "election officials" (including the Attorney General and local City and District Attorneys), incumbent politicians, and candidates for elective office. Cal. Elec. Code § 20516. In other words, California has enacted a law in which it controls the definition of what constitutes "materially deceptive content," bans such "materially deceptive content" when it concerns politicians during election season, and provides those same politicians with the power to enjoin the dissemination of such "materially deceptive content"—which content, of course, harms their chances of election or reelection. This is protectionist madness.

Setting aside the low-hanging fruit of AB 2655's overbreadth and vagueness problems, California's cavalier approach to regulating disinformation based on its content via the imposition of prior restraints finds no basis in the American constitutional tradition. And, frankly, this supposed cure for disinformation is worse than the disease—particularly given the abbreviated enforcement timeline contemplated by AB 2655.

ARGUMENT

California's totalitarian power grab raises questions of constitutional magnitude. And, when analyzed under the constitution that governs our land—the U.S. Constitution—only one answer inheres: In unilaterally anointing itself as the

arbiter of truth to impose prior restraints on political speech based on its content, California has violated the freedom of speech of all Americans and, thus, vitiates "a precondition to enlightened self-government[.]" *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 339 (2010).

I. The First Amendment's purpose is to safeguard the sovereignty of the People through their ability to express themselves on matters of public concern.

In the United States, political power derives "from the consent of the governed." U.S. DECLARATION OF INDEPENDENCE (1776). So the "people, not the government, possess the absolute sovereignty." *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1976) (quoting James Madison). Power inheres in the people.

How do the people exercise their power? Speech. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). Hence the protections afforded speech provided for in the First Amendment to the U.S. Constitution. To be sure, the "protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484 (1957). As relevant here, "core political speech occupies the highest, most protected position." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 423 (1992) (Blackmun, J., concurring).

Power can be derived from a source of legitimate authority by delegation or usurpation.[2] In our constitutional republic, the people delegate their power of self-governance to certain elected representatives. *See, e.g.*, U.S. CONST. Art. I, § 1. However, at times, those representatives may, in turn, usurp additional power from the people. When this occurs, the representative governs not in the interests of the people, but for private gain. By classical definition, such a representative is a tyrant. THOMAS AQUINAS, DE REGNO bk. 1, ch. 4, § 24 (trans. Gerald B. Phelan, 1949) ("If, on the other hand, a rulership aims, not at the common good of the multitude, but at the private good of the ruler, it will be an unjust and perverted rulership.").[3]

A time-tested tool ever present in the tyrant's toolbelt is the suppression of political speech. *See Hill v. Colorado*, 530 U.S. 703, 787 (2000) ("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against.") (Kennedy, J., dissenting). Prior to the Founding, British colonial authorities suppressed both the people and the press, including by prosecuting newspaper

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[2] *Cf. Springer v. Gov. of Philippine Islands*, 277 U.S. 189, 202 (1928) ("Not having the power of appointment, unless expressly granted or incidental to its powers, the Legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be different if the additional duties were devolved upon an appointee of the executive.").

[3] Available at: https://isidore.co/aquinas/english/DeRegno.htm#4.

publishers who criticized the government. RUSSELL L. WEAVER & CATHERINE HANCOCK, THE FIRST AMENDMENT 6–8 (7th ed., 2023). For example, publisher John Peter Zenger was criminally prosecuted for mocking the royal governor, William R. Glendon, *The Trial of John Peter Zenger*, N.Y. ST. B.J. Dec. 1996, at 48, and James Franklin (Benjamin Franklin's brother) was jailed for using his press to suggest that the colonial authorities were not pursuing pirates vigorously enough. H.W. BRANDS, THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 29–30 (2000).

Concerned with the ever present "potential for tyranny" in government evidenced by this history of suppressed speech, the Anti-Federalists demanded that the U.S Constitution—if it be ratified at all—include "a Bill of Rights guaranteeing individual liberty[.]" *Wallace v. Jaffree*, 472 U.S. 38, 93 (1985) (Rehnquist, C.J., dissenting). The Anti-Federalists won that debate, and we have them to thank for the U.S. Constitution's explicit protections for speech and press contained within its First Amendment.

