No. 25-6138

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BABYLON BEE, et al.,

Plaintiffs-Appellees,

v.

ROB BONTA, in his official capacity as Attorney General of California, et al.,

Defendants-Appellants.

On Appeal from the United States District
Court for the Eastern District of California
(Case No. 24-cv-2527-JAM) (Judge John A. Mendez)

BRIEF OF WASHINGTON LEGAL FOUNDATION, THE MANHATTAN INSTITUTE, AND AMERICANS FOR PROSPERITY FOUNDATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICI CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. In furtherance of that mission, WLF has appeared before the U.S. Supreme Court and this Court to advocate for a proper interpretation of section 230 of the Communications Decency Act (CDA), *Gonzalez v. Google*, 598 U.S. 617 (2023), and a robust application of the First Amendment, *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263 (9th Cir. 2023).

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI has long produced scholarship and filed briefs supporting the First Amendment and a free society. California's law is overly broad, vague, and would hinder robust expression in political speech.

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* No party's counsel authored any part of this brief. No one, apart from Amici and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

Americans for Prosperity Foundation (AFPF) is a § 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as amicus curiae before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is necessary for an open and diverse society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech isn't pollution—its protection is "'a fundamental principle of our constitutional system.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964) (quoting *Stromberg v. Cal.*, 283 U.S. 359, 369 (1931)). No surprise then that federal law ironclads our constitutional order and safekeeps from state action the decision to provide an online forum for the "'prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions'"—including candidates and election officials. *Id.* (quoting *Bridges v. Cal.*, 314 U.S. 252, 270 (1941)).

California prefers it were otherwise. The State holds that some political speech (so-called deepfakes) "pollute[s] our information ecosystems" and transforms free expression into poison. Cal. Elec. Code § 20511(a). The State's allegedly anti-deepfake law—which by its own terms "is not limited to deepfakes," Cal. Elec. Code § 20512(i) (comma omitted)—compels major online publishers to, upon request and depending on proximity to an election, either affix a state-sponsored edit or outright delete disfavored political expression. But section 230 of the CDA forecloses the States from hijacking publishers to carry out a censorship regime, even if the targeted speech is misleading, outright false, or just digitally modified to use a public servant to make a political point. 47 U.S.C. § 230(c)(1); U.S. Const. art. VI, cl. 2.

Section 230 was originally introduced as the "Internet Freedom and Family Empowerment Act." Jeff Kosseff 81, *The Twenty-six Words that Created the Internet* (Kindle Ed. 2018). That title gets at 230's dual immunities. The first is protection for any "interactive computer service" for publishing others' work online. That's a guarantee of internet freedom. 47 U.S.C. § 230(c)(1). The second is immunity for a service disassociating itself (or empowering others to do so) from "objectionable"

content. *Id.* § 230(c)(2). Because that provision emphasizes (but is not limited to) violent or obscene content, that's the family empowerment piece. While both immunities apply here, ER-23–27, there's no need for the Court to look beyond § 230(c)(1)'s internet-freedom shield.

Lawyers understand that the First Amendment's instruction that legislatures "make no law . . . abridging the freedom of speech, or of the press" doesn't extend beyond government action to prohibit private torts. But section 230 does provide that protection, displacing some private torts absolutely. "Subsection (c)(1), by itself, shields from liability *all* publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (emphasis supplied). When it comes to online publishing, no law means *no law*. That's fatal to California's "looming threat of costly, expedited litigation" against platforms that fail to police political speech to California's liking. ER-28.

Even if section 230, "the First Amendment on steroids, for the Internet age," Kosseff 253, doesn't apply, the ordinary First Amendment compels the same outcome on different grounds. The State targets "materially deceptive content." While that may try to sound like an

ancient tort, it doesn't sound in one. Rather, it covers audio or video about candidates or certain election officials that's been "digitally . . . modified" to appear "authentic." Cal. Elec. Code § 20512(i)(1). These days, that's pretty much all online political communication.

To claw back that overbreadth, the State fenced off "minor modifications that do not significantly change the *perceived* contents or meaning of the content," *id.* § 20512(i)(2) (emphasis supplied), while limiting the deletion mandate to speech "reasonably likely to harm the reputation or electoral prospects of a candidate" or cast doubt on an election. Cal. Elec. Code § 20513(a)(2)(A-C). This so-called safe harbor teems with "the shoals of vagueness," *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (per curiam), because it relies on "amorphous considerations of intent and effect," *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (Roberts, C.J., controlling), which allow "no security for free discussion." *Thomas v. Collins*, 323 U.S. 516, 535 (1945). This opaque standard will lead to platforms over-labeling and over-deleting political speech. As ever, "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408

U.S. 104, 109 (1972) (punctuation altered, citation omitted). The First Amendment recoils from such a result. *Mills v. Ala.*, 384 U.S. 214, 218 (1966) (noting the "practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs").

