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12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA
 14 SACRAMENTO DIVISION

15 CHRISTOPHER KOHLS,
 16 *Plaintiff,*
 17 v.
 18 ROB BONTA, *et al.,*
 19 *Defendants.*

No. 24-cv-02527-JAM-CKD

**MOTION FOR LEAVE TO
 FILE *AMICUS CURIAE* BRIEF
 IN SUPPORT OF NEITHER
 PARTY ON BEHALF OF
 PROTECT DEMOCRACY
 PROJECT**

Date: September 30, 2024
 Dept: 6
 Judge: Hon. John A. Mendez
 Trial Date: Not Scheduled
 Filed: 9/17/2024

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1 **RULE 7.1 CORPORATE DISCLOSURE STATEMENT**

2 The Protect Democracy Project is a nonprofit organization with no parent
3 corporation and in which no person or entity owns stock.

4 **MOTION**

5 The undersigned counsel represent the Protect Democracy Project (“Protect
6 Democracy”). On its behalf, undersigned counsel respectfully request leave to file the
7 attached amicus brief in support of neither party on Plaintiff’s Motion for a
8 Preliminary Injunction, ECF No. 6.

9 Counsel for Plaintiff, Mr. Frank, informed the undersigned that Plaintiff
10 opposes this motion and asked that the undersigned counsel convey his full response.
11 In full, Mr. Frank emailed the following on Wednesday, September 25, 2024:

12 Briefing concludes Thursday, and our small nonprofit would be
13 unfairly prejudiced and burdened by anything filed after September 23,
14 especially because we avoided recruiting amici in this procedural
15 posture to avoid burdening the court.

16 Kohls opposes. We would consent to amicus at a later stage in
17 the case when the briefing isn’t expedited and the amicus isn’t
18 untimely.

19 Counsel for Defendants informed the undersigned that Defendants do not
20 oppose this motion.¹

21 While Federal Rule of Appellate Procedure 29 governs amicus participation in
22 the federal courts of appeal, the Federal Rules of Civil Procedure contain no similar
23 rule for amicus briefs filed in the federal district courts. But the Ninth Circuit has made
24 clear that district courts have “broad discretion to appoint amici curiae,” such that an

25 ¹ *Amicus* affirms that no counsel for any party authored this brief in whole or in
26 part and that no person other than *Amicus* or its counsel made any monetary
27 contributions intended to fund the preparation or submission of this brief.

1 appellate court will not reverse absent an abuse of discretion. *Hoptowit v. Ray*, 682
2 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*,
3 515 U.S. 472, 487 (1995); *Foothill Church v. Watanabe*, 623 F. Supp. 3d 1079, 1084
4 (E.D. Cal. 2022) (“The district court has broad discretion regarding the appointment
5 of amici.”). “District courts frequently welcome amicus briefs from non-parties
6 concerning legal issues that have potential ramifications beyond the parties directly
7 involved or if the amicus has unique information or perspective that can help the court
8 beyond the help that the lawyers for the parties are able to provide.” *NGV Gaming,*
9 *Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005);
10 *Foothill Church*, 623 F. Supp. 3d at 1085. Indeed, in such circumstances, “[a]n amicus
11 brief should normally be allowed.” *Foothill Church*, 623 F. Supp. 3d at 1084. The
12 touchstone is whether the amicus is “helpful.” *California v. United States Dep’t of*
13 *Lab.*, No. 213CV02069KJMDAD, 2014 WL 12691095, at *1 (E.D. Cal. Jan. 14,
14 2014).

15 *Amicus curiae*, Protect Democracy, is a nonpartisan, nonprofit organization
16 dedicated to preventing our democracy from declining into a more authoritarian form
17 of government. It engages in litigation and other advocacy to protect free and fair
18 elections and challenge abuses of power and tortious conduct, including those that
19 violate constitutional protections for the freedom of speech and a free press. It has
20 litigated extensively on the First Amendment, voting rights, and election
21 administration, including several defamation lawsuits against defendants who spread
22 knowing falsehoods about election workers and voters. It has also engaged in
23 extensive advocacy to oppose laws and regulations that might trample First
24 Amendment rights, while promoting common-sense laws and regulations that support
25 the functioning of our political marketplace.

26 As Protect Democracy lays out in its proposed amicus brief, Mr. Kohls has
27 brought a facial challenge and now seeks a facial preliminary injunction to a California
28

1 law requiring that deceptive political deepfakes be labeled. Eighteen other states have
2 enacted similar statutes, and Congress is considering enacting various bills that would
3 likewise regulate deceptive political deepfakes. In these circumstances, the legal issues
4 the Court must address to resolve Mr. Kohls' motion have potential ramifications far
5 beyond the parties directly involved.

6 Protect Democracy's proposed brief does not support one party or the other on
7 the ultimate resolution of Mr. Kohls' motion and takes no position on whether
8 California's AB 2839 should stand or fall in the final analysis. *Amicus* seeks only to
9 assist the Court and the parties in resolving the novel issues implicated by Mr. Kohls'
10 motion in a way that comports with the proper First Amendment analysis for facial
11 challenges and does not unnecessarily short-circuit ongoing legislative efforts to
12 address the problem of deceptive political deepfakes.

13 For the foregoing reasons, Protect Democracy respectfully requests that the
14 Court grant the enclosed proposed order granting Protect Democracy leave to file the
15 proposed amicus brief included as an exhibit to this motion.