II. AB 2655 conflicts with the First Amendment's purpose by enabling the suppression of speech.

California's AB 2655 ignores the First Amendment's historical pedigree and stated purpose—all in the interests of political expediency and protectionism. There are several reasons that AB 2655 should be struck down. Here, I will discuss just two.

First, in the two centuries since the First Amendment was ratified, courts and commentators have coalesced around the proposition that prior restraints on free expression are presumptively unconstitutional. *See New York Times Co. v. U.S.*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931). In *Near*, the U.S. Supreme Court flatly stated that "it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication." 283 U.S. at 713. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications." *Id.* at 713.

In the typical case, a prior restraint on speech exists when the government has created a licensing scheme requiring governmental approval before publication, *see Lovell*, 303 U.S. at 451, 452.; *Near*, 283 U.S. at 713, or it seeks injunctive relief to preclude publication of speech. *See New York Times Co.*, 403 U.S. at 713; *Near*, 283 U.S. at 721. While the present appeal involves neither a licensing regime nor an injunction, the targeted law—AB 2655—itself imposes a prior restraint on political speech.

Illustrative is the holding in *Bantam Books*. There, a state commission on morality used official stationery to notify distributors that certain designated books or magazines that they sold had been reviewed by the commission and found to be

objectionable for sale, distribution, or display to youths under 18 years of age. 372 U.S. at 58. The notices reminded distributors that the commission had the authority to recommend prosecution to the Attorney General. The regime imposed an unconstitutional "system of prior administrative restraints," in part, because it did "not follow" that the objectionable nature of certain publications constitutes a "judicial determination[] that such publications may lawfully be banned." *Id.* at 70. Such a regime is tolerated "only where it operate[s] under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Id.* at 70.

As in *Bantam Books*, AB 2655 there is no "judicial superintendence" and no assurance of an "immediate judicial determination of the validity of the restraint." *Id.* As a result, AB 2655 enters "this Court bearing a heavy presumption against its constitutional validity." *Id.* And to make matters worse (for California), the prior restraint issues presented here are more troubling than the issues involved in *Bantam Books*.

AB 2655 creates a prior-restraint regime in which a report of disinformation can be made by *any* California resident and, upon receipt of such a report, political content deemed to be "materially deceptive" must be either labeled as such or removed from the platform altogether—all during election season. Cal. Elec. Code

§§ 20513–20515. And the platform must make this determination within 72 hours. Cal. Elec. Code §§ 20513(b), 20514(b)–(c). If the platform determines that content is materially deceptive but it is, in fact, not so, the platform is off the hook. However, if the platform determines that content is *not* materially deceptive, but in the eyes of California, it is, the platform can be subjected to civil penalties and may even be enjoined. Cal. Elec. Code §§ 20515(b). The platform's safest approach, therefore, will be to remove the post or post a warning—particularly given the incredibly small decision window of just three short days.

Through it all, as in *Bantam Books*, there is no judicial supervision of the platform's state-inspired content moderation. As a result, a report of political disinformation made during election season will place tremendous pressure on social media platforms to remove content, or at least post concerns regarding its accuracy. Even the mandated inquiry to be performed by a platform upon receipt of a report chills the speakers' free speech rights. What's more, the inquiry, labeling, and/or removal is all conducted at the behest of California via AB 2655, effectively performing a prior restraint function—the "most serious and the least tolerable infringement on First Amendment rights." *Garcia v. Google, Inc.*, 786 F.3d 733, 747 (9th Cir. 2015) (*en banc*).

Second, AB 2655 imposes a content-based restriction on political speech on the basis that such speech is, in California's view, "materially deceptive." To be sure, the U.S. Supreme Court has explained that certain categories of speech—fighting words, obscenity, child pornography, and true threats—are not protected under the First Amendment. Disinformation, however, is not a category of speech that is unprotected. In fact, false speech can be protected speech.

