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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CHRISTOPHER KOHLS,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California, and SHIRLEY N. WEBER, in her official capacity as California Secretary of State,

Defendants.

Case No. 2:24-cv-02527-JAM-CKD

MOTION FOR PRELIMINARY INJUNCTION

DATE: September 30, 2024
TIME: TBD
JUDGE: Hon. John A. Mendez

As Federal Rule of Civil Procedure 65 permits, Plaintiff Christopher Kohls moves this Court for a preliminary injunction enjoining enforcement of California's recently passed AB 2839, codified at Cal. Elec. Code § 20012, *et seq.*

AB 2839 was enacted on September 17, 2024, when California Governor Gavin Newsom signed the amended version of the bill (along with two others) passed by the Legislature. It is in effect today. For the reasons explained in the attached Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order, it violates Kohls's First Amendment rights to free speech, the Fourteenth Amendment's due process guarantees, and the California Constitution's free speech protections. Further, as demonstrated in the Verified Complaint, the accompanying Affidavit, and the Memorandum in Support, AB 2839 causes irreparable injury to Kohls and other citizens of this state. Because Kohls demonstrates likelihood of success on the merits of his constitutional claims, he is irreparably harmed by AB 2839, and the balance of the equities and the public interest weigh in favor of enjoining enforcement of the law, Plaintiff specifically requests:

A. A temporary restraining order prohibiting Defendant Weber, her office, and any person acting in concert with her from enforcing AB 2839: (a) facially, against any speaker, *see Netchoice v. Bonta*, No. __F.4th__, 2024 U.S. App. LEXIS 20755 (9th Cir. Aug. 16, 2024) (affirming the appropriateness of facial relief in the First Amendment context); and (b) as applied to the constitutionally protected activities of Kohls.

B. A waiver of the bond requirement in Federal Rule of Civil Procedure 65(c), because Kohls has a high probability of success on the merits, *People ex rel. van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319, 1326 (9th Cir. 1985), the costs and damages from granting a TRO are insignificant, *U.S. v. State of Or.*, 675 F. Supp. 1249, 1253 (D. Or. 1987), and—most importantly—because Kohls brings this claim to protect his constitutional rights. *See, e.g.*, *Smith v. Board of Election Comm'rs*, 591 F. Supp. 70, 72 (N.D. Ill. 1984) (constitutional rights at stake).

Dated: September 18, 2024

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to all attorneys of record. I also emailed this document to Kristin A. Liska, Deputy Attorney General, who has agreed to waive service but has not yet appeared, because her office will represent both defendants.

DATED this 18th day of September, 2024.

/s/ Theodore H. Frank
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CHRISTOPHER KOHLS,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California, and SHIRLEY N. WEBER, in her official capacity as California Secretary of State,

Defendants.

No. 24-cv-02527-JAM-CKD

MEMORANDRUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

DATE: September 30, 2024
TIME: TBD
JUDGE: Hon. John A. Mendez

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The American people have been making fun of politicians—using hyperbole, mockery, gesticulation, and satire, amongst other means—since before this country was founded.

In modern America, Plaintiff Christopher Kohls has found fame and steady income creating videos from real clips and generative artificial intelligence (AI)[1] that pokes fun at politicians he opposes politically, including Vice President Kamala Harris, the Democratic nominee for President. Kohls posts these videos to his accounts on YouTube and X (commonly known as Twitter), where viewers can watch satire of "Harris" announcing outrageous policies and arguments for her candidacy (in an AI-generated voice) in the aesthetic of a political campaign ad. California Governor Gavin Newsom and the California Legislature won't allow Plaintiff's burlesque: The Governor replied to Kohls's first Harris video on X with his own tweet, where he promised to sign a then-pending law that would make Kohls's content illegal. Then, the Legislature passed that legislation in mere weeks—with urgency, meaning it's enforceable today—doing just that. The full force of state power has been enlisted to take down harmless and constitutionally-protected parody.

More broadly, for the past few years California's legislature has embarked on an unrelenting quest to combat "misinformation" by imposing content-based regulations of private speech. *See, e.g., X Corp. v. Bonta*, __F.4th__, 2024 U.S. App. LEXIS 22456 (9th Cir. Sept. 5, 2024) (holding unconstitutional a social media mandatory reporting law intended, among other things, to combat misinformation and disinformation); *McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024) (holding moot challenge to COVID misinformation statute when

[1] "Generative AI can be thought of as a machine-learning model that is trained to create new data, rather than making a prediction about a specific dataset. A generative AI system is one that learns to generate more objects that look like the data it was trained on." Adam Zewe, *Explained: Generative AI*, MIT News (Nov. 9, 2023), https://news.mit.edu/2023/explained-generative-ai-1109. For example, a Generative AI trained on the voice of a person can be used to create new audio that resembles the voice of that person, as Kohls did.

California repealed it after unfavorable oral argument). The California legislature should stop immediately because it does not possess "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *X Corp.*, 2024 U.S. App. LEXIS 22456, at *20 (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). And the Supreme Court has clarified that misinformation is fully protected speech unless it causes a "legally cognizable harm" to the interests of another. *United States v. Alvarez*, 567 U.S. 709, 719 (2012); *see generally* Eugene Volokh, *When are Lies Constitutionally Protected*, 4 J. FREE SPEECH L. 685 (2024).[2] But for now, California continues its crusade.

AB 2839 is the result, a patently unconstitutional law which allows any political candidate, election official, the Secretary of State, and *everyone who sees* Kohls's AI-generated videos to sue him for damages and injunctive relief starting 120 days before an election, until 60 days *after* an election. While the bill's sponsor pretended that the bill was "narrowly tailored," the First Amendment does not take a vacation for five months every year.

Liability under AB 2839 extends to satire and parody like Kohl's July 26 video, where an AI voiceover for "Harris" calls herself a "diversity hire" who follows "rule number one: carefully hide your total incompetence." Complaint ¶ 33. Confronting the lampooning video, Gov. Gavin Newsom responded that "[m]anipulating voice in an 'ad' like this one should be illegal. I'll be signing a bill in a matter of weeks to make sure it is." *Id.* at ¶ 35. True to his word, Newsom collaborated with the bill's sponsors to excise the bill's carveout of parody and satire, which originally read: "This section does not apply to materially deceptive content that constitutes satire or parody." *Id.* at ¶¶ 79-80.[3] Instead, of exempting parody, AB 2839 merely provides a safe harbor for videos that satisfy restrictive labeling requirements.

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[2] *Available at:* https://www.journaloffreespeechlaw.org/volokh5.pdf

[3] A similar carveout still exists in AB 2839's companion bill, AB 2655, which does not become effective until January 1, 2025, and is not the subject of this memorandum. The carveout (part of Cal. Elec. Code § 20519) provides no defense against causes of action under AB 2839, which may be brought by defendant Weber, any candidate or even any *recipient* of political satire, codified at Cal. Elec. Code § 20012. Moreover, the carveout in AB 2655 is also inadequate because it imposes liability on platforms that do not swiftly respond to removal

Kohls uploaded his video under the title "Kamala Harris Campaign Ad PARODY," but this does not satisfy AB 2839's labeling safe harbor, which requires a specific message that runs the *entire duration* of the video in a typeface no smaller than the largest text visible in the video. His video, dozens of others on his channel, and likely countless thousands of other videos, memes, and graphics online, became actionable upon the governors' signature yesterday. Even if Plaintiff wished to comply with the onerous labelling requirement—which he does not—and even if he were willing to upload new labeled version of the video (which reduces his reach on platforms like YouTube), the required disclaimer literally could not fit on the video because the text would greatly exceed the space available on the screen. This is because the video includes prominent text to assist viewers watching it from a cellphone and it also includes a Kamala Harris logo at the end, and inclusion of large text makes it impossible to fit the required disclosure on the screen at equally-large font size, as the statute requires: "This [video] has been manipulated for purposes of satire or parody." Cal. Elec. Code § 20012(b)(3). AB 2839 therefore permits anyone to file suit against Kohls even though his videos are parody, and are labeled as such. This will harm Kohls in particular, whose videos are already in the cross-hairs for liberal activists thanks to the Governor calling out the video before Newsom's two million X followers—twice!