16
17
18 Dated: September 27, 2024

Respectfully submitted,

19
20 By: 

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Americans for Prosperity Found. v. Bonta,
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Balla v. Hall,
59 Cal. App. 5th 652 (2021)13

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Buckley v. Valeo,
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Burson v. Freeman,
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Citizens United v. Fed. Election Comm’n,
558 U.S. 310 (2010).....8, 9

Counterman v. Colorado,
600 U.S. 66 (2023).....14

Eu v. San Francisco Cnty. Democratic Cent. Comm.,
489 U.S. 214 (1989).....6, 7

Ex parte Bradshaw,
501 S.W.3d 665 (Tex. App. 2016).....11

FEC v. Ted Cruz for Senate,
596 U.S. 289 (2022).....8

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).....11

Golb v. Att’y Gen. of the State of New York,
870 F.3d 89 (2d Cir. 2017).....11

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46 (1988).....13

1 *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*,
2 538 U.S. 600 (2003).....12

3 *John Doe No. 1 v. Reed*,
4 561 U.S. 186 (2010).....8

5 *League of Women Voters of New Hampshire v. Kramer*,
6 No. 24-cv-73 (D.N.H. Mar. 14, 2024)2

7 *McConnell v. Fed. Election Comm’n*,
8 540 U.S. 93 (2003).....8

9 *Meese v. Keene*,
10 481 U.S. 465 (1987).....8

11 *Minnesota Voters Alliance v. Mansky*,
12 585 U.S. 1 (2018).....7

13 *Moody v. NetChoice, LLC*,
14 144 S. Ct. 2383 (2024).....5, 6, 14

15 *Munro v. Socialist Workers Party*,
16 479 U.S. 189 (1986).....7

17 *Nat’l Coal. on Black Civic Participation v. Wohl*,
18 661 F. Supp. 3d 78 (S.D.N.Y. 2023).....12

19 *NetChoice, LLC v. Bonta*,
20 113 F.4th 1101 (9th Cir. 2024)5

21 *New State Ice Co. v. Liebmann*,
22 285 U.S. 262 (1932) (Brandeis, J., dissenting)1

23 *New York Times Co. v. Sullivan*,
24 376 U.S. 254 (1964).....13

25 *Oregon v. Ice*,
26 555 U.S. 160 (2009).....1

27 *Reed v. Town of Gilbert, Ariz.*,
28 567 U.S. 155 (2015).....10

1 *Rosenblatt v. Baer*,
 383 U.S. 75 (1966) (Stewart, J., concurring) 11

2

3 *United States v. Alvarez*,
 567 U.S. 709 (2012) 14

4

5 *United States v. Harriss*,
 347 U.S. 612 (1954) 8

6

7 *United States v. Lepowitch*,
 318 U.S. 702 (1943) 10

8

9 *Virginia v. Black*,
 538 U.S. 343 (2003) 12

10

11 *Wolfson v. Concannon*,
 811 F.3d 1176 (9th Cir. 2016) 6

12 **Statutes**

13 18 U.S.C. § 709 10

14 18 U.S.C. § 712 10

15 18 U.S.C. § 912 10

16 Cal. Civ. Code § 45a 13

17 Cal. Civ. Code § 46 13

18 Cal. Elec. Code § 20012 *passim*

19 Cal. Penal Code § 529 11

20 N.Y. Penal Law § 190.25 11

21 Tex. Penal Code Ann. § 33.07 11

22 **Other Authorities**

23 Daniel Zuidijk, *Deepfakes in Slovakia Preview How AI Will Change the Face*
 of Elections, Bloomberg (Oct. 4, 2023),
 [https://www.bloomberg.com/news/newsletters/2023-10-04/deepfakes-](https://www.bloomberg.com/news/newsletters/2023-10-04/deepfakes-in-slovakia-preview-how-ai-will-change-the-face-of-elections)
 [in-slovakia-preview-how-ai-will-change-the-face-of-elections](https://www.bloomberg.com/news/newsletters/2023-10-04/deepfakes-in-slovakia-preview-how-ai-will-change-the-face-of-elections) 3

24

25

26 Danielle K. Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for*
 Privacy, Democracy, and National Security, 107 Cal. L. Rev. 1753
 (2019) 1

27

28

1 *Increasing Threats of Deepfake Identities*, Dep’t of Homeland Sec. (2019),
 2 https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_addendum_0.pdf1

3 Donald J. Trump (@realDonaldTrump), Truth (Jan. 9, 2024, 11:19 AM),
 4 <https://truthsocial.com/@realDonaldTrump/posts/111727606183781019>2

5 *Private Industry Notification: Malicious Actors Almost Certainly Will Leverage Synthetic Content for Cyber and Foreign Influence Operation*,
 6 FBI (Mar. 10, 2021),
 7 <https://s3.documentcloud.org/documents/20514502/fbipin-3102021.pdf>1

8 Ivana Saric, *Half of U.S. States Seek to Crack Down on AI in Elections*, Axios
 9 (Sept. 16, 2024), <https://www.axios.com/2024/09/22/ai-regulation-election-laws-map>3

10 Josh Margolin & Sasha Pezenik, *DHS Warns of Threats to Election Posed by Artificial Intelligence*, ABC News (May 20, 2024),
 11 <https://abcnews.go.com/Politics/dhs-warns-threats-election-posed-ai/story?id=110367438>.....1

12 Katie Polglase, *‘My Identity is Stolen’: Photos of European Influencers Used to Push Pro-Trump Propaganda on Fake X Accounts*, CNN (Aug. 28, 2024 11:19 AM), <https://www.cnn.com/2024/08/28/europe/fake-maga-accounts-x-european-influencers-intl-cmd/index.html>3

13 *Deepfakes, Explained*, MIT Sloan (July 21, 2020),
 14 <https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained>1

15 Morgan Meaker, *Slovakia’s Election Deepfakes Show AI Is a Danger to Democracy*, Wired (Oct. 3, 2023),
 16 <https://www.wired.com/story/slovakias-election-deepfakes-show-ai-is-a-danger-to-democracy/>3

17 *Contextualizing Deepfake Threats to Organizations*, Nat’l Sec. Agency et al. (Sept. 2023), <https://media.defense.gov/2023/Sep/12/2003298925/-1/-1/0/CSI-DEEPFAKE-THREATS.PDF>1

