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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 2839

Dear Governor Newsom:

We write on behalf of the First Amendment Coalition, a California nonprofit public interest organization dedicated to advancing free speech, a free press, and government transparency, to respectfully request a veto of AB 2839. Regardless of whether its purpose is commendable, the bill would unconstitutionally infringe on the editorial discretion of the press and impose content-based restrictions on political speech, thus exposing the state to costly constitutional litigation.

AB 2839 would unconstitutionally compel news outlets to include mandatory disclaimers if they broadcast or publish "materially deceptive content." 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).

Apart from that problem, AB 2839 singles out speech of particular content, and a content-based restriction of speech is "presumptively unconstitutional" regardless of any "innocuous justification" or "benign motive." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 165–66 (2015). "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. Hobb*s, 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).

By requiring a disclaimer for "materially deceptive content," and in print publications that carry "news and commentary of general interest" but not other news, AB 2839 would unconstitutionally discriminate based on the content of speech. To the extent AB 2839 is concerned with materially false and defamatory statements of fact, the existing law of

defamation provides an established framework for addressing such claims and represents a less restrictive alternative. 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 imposing liability for content that is "reasonably likely to harm the reputation . . . of a candidate," as opposed to the rigorous proof to establish defamation, AB 2839 goes beyond existing law and is not the least restrictive alternative for addressing materially false statements of fact.

The bill also presents constitutional problems by authorizing an injunction against speech that is only "reasonably likely" to harm reputation, as opposed to speech that has been found to be actually defamatory. *See Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1156 (2007) (allowing injunction against repeating alleged defamation "only following a determination at trial that the enjoined statements are defamatory"); *Gilbert v. Nat'l Enquirer*, 43 Cal. App. 4th 1135, 1144 (1996) (holding preliminary injunction against alleged defamation, which can be based on finding that plaintiff is likely to prevail, "is an unconstitutional prior restraint").

By allowing courts to decide whether speech is "reasonably likely" to harm "electoral prospects" or "undermine confidence" in elections, AB 2839 would improperly embroil courts in political disputes. As the Supreme Court recently confirmed, 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." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407 (2024).

In addition, AB 2839 radically expands the scope of liability by allowing any alleged "recipient of materially deceptive content" to sue any person who distributes such content, regardless of whether the plaintiff was personally injured. AB 2839 threatens to flood the courts with complex litigation initiated by persons with no personal stake in the matter. It also threatens to enable litigation motivated by harassment or retaliation, for example by empowering anyone with a grudge against a neighbor or newspaper to file suit over a single social media post or story.

On its own terms, AB 2839 fails strict scrutiny because it is "seriously underinclusive" when "judged against its asserted justification." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). By providing that it "does not apply to a broadcasting station when it is paid to broadcast materially deceptive content" as long as the station shares its "prohibition and disclaimer requirements" with the advertiser, without requiring the advertisement to include a disclaimer, the bill would create a loophole for paid advertising that undermines its stated purposes. Moreover, the bill would present significant problems by affording this exemption only to broadcasters but not other publishers, since the First Amendment generally prohibits discriminating between different segments of the press. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591–92 (1983).

Finally, AB 2839 presents both underinclusiveness and viewpoint discrimination problems by imposing liability for content that harms the 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 liability 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).

For these reasons, we respectfully request a veto of AB 2839. Please feel free to reach out to Ginny LaRoe, advocacy director, at glaroe@firstamendmentcoalition.org, with any questions. Thank you for your consideration.

Very truly yours,

FIRST AMENDMENT COALITION

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David Loy
Legal Director

cc: The Honorable Gail Pellerin, California State Assembly
Emily Patterson, Office of Governor Newsom