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September 6, 2024

VIA EMAIL

The Honorable Gavin Newsom
Governor, State of California
1021 O Street, Suite 9000
Sacramento, CA 95814

Re: Request for veto — AB 2655 (Berman)

Dear Governor Newsom:

We write on behalf of the First Amendment Coalition, a nonprofit public interest organization dedicated to advancing free speech, a free press, and government transparency, to respectfully request a veto of AB 2655. Regardless of whether its purpose is commendable, the bill would violate the First Amendment by intruding on editorial discretion and discriminating based on the content or viewpoint of speech, thus exposing the state to costly constitutional litigation.

AB 2655 would unconstitutionally compel online news organizations to include a mandatory disclaimer if they publish "materially deceptive content that an online platform is required to block or label." To compel the press to report on such material in any given way violates the editorial discretion guaranteed by the First Amendment. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment."); *Wash. Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) (striking down "publication requirement" for news outlets to post certain information about political advertisements). In addition, by requiring a disclaimer only fo publications that carry "news and commentary of general interest" but not other news, the bill would unconstitutionally discriminate based on the content of the publication. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163, 165–66 (2015).

AB 2655 would also violate the First Amendment by requiring certain online platforms to block, prevent, or label designated content. The Supreme Court recently confirmed that the First Amendment protects the editorial discretion of platforms over the content that they choose to host. *Moody v.NetChoice, LLC*, 144 S. Ct. 2383, 2400–08 (2024). As the Court said, "'[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary.'" *Id*. at 2403 (alteration in original) (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011)). Social media and other platforms "create a distinctive expressive offering" based on "a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint," and in doing so, "they receive First Amendment protection." *Id*. at 2405–06. The government "cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few

greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana." *Id*. at 2407.

While platforms may establish their own content moderation policies and procedures, and many have done so, the government cannot compel them to do so in any particular fashion. To violate that principle risks suppressing far more speech than the content identified in AB 2655. Faced with the legal compulsion to vet reported posts to determine if they contain "materially deceptive content," platforms would likely be forced to censor or prohibit speech out of fear of liability, including much political speech that lies at the core of the First Amendment.

Apart from those problems, AB 2655 singles out speech of particular content, and any law based on its content of speech is "presumptively unconstitutional" regardless of any "innocuous justification" or "benign motive" the government might have for enacting it. *Reed* , 576 U.S. at 163, 165–66. "Content-based restrictions on speech are subject to strict scrutiny and may only be upheld if they are the least restrictive means available to further a compelling government interest." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citation and internal quotation marks omitted). "The least-restrictive-means standard is exceptionally demanding." *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp*., 529 U.S. 803, 813 (2000) (citation omitted).

To the extent AB 2655 is concerned with materially false and defamatory statements of fact, the existing law of defamation provides an established framework for pursuing such claims directly against the creators of such content and represents a less restrictive alternative than imposing burdensome requirements on social media platforms.

Among other elements, defamation requires a false statement of fact "that exposes the plaintiff 'to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.'" *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 112 (2007) (quoting Civ. Code § 45)). By referring to content that is only "reasonably likely to harm the reputation . . . of a candidate," as opposed to the rigorous proof necessary to establish defamation, AB 2655 goes beyond existing law and is not the least restrictive alternative for addressing materially false and defamatory statements of fact. AB 2655 discriminates based on viewpoint by referring to content that harms a targeted candidate but not content that inflates the reputation of a candidate. An alleged deepfake might influence elections by positively portraying a candidate, for example by falsely depicting a heroic deed, but it would not be subject to the statute if it is not reasonably likely to harm that candidate's reputation or electoral prospects. To prohibit false criticism while allowing false praise violates the First Amendment by discriminating based on viewpoint. *Chaker v. Crogan*, 428 F.3d 1215, 1228 (9th Cir. 2005).

Finally, AB 2655 may well be preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c), which "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). Section 230 "must be interpreted to protect

websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc). By allowing claims against platforms arising from content posted by users, AB 2655 presents the scenario Section 230 was designed to address. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, [Section 230(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").

For these reasons, we respectfully request a veto of AB 2655. Please feel free to contact Ginny LaRoe, advocacy director, at glaroe@firstamendmentcoalition.org, with any questions.

Very truly yours,

FIRST AMENDMENT COALITION

Ginny LaRoe
Advocacy Director

FIRST AMENDMENT COALITION

David Loy
Legal Director

cc: The Honorable Marc Berman, California State Assembly
Emily Patterson, Office of Governor Newsom