18 *Public Citizen Calls on Presidential Candidates, Parties to Pledge Not to Use Dangerous, Manipulative Deepfakes*, Public Citizen (May 16, 2023),
 19 <https://www.citizen.org/news/public-citizen-calls-on-presidential-candidates-parties-to-pledge-not-to-use-dangerous-manipulative-deepfakes/>.....2

20 *Tracker: State Legislation on Deepfakes in Elections*, Public Citizen (last updated Sept. 18, 2024), <https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/>3

21 Rebecca Green, *Counterfeit Campaign Speech*, 70 Hastings L.J. 1445 (2019).....10

22 Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 St. Louis Univ. L. Rev. 535 (2020).....1

23
24
25
26
27
28

1 Sara Dorns, *Trump Calls For AI Controls After Mark Ruffalo Posts Fake*
2 *Photos Of Him With Young Girls On ‘Epstein’ Planes*, Forbes (Jan. 9,
3 2024), [https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-](https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-for-ai-controls-after-mark-ruffalo-posts-fake-photos-of-him-with-young-girls-on-epstein-plane/)
4 [for-ai-controls-after-mark-ruffalo-posts-fake-photos-of-him-with-](https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-for-ai-controls-after-mark-ruffalo-posts-fake-photos-of-him-with-young-girls-on-epstein-plane/)
5 [young-girls-on-epstein-plane/](https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-for-ai-controls-after-mark-ruffalo-posts-fake-photos-of-him-with-young-girls-on-epstein-plane/)2

6 Timothy M. Persons, *Science & Tech Spotlight: Deepfakes*, GAO-20-379SP,
7 Gov’t Accountability Office (Feb. 2020),
8 <https://www.gao.gov/assets/gao-20-379sp.pdf>1

9 **Bills**

10 S. 2770, 118th Cong. (2024)3

INTRODUCTION

The Supreme Court has long recognized the role of the states “as laboratories for devising solutions to difficult” and “novel” legal problems. *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Today, few problems are as novel or difficult as what to do about deceptive political “deepfakes.”¹

Since the advent of deepfakes in 2017,² law enforcement agencies,³ scholars,⁴

¹ Deepfakes are typically defined as media content that has been intentionally manipulated by artificial intelligence in ways that deceive the recipient. *E.g.*, Timothy M. Persons, *Science & Tech Spotlight: Deepfakes*, GAO-20-379SP, Gov’t Accountability Office (Feb. 2020), <https://www.gao.gov/assets/gao-20-379sp.pdf>; *Deepfakes, Explained*, MIT Sloan (July 21, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained>. California’s AB 2839 defines both “deepfakes” and “materially deceptive content.” Cal. Elec. Code § 20012(f)(4), (8). *Amicus* Protect Democracy Project is concerned about content that is intentionally digitally created or modified such that the content would falsely appear to a reasonable person to be an authentic record of the content depicted in the media, and refer to that content throughout as “deepfakes.”

² *Increasing Threats of Deepfake Identities*, Dep’t of Homeland Sec. (2019), https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_addendum_0.pdf.

³ *E.g.*, *id.*; *Private Industry Notification: Malicious Actors Almost Certainly Will Leverage Synthetic Content for Cyber and Foreign Influence Operation*, FBI (Mar. 10, 2021), <https://s3.documentcloud.org/documents/20514502/fbipin-3102021.pdf>; *Contextualizing Deepfake Threats to Organizations*, Nat’l Sec. Agency et al. (Sept. 2023), <https://media.defense.gov/2023/Sep/12/2003298925/-1/-1/0/CSI-DEEPAKE-THREATS.PDF>; Josh Margolin & Sasha Pezenik, *DHS Warns of Threats to Election Posed by Artificial Intelligence*, ABC News (May 20, 2024), <https://abcnews.go.com/Politics/dhs-warns-threats-election-posed-ai/story?id=110367438>.

⁴ *E.g.*, Danielle K. Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. 1753 (2019); Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 St. Louis Univ. L. Rev. 535 (2020).

1 and advocates⁵ have sounded alarm bells about the looming threat of malicious
2 deepfakes for our elections and our democracy more broadly. But it is only in the last
3 year or so that the widespread accessibility of advanced generative artificial
4 intelligence has realized the threat.

5 This year, deepfakes have impacted candidates across the political spectrum,
6 resulting in bipartisan calls for regulation. On January 9, former President Trump
7 called for “Strong Laws . . . against AI” after fake images manipulated by artificial
8 intelligence circulated widely, appearing to show former President Trump mingling
9 with Jeffrey Epstein and young women on Epstein’s plane.⁶ On January 21, thousands
10 of likely Democratic voters in New Hampshire received a robocall featuring a voice
11 generated by artificial intelligence impersonating President Joe Biden, telling the
12 voters not to bother voting in the primary.⁷ In August, CNN and the Centre for
13 Information Resilience identified fifty-six fake accounts on X using manipulated
14 images of real European influencers (all women) suggesting they supported former
15 President Trump and his campaign in what appeared to be a coordinated effort.⁸

17 ⁵ E.g., *Public Citizen Calls on Presidential Candidates, Parties to Pledge Not*
18 *to Use Dangerous, Manipulative Deepfakes*, Public Citizen (May 16, 2023),
19 [https://www.citizen.org/news/public-citizen-calls-on-presidential-candidates-parties-](https://www.citizen.org/news/public-citizen-calls-on-presidential-candidates-parties-to-pledge-not-to-use-dangerous-manipulative-deepfakes/)
20 [to-pledge-not-to-use-dangerous-manipulative-deepfakes/](https://www.citizen.org/news/public-citizen-calls-on-presidential-candidates-parties-to-pledge-not-to-use-dangerous-manipulative-deepfakes/).