After an individual was prosecuted under the Stolen Valor Act for falsely asserting that he had won the Congressional Medal of Honor, the U.S. Supreme Court explained that the individual could not be prosecuted for making a false statement regarding winning the medal. *U.S. v. Alvarez*, 567 U.S. 709 (2012). Why? Because the government had less restrictive means for protecting against stolen valor (the compelling interest) than punishing the speech. For example, it could simply publish a list of prior winners so that someone's claim to have won the medal can be verified. *Id.* at 720.

California's law is not the least restrictive means for achieving a compelling governmental interest. Even if we granted the idea that disinformation could have a negative impact on the democratic process, AB 2655 simply does not provide the right solution. By requiring social media platforms to make quick decisions regarding content moderation of political speech during election season and punishing them

only when they make an incorrect decision not to censor speech, then the natural result will be the censorship of vast swaths of truthful information.

Purging disinformation is perilous and can lead to errors. The Hunter Biden laptop story (which involved alleged corruption on the part of President Joseph R. Biden) is a helpful case study. At the time the story broke, most reputable news organizations dismissed the allegations and refused to report the story even though there were allegations of corruption against the Bidens and even though an election was imminent. NPR, in a segment that aired just a couple of weeks before the presidential election, dismissed the laptop story as "questionable," and claimed that the allegations were part of a conspiracy theory being pushed by President Donald J. Trump and his allies. *See* David Folkenflik, *Analysis: Questionable 'N.Y. Post' Scoop Driven By Ex-Hannity Producer And Giuliani*, National Public Radio (Oct. 17, 2020). https://www.npr.org/2020/10/17/924506867/analysis-questionable-n-y-post-scoop-driven-by-ex-hannity-producer-giuliani. PBS similarly dismissed the allegations, concluding that Trump's allies were pushing "Russian disinformation." Judy Woodruff, Are Trump Allies Sharing Russian Disinformation About Biden?, PBS NewsHour (Oct. 16, 2020). https://www.pbs.org/video/warning-signs-1602880956/. The *New York Times* similarly concluded that Trump was colluding with the Russians and thus dismissed the story, stating that "Giuliani's dirty tricks

are the scandal, not Hunter Biden's hard drive." *See* Michelle Goldberg, *Is the Trump Campaign Colluding with Russia Again?*, INT'L NEW YORK TIMES 26 (Oct. 21, 2020).

Facebook and Twitter, accordingly, quashed the story. Twitter went so far as to prevent users from sharing links to the *New York Post* story (which contained the allegations) and prevented users who had previously sent tweets sharing the story from sending new tweets until they had deleted their previous tweets. *Missouri v. Biden*, 680 F. Supp. 3d 630, 676 (W.D. La. 2023). Facebook, for its part, reduced the story's distribution on its platform. *Id.* About the same time, 51 former national intelligence officials signed a letter (falsely) denouncing the story as "Russian disinformation." *See* Luke Broadwater, *Republicans Question Official Who Cast Doubt on Hunter Biden's Laptop,* THE NEW YORK TIMES A16 (May 17, 2023); Scott Simon, *More Details Emerge in Federal Investigation into Hunter Biden*, NATIONAL PUBLIC RADIO (Apr. 9, 2022), https://www.npr.org/2022/04/09/1091859822/more-details-emerge-in-federal-investigation-into-hunter-biden ("And then there was this cohort of paid pundits—50 former national security officials, many of them appearing frequently in mainstream media outlets—who came together for a statement saying that this surfacing of the laptop bore all the hallmarks of a Russian misinformation campaign.").