AB 2839 is also an unconstitutional content regulation, since it seeks to regulate only AI-generated content that is directed at a Presidential or California candidate/election and that is "likely to harm the reputation or electoral prospects" of a candidate or is "likely to falsely undermine confidence in the outcome of" an election. Most importantly, the Government's sole cited interest in passing AB 2839—ensuring "free and fair elections" by preventing AI deepfakes—does not justify, in any form, a government crackdown on political speech.

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requests, causing them to err on the side of removing potentially satirical content. Plaintiff intends to bring a motion for preliminary injunction of AB 2655 in due course, which will explain the problems of that bill in advance of its January 1 effective date.

As a result of AB 2839, Kohls suffers material harm: He wishes to continue making and distributing AI generated content that mocks Vice President Harris and other politicians with whom he disagrees—perhaps Governor Newsom and Defendants themselves are in the cards for future jokes. As to his current videos of Vice President Harris, it is likely that they may attract an activist lawsuit under the statute—especially given that the Governor has already observed they are unlawful under the Act. The chill on future speech and likely threat to current speech impairs his ability to earn an income, which he does by monetizing viewership of his videos. Moreover, AB 2839 robs Kohls of the ability to spread his political message. This is bread and butter irreparable harm.

In addition, because of the strong public interest and equities that favor protecting constitutional rights, a preliminary injunction is warranted here to preserve the *status quo ante*. Accordingly, this Court should grant Plaintiff's Motion and enjoin AB 2839 for enforcement by Defendant Weber and her office.

FACTUAL BACKGROUND

Plaintiff Christopher Kohls is a California resident currently traversing the world while living on income from monetizing digital content on his YouTube and X accounts. He posts under the moniker "@MrReaganUSA" on X and "Mr Reagan" on YouTube, a reference to both his own conservative views and the political nature of his content. Part of Kohls's persona as "Mr Reagan" is creating fake political ads that mimic Democratic Party politicians, where—rather than flattering or supportive language—they feature the politician mocking their own candidacies. Kohls creates this content by relying on generative artificial intelligence, a new technological development that exposes high-powered and advanced computer algorithms to swaths of data—as relevant here, sound clips of a particular politician's voice—to produce content that mimics the original speaker.

In late July, Kohls uploaded a video to his X and YouTube pages that featured Vice President and Democratic nominee Kamala Harris's AI-generated voice. "Harris" was featured as saying:

> I, Kamala Harris, am your Democrat candidate for president because Joe Biden finally exposed his senility at the debate. Thanks Joe. I was selected because I am the ultimate diversity hire. I'm both a woman and a person of color. So if you criticize anything I say, you're both sexist and racist. I may not know the first thing about running the country, but remember, that's a good thing if you're a deep state puppet. I had four years under the tutelage of the ultimate deep state puppet; a wonderful mentor, Joe Biden. Joe taught me rule number one: carefully hide your total incompetence.
>
> I take insignificant things and I discuss them as if they're significant. And I believe that exploring the significance of the insignificant is itself significant.

The video then features video and audio from a real Harris speech.[4] In the clip Harris says: "Talking about the significance of the passage of time, right? The significance of the passage of time. So when you think about it, there is great significance to the passage of time," the real video cuts here with a "swish" sound effect and concludes: "and there is such great significance to the passage of time." The AI-generated narration then continues:

> Another trick is trying to sound black. I pretend to celebrate Kwanzaa, and in my speeches, I always do my best Barack Obama impression.

The video again excerpts a real Harris speech:[5] "So hear me when I say, I now Donald Trump's type." The narration by "Harris" continues:

> And okay, look, maybe my work addressing the root causes of the border crisis were catastrophic, but my knowledge of international politics is truly shocking.

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[4] The clip comes from a speech Harris gave on March 20, 2022 in Sunset, Louisiana concerning rural broadband access. https://www.katc.com/news/st-landry-parish/vice-president-kamala-harris-to-visit-st-landry-parish-monday (last visited August 30, 2024) (remarks about the "significance to the passage of time" at 8:32).

[5] Susan Davis, Ben Giles, *Harris says, as a former prosecutor, 'I know Donald Trump's type',* NPR (Jul. 22, 2024) https://www.npr.org/2024/07/22/g-s1-12690/democrats-rally-behind-vice-president-harris (last visited August 30, 2024).

Again, the video illustrates the fake voiceover with a real speech,[6] where Harris said: "The United States ["swish" cut] shares a very important relationship, which is an alliance with the Republic of North Korea. ["swish" cut] It is an alliance that is strong and enduring." The parody narration in the ad concludes:

> And just remember, when voting this November, it is important to see what can be unburdened by what has been. And by what has been, I mean Joe Biden.
>
> You think the country went to [beeped out expletive] over the past four years? You ain't seen nothing yet. [Cackles].

Kohls entitled the ad "Kamala Harris Campaign Ad PARODY." It quickly took off on social media, garnering hundreds of thousands of views. Governor Newsom decided Plaintiff's political message was unacceptable—he replied to the tweet with a tweet of his own, to his more than two million followers on X. That message read, "Manipulating a voice in an 'ad' like this one should be illegal. I'll be signing a bill in a matter of weeks to make sure it is." Complaint ¶¶ 2, 35.

The Legislature heard the Governor's message loud and clear, and the result is AB 2839, the statute at issue. In accordance with the Governor's response to Kohls on X, the Legislature shepherded AB 2839—which had been in markup in the Senate—and passed it "with urgency" on August 30. Prior to the vote passing the amended bill, the bill's co-sponsor Rep. Gail Pellerin confirmed Gov. Newsom's direct involvement in amending the bill. She said: "We've worked with the Governor's office on Senate amendments that require deep fake parody material to be labeled as being digitally manipulated for those purposes … Additionally, recent amendments add an urgency clause—that was a great idea—so the bill can take effect before

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[6] *Remarks by Vice President Harris After Tour of the Korean Demilitarized Zone*, THE WHITE HOUSE (Sept. 29, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/29/remarks-by-vice-president-harris-after-tour-of-the-korean-demilitarized-zone/ (striking through Harris's erroneous mention of "North" Korea).

the November 5, 2024 general election."[7] The amendments deleted the carveout for parody and satire that previously existed and replaced it with the "disclosure" safe harbor that requires "the disclosure shall appear in a size … no smaller than the largest font size of other text appearing in the visual media. … for the duration of the video," and added an urgency clause.[8] "Urgency" means the law went into effect immediately upon Governor Newsom's signature on September 17, when he theatrically signed the bills on stage at the Dreamforce 2024 conference in San Francisco. On stage, Newsom characterized the bills as "surgical" unlike other AI bills that could have a "chilling" effect on the development of AI. Chase DiFeliciantonio, Sophia Bollag, *In Dreamforce 'stunt,' Newsom signs AI bills to rein in election misinformation*, SAN FRANCISCO CHRONICLE (Sept. 17, 2024).[9] Newsom evidently expressed no concern about the laws' chilling effect on *speech*, which is of constitutional importance.

Within hours of the signing, Newsom reposted his earlier tweet targeting Kohls' video, this time declaring, "I just signed a bill to make this illegal in the state of California."[10]

AB 2839 purports to ensure "California elections are free and fair" by "prevent[ing] the use of deepfakes and disinformation meant to prevent voters from voting and to deceive voters based on fraudulent content" "for a limited time before and after elections." Cal. Elec. Code § 20012(a)(4). The touted "limited time" turns out to be *almost all the time* during election years—beginning 120 days before "any election in California" and extending to 60 days afterward, while covering every "candidate for any federal, state, or local elected office in California," including "any person running for the office of President of the United States or Vice President

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[7] Remarks in support of Concurrence with Senate Amendments, Aug. 30, 2024, https://www.assembly.ca.gov/media/assembly-floor-session-20240830?time[media-element-3753]=16064.105438.

[8] The relevant Senate amendments can be viewed at legislature.ca.gov: https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=202320240AB2839&cversion=20230AB283994AMD.

[9] Available at: https://www.sfchronicle.com/election/article/newsom-signs-new-california-laws-rein-ai-election-19771932.php [archive.ph/uYbdp].