21 ⁶ Donald J. Trump (@realDonaldTrump), Truth (Jan. 9, 2024, 11:19 AM),
22 <https://truthsocial.com/@realDonaldTrump/posts/111727606183781019>; Sara Dorns,
23 *Trump Calls For AI Controls After Mark Ruffalo Posts Fake Photos Of Him With*
24 *Young Girls On ‘Epstein’ Planes*, Forbes (Jan. 9, 2024),
25 [https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-for-ai-controls-after-](https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-for-ai-controls-after-mark-ruffalo-posts-fake-photos-of-him-with-young-girls-on-epstein-plane/)
26 [mark-ruffalo-posts-fake-photos-of-him-with-young-girls-on-epstein-plane/](https://www.forbes.com/sites/saradorn/2024/01/09/trump-calls-for-ai-controls-after-mark-ruffalo-posts-fake-photos-of-him-with-young-girls-on-epstein-plane/).

27 ⁷ See Compl., *League of Women Voters of New Hampshire v. Kramer*, No. 24-
28 cv-73 (D.N.H. Mar. 14, 2024), ECF No. 1, available at
29 [https://freespeechforpeople.org/wp-content/uploads/2024/03/ecf-1-complaint-03-14-](https://freespeechforpeople.org/wp-content/uploads/2024/03/ecf-1-complaint-03-14-24-1.pdf)
30 [24-1.pdf](https://freespeechforpeople.org/wp-content/uploads/2024/03/ecf-1-complaint-03-14-24-1.pdf).

31 ⁸ Katie Polglase, *‘My Identity is Stolen’: Photos of European Influencers Used*
32 *to Push Pro-Trump Propaganda on Fake X Accounts*, CNN (Aug. 28, 2024 11:19
33 (continued...))

1 Overseas, a late-breaking deepfake caused disruption in a European national election
2 late last year, possibly impacting its outcome.⁹

3 Responding to the tangible threat of election-related deepfakes, nineteen states,
4 including California, have enacted legislation aimed at protecting the integrity of
5 elections through a mix of disclosure requirements and prohibitions.¹⁰ Other states are
6 actively considering similar legislation.¹¹ Congress, too, is vetting a suite of legislation
7 aimed at stopping deepfakes from upending elections, including the Protect Elections
8 from Deceptive AI Act, introduced by Senators Klobuchar (D-Minn.), Hawley (R-
9 Mo.), Coons (D-Del.), and Collins (R-Me.).¹²

10 In short, there is widespread recognition up and down our federal system and
11 across the political spectrum about the urgent need to ensure that deceptive political
12 deepfakes do not disrupt elections. Many of the great laboratories of our democracy
13 are presently hard at work searching for practical solutions that can safeguard our
14 elections by protecting the ability of the citizenry to make informed choices among
15 candidates for office and preventing malicious actors from undermining confidence in
16 the integrity of our elections without running afoul of the First Amendment.

17
18 AM), <https://www.cnn.com/2024/08/28/europe/fake-maga-accounts-x-european-influencers-intl-cmd/index.html>.

19 ⁹ Daniel Zuidijk, *Deepfakes in Slovakia Preview How AI Will Change the Face*
20 *of Elections*, Bloomberg (Oct. 4, 2023),
21 [https://www.bloomberg.com/news/newsletters/2023-10-04/deepfakes-in-slovakia-](https://www.bloomberg.com/news/newsletters/2023-10-04/deepfakes-in-slovakia-preview-how-ai-will-change-the-face-of-elections)
22 [preview-how-ai-will-change-the-face-of-elections](https://www.bloomberg.com/news/newsletters/2023-10-04/deepfakes-in-slovakia-preview-how-ai-will-change-the-face-of-elections); Morgan Meaker, *Slovakia's*
23 *Election Deepfakes Show AI Is a Danger to Democracy*, Wired (Oct. 3, 2023),
24 [https://www.wired.com/story/slovakias-election-deepfakes-show-ai-is-a-danger-to-](https://www.wired.com/story/slovakias-election-deepfakes-show-ai-is-a-danger-to-democracy/)
25 [democracy/](https://www.wired.com/story/slovakias-election-deepfakes-show-ai-is-a-danger-to-democracy/).

26 ¹⁰ See *Tracker: State Legislation on Deepfakes in Elections*, Public Citizen (last
27 updated Sept. 18, 2024), [https://www.citizen.org/article/tracker-legislation-on-](https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/)
28 [deepfakes-in-elections/](https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/).

¹¹ *Id.*; see also Ivana Saric, *Half of U.S. States Seek to Crack Down on AI in*
Elections, Axios (Sept. 16, 2024), [https://www.axios.com/2024/09/22/ai-regulation-](https://www.axios.com/2024/09/22/ai-regulation-election-laws-map)
[election-laws-map](https://www.axios.com/2024/09/22/ai-regulation-election-laws-map).

¹² S. 2770, 118th Cong. (2024).

1 It is against this backdrop that Mr. Kohls pursues his facial challenge to AB
2 2839,¹³ California’s latest effort to ensure that deceptive political deepfakes are
3 labeled. The Court will find few guideposts directly on point. However it rules, its
4 ruling will be clarifying for legislators in California and around the country. *Amicus*
5 submits this brief in support of neither party to assist the Court and the parties in
6 resolving this novel challenge.

7 **ARGUMENT**

8 Mr. Kohls argues that AB 2839 could not withstand Constitutional scrutiny
9 were it ever enforced against him and held to proscribe his parody videos. But that is
10 not the question before the Court.