So the "materially deceptive content" definition has to go. And since the statute "is incapable of functioning independently" without it, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), the entire regime must fall.

ARGUMENT

I. THE STATE'S SPEECH-SCRUBBING REGIME CAN'T BE RECONCILED WITH SECTION 230.

Think of section 230's internet-freedom immunity as an analog to the Free Exercise Clause's Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb-1. It is Congress's instruction to the courts that, when it comes to online publishing, they *must* apply a maximalist—even woodenly literal—interpretation of the First Amendment. Or think of it as Congress's sweeping version of *New York Times v. Sullivan*, an uncompromising First Amendment reading that ousts contrary state

laws to bring about an "uninhibited, robust, and wide-open" internet. 376 U.S. at 270.

Either way, unlike a bog-standard statute, which must be read parsimoniously to avoid conflict with the Constitution, section 230(c)(1) expands upon the First Amendment. Internet-freedom immunity protects platforms from any sanction for leaving an online space "free" for "the people and the press . . . to criticize officials and discuss public affairs with impunity." *Id.* at 296 (Black, J., concurring). When section 230 governs, it is quite literally the case "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

We don't need complicated guesswork or statutory exegesis to know this. Section 230 itself tells us. The statute explains that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," 47 U.S.C. § 230(a)(4), so "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2). The CDA's internet-freedom immunity brings

that policy to life, compelling courts to treat state laws targeting online publishers as "the deadly enemy of freedom and progress"—not an acceptable use of the state's police powers or a court's equitable jurisdiction. *Smith v. Cal.*, 361 U.S. 147, 160 (1959) (Black, J., concurring).

So while generally "[t]he government may not . . . alter a private speaker's own editorial choices about the mix of speech it wants to convey," *Moody v. NetChoice LLC*, 603 U.S. 707, 734 (2024), internet-freedom immunity ironclads that promise for online forums. *Barnes*, 570 F.3d at 1105. The "provision was 'enacted to protect [online platforms] against the evil of liability for failure to remove offensive content.'" *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (quoting *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc)). The core of online publishing—the ability "to edit, monitor, or remove user generated content"—can't be touched by any law or any cause of action. *Internet Brands, Inc.*, 824 F.3d at 852; *Est. of Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1180 (9th Cir. 2024) (internet-freedom immunity precludes "essentially faulting" a platform "for not moderating content in some way, whether through deletion, change, or suppression").

Yet that's precisely what the State's speech-scrubbing law demands. California has targeted speech about candidates and election administration. Cal. Elec. Code §§ 20512–20. If that speech is sufficiently edited with a computer program, *id.* § 20512(i), it risks being treated as a "pollut[ant]" to the "information ecosystem[]." *Id.* § 20511(a). An "interactive computer service," 47 U.S.C. § 230(f)(2), once alerted to that allegedly toxic expression, must "actively vet and evaluate" it for compliance with California law. *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 744 (9th Cir. 2024). If it doesn't, the platform must either (1) delete the speech if it's made within 120 days of an election (and up to 60 days after if the speech about an election official), Cal. Elec. Code § 20513(b), or (2) outside that window affix the State's preferred ride-along message ("This [speech] has been manipulated and is not authentic"). *Id.* § 20514. If the publisher doesn't properly comply within a short, statutory timeclock, an affected candidate or official, *id.* § 20515, or the "Attorney General or any district attorney or city attorney may seek injunctive or other equitable relief" against the service. *Id.* § 20516. A bit of a Rube Goldberg machine, sure, but its effect is plain: platforms must edit or remove user-generated content at the pointy end of a court's equitable

jurisdiction. That just can't be reconciled with section 230's insistence that "*no* cause of action may be brought . . . under any State or local law" that conflicts with (c)(1)'s promise. 47 U.S.C. § 230(e)(3) (capitalization altered, emphasis supplied).

The State tries to evade this defect by parading horrible collateral consequences for a government's ability to police speech with no inherent constitutional protection or redeeming social value. Cal. Br. 34–36 (revenge pornography); *id*. 24–25, 36–37 (child sexual abuse material). But governments can, of course, act against universally condemned depravities without interfering with the publication of political speech. After all, the governor of California posts deepfake content on his official feed to persuade his fellow Americans to oppose the Trump administration. Gov. Newsom Press Off., @GovPressOffice, X (Oct. 1, 2025 1:00AM) (80-second digitally modified clip of the Vice President); https://bit.ly/4rleJFy. Surely there's a dispositive difference in the distinction between that speech and child abuse.