[10] https://x.com/GavinNewsom/status/1836188721663873324 [archive.ph/uYbdp].

of the United States who seeks to or will appear on a ballot issued in California." *Id.* at (c)(3) & (b)(1)(A). For example, if the bill had been in effect last year, it would have begun prohibiting Plaintiff's video on November 6, 2023 (120 days before California's presidential primary, where Kamala Harris appeared on the ballot as Vice Presidential nominee), continued through May 4, then picked up again on July 8, 2024 and running through January 4, 2025—which is 60 days after the Presidential election. Thus, out of the 425 days between these dates, AB 2836 only permits videos like Kohls's between May 5 and July 7—just 64 days in 2024!

Kohls intends to keep posting similar AI-generated content that makes fun of Vice President Harris's campaign and other political officials.[11] AB 2839 attempts to deter Kohls from making the videos he wants through the imposition of monetary liability and because the terms of service for his accounts with YouTube and X require that he post lawful content. As to Kohls's current material, Governor Newsom has twice targeted it as illegal under AB 2839. For this reason, left-leaning activists or state elections officials will likely challenge the content through the new cause of action furnished by AB 2839, thanks to the Governor's amplification. Finally, as to both Kohls's current and future postings implicated by the Act, Kohls is at serious risk of losing a source of his livelihood—if these posts are removed from his account, he loses out on monetization from engagement with these videos and his account. He is also precluded from sharing the political speech and thoughts that he wants to express on his social media accounts.

LEGAL STANDARD

Four factors determine whether a court should issue a preliminary injunction: (1) whether the plaintiff is likely to succeed in the litigation; (2) whether the plaintiff will suffer irreparable harm absent the injunction; (3) the balance of equities; and (4) the public interest. *Am. Bev. Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (*en banc*). In the context of a First Amendment claim, the test generally turns on the first factor. Where plaintiffs

[11] Kohls posted additional videos poking fun at Vice President Harris in the time period between Newsom's first tweet but before AB 2839 went into effect. Complaint ¶ 15.

"have a colorable First Amendment claim, they have demonstrated that they will suffer irreparable harm if the [law] takes effect." *Id.* at 758. And "the fact that plaintiffs have raised serious First Amendment questions compels a finding that the balance of hardships tips sharply in plaintiffs' favor." *Id.* (cleaned up). Likewise, the Ninth Circuit "has consistently recognized the significant public interest in upholding First Amendment principles." *Id.* (internal quotation omitted). "Indeed, it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (internal quotation omitted).

To determine whether a First Amendment plaintiff can demonstrate a likelihood of success, the Ninth Circuit has framed a burden-shifting approach where "the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). "Because of the extraordinary nature of injunctive relief, including the potential for irreparable injury if not granted, a district court may consider evidence outside the normal rules of evidence, including: hearsay, exhibits, declarations, and pleadings." *NRA of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 926 (C.D. Cal. 2019) (citing *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009)). For example, a verified complaint like Plaintiff's before the Court, Dkt.1, is evidence that may support injunctive relief. *Thalheimer*, 645 F.3d at 1116.

I. Kohls has Article III standing to bring a suit to enjoin AB 2839.

Kohls demonstrates sufficient Article III injury from AB 2839 to adjudicate his claims. "When an individual is subject to [the] threat" of a law's enforcement, an "actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). It "is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *ACLU of Nev. v. Heller*, 378 F.3d 979, 984 (9th Cir. 2004); *see also SBA List*, 573 U.S. at 158; *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). "[I]n the First Amendment

context" courts apply a relaxed standing analysis that "tilt[s] dramatically toward a finding of standing." *Tingley v. Ferguson*, 47 F.4th 1055, 1066–67 (9th Cir. 2022) (internal quotation omitted); *accord Firearms Policy Coalition Second Amendment Defense Comm. v. Harris*, 192 F. Supp. 3d 1120, 1125 (E.D. Cal. 2016).

Kohls alleges that he wants to keep his current AI-generated Harris ads on his YouTube and X channels, without risking monetary liability. Governor Newsom's two tweets—both before and after the passage of the bill—directly target Kohls's content as illegal under AB 2839 and indicate that Kohls's speech is, in the view of the head executive of the state, more than arguably proscribed. Indeed, it shows that he and other meme creators like him are the "very object" of the regulation, and so have standing to sue to enjoin its enforcement. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

Because AB 2839 is new, there is no past enforcement history to carry weight in the "credible threat of enforcement" analysis. *Tingley*, 47 F.3d at 1069 (quoting *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021)). Thus, absent evidence to the contrary, courts will presume that recently enacted legislation will be enforced. *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 138 (2d Cir. 2023); *Speech First v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020). Yet again, the Newsom tweet bolsters the credibility of AB 2839 being used to enjoin and punish Kohls's constitutionally protected political speech. *See Isaacson v. Mayes*, 84 F.4th 1089, 1099 (9th Cir. 2023) (noting among other factors, "whether the enforcement authorities have 'communicated a specific warning or threat to initiate proceedings'") (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*)); *see also SBA List*, 573 U.S. at 159 (giving such an example). Governor Newsom appointed Defendant Weber as California Secretary of State in December 2020, and AB 2839 authorizes her and other California elections officials to sue for damages and injunctive relief. AB 2839 also empowers an online army of volunteer commissars (Governor Newsom's X followers) to sue Kohls for his speech, bolstering the threat from the statute. *ACLU of Nev.*, 378 F.3d at 984; *SBA List*, 573 U.S. at 164.

Independently, AB 2839 objectively chills Kohls and other speakers from making other AI-generated political content that they'd like to. AB 2839 threatens the direct imposition of monetary liability, but also puts Kohls's content in breach of YouTube and X's terms of service, thus risking sanctions or removal from platforms. "Where a plaintiff alleges that he or she engaged in self-censorship as a result of a speech-restricting statute," that alone sustains "the requisite level of injury necessary to confer standing." *Firearms Policy Coalition*, 192 F. Supp. 3d at 1125 (citing *Az. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006–07 (9th Cir. 2003)). In addition to creating content, Kohls wishes to view political commentary that uses AI-deepfake technology but AB 2839 chills others from creating and posting it. Thus, Plaintiff has two independent Article III injuries to bring his claim.

The safe harbor label for satire and parody does not remedy Kohls's injury. Indeed, it compounds the First Amendment harm by compelling Kohls's speech and materially altering his underlying message by restricting his intended speech. *See* Complaint ¶ 98.

II. Kohls is very likely to win his constitutional claims that AB 2839 violates the First and Fourteenth Amendments and the California Constitution's analogous free speech protections.

For multiple independent reasons, Kohls's constitutional claims are likely to succeed. *First*, the State has no interest in preventing the videos at issue (or any AI-generated content) about elections. *Second*, the Act is unconstitutional because it discriminates against political speech based on content. *Third*, AB 2839 suffers from both overbreadth and vagueness issues which are fatal to regulation of core political speech. *Fourth*, AB 2839's demanding requirements to label AI-generated content over the *entire duration* of a video do not resolve the overbreadth and vagueness of the statute but instead exacerbate it while independently infringing Plaintiffs' First Amendment right against compelled speech. *Fifth*, AB 2839 discriminates based on speakers, by allowing an exception for "candidates portraying themselves as doing or saying something the candidate did not do or say." Cal. Elec. Code § 20012(b)(2).

A. The State has no interest in preventing AI-generated political content about politicians or elections.

The Supreme Court "has recognized only one permissible ground for restriction political speech: the prevention of *'quid pro quo'* corruption or its appearance." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 305 (2022); *accord Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013) (discussing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 365 (2010)). It has "consistently rejected attempts to restrict campaign speech based on other legislative aims" because, "[h]owever well intentioned," they would "tamper with the right of citizens to choose who shall govern them." *FEC v. Cruz*, 596 U.S. at 305–06 (internal quotation omitted); *accord Progressive Democrats for Soc. Justice v. Bonta*, 73 F.4th 1118, 1133 (9th Cir. 2023) (Ikuta, J., concurring in the result). But as AB 2839 announces, it is intended to ensure "California elections are free and fair" by "prevent[ing] the use of deepfakes and disinformation meant to prevent voters from voting and to deceive voters based on fraudulent content" "for a limited time before and after elections." Cal. Gov. Code § 20012(a)(4). Thus, it targets political speech—but noticeably *not* for the purposes of "avoiding corruption or the appearance thereof." *Texans for Free Enter.*, 732 F.3d at 537. However noble a cause, the State cannot justify regulating or protecting truth—this is a timeless constitutional principle. *See Whitney v. California*, 274 U.S. 357, 377 (1927) ("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"); *United States v. Alvarez*, 567 U.S. 709 (2012). Because AB 2839 regulates political speech but not for avoiding corruption, it is unconstitutional.