11 Mr. Kohls chose to bring a facial challenge and now seeks to enjoin defendants
12 from enforcing AB 2839 against anyone, upping the ante for himself, Californians,
13 and the development of the law more broadly. The ultimate question before the Court
14 is not whether AB 2839 would violate the First Amendment if applied to Mr. Kohls’
15 parody videos; the question is whether the full set of the law’s unconstitutional
16 applications, if any, substantially outweigh the full set of its constitutional
17 applications, if any. It is in that context that *Amicus* submits this brief to underscore
18 two additional narrow points in the hope that, however the Court rules, it does not
19 short-circuit the ongoing development of common-sense and constitutionally-
20 permissible regulations of deepfakes that have the potential to upend elections.

21 *First*, myriad compelling governmental interests can justify narrowly-tailored,
22 content-based disclosure requirements for political deepfakes otherwise protected by
23 the First Amendment. Mr. Kohls’ contention that the *only* legitimate governmental
24 interest in this context is the prevention of *quid pro quo* corruption or its appearance
25 is clearly wrong and controverted by many lines of Supreme Court precedent.

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¹³ Codified at California Election Code § 20012 (throughout, “AB 2839”).

1 Erroneously holding otherwise would severely hamstring California and other states
2 in their efforts to mitigate pernicious deepfakes aimed at deceiving the electorate.

3 *Second*, many political deepfakes are not protected by the First Amendment.
4 Applying AB 2839 to those deepfakes raises no First Amendment concerns
5 whatsoever. Because AB 2839 likely has at least some legitimate sweep, the Court
6 will have to determine whether any unconstitutional applications substantially
7 outweigh the constitutional applications in resolving Mr. Kohls’ facial challenge.

8 **I. MR. KOHLS CHOSE TO BRING A FACIAL CHALLENGE, WHICH**
9 **MEANS THE COURT MUST LOOK BEYOND HIM**

10 Mr. Kohls “chose to litigate [this case] as [a] facial challenge[], and that decision
11 comes at a cost.” *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). In a facial
12 challenge, the ultimate question before the Court is “whether a substantial number of
13 [the law’s] applications are unconstitutional, judged in relation to the statute’s plainly
14 legitimate sweep.” *Id.* The Court must determine “[w]hat activities, by what actors, . .
15 . the law[] prohibit[s] or otherwise regulate[s],” and “which of the law[’s] applications
16 violate the First Amendment, to measure them against the rest.” *Id.* at 2398. In other
17 words, the cost to Mr. Kohls is that his case is not primarily about him.

18 Here, AB 2839 likely reaches many deepfakes in ways that do not violate the
19 First Amendment. *See infra* Sections II–III. Because AB 2839 likely has at least some
20 plainly legitimate sweep (and possibly a substantial legitimate sweep), the Court will
21 have to determine whether “the law’s unconstitutional applications substantially
22 outweigh its constitutional ones.” *Moody*, 144 S. Ct. at 2397; *see also NetChoice, LLC*
23 *v. Bonta*, 113 F.4th 1101, 1124 (9th Cir. 2024) (a district court’s failure to consider
24 the facial nature of a challenge renders appellate review “practically impossible” and
25 requires vacating a preliminary injunction).

26 In making that determination, there is a thumb on the scale against Mr. Kohls.
27 *Moody*, 144 S. Ct. at 2397. “Claims of facial invalidity often rest on speculation about
28 the law’s coverage and its future enforcement;” they also “threaten to short circuit the

1 democratic process by preventing duly enacted laws from being implemented in
2 constitutional ways.” *Id.* Those concerns loom particularly large here, given the rapid
3 development of artificial intelligence and the importance of protecting the integrity of
4 elections.

5 **II. MANY COMPELLING GOVERNMENTAL INTERESTS CAN**
6 **JUSTIFY REASONABLE DISCLOSURE REQUIREMENTS FOR**
7 **DECEPTIVE POLITICAL DEEPPAKES**

8 However the Court rules, Mr. Kohls’ contention that “[b]ecause AB 2839
9 regulates political speech but not for avoiding corruption, it is unconstitutional” is just
10 wrong. ECF No. 6-1 at 12. That proposition flies in the face of Supreme Court
11 precedent recognizing that there are many compelling governmental interests that
12 could justify narrowly tailored disclosure requirements for political deepfakes, even
13 though they are content based. Adopting Mr. Kohls’ argument would severely
14 hamstring legislators confronting an urgent threat to the political marketplace.

15 **A. Numerous Compelling Governmental Interests in the Electoral**
16 **Context Can Justify Content-Based Regulations of Political Speech,**
17 **Including Disclosure Requirements**

18 In the election context, “a State has a compelling interest in protecting voters
19 from confusion and undue influence.” *Burson v. Freeman*, 504 U.S. 191, 199 (1992)
20 (citing *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228
21 (1989)). Closely related, a “State has a legitimate interest in fostering an informed
22 electorate.” *Eu*, 489 U.S. at 228–29. And as Mr. Kohls necessarily concedes, ECF No.
23 6-1 at 20, “a State ‘indisputably has a compelling interest in preserving the integrity
24 of its election process,’” *Burson*, 504 U.S. at 199 (quoting *Eu*, 489 U.S. at 23).

25 When a state regulates to protect these vital interests, regulations need not be
26 “perfectly tailored” to survive First Amendment scrutiny. *Burson*, 504 U.S. at 209;
27 *Wolfson v. Concannon*, 811 F.3d 1176, 1185 (9th Cir. 2016). “[B]ecause a government
28 has such a compelling interest in securing the right to vote freely and effectively, [the
Supreme] Court never has held a State ‘to the burden of demonstrating empirically the

1 objective effects on political stability that [are] produced’ by the voting regulation in
2 question.” *Burson*, 504 U.S. at 208 (quoting *Munro v. Socialist Workers Party*, 479
3 U.S. 189, 195 (1986)). This lowered scrutiny is justified by three common-sense
4 propositions: (1) “[e]lections vary from year to year, and place to place,” rendering it
5 uniquely “difficult to make specific findings about the effects of a voting regulation”;
6 (2) there is no effective *post hoc* remedy for a tainted election, as rerunning an election
7 would have a “negative impact on voter turnout”; and (3) “a State’s political system
8 [need not] sustain some level of damage before the legislature [may] take corrective
9 action,” so long as regulations do not “significantly impinge on constitutionally
10 protected speech.” *Id.* at 209.