II. THE DEFINITION OF "MATERIALLY DECEPTIVE CONTENT" IS UNCONSTITUTIONALLY VAGUE.

The State's speech-scrubbing hinges on the definition of "materially deceptive content." Cal. Elec. Code § 20512(i). While that term may try

to invoke the tort of fraud, it doesn't sound in it. Rather, materially deceptive content is just any "audio or visual media that is digitally created or modified . . . such that it would falsely appear to a reasonable person to be an authentic record of the content depicted." *Id.* § 20512(i)(1). By its own terms, that definition would cover pretty much all modern audio or video political advocacy. Campaigns and civil society groups alike seek to persuade using trimmed content: a candidate's sentences are chopped and sewn together for clarity (or not), lighting is changed to improve a person's appearance (or not), reaction shots from crowds are intercut to give an impression of enthusiasm (or not). That stuff's not done by hand—it's "digitally created or modified" all the way down. Cal. Elec. Code § 20512(i).

So the general definition of "materially deceptive content" plausibly reaches practically all online "speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). That breadth would doom the statute under even cursory judicial review, since election season is when "the First Amendment 'has its fullest and most urgent application.'" *Id.* (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Unsurprisingly, California provided a

carve-out. Yet the State's exception trades the frying pan of overbreadth for the fire of vagueness.

The statute's saving provision exempts "minor modifications that do not significantly change the perceived contents or meaning of the content" of a political communication. Cal. Elec. Code § 20512(i)(2). The line-drawing difficulty in distinguishing a major from a minor modification is obvious, despite the State's to-be-sure guidance that color "brightness or contrast" and the "removal of background noise" fall safely within the green zone. *Id*. What's especially fatal, however, is the statute's reliance on an intent-and-effect standard for ruling whether speech is deceptive or protected. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 21 (2018) (State regulation of political speech requires "objective, workable standards").

Take the famous 1988 Bush campaign ad attacking Michael Dukakis's national security credentials. *See* Museum of the Moving Image, "Tank Ride," Bush vs. Dukakis, *The Living Room Candidate*, https://perma.cc/WQY5-4QMU. The footage of a helmeted Dukakis weaving around in a tank was real—but it was modified. The ad's producers "added sound effects of grinding gears to mimic tank treads,

mixed with engine noise," which heightened the absurdity of the visual. Josh King, *Dukakis and the Tank*, Politico Magazine (Nov. 17, 2013). Today, that change would be provided by a computer program—it would be "digitally . . . modified," Cal. Elec. Code § 20512(i)—and shared on social media. Is that a "minor change that does not impact the content of the image or audio or visual media" and thus safe? *Id.* § 20512(i)(2) (pluralization and tense altered). Or is the ad no longer "an authentic record" and must now be deleted? *Id.* § 20512(i)(1). The safe harbor's text suggests that it depends on some inchoate combination of the speaker's intent and the audience's perception. That's constitutionally impermissible.

The Supreme Court has repeatedly confirmed that intents-and-effects tests for political speech are unconstitutionally vague because they "offer[] no security for free discussion." *Thomas*, 323 U.S. at 535; *Buckley*, 424 U.S. at 43. "General words" and images inevitably "create different and often particular impressions on different minds. No speaker, however careful, can convey exactly [her] meaning, or the same meaning, to the different members of an audience"—let alone escape the use of the courts by targeted politicians looking to label or delete the

effective advocacy of their opponents. *Thomas*, 323 U.S. at 535; Cal. Elec. Code § 20515.

"This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349 (2010). And so to "safeguard [First Amendment] liberty" to "'discuss publicly and truthfully all matters of public concern,'" any restriction—even one aimed at misleading political speech—must "focus[] on the substance of the communication rather than amorphous considerations of intent and effect." *Wis. Right to Life*, 551 U.S. at 469 (Roberts, C.J., controlling) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

Consider the State's regime. A complainant—likely the subject of the speech—flags a communication, forcing a platform not only to decide whether the speech was modified, but to measure by how much. The platform must then often make the next call whether it "is reasonably likely to harm the reputation or electoral prospects of a candidate" or cast doubt on election results. Cal. Elec. Code § 20513.

The company knows that if it refuses to take the speech down or impose the State's edit, it will incur costly litigation—even if ultimately vindicated. In practice, this will lead to over-labeling and over-deletion of political speech, in defiance of the First Amendment's "universal[ly] agree[d]" upon mission "to protect the free discussion of governmental affairs," which "of course includes discussions of candidates" and election administration. *Mills*, 384 U.S. at 218. As always, "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned*, 408 U.S. at 108 (punctuation altered). So the "materially deceptive content" definition must be void-for-vagueness and itself deleted.

That infirmity takes the rest of the speech-scrubbing scheme with it—that woefully vague definition is load bearing. Without it, there's no category of wrong speech regulated by the law. Since "the balance of the legislation is incapable of functioning independently," California's statute must go in one fell swoop. *Alaska Airlines*, 480 U.S. at 684.

CONCLUSION

Section 230's internet-freedom immunity and the constitutional requirement of definiteness point in the same direction. California cannot outlaw political speech. The Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,935 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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