This is not to say that states have no valid interest in protecting the integrity and reliability of the electoral process. They do. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008). It *is* to say that this generally valid interest in "free and fair elections" has no application to political speech that does not affect the mechanics of the election. *See, e.g., FEC v. Cruz*. In other words, AB 2839 has no tailoring to its stated interest, let alone the narrow tailoring and least restrictive alternative that a content-based law requires under "demanding"

strict scrutiny. *X Corp. v. Bonta*, 2024 U.S. App. LEXIS 22456, at *26; *see also IMDB.com, Inc. v. Becerra*, 962 F.3d 1111, 1125–27 (9th Cir. 2020).

For example, on remand in *SBA List*, the Sixth Circuit held that Ohio's law against false political statements could not survive strict scrutiny. 814 F.3d 466, 473–76 (6th Cir. 2016). Although the court recognized that the general interest in election integrity is compelling, Ohio's law against speech was not narrowly tailored to that interest; "courts have consistently erred on the side of permitting more political speech than less." *Id.* at 476. So too in *281 Care Committee v. Arneson*, where the Eighth Circuit allowed First Amendment claims to proceed against a Minnesota law that proscribed false electoral speech. 766 F.3d 774 (8th Cir. 2014). "Directly regulating what is said or distributed during an election, as [AB 2839] does, goes beyond an attempt to control the process to enhance the fairness overall so as to carefully protect the right to vote." *Id.* at 787. Even if it served a compelling interest, it was neither necessary to nor the least restrictive means of achieving that interest. *Id.* at 787–96. "Especially as to political speech, counterspeech is the tried and true buffer and elixir," not speech restriction. *Id.* at 793*; accord Commonwealth v. Lucas*, 34 N.E.3d 1242, 1244 n.1, 1252, 1256 (Mass. 2015).

So too in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). There, the Eleventh Circuit invalidated a judicial canon that punished even negligently false speech, which the State of Georgia had justified, in part, on its compelling interest in electoral integrity. *Id.* at 1320. But, again, that stated interest could not justify the canon's "dramatic chilling effect" on political speech. *Id.* And, again, the *Weaver* court noted that counterspeech, not proscription, was the correct solution: "The ability of an opposing candidate to correct negligent misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements." *Id.*

"Free and fair elections" require "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail,"[12] not closing it to content that the state deems "materially deceptive." It is exactly *for* the sake of free and fair elections, that we must live with "misinformation" (which is often nothing more than commentary or satire cavalierly branded by self-interested politicians as "misinformation").

B. AB 2839 is an unconstitutional content-based regulation.

"Content-based regulations—those that target speech based on its topic, idea, or message—are presumptively invalid." *Boyer v. City of Simi Valley*, 978 F.3d 618, 621 (9th Cir. 2020). A law is content-based if it "draws distinctions based on the message a speaker conveys" through either "subject matter," "function[,] or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In other words, if "enforcement authorities [need] to examine the content of the message that is conveyed to determine whether a violation has occurred," then the law is facially content-based and presumptively unconstitutional. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation omitted).

AB 2839 only applies to two specific types of AI-generated content: that which is "likely to harm the reputation or electoral prospects" of a candidate, and that which is "likely to falsely undermine confidence in the outcome of" an election in California. § 20012(b). Furthermore, these depictions only apply to portrayals of candidates or portrayals in connected to an election in California of "elections officials," "elected officials," or a "voting machine, ballot, voting site, or other property or equipment." *Id.* AB 2839 thus targets speech "based on its topic," which is "presumptively invalid" as a content regulation. *Boyer*, 978 F.3d at 621. And illicit AI-generated content must portray the candidate or election official *themselves*; an AI-generated video of Taylor Swift endorsing Donald Trump, for example, does not implicate liability under the law. This type of arbitrary and underinclusive line drawing is plainly unconstitutional. *Grimmett v. Freeman*, 59 F.4th 689, 694–96 (4th Cir. 2023) (following *R.A.V. v. City of St.*

[12] *X Corp. v. Bonta*, 2024 U.S. App. LEXIS 22456, at *18 (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)).

Paul, 505 U.S. 377 (1992)). And the content AB2839 targets—political speech—is the *most protected* form of expression under the First Amendment. *See Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1223 (9th Cir. 2019) (laws that single out political speech for disfavored treatment "strike[] at the heart of the First Amendment").

A law is also a "non-neutral" content regulation if it has been "adopted by the government because of disagreement with the message the speech conveys." *Reed*, 576 U.S. at 164 (simplified); *accord Victory Processing*, 937 F.3d at 1226. Precisely this occurred to Kohls. Governor Newsom tweeted that Kohls's AI-generated political content should not be allowed and promised to enact a bill to make it illegal. Within weeks the Legislature followed the Governor's lead and did so; while the bill advanced the Legislature before Newsom's tweet, lawmakers passed it "with urgency" after his public admonishing of Kohls's work to ensure the law took effect upon Newsom's signature. Worse, the bill's sponsors, in cooperation with the governor's office, deleted the exception for parody and satire. The passed version of AB 2839 instead confirms that parody and satire are targetable by the bill and actionable unless plastered with compelled labels no smaller than the largest text visible in the video. Then, after signing the bill, Governor Newsom tweeted again that the bill now makes Kohls' video illegal.

The motivation behind the law as applied to Kohls only further confirms AB 2839 is not content-neutral.

C. AB 2839's failure to define its material terms makes the law unconstitutionally vague.

To determine whether a law improperly regulates constitutionally protected conduct, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982). In the First Amendment context, vagueness and overbreadth often go hand-in-hand. Ordinarily "when a law is facially challenged on [both] grounds, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected" speech. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014) (citing *id.*). Because "political speech is at the core of

the First Amendment right," courts give no benefit of the doubt to the speech implicated by laws like AB 2839. *Id.* at 811.

AB 2839 relies on various subjective terms and awkwardly-phrased *mens rea* to implicate as much political speech as possible.

The law does not explain what might be meant by content that "would falsely appear to a reasonable person to be an authentic record of the content depicted in the media," which is the definition of "materially deceptive content." Does "authentic record" describe the candidate's voice in the ad or the ad itself? Does "falsely appear" mean the video looks or sounds like Kamala Harris (or a Harris ad), but a reasonable person knows it isn't, or does the reasonable person have to be tricked into believing it is a Harris ad? Governor Newsom apparently believes the former, because it's hard to believe Plaintiff's video could be taken as a genuine Harris ad, yet he said it the bill makes it illegal.

Next, consider what AB 2839 means in defining exemptions for "minor [AI-generated] modifications that do not significantly change the perceived contents or meaning of the content." What's a minor versus major modification? What does "not significantly" mean, if it's not surplusage? At what point does a modification "change the perceived [] meaning" of the content? Did Governor Newsom's endorsed candidate for President, Vice President Harris, make a "minor modification" or a "materially deceptive" one when her campaign manipulated media headlines with AI to appear to give her more favorable news coverage in advertisements?[13]

Perhaps the most damning example of vagueness is one of the prerequisites for liability, that AI-generated content be "reasonably likely to harm the reputation or electoral prospects of a candidate." "Reasonably likely" according to whom? A generic Democrat will tell you Trump's call for a border wall harms his electoral prospects; a generic Republican claims the opposite. The same concept applies to Harris's recent "price gouging" proposal, or Trump's

[13] David Bauder, *They look like — and link to — real news articles. But they're actually ads from the Harris campaign*, ASSOCIATED PRESS (Aug. 16, 2024) https://tinyurl.com/4kpx3erk.

mass deportations, or Harris's decriminalization of the border, and so on. Plaintiff can invent some hysterical policy examples his fans will find laughable—imagine a video where the voice of "Harris" announces that she will set the minimum wage to $50/hour—but some of Harris's supporters might very well be *more* inclined vote for the AI-generated Harris announcing them.