11 Together and assessed under this lessened scrutiny, a state’s interests in
12 preventing voter confusion, fostering an informed electorate, and protecting the
13 integrity of elections are sufficient to justify even content-based regulations necessary
14 to prevent “fraud” and “undue influence” in the election process. *Burson*, 504 U.S. at
15 199; *see also Eu*, 489 U.S. at 228–29 (observing that “a State may regulate the flow of
16 information between political associations and their members when necessary to
17 prevent fraud”). In *Burson*, for example, the Supreme Court upheld a ban on “the
18 solicitation of votes and the display or distribution of campaign materials within 100
19 feet of the entrance to a polling place.” 504 U.S. at 193. In *Burson*, the Court also
20 recognized that the same interests generally permit restrictions aimed at preventing
21 voter intimidation. *Id.* at 206. In *Minnesota Voters Alliance v. Mansky*, the Supreme
22 Court made clear that “a State may prohibit messages intended to mislead voters about
23 voting requirements and procedures.” 585 U.S. 1, 18 n.4 (2018).¹⁴

24 Most on point, the Supreme Court has held that the compelling governmental

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26 ¹⁴ The Ninth Circuit and Supreme Court also cited these interests in upholding
27 a public records statute requiring disclosure of referendum petition signers. *Doe v.*
28 *Reed*, 586 F.3d 671, 679–81 (9th Cir. 2009), *aff’d sub nom. John Doe No. 1 v. Reed*,
561 U.S. 186 (2010).

1 interest in providing information to the electorate “alone” justifies disclosure
2 requirements about the provenance of political speech. *Citizens United v. Fed. Election*
3 *Comm’n*, 558 U.S. 310, 368–69 (2010); *see also McConnell v. Fed. Election Comm’n*,
4 540 U.S. 93, 196 (2003); *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976). Those disclosure
5 requirements are not subject to strict scrutiny in its strongest form, but to what has
6 been termed “exacting scrutiny.” *Americans for Prosperity Found. v. Bonta*, 594 U.S.
7 595, 608 (2021). That standard “requires a ‘substantial relation’ between the disclosure
8 requirement and a ‘sufficiently important’ governmental interest.” *John Doe No. 1 v.*
9 *Reed*, 561 U.S. 186, 196 (2010) (quoting *Citizens United*, 558 U.S. at 366).

10 Applying exacting scrutiny, the Supreme Court has upheld disclosure
11 requirements about core political speech in the electoral context in part because they
12 *serve* the First Amendment interests of *voters*. In *Citizens United*, the Supreme Court
13 upheld disclosure requirements for corporate campaign contributions. *Id.* at 367–71.
14 It explained that disclosure about the provenance of political speech “permits citizens
15 and shareholders to react to the speech of corporate entities in a proper way” and “[t]his
16 transparency enables the electorate to make informed decisions and give proper weight
17 to different speakers and messages.” *Id.* at 370; *see also McConnell*, 540 U.S. at 197
18 (recognizing that although disclosure requirements in the electoral context can burden
19 the speech of those to whom they apply, they also serve “the competing First
20 Amendment interests of individual citizens seeking to make informed choices in the
21 political marketplace”). For similar reasons, the Supreme Court has likewise upheld
22 disclosure requirements for lobbying activities, *United States v. Harriss*, 347 U.S. 612,
23 625 (1954), and “political propaganda” published by agents of foreign powers, *Meese*
24 *v. Keene*, 481 U.S. 465, 480 (1987).¹⁵

25
26 ¹⁵ *FEC v. Ted Cruz for Senate*, on which Mr. Kohls primarily relies, was not a
27 case about disclosure requirements. 596 U.S. 289 (2022). There, Senator Cruz
28 challenged a provision of federal law barring campaigns from using more than

(continued...)

1 In the electoral context, the compelling governmental interests recognized by
2 the Supreme Court reflect a fundamental truth about democracy: “In a republic where
3 the people are sovereign, the ability of the citizenry to make informed choices among
4 candidates for office is essential.” *Citizens United*, 558 U.S. at 339. Precisely because
5 “the public has an interest in knowing who is speaking about a candidate shortly before
6 an election,” the government’s “informational interest alone” can often justify
7 disclosure laws about the provenance of political speech that “help viewers make
8 informed choices in the political marketplace.” *Id.* at 369.

9 These compelling interests can clearly justify appropriately tailored disclosure
10 requirements for political deepfakes. Like disclosures about the source of campaign
11 contributions, political deepfake disclosure laws “insure that the voters are fully
12 informed’ about the person or group who is speaking” and “enable[] the electorate to
13 make informed decisions and give proper weight to different speakers and messages.”
14 *Citizens United*, 558 U.S. at 368–69 (quoting *Buckley*, 424 U.S. at 76).

15 **B. Additional Compelling Governmental Interests Outside the**
16 **Electoral Context Can Also Justify Disclosure Laws for Political**
17 **Deepfakes**

18 Beyond the electoral context, there are still other compelling governmental
19 interests that can justify disclosure requirements for deepfakes about candidates and
20 election officials.

21 There is a compelling governmental interest in protecting the integrity of
22 government processes and preventing the fraudulent impersonation of government
23 officials and agencies. For example, various provisions of the United States Code

24 _____
25 \$250,000 of funds raised after election day to repay a candidate’s personal loans. *Id.*
26 at 293. It is clear in context that the Supreme Court’s reference to “restricting political
27 speech” was intended to refer to restrictions in the nature of caps on election-related
28 spending. *Id.* at 305. In contrast, disclosure laws, like AB 2839, are “a less restrictive
alternative” to laws “that impose[] a ceiling on” political speech. *Citizens United*, 558
U.S. at 369.