As it turns out, the Hunter Biden laptop story did not involve disinformation at all. And the FBI knew that the story did not involve disinformation when it first broke. Indeed, the FBI had possession of the laptop and was aware of its contents. *Missouri*, 680 F. Supp. 3d at 676. However, when asked about the allegations by Facebook, which was debating whether to censor the story, the FBI withheld the truth. *Id.* As a result, Twitter and Facebook quashed it. *Id.*

Today, reputable news organizations recognize that the Hunter Biden laptop story was not "disinformation," "fake news," or "Russian propaganda," and Congress has held extensive hearings regarding the letter (issued during the heat of a presidential campaign) by intelligence officials denouncing the story. Indeed, "the most explosive emails from Hunter Biden's purported laptop were entirely genuine" and were not simply Russian-planted disinformation. Bret Stephens, *An Ethically Challenged Presidency,* INT'L NEW YORK TIMES 21 (Oct. 7, 2021). Even NPR has recognized that the allegations regarding the laptop were valid: "much of the mainstream media dismissed a story about Hunter Biden's business dealings. Now emails supporting the story have been authenticated." Simon, *More Details Emerge in Federal Investigation into Hunter Biden*.

While AB 2655 requires online platforms to respond to disinformation, it does not provide a reliable mechanism for deciding what constitutes disinformation. Nor

can it. Worse, such content moderation is conducted at the behest of the state which may have its own political motivations for quashing information. All too often, claims of "disinformation" have turned out to be wrong—as was the case with the Hunter Biden laptop story.

III. California's disinformation cure is worse than the disease—particularly given the abbreviated timeline contemplated by AB 2655.

In response to the not-so-novel threat posed by disinformation to democratic institutions, California took the liberty of (1) defining what constitutes "materially deceptive content," (2) arming its politicians with enforcement authority with respect to "materially deceptive content," and (3) wielding the power to enjoin and fine large online platforms who either (a) fail to anticipate what content the state will deem to be "materially deceptive" or (b) refuse to comply with AB 2655 for whatever reason. Baked into California's crazy power grab is a faulty premise: The state and its elected officials are competent to, and capable of, regulating speech in an even-handed, fair fashion. Not so.

a. Politicians, including California politicians, weaponize disinformation all the time.

Although some (apparently including California) attribute disinformation to the internet era and the rise of social media, the reality is that the problem runs far

deeper. RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 337 (3d ed., 2024). In truth, the problem with disinformation is the human propensity to lie. And politicians are not immune from this tendency. Indeed, it is not at all uncommon for politicians and governmental officials to lie to the American public. And an argument could be made that they lie more than non-politicians. A few examples demonstrate the point.

Following Edward Snowden's revelation that the U.S. government was running a massive cybersurveillance operation, then National Security Agency Director James Clapper was asked about the program. In response to a direct question regarding whether the NSA was collecting "any type of data at all on millions or hundreds of millions of Americans," he flatly responded, "No, sir. Not wittingly." Charlie Savage & Scott Shane, *N.S.A. Leader Denies Giving Secrets to China*, THE NEW YORK TIMES A5 (June 18, 2013). After the fact, Director Clapper admitted that he had lied and tried to explain the lie by stating that it was the "most truthful" or "least untruthful" thing he could say at the time. Andrew Rosenthal, *Clapper and Carney Get Slippery on Surveillance*, THE NEW YORK TIMES (Oct. 24, 2013). About the same time, President Barack Obama lied about the scope of the NSA's cybersurveillance program, maintaining that it was not focused on surveilling

ordinary U.S. citizens; in reality, the U.S. government was collecting massive amounts of data about virtually everyone. Scott Shane, *No Morsel Too Miniscule for All-Consuming NSA: From Spying on Leader of U.S. to tracking Drug Deals, on Ethos of "Why Not?"*, THE NEW YORK TIMES (Nov. 13, 2013); Doug Stanglin, *Snowden Says NSA Can Tap Email Chats*, THE COURIER-JOURNAL (Aug. 1, 2013).

For his part, President Trump is perhaps "the all-time champion of disinformation"—having been "widely denounced as a compulsive 'liar.'" FROM GUTENBERG TO THE INTERNET at 338–39. The most obvious example is "The Big Lie": Trump's disreputable claim that the 2020 presidential election was stolen from him, which lie culminated in the insurrection attempt on January 6, 2021. *Id.* at 339.