These are all classic terms of degree term that "vest[] virtually complete discretion in the hands of" those who bring suit against Kohls, whether it be an enforcement official like Defendants or a third party. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (finding unconstitutionally vague the distinction between "general" description and "with elaboration"); *Butcher v. Knudsen*, 38 F.4th 1163, 1173–78 (9th Cir. 2022) (determining that a campaign finance exemption for "*de minimis* acts" was unconstitutionally vague). In the First Amendment context, the void-for-vagueness doctrine disallows even the "real possibility" of "discriminatory enforcement"—the mere "opportunity for abuse." *Gentile*, 501 U.S. at 1051; *Minn. Voters All. v. Mansky*, 585 U.S. 1, 21 (2018) (internal quotation omitted).

The discretion provided by AB 2839 is especially broad because the "enforcement officials" include not only the Secretary of State, but *any* "recipient of materially deceptive content …, candidate or committee participating in the election, or elections official." § 20012(d). Any person, activist, pundit, or delusional crank can file suit to seek injunction "prohibiting the distribution of the materially deceptive content" and "general or special damages," plus "reasonable attorney's fees and costs." *Id.* Moreover, Kohls bears the cost of defending against such suits—in time and in money—even if he's ultimately victorious.

Confusing, subjective, and broad language permeates AB 2839. The Legislature cast a wide net to regulate AI-generated speech which threatens "free and fair elections." And then it exacerbated its existing overbreadth problems by applying unintelligible definitions to the covered speech. The law is a quintessential example of a statute unconstitutionally plagued by vagueness.

D. AB 2839's onerous "labeling" requirement for parody compels speech in violation of the First Amendment.

Defendants may argue that AB 2839 exempts parody, but this is flatly untrue. The final amendment to the bill, made on August 23 with assistance from the governor's office, *deleted* the draft carveout for satire and parody. Satire and parody are thus swept under the statute, which provides only an exacting safe harbor for labeled content. The statute reads:

> Notwithstanding paragraph (1), this section does not apply to … election communication containing materially deceptive content that constitutes satire or parody if the communication includes a disclosure stating "This ____ has been manipulated for purposes of satire or parody." The disclosure shall comply with the requirements set forth in subparagraphs (A) and (B) of paragraph (2).

§ 20012(b)(3). Subparagraphs (A) and (B) in turn set forth unforgiving labeling requirements which in the case of video requires that "the text of the disclosure shall appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media," and that "the disclosure shall appear for the duration of the video." *Id.* at (b)(2)(B)(i).

The structure of the onerous safe harbor suggests that satire and parody do indeed run afoul of paragraph (b)(1) which sets forth the prohibition on distributing "materially deceptive content"—otherwise it would not be "notwithstanding." This is made even more clear by subparagraph (b)(4)(A), which prohibits speakers from "[r]emov[ing] and disclosure required by paragraph (2) or (3)" and from knowingly "republishing any content subject to paragraph (2) or (3) without the required disclosure." Subparagraph (b)(4)(B) says that "violation of subparagraph (A) is evidence of intent to knowingly distribute … election communication containing materially deceptive content, as prohibited by paragraph (1)."

The disclaimer requirement unconstitutionally compels speech. *See, e.g., Nat'l Inst. of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018). It is not subject to the lessened standard for a commercial speech labeling requirement. *See X Corp. v. Bonta*, 2024 U.S. App. LEXIS 22456. But even if it were subject to a lower standard, AB 2839 could not meet its

"burden to prove that the…notice is neither unjustified nor unduly burdensome." *NIFLA*, 585 U.S. at 776. The size requirements of the disclaimer "effectively rule[] out the possibility of [Kohl's video] in the first place." *Id.* at 778 (internal quotation omitted); *accord Am. Bev. Ass'n*, 916 F.3d at 757 (determining that labeling requirement that would occupy 20% of advertisement was "unjustified or unduly burdensome"). AB 2839's disclaimer would invade far more of Kohls's video that that. It would fully "drown out" his message. *Id.* at 757 (internal quotation omitted).

Moreover, while this disclaimer safe harbor provision is available to "satire or parody," the statute does not define those terms. Thus, this exemption—which Plaintiff does not wish to adhere to given that it materially impacts his underlying message—"simply exchanges [some] overbreadth for [more] vagueness." *Zarate v. Younglove*, 86 F.R.D. 80, 104 (C.D. Cal. 1980) (quoting Professor Lawrence Tribe, *American Constitutional Law* § 12-26); *see* Section II.C, *supra*. Even more so because Kohls will have to foot the costs to defend himself against any suit under AB 2839. As in *United States v. Stevens*, California's "attempt to narrow the statutory ban [in AB 2839] … requires an unrealistically broad reading of the exceptions clause," 559 U.S. 460, 478 (2010), *and* it puts the burden on Kohls to use California's preferred language. But the state can't "use[]" one class of protected speech (here parody and satire) "as a general precondition to protecting *other* types of speech in the first place." *Id.* at 479.[14] This is *especially* so because enforcement of the bill is outsourced to any recipient of allegedly misleading content who feels inspired to file suit.

Plus, Kohls labeled his first video at issue a "PARODY" and Governor Newsom responded by threatening to take it offline and then passing *this* law—enabling an army of commissars to bankrupt Kohls even without proving liability. *See 281 Care Committee*, 766 F.3d at 790, 796 ("it is immensely problematic that *anyone* may lodge a complaint" for violation of

[14] Justice Alito's dissent in *Alvarez* also points out that the Stolen Valor Act there did "not reach dramatic performances, satire, parody, hyperbole, or the like." 567 U.S. 709, 740 (2012). Since the majority still found the law unconstitutional, a carveout for satire and parody alone is insufficient to justify First Amendment regulations of "misinformation."

the statute; "[t]he statute itself actually opens a Pandora's box to disingenuous politicking"); *Lucas*, 34 N.E. 3d at 251 (noting "the statute may be manipulated easily into a tool for subverting its own justification").

E. AB 2839 unconstitutionally discriminates based on speaker

The First Amendment is "deeply skeptical of laws that 'distinguish among different, allowing speech by some but not others.'" *NIFLA*, 585 U.S at 777–78 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Such laws "run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'" *Id.* (quoting *Sorrell v IMS Health Inc.*, 564 U.S. 552, 580 (2011)). "[A]ll too often" speaker-based discrimination is merely "content-based discrimination in disguise." *Boyer v. City of Simi Valley*, 978 F.3d 618, 621 (2020) (quoting in part *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015)). When it is, speaker-based distinctions invoke strict scrutiny just as any other content-based regulation.

Here, AB 2839 effects a speaker preference by offering a special safe harbor to candidates that use deepfakes to falsely portray themselves. *See* Cal. Elec. Code § 20012(b)(2).[15] This is content-based discrimination in disguise. The statute prefers laudatory lies about oneself—stolen valor, for example—over deprecatory lies about another. Yet a "free and fair election" is equally endangered (Kohl thinks not at all) by positive lies as by negative lies.

Moreover, the exemption for candidate speech is completely at odds with that purported aim of "free and fair elections" in another way. In an ideal world with a platonically perfect and accurate information-scape, it is *most* crucial that the candidates themselves not be purveyors of misinformation. Everything starts with them. After all, the candidates are the very people that voters are deciding upon. Voters are not electing Joe Schmo, social media Memeologist; they are electing the candidate. Yet, even though a candidate's truthful speech is most indispensable to a platonically "free and fair election," AB 2839 privileges candidate

[15] Private citizens are only allowed the equivalent safe harbor if they engage in satire or parody.

misinformation with a safe harbor that is not available to private speakers who are not engaged in parody or satire.

The speaker preference of AB 2839 is a further reason that the law violates the First Amendment.

III. Plaintiff is irreparably harmed by AB 2839.

"When an alleged deprivation of a constitutional right is involved, such as the right to free speech [], most courts hold that no further showing of irreparable injury is necessary." 11A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. Apr. 2020 update). Both the Ninth Circuit and the Supreme Court "have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (internal quotation omitted; citing cases). "[A]ny First Amendment infringement that occurs with each passing day is irreparable." *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975). The "chill on … free speech rights—even if it results from a threat of enforcement rather than actual enforcement—constitutes irreparable harm." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019). "A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief." *Am. Bev. Ass'n*, 916 F.3d at 758 (quoting *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014)).

Because of AB 2839, Kohls is chilled from providing and receiving the political commentary that he wants. This is because (a) he and other speakers will likely face suit for his videos under AB 2839 (b) the costs they'll bear to defend themselves against such lawsuits deter their political speech; (c) their videos likely breach YouTube or X's terms of service because the content is unlawful under AB 2839; and, (d) the content could result in sanctions such as deplatforming or temporary suspensions by YouTube or X. This chilling effect materially impedes Kohls's ability to monetize his X and YouTube accounts and, more importantly for the purposes of a preliminary inunction, it inhibits him and others from

speaking their minds politically. While AB 2839 has not yet been enforced against Kohls, the *threat* of enforcement is clear and real. *See Cuviello*, 944 F.3d at 833.

IV. The public interest and the balance of the equities weigh in favor of granting a preliminary injunction.

The remaining two factors to be considered—the public interest and whether other interested persons would be benefited or harmed by an injunction—weigh in favor of granting Kohls's Motion. AB 2839 deters the uninhibited political speech of all Californians through its regulation of AI generated videos, and so "the balance of equities and the public interest thus tip sharply in favor of enjoining the [law]." *Klein*, 584 F.3d at 1208. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotations omitted); *accord Sammartano v. First Jud. Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002).

On the other side of the equation and as discussed above, *supra* II.A, California lacks a valid interest in regulating Kohls's political speech to ensure "free and fair elections," however noble a cause that may be. Separately, if California is truly that concerned about Kohls's videos and others like it delegitimizing elections, then the antidote to that is the truth. "The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Alvarez*, 567 U.S. at 727 (Plurality Op. of Kennedy, J.). That speech can be the government's own, delivered through, for example, a "public-information campaign." *NIFLA*, 585 U.S. at 775. California may promote its own content that points out Kohls's videos are AI-generated; it might author a "community note" on X, for example, which provides the public with important user-generated comments that add context to tweets. Or Gavin Newsom might assign one of his staffers to reply to every tweet Kohls makes with a message like "this video is AI generated and not actually Vice President Harris," to assist any California residents that might think otherwise. But the government may not "co-opt" private parties to act as the mouthpiece of the government's preferred message. *Id.* "If there be a 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." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

V. Kohls should not be required to post a Rule 65(c) bond.

Federal Rule of Civil Procedure 65(c) "invest[s] the district court with the discretion as to the amount of security required, if any." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). "The district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003). A bond is not appropriate or necessary here: Plaintiff has a high probability of success on the merits, *People ex rel. van de Kamp v. Tahoe Reg'l Plan*, 766 F.2d 1319, 1326 (9th Cir. 1985), the costs and damages from granting a preliminary injunction are insignificant, *U.S. v. State of Or.*, 675 F. Supp. 1249, 1253 (D. Or. 1987), and—most importantly—Kohls brings this claim to protect constitutional rights, both for himself and the people of California. *See, e.g.*, *Smith v. Board of Election Comm'rs*, 591 F. Supp. 70, 72 (N.D. Ill. 1984) (constitutional rights at stake). This is a public-interest case seeking declaratory and injunctive relief and there is no risk of monetary loss to the Defendant from the injunction. *See* 11A Charles Alan Wright, *et al.*, Federal Practice and Procedure § 2954 (3d ed. 2020) (collecting cases).

CONCLUSION

The court should enjoin defendant Weber from enforcement of AB 2839.

LR 231(d)(3) STATEMENT RE ARGUMENT

As LR 231(d)(3) requires, Kohls states he would be happy to present argument if the Court would find it helpful for whatever length of time most helpful to the Court.

Dated: September 18, 2024

Respectfully submitted,

/s/ Theodore H. Frank
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Attorneys for Plaintiff Christopher Kohls

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CHRISTOPHER KOHLS,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California, and SHIRLEY N. WEBER, in her official capacity as California Secretary of State,

Defendant.

Case No. 24-cv-02527-JAM-CKD

THEODORE H. FRANK'S DECLARATION OF IRREPARABLE HARM AND NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

DATE: September 30, 2024
TIME: 1:00 PM
JUDGE: Hon. John A. Mendez

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am the attorney for Plaintiff Christopher Kohls in this case. I am the Director of the Hamilton Lincoln Law Institute (HLLI). Should a hearing on Kohls's motion for preliminary injunction occur, it will most likely be argued by my colleague Adam Schulman.

2. I provide this declaration to (1) lay out facts concerning the question of irreparable injury as LR 231(d)(2)(ii) requires, and (2) outline our efforts to notice, meet, and confer with defendants in this case.

Irreparable Harm

3. AB 2839, signed by Governor Newsom on September 17, 2024, includes an urgency clause that stipulates that it will be effective immediately upon signing and chaptering. The bill was chaptered no later than last night at 11:06 pm, when I received an email notice from lc.ca.gov, the legislature's bill tracking service, which advised the status of AB 2839 had been altered to add "Chaptered by Secretary of State - Chapter 262, Statutes of 2024."

4. Section 3 of AB 2839 adds a new section to the California Elections Code, § 20012.[1] The section adds a new cause of action, which can be brought by any "recipient of materially deceptive content distributed in violation of this section, candidate or committee participating in the election, or elections official." § 20012(d). Election officials specifically include the "Secretary of State and their staff." § 20012(f)(6)(ii). The statue defines "material deceptive content" as "audio or visual media that is intentionally digitally created or modified, which includes, but is not limited to, deepfakes, such that the content would falsely appear to a reasonable person to be an authentic record of the content depicted in the media" excluding only "minor modifications that do not significantly change the perceived contents or meaning of the content" such as altering the contrast or background of an image. § 20012(f)(8).

[1] The entire text of the now-chaptered bill can be read on legislature.ca.gov: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB2839.

Actionable "materially deceptive content" includes "election communication" of, among other things, "A candidate for any federal, state, or local elected office in California portrayed as doing or saying something that the candidate did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate." § 20012(b)(1)(A). "'Election communication' means any general or public communication not covered under 'advertisement' that is broadcast by or through television, radio, telephone, or text, distributed through the internet, or disseminated by print media, including billboards, video billboards or screens, and other similar types of communications, that concerns any of the following: (A) A candidate for office or ballot measure. (B) Voting or refraining from voting in an election. (C) The canvass of the vote." § 20012(f)(5).

5. Satire and parody is not excluded from the bill. Instead, AB 2839 provides only a narrow safe harbor for parody and satire that satisfies onerous labeling requirements: It states "this section does not apply to an advertisement or other election communication containing materially deceptive content that constitutes satire or parody if the communication includes a disclosure stating 'This ____ has been manipulated for purposes of satire or parody.' The disclosure shall comply with the requirements set forth in subparagraphs (A) and (B) of paragraph (2)." § 20012(b)(2)(3). These requirements in turn require that "(i) For visual media, the text of the disclosure shall appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media. … For visual media that is video, the disclosure shall appear for the duration of the video. (ii) If the media consists of audio only, the disclosure shall be read in a clearly spoken manner and in a pitch that can be easily heard by the average listener, at the beginning of the audio, at the end of the audio, and, if the audio is greater than two minutes in length, interspersed within the audio at intervals of not greater than two minutes each." § 20012(b)(2)(B). As detailed in the complaint and discussed below, complying with the disclosure requirement would entail creating a new video that consists entirely of the disclosure text.

A. Chilling Plaintiff Kohls's Speech Labelled "Illegal" by the Governor

6. Plaintiff Christopher Kohls is the owner of the "@MrReaganUSA" account on X and "Mr Reagan" account on YouTube, where he posts political satire videos created in part with AI-generated voiceovers. His content is viewed hundreds of thousands of times, and Kohls is paid by both social media platforms for user engagement with this videos.

7. These videos send a political message about Vice President Harris's politics: that she will serve not the country well if elected President, these AI-generated ads send a message to other voters throughout the country that they should not vote for her in the 2024 Presidential election.

8. On July 26, 2024, Kohls posted his first Harris-inspired AI-generated video to X and YouTube, where it was an immediate hit, drawing attention from Elon Musk (the owner of X).

9. While this video (the "July 26 video") is the primary of the focus of the discussion below, plaintiff Kohls has produced at least 5 videos that are colorably actionable under AB 2839: The July 26 video,[2] "Kamala Harris Ad PARODY 2,"[3] "Kamala / Tim Walz Phone Call PARODY,"[4] "Kamala Harris Ad PARODY 3,"[5] and "Kamala Harris Ad PARODY 4."[6] Each video uses AI technology to simulate the voice of Kamala Harris and/or Tim Walz, who are candidates for federal election in California. While the Kohls uploaded each video with "parody" in the title, none of the videos includes the disclaimer required by AB 2839 for the entire duration of each short video.

[2] https://www.youtube.com/watch?v=sVspeqNnoWM.

[3] https://www.youtube.com/watch?v=RIjoPqIcyaw.

[4] https://www.youtube.com/watch?v=TEg7yY_Cv60.

[5] https://www.youtube.com/watch?v=XMcPVQAA3rc.

[6] https://www.youtube.com/watch?v=Zwj6Gy8lno0.

10. All of Kohls videos are available on the YouTube and/or X platforms and continue to be disseminated as they are available to residents in California and views of these videos must include California residents.

11. Kohls bears significant risk of action by the Secretary of State and numerous "recipients" of his content under AB 2839, which the Governor of California has repeatedly singled out as content made illegal by the bill he signed.

12. In response to July 26 video and Musk's repost of it, on July 27, 2024, Gov. Gavin Newsom posted on X and said to his more than two million followers that "manipulating a voice in an 'ad' like this one should be illegal. I'll be signing a bill in a matter of weeks to make sure it is." *See* Ex. A to Verified Complaint.

13. Subsequently, the governor evidently worked with the sponsors of AB 2839 to incorporate amendments *deleting* a prior exception for parody and satire, drafting instead onerous disclosure requirements, and adding an urgency clause so that the statute becomes effective immediately. Rep. Gail Pellerin confirmed Gov. Newsom's direct involvement in amending the bill. She said: "We've worked with the Governor's office on Senate amendments that require deep fake parody material to be labeled as being digitally manipulated for those purposes … Additionally, recent amendments add an urgency clause—that was a great idea—so the bill can take effect before the November 5, 2024 general election."[7]

14. The result of his and the California Legislature's effort is AB 2839, signed into law on September 17, which Kohls is suing to enjoin enforcement of.

15. Within hours of the signing, Newsom reposted his earlier tweet targeting Kohls's video, this time declaring, "I just signed a bill to make this illegal in the state of California."[8]

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[7] Remarks in support of Concurrence with Senate Amendments, Aug. 30, 2024, https://www.assembly.ca.gov/media/assembly-floor-session-20240830?time[media-element-3753]=16064.105438.

[8] https://x.com/GavinNewsom/status/1836188721663873324 [archive.ph/uYbdp].

16. Before AB 2839 was passed and signed by the Governor, Kohls continued to post several new videos similar to the one targeted by Governor Newsom.

17. After the passage, Kohls's Harris video again went viral and he republished the content himself by retweeing a post by Elon Musk that incorporates his July 26 video.[9] Kohls credits Governor Newsom for "unintentionally" causing the video to go viral again.[10] Internet users often respond to perceived censorship by spreading the targeted content even more widely, which is called the Streisand effect, after Barbara Streisand's 2003 counterproductive effort to suppress the photograph of her Malibu residence. While the internet's resistance to censorship is admirable, it doesn't pay the bills or substitute for the right to speak freely in the future on political issues.

18. As a result of AB 2839, Kohls is irreparably harmed: he is at immediate risk of being subject to a lawsuit that carries liability for damages, injunctive relief, equitable relief, and attorneys' fees, in retaliation for exercising his First Amendment right to distribute his video.

19. He is immediately subject to an unconstitutional speech compulsion through the law's disclosure requirement.

20. He is also at immediate risk that his content will be determined to be in violation of the new law, and so either removed from the platforms, or demonitized, or otherwise retaliated against.

21. This creates an objective chilling effect that the First Amendment does not permit. Under the specter of AB 2839, Kohls is better off making "safe" content that is more likely to stay posted rather than post videos similar to his original Harris ads.

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[9] The retweet is currently visible by scrolling down on Kohls's X profile page, https://x.com/MrReaganUSA. Musk's tweet is available at: https://x.com/elonmusk/status/1836265669631053838 [archive.ph/kuJfZ].

[10] https://x.com/MrReaganUSA/status/1836281763431346578 [archive.ph/mZIAQ].

22. If Kohls posts similar AI-generated content, he risks violating the terms of service for YouTube, which requires that he post lawful content, especially given that the Governor of California has accused his content of being illegal under AB 2839.

23. If Kohls posts similar AI-generated content, he risks sanctions (such as de-platforming, temporary suspension, or shadow-banning) from YouTube that will reduce his viewership, revenue, and ability to spread his political message.

24. As to his current AI-generated content that is already posted, such as the July 26 video targeted by Governor Newsom, he is irreparably harmed because, as his content remains posted, it remains subject to a threat of a lawsuit that risks monetary and non-monetary liability.

25. Also, his political content is likely to be reported and/or taken down as a result of AB 2839 and the Governor's tweets. This will similarly result in his political speech being blocked, and risk violating terms of service with and/or sanctions from YouTube.

B. AB 2839's Attempt to Compel Speech Provides Kohls No Safe Harbor

26. Kohls has informed his attorneys and I believe that he does not wish to re-upload the videos to include the required disclaimers. In the first place, adding the disclaimers would mar his intended speech, which aims toward satire in the style of a realistic campaign video. He does not agree to allow California to compel his speech in this manner. Moreover, editing and re-uploading each video in this fashion would take hours of work.

27. Finally, and significantly for a content creator who earns a living by creating media like plaintiff Kohls, deleting and re-uploading videos results in losing all of the past interactions, likes, views, and metrics on the video, which negatively impacts future viewership and therefore revenue. While the algorithms of these platforms are proprietary, they are known to reward past engagement with particular pieces of content by recommending popular videos to additional users who might enjoy it. Deleting and re-uploading videos destroys the past weight of user interaction and may even reflect negatively on a creator's channel generally in terms of

algorithmic recommendations.[11] X and YouTube allows only limited edits like cutting parts of a video (used to resolve copyright demands).[12] In order to add the required disclaimer, the screen content of the video must be changed, and a revised video like this requires a new upload. Additionally, YouTube's policy and algorithms discourage uploads of near-identical videos because it interprets them as an attempt to "spam" notifications to subscribers. YouTube warns its creators to "Not be duplicative or repetitive," and skirting this rule can result in outright demonetization (where YouTube ceases to pay for content created).[13]

28. For most or all of the videos, including the July 26 video, it would be impossible to fit the disclaimer on the screen even if Kohls were to remove and re-upload such videos to include a disclaimer. This is because text in each video is so large, that the required disclosure—which cannot be any smaller than the largest text that appears in the video—could not fit on the screen.

29. Thus, even if Kohls were willing to have his speech compelled at the behest of lawmakers, which itself infringes his First Amendment rights, it would significantly harm him financially and be completely impossible for him to do with the viral July 26 video.

C. Conclusion

30. Plaintiff Kohl's ability to monetize his political content is irreparably harmed due to AB 2839, because AB 2839 will create a chilling effect on other people reposting and sharing his videos.

31. AB 2839 not only infringes the First Amendment rights of Kohls, it infringes the rights of content creators and consumers nationwide.

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[11] *See* The Marketing Heaven, *Is It OK to Delete and Reupload YouTube Video?* (Feb. 29, 2024) https://themarketingheaven.com/is-it-ok-to-delete-and-reupload-youtube-video/.