1 prohibit impersonating federal officials and the federal government itself. *See, e.g.*, 18
2 U.S.C. §§ 709, 712, 912. Many states have their own versions of these prohibitions.¹⁶
3 In *United States v. Alvarez*, the Supreme Court explained that these kinds of statutes
4 do not run afoul of the First Amendment because they serve to “protect the integrity
5 of Government processes” or otherwise “implicate fraud or speech integral to criminal
6 conduct,” two categories of speech historically carved out from First Amendment
7 protection. 567 U.S. 709, 721 (2012); *see United States v. Lepowitch*, 318 U.S. 702,
8 704 (1943) (holding that the purpose of 18 U.S.C. § 912 is to “maintain the general
9 good repute and dignity of the (government) service itself”).^{17, 18}

10
11 ¹⁶ Rebecca Green, *Counterfeit Campaign Speech*, 70 Hastings L.J. 1445, 1474
& nn. 155–58 (2019) (collecting state prohibitions on impersonating state officials).

12 ¹⁷ Notably, just this week, it was reported that Senator Ben Cardin (D-Md.), the
13 Democratic chair of the Senate Foreign Relations Committee, was the target of an
14 advanced deepfake operation that aim of which was to apparently elicit admissions
15 dangerous to the national security. Dan Merica, *Sophistication of AI-Backed Operation*
16 *Targeting Senator Points to Future of Deepfake Schemes*, Assoc. Press (Sept. 26,
2024), <https://apnews.com/article/deepfake-cardin-ai-artificial-intelligence-879a6c2ca816c71d9af52a101dedb7ff>.

17 ¹⁸ AB 2839 differs from the 18 U.S.C. § 912 prohibition on impersonating
18 federal officials in that it goes beyond mere impersonation to specify that only specific
19 impersonating content is unlawful—namely, impersonations that convey messages
20 likely to harm the reputation of candidates and officials or undermine confidence in
21 election results. *Cf.* Cal. Elec. Code § 20012(b)(1); 18 U.S.C. § 912. If the set of
22 candidate and election official impersonations targeted by AB 2839 are essentially a
23 kind of proscribable fraud or defamation, the content-based distinction of AB 2839 is
24 constitutional, so long “the basis for the content discrimination consists entirely of the
25 very reason the entire class of speech at issue is proscribable.” *R.A.V. v. City of St.*
26 *Paul*, 505 U.S. 377, 388 (1992); *see id.* (explaining why the government may
27 specifically criminalize threats of violence against the President). Alternatively, if the
28 speech covered is protected, the further content-based discrimination would be
constitutional, so long as it is appropriately (though not necessarily perfectly) tailored
to serve the government’s compelling interests. *See Reed v. Town of Gilbert, Ariz.*,
576 U.S. 155, 163 (2015); *see supra* Section II.A. Either way, AB 2839 is ultimately
narrower than the general prohibition on impersonation in 18 U.S.C. § 912.

1 There is also a compelling governmental interest in preventing the harmful
2 impersonation of private individuals, and California and other states have criminalized
3 impersonating another private individual with intent to obtain a benefit or to injure or
4 defraud that person or anyone else. *E.g.*, Cal. Penal Code § 529; N.Y. Penal Law §
5 190.25; Tex. Penal Code Ann. § 33.07(a). When these statutes have been facially
6 challenged—including on the grounds that they might unconstitutionally reach
7 protected parody—courts have upheld them, concluding they are supported by
8 compelling governmental interests in preventing the malicious, nonconsensual usage
9 of someone else’s name and protecting private individuals’ reputations; and those
10 courts have made clear that in the rare case protected parody is prosecuted, an as-
11 applied defense will suffice. *See, e.g., Golb v. Att’y Gen. of the State of New York*, 870
12 F.3d 89, 101–03 (2d Cir. 2017); *Ex parte Bradshaw*, 501 S.W.3d 665, 674–77 (Tex.
13 App. 2016).¹⁹

14 The Supreme Court, too, recognized the compelling governmental interest in
15 protecting individuals’ reputations when it explained why there is no absolute
16 protection for news media from state libel law. *Gertz v. Robert Welch, Inc.*, 418 U.S.
17 323, 341 (1974). “We would not lightly require the State to abandon” its interest in
18 protecting individuals’ reputations, the Court wrote, “for, as Mr. Justice Stewart has
19 reminded us, the individual’s right to the protection of his own good name ‘reflects no
20 more than our basic concept of the essential dignity and worth of every human being—
21

22
23 ¹⁹ In *Golb v. Attorney General of the State of New York*, the Second Circuit
24 offered a narrowing construction of New York’s impersonation statute that might be
25 useful to this Court, explaining that “[p]arody . . . differs from ‘impersonat[ion]’”
26 because “[w]hile it is true that a parody enjoys First Amendment protection
27 notwithstanding that not everybody will get the joke, it is also true that parody depends
28 on *somebody* getting the joke; parody succeeds only by its recognition as parody. An
author who intends to fool everyone may be pulling a prank or perpetrating a hoax,
but the result is not a parody.” 870 F.3d 89, 102 (2d Cir. 2017).

1 a concept at the root of any decent system of ordered liberty.” *Id.* (quoting *Rosenblatt*
2 *v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

3 Each of these compelling governmental interests could justify appropriately
4 tailored disclosure laws for deceptive political deepfakes. Indeed, disclosure laws for
5 deepfake impersonations of candidates and election officials that mislead voters, harm
6 the reputations of candidates or officials, or undermine the functioning of elections
7 may often be the least restrictive means of protecting the government’s compelling
8 interests in protecting the integrity of government processes, preventing fraud, and
9 protecting individuals’ reputations in this context.