Obama and Trump aren't the only liars. Biden has also lied to the American public. Following the disastrous withdrawal of U.S. troops from Afghanistan, when the media asked Biden why he did not keep more U.S. troops in the country to help with the withdrawal, Biden flatly stated that his senior military advisors had asked him not to do so. Stephens, *An Ethically Challenged Presidency*. Both General Mark Milley, then-Chairmen of the Joint Chiefs of Staff, and General Kenneth McKenzie Jr., then-head of U.S. Central Command, disputed President Biden's claims in sworn testimony. *Id.* After that, then-Secretary of Defense Lloyd Austin agreed with

Generals Milley and McKenzie—and not with Biden—that Biden's military advisers were actually "in lock step in recommending that the U.S. leave 3,000 to 4,500 troops in Afghanistan." *Id.* So, either Biden lied, or the three officials perjured themselves under oath. Occam's razor suggests the answer. Biden is, of course, also complicit in the deceptive suppression of the Hunter Biden laptop story addressed earlier.

There are plenty of other examples of non-presidential political disinformation. As relevant here, The Wall Street Journal labeled California Congressman (now Senator) Adam Schiff as "disinformation man." Editorial Board, *Adam Schiff, Disinformation Man*, THE WALL STREET JOURNAL (Jan. 20, 2023). In 2018, Intelligence Committee Chair Devin Nunes tried to inform the public about the FBI's alleged abuse of the FISA warrant process in regard to its investigation into Trump's alleged collusion with Russia. Congressman Schiff, armed with full intelligence information, made a variety of demonstrably false statements designed to undercut the Nunes Report. Schiff's statements caused the media to denounce the Nunes Report as a "joke." As it turns out, the validity of the Nunes Report was later confirmed by the Department of Justice's Inspector General, Michael Horowitz. In other words, California Congressman Schiff intentionally spread disinformation in hopes of securing a political win.

Politicians and other government officials' efforts to spread disinformation are not limited to oral communications—but extend to social media platforms like those targeted by AB 2655. Indeed, the U.S. government has used fake Twitter accounts to disseminate propaganda regarding Russia, China, and other adversaries. Hiawatha Bray, *We Ignore Musk's "Twitter Files" at Our Peril*, BOSTON GLOBE (Jan. 20, 2023). U.S. officials have also posed as Iraqis on Twitter to allege that Iran was smuggling drugs into Iraq. *Id.*

b. Politicians are ill-suited to be the arbiters of truth and, thus, will manipulate social media platform censorship for their own benefit.

As this (very) brief history reveals, American politics is a cesspit. So, anyone with a hint of foresight can see the practical problems inherent with AB 2655's enforcement. Picture this:

An incumbent Senator in California is gearing up for the homestretch of election season, hoping to retain her seat. To date, the election strategy of her opponent has been that of most politicians—running innumerable, often tacky and distasteful, campaign ads jabbing the incumbent on a variety of key issues. However, the incumbent is not as stressed with this assault as in prior election cycles. Why? She's eagerly awaiting the 120th day before Election Day.

On the 120th day before Election Day, the incumbent's army of staffers, interns, and volunteers launch a concerted counter-assault: Together, they report the opponent's innumerable campaign ads—and any other content reflecting disfavorably upon the incumbent posted by ordinary Americans (AB 2655's reach is not limited to California residents)—appearing on large online platforms for spreading "materially deceptive content" in violation of AB 2655. The large online platforms must now review, assess, and render a judgment as to the materially deceptive nature (or lack thereof) of each report as to each ad and/or post—an unenviable task. It must then further decide whether to label or remove such content. All within three short days (no weekends off!).

When the platform inevitably takes too long to decide or otherwise renders an unfavorable decision, the incumbent promptly files a pre-canned action seeking injunctive relief under AB 2655 in a favorable jurisdiction (the election is statewide, after all). If the incumbent secures an injunction, she then effectively snuffs out her opponent's entire campaign in the blink of an eye.

That is true election interference. And that would be entirely legal under AB 2655—but for the First Amendment: "It is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes." *Citizens United*, 558 U.S. at 341.

California's problem is that they have usurped the power to suppress political speech and entrusted that power to those most interested in the suppression of political speech: Politicians and other elected officials. As California's Assembly Committee on Judiciary conceded while considering AB 2655: "It is difficult to imagine any content more related to 'political expression' and 'discussion of public issues' than content about candidates and elections." The Assembly, thus, deemed the then-proposed legislation to be "potentially problematic" because it singles "out particular content" that "relates to political candidates and elections," which normally receives robust protection under the First Amendment. II-SER-56. The Assembly was right to be concerned.

"Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" *Virginia v. Black*, 538 U.S. 343, 365 (2003). And, as U.S. history reveals, political speech often includes false statements. California's Assembly Committee on Judiciary was forced to acknowledge the same: "The fact that the bill restricts speech that is 'materially deceptive' or 'false' does not matter, for the U.S. Supreme Court has been unequivocal that the First Amendment protects even 'false' speech." II-SER-56. Why? Because "in the U.S., the government is not designated as the arbiter of truth!" FROM GUTENBERG TO THE INTERNET at 345.

c. Thanks to *Murthy v. Missouri*, we know what state-coerced content moderation of the type contemplated by AB 2655 looks like.

California's contemplated effort to stifle political speech on social media platforms is not unprecedented. The recent decision in *Murthy v. Missouri*, 603 U.S. 43 (2024), offers chilling insight into how the "sausage is made" with respect to state-driven efforts to pressure large online platforms to suppress "disinformation." Indeed, in that case, "[t]here were constant communications among the White House and other governmental officials and social media platforms regarding content moderation." Russell L. Weaver, *Governmental Suppression of Speech on the Internet: Reflections on the* Murthy *Decision*, 85 La. L. Rev. 887, 897 (2025).

For the stated reason of combatting "disinformation," the U.S. government secretly counseled, pressured, and threatened social media platforms regarding their content-moderation decisions. *Id.* The Boston Globe analogized the U.S. government's actions to working "the refs"—that is, the content moderators of social media platforms—"like an aggressive football coach, hectoring and goading [the social media platform] executives into exercising ever-stricter control over what users are permitted to say." Bray, *We Ignore Musk's 'Twitter Files' at Our Peril*. How? As detailed in the trial court decision in the *Murthy* case (*Missouri*, 680 F. Supp. 3d at 630), the Biden Administration realized that it had leverage over social media

platforms and effectively wielded that power. Although the U.S. Supreme Court dismissed the *Murthy* case on standing grounds, the dissenting opinion of Associate Justice Samuel Alito memorialized portions of the trial court record which are relevant here:

- Governmental officials "continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID-19-related speech." *Murthy*, 603 U.S. at 79 (Alito, J., dissenting).
- If "Facebook did not heed their requests as quickly or as fully as the officials wanted," it was "subtly threatened with retaliation." *Id.* at 81.
- Expectedly, Facebook deplatformed individuals who expressed views "disapproved" by the government. *Id.*

This is not all second-hand reporting—White House Senior Advisor Andy Slavitt's own words evidence the same:

- "Internally we have been considering our options on what to do about" Facebook not "trying to solve the problem" of COVID-19-related disinformation. *Id.* at 82.

Another White House official flatly demanded Facebook produce information "to ensure you're not making our country's vaccine hesitancy problem worse." *Id.* at 83.

In short, the Biden Administration "browbeat the platform for months and made it clear that if it did not do more to combat what they saw as misinformation, it might be called to account for its shortcomings." *Id.* at 104. The Biden Administration's browbeating was effective because it had substantial leverage over Facebook, namely, (1) the ability to eliminate the platforms' immunity under the Communications Decency Act of 1996; (2) the discretion to prosecute (or not prosecute) robust federal antitrust actions; and (3) the power to provide diplomatic cover and protection to the platforms, a necessity given their global operations. It is largely for these reason that every Big Tech oligarch flocked to Trump promptly upon his reelection as the Fifty Seventh President. *See* Edward Helmore, *Trump inauguration: Zuckerberg, Bezos and Musk seated in front of cabinet picks*, THE GUARDIAN (Jan. 20, 2025), https://www.theguardian.com/us-news/2025/jan/20/trump-inauguration-tech-executives.

California was clearly inspired by the Biden Administration's efforts to suppress political speech on social medial platforms. However, California recognized that it lacked the necessary leverage to secure results. Enacting AB 2655 was its way of obtaining leverage. However, the U.S. Supreme Court has already determined that laws like AB 2655 are unconstitutional.

d. And thanks to *Moody v. NetChoice LLC* and *Nat'l Rifle Ass'n of Am. v. Vullo*, we know that state-coerced content moderation of the type contemplated by AB 2655 is unconstitutional.

Enter *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). In considering the constitutionality of "laws, from Florida and Texas," each which "restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users," *id.* at 717, *Moody* declared—in no uncertain terms—that social media platforms "are indeed engaged in expression" when they "make choices about what third-party speech to display and how to display it." *Id.* at 716. "Or otherwise put," the First Amendment prohibits the state from limiting social media "platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post." *Id.*

Moody's holding should come as no surprise to this Court. After all, "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." *Id.* at 719. *Nat'l Rifle Ass'n of Am. v. Vullo*, decided the same term as *Moody*, further warns of the "constitutional concerns with the kind of intermediary strategy that" California has "adopted to target" political speech. 602 U.S. 175, 197 (2024). "Such a strategy allows government officials to 'expand

their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over.'" *Id.* at 197–98.

With AB 2655, California has incorrectly reasoned "that the content choices the major platforms make for their main feeds are 'not speech' at all, so States may regulate them free of the First Amendment's restraints." *Moody*, 603 U.S. at 726. But California is "wrong in concluding that [its] restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression. And [California] [is] wrong to treat as valid [its] interest in changing the content of the platforms' feeds." *Id.*

Accordingly, not only does AB 2655 impose prior restraints on speech, as detailed above, but it further compels speech from the platforms which it regulates. By mandating the labeling or removal of certain political content during election season, California has substituted its judgment for those platforms' as to what their feeds ought to look like. And worse, such compelled speech is coerced via the threat of civil penalties.

The holdings of *Moody* and *Vullo* are not novel. Rather, they are reminiscent of *Miami Herald Pub. Co. v. Tornillo*, which stands for the proposition that laws which interfere with a publisher's "'exercise of editorial control and judgment'" are unconstitutional. 418 U.S. 241, 258 (1974). Notably, the challenged law in *Tornillo*

merely required a newspaper to give politicians a right to reply when "criticism and attacks" on the politician's record were published. *Id.* at 243. The law did not compel retraction—the practical effect of depublishing for a print publication. And, yet, it was unconstitutional.

The lesson is this: The First Amendment prevents the government from compelling a publisher—like a newspaper or social medial platform—to print or post what "it would not otherwise print" or post. *Tornillo*, 418 U.S. at 256. So, California cannot compel social media platforms to post a disinformation label that it would not otherwise post or to de-publish posts that it would not otherwise de-publish.

These restrictions on the power of the state to suppress political speech remain in full force even when "modern media empires" exercise great power to "shape" and even "manipulate popular opinion." *Id.* at 249–50. Thus, as was the case in *Tornillo*, "the cure proposed" by the state—here, California—"collide[s] with the First Amendment's antipathy to *state* manipulation of the speech market." *Moody*, 603 U.S. at 728–29 (emphasis in original). "The remedy for false speech"—as California's Assembly Committee on Judiciary acknowledged—"is more true speech," not suppression. II-SER-56.

CONCLUSION

In short, it is unconstitutional for California to "deputize private actors into determining whether material" about politicians "is suitable" for dissemination during election season. *NetChoice LLC v. Bonta*, 113 F.4th 1101, 1118 (9th Cir. 2024). This Court must, therefore, decline to bless California's unconstitutional effort to strip the people of "a precondition to enlightened self-government[.]" *Citizens United*, 558 U.S. at 339. Instead, it should affirm the district court's judgment.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using Appellate Case Management System ("ACMS"). I certify that all participants in the case are registered ACMS users, and that service will be accomplished by the ACMS system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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