[12] *See* X Help Center, *Media Studio Live Cut Producer*, https://help.x.com/en/using-x/live-producer-faq; YouTube Help, *Trim your videos*, https://support.google.com/youtube/answer/9057455?hl=en

[13] *YouTube channel monetization policies*, support.google.com/youtube/answer/1311392.

Notice

32. Especially because neither defendant has formally appeared in this case, I should explain how my colleagues and I have endeavored to follow this Court's directive to "contact opposing counsel to discuss thoroughly… the substance of the contemplated motion and any potential resolution." Dkt. 4-2.

33. In the past three years, HLLI has filed three pre-enforcement challenges to recently-enacted California laws that our clients pleaded infringe upon the First Amendment's freedom of speech. This is the third.

34. In *Gupta v. Bonta*, 3:21-cv-09045 (N.D. Cal.), HLLI represented an individual (a minor at the time of filing his complaint through his father, who served as next friend) who wished to spread pro-vaccine speech outside of a neighborhood pharmacy even though a recently-passed law, SB 742, purported to criminalize approaching any person in order to "leaflet, display a sign, protest, educate, or counsel" when within 100 feet of any vaccination site, which includes most grocery stores and pharmacies in the state. Ultimately, defendant Rob Bonta agreed to extend as permanent a preliminary injunction that other plaintiffs won prohibiting enforcement of objectionable elements of the law, and Bonta stipulated that our client was the prevailing party. *See id.*, Dkt. 74. In *Couris v. Lawson*, 22-cv-1922 (S.D. Cal.), HLLI represented two conscientious doctors (not anti-vaxxers) who wished to convey accurate information about risks and benefits of COVID-19 vaccines to their patients without fear of reprisal from AB 2098, a newly-passed bill that provided vague rules and harsh penalties against "misinformation." After the district court refused to rule on our motion for preliminary injunction, we appealed the constructive denial to the Ninth Circuit, where my colleague Adam Schulman ably argued. The panel seemed deeply skeptical of the law. In the months following the argument, the legislature amended a must-pass bill to repeal AB 2098, thus mooting our appeal. The legislature had not earlier discussed repealing the bill, and I took the late-session amendment as a sign that the state recognized the Ninth Circuit would soon opine that AB 2089 infringed upon the First Amendment.

35. In both matters, the state attorney representing Attorney General Rob Bonta was Kristin Liska. We have a cordial relationship as adversaries.

36. Because Ms. Liska apparently represents the Attorney General in First Amendment cases, about one hour after I filed the complaint on September 17, at 5:44 pm, I emailed attorney Liska a copy of the complaint, civil cover sheet, and—in a separate email—exhibits to the complaint. I informed her in the message: "The temporary case number is 2:24-at-1196, and Adam [Schulman] or I will email you again once we have the formal case number."

37. The email containing complaint exhibits bounced back, which was consistent with my experience: the Attorney General's office seems to have a size limitation on incoming emails, and the exhibits as filed exceeded 20 MB altogether. I subsequently sent these, which my colleague M. Frank Bednarz compressed, at 4:12 pm on September 18. I also then sent all filings I hadn't previously emailed to attorney Liska (including the *pro hac vice* motion).

38. In the morning of September 18, after the case was assigned a permanent docket number, I emailed Ms. Liska again on September 18 at 9:50 am, replying to my 5:44 pm email so as to include my previous message. I advised "We will be moving for a TRO as soon as we have a hearing date from the court." I also inquired whether she would be representing the Secretary of State.

39. After sending this email, and after having previously reviewed the Court's webpage, which requires that parties should contact the courtroom deputy for available dates for hearing any motion, I sent the courtroom deputy an email at 9:58 am. I stated our intention to apply for a TRO and asked whether Tuesday, September 24 would be available "or would the court prefer a different date and time?"

40. At 11:54 am today, Ms. Liska replied to my 9:50 am email, thanking me for the message and inquiring when the TRO would be heard and whether it would concern only AB 2839 or both bills we challenge, given that AB 2655 will not be effective until January 1. She advised in this message "I don't yet have an answer regarding representation of the

Secretary or waiving service on her behalf; we are willing to waive service as to the Attorney General."

41. Separately, I endeavored to serve both defendants with the complaint, summons, the court's orders, and a cover letter advising in large (24-point) print "We intend to file for TRO enjoining enforcement of AB 2839 **today**; please contact me **immediately**." (emphasis in original). My colleague Frank Bednarz arranged for service through a process server, OneLegal. Upon learning that attorney Liska would waive service as to the Attorney General, Bednarz asked the server to proceed to serve only Secretary of State Weber.

42. At 2:12 pm, after a telephone conversation with the courtroom deputy, I received an email from her that read:

> Judge Mendez has directed me to give you a briefing schedule for a Motion for Preliminary Injunction as follows:
>
> - The Motion for Preliminary Injunction shall be filed by today, Wednesday, September 18, 2024;
> - Opposition due by Monday, September 23, 2024; and if any,
> - Reply due by Thursday, September 26, 2024, whereupon the motion will be submitted.
>
> If the Court subsequently concludes that oral argument is necessary, a hearing on the Motion for Preliminary Injunction will be specially set for Monday, September 30, 2024.
>
> **As to the filing of a TRO:**
>
> Please determine how you should proceed. Counsel may file any pleading counsel thinks is appropriate for the Court's consideration. Either counsel decides to file a TRO or a Moton for Preliminary Injunction, please make sure to follow the Local Rules.

43. While Kohls's motion is urgent and poses a real risk of irreparable harm to his speech rights—chilling Constitutionally-protected speech almost always presents irreparable injury, as explained in the next section—I believe this schedule to be adequate and it conserves private and judicial resources by avoiding a separate hearing for preliminary injunction upon

conclusion of a time-limited TRO. Therefore, I instructed my colleagues to adapt the drafted TRO papers into a motion for preliminary injunction.

44. I forwarded this email to Ms. Liska at 2:18 pm. My message agreed with Liska that we would only seek injunctive relief for AB 2839 "(reserving rights to seek PI on 2655 at a later date) against Weber, with the attached briefing schedule." I asked who would be counsel for the Secretary of State and also asked Ms. Liska to complete the waiver of service form for defendant Bonta.

45. At 4:10 pm, I again emailed Ms. Liska to advise "We are proceeding with service to the Secretary of State today with a cover letter asking any representative to immediately contact us, and I will let you know if I hear anything."

46. At 5:16 pm, Ms. Liska replied that "I can also let you know that our office will be representing the Secretary of State as well, and we can accept service on her behalf. I can fill out the form you sent along earlier to that effect as well."

47. Additionally, with the filing of this affidavit, I will have filed the Motion, its accompanying Memorandum for Preliminary Injunction, and all other required documents under Local Rule 231 using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case. The filings will be publicly available to any others who wish to review them. Following the filing, I will also email Ms. Liska with copies of all filed papers.

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

Executed on September 18, 2024 in Houston, Texas.

/s/ Theodore H. Frank
Theodore H. Frank

Theodore H. Frank (SBN 196332)
Adam E. Schulman (*pro hac vice* pending)
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CHRISTOPHER KOHLS,

Plaintiff,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California, and SHIRLEY N. WEBER, in her official capacity as California Secretary of State,

Defendants.

Case No. 2:24-cv-02527-JAM-CKD

[PROPOSED] ORDER GRANTING PRELIMINARY INJUNCTION

The Motion for a Preliminary Injunction of Plaintiff Christopher Kohls was filed before this Court on September 18, 2024. Having read the applicable papers, and having heard from the Parties' counsel of record, the Court finds that Plaintiff has met his burden for a preliminary injunction enjoining enforcement of AB 2839. Plaintiff's Motion for a Temporary Restraining Order is GRANTED.

THEREFORE, IT IS ORDERED,

1. Defendant Weber and her employees, agents, servants, officers, and persons acting in concert with Defendant Weber, are enjoined from enforcing AB 2839.
2. The bond requirement under Federal Rule 65(c) is waived because Plaintiff asserts First Amendment claims that have a high probability of success on the merits, the costs and damages from granting this Preliminary Injunction are insignificant, and Plaintiff brings his claim to protect constitutional rights that serve the public interest.

DATED this _____ day of _____, _____.

_____
DISTRICT JUDGE
JOHN A. MENDEZ