10 **III. MANY POLITICAL DEEPFAKES ARE UNPROTECTED SPEECH**

11 While many political deepfakes are fully protected under the First Amendment,
12 many others are not. Applying AB 2839 to deepfakes that fall fully outside the
13 protection of the First Amendment raises no First Amendment concerns. Consider
14 three examples.

15 ***Fraud.*** A deepfake of a candidate for Vice President of the United States urges
16 viewers to donate to their campaign using a certain link, but the link routes funds to
17 the opposing campaign instead. That is fraud, and “the First Amendment does not
18 shield fraud.” *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600,
19 612 (2003). As applied to fraudulent-solicitation deepfakes, AB 2839 gives rise to no
20 First Amendment concerns.

21 ***True Threats.*** A deepfake of a candidate for President portrays the candidate as
22 saying in-person voters will be mandatorily vaccinated. That is a true threat, *Nat’l*
23 *Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 119–20 (S.D.N.Y.
24 2023), and unprotected by the First Amendment, *Virginia v. Black*, 538 U.S. 343, 359
25 (2003). As applied to true-threat deepfakes, AB 2839 gives rise to no First Amendment
26 concerns.

1 **Defamation.** A deepfake of an election official shows the official confessing to
2 throwing away ballots reflecting votes for one party’s candidate in order to swing the
3 election, and the publisher knows the official did not confess to committing any such
4 crime. That is defamation *per se*. Cal. Civ. Code §§ 45a, 46; *see also Barker v. Fox &*
5 *Assocs.*, 240 Cal. App. 4th 333, 351 (2015). Even in the context of “political speech”
6 about politicians and high-level government officials, defamation is unprotected by
7 the First Amendment when published with knowledge of falsity or reckless disregard
8 for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *see also Balla*
9 *v. Hall*, 59 Cal. App. 5th 652, 659 (2021) (“Although political speech is appropriately
10 accorded wide latitude, especially in election campaigns, calculated or reckless
11 falsehoods can still amount to defamation even in that context.”). AB 2839 reaches
12 only deepfakes published by someone with knowledge the content is “false or with a
13 reckless disregard for the truth.” Cal. Elec. Code § 20012(f)(7). Accordingly as applied
14 to defamatory deepfakes, AB 2839 gives rise to no First Amendment concerns.²⁰
15

16 ²⁰ As for parody, the Supreme Court’s treatment of parody in the defamation
17 context illustrates well how AB 2839, even without an explicit carveout provision and
18 even setting aside the safe harbor labeling provision, might still carve parody videos
19 out from its coverage and how someone like Mr. Kohls could raise an as-applied
20 parody defense. In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court made clear
21 that the First Amendment protects parody and explained that someone cannot be sued
22 for defamation for a parody so long as it cannot “reasonably be understood as
23 describing actual facts about” the person depicted or is “not reasonably believable.”
24 485 U.S. 46, 57 (1988). That dovetails neatly with AB 2839’s requirements that
25 actionable “materially deceptive content” must “appear to a reasonable person to be
26 an authentic record of the actual speech or conduct of the individual depicted in the
27 media,” and be “reasonably likely” to either harm someone’s reputation or falsely
28 undermine confidence in the outcome of an election. Cal. Elec. Code § 20012(b)(1),
(f)(7). Should Mr. Kohls ever be sued, he would have two ready responses. First, he
could argue that no one could reasonably believe his parody videos to be authentic,
such that AB 2839 doesn’t reach his videos as a matter of statutory construction.
Second, if AB 2839 does require that he label his videos, he could raise an as-applied
parody defense to the labeling requirements.

1 These are just three examples, but the same analysis goes for deepfakes that
2 consist of other historically unprotected categories of speech, including incitement,
3 obscenity, fighting words, speech integral to criminal conduct, and so forth. *See*
4 *Counterman v. Colorado*, 600 U.S. 66, 74 (2023); *United States v. Alvarez*, 567 U.S.
5 709, 717 (2012).

6 Because AB 2839 reaches unprotected deepfakes and thus, at a minimum, has
7 some plainly legitimate sweep, the Court must determine whether “the law’s
8 unconstitutional applications substantially outweigh its constitutional ones.” *Moody*,
9 144 S. Ct. at 2397.

10 CONCLUSION

11 For the reasons above, however the Court rules on Mr. Kohls’ facial challenge
12 to AB 2839, *Amicus* urges the Court not to undercount the many compelling
13 governmental interests that can support appropriately tailored disclosure laws or rely
14 on an overly broad reading of the First Amendment’s protection for deceptive political
15 deepfakes. To do so would short-circuit good faith efforts around the country to enact
16 sensible regulations of deceptive political deepfakes.

17
18 Dated: September 27, 2024

Respectfully submitted,

19
20 By: 

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8 **Pro hac vice* applications forthcoming

9 *Attorneys for Amicus Curiae*

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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF CALIFORNIA
14 SACRAMENTO DIVISION

15 CHRISTOPHER KOHLS,
16
17 *Plaintiff,*
18
19 v.
20 ROB BONTA, *et al.*,
21
22 *Defendants.*

No. 24-cv-02527-JAM-CKD
**[PROPOSED] ORDER
GRANTING MOTION FOR
LEAVE TO FILE *AMICUS
CURIAE* BRIEF**

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1 Upon consideration of the Motion for Leave to File *Amicus Curiae* Brief in
2 Support of Neither Party on Behalf of The Protect Democracy Project (“the Motion”),
3 it is hereby:

4
5 **ORDERED** that the Motion be **GRANTED**; and it is further

6
7 **ORDERED** that *Amicus Curiae* The Protect Democracy Project’s Brief in
8 Support of Neither Party on Behalf of The Protect Democracy Project, attached as
9 exhibit to the Motion, is deemed filed.

10
11 DATED this _____ of _____, _____.

12
13
14 _____
HON. JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE