23-7577

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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UNITED STATES OF AMERICA,

Appellee,

v.

DOUGLASS MACKEY,

Defendant - Appellant.

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On Appeal from the United States District Court for the
Eastern District of New York, Case No. 21-cr-00080-AMD

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**BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER
LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Amicus is a nonprofit organization. It has no parent corporations, and no publicly held corporation owns any portion of it.

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INTERESTS OF THE AMICUS CURIAE[1]

Formed in 1963, the Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization using legal advocacy to pursue racial justice. It fights inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of American democracy real. It has a national voting rights litigation practice. *See, e.g.*, *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013). It routinely participates in cases concerning online speech and voter intimidation. *See, e.g.*, *Counterman v. Colorado*, 143 S. Ct. 2106 (2023); *Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 120-21 (S.D.N.Y. 2023).

The Lawyers' Committee is also the convenor of the Election Protection Coalition, a nationwide, nonpartisan coalition consisting of over 300 national, state, and local partners working to ensure that voters can exercise their right to vote. Election Protection provides comprehensive information about voting and operates a hotline to help voters overcome problems with voting, including problems related to mis- and disinformation campaigns and voter intimidation. During the 2020 election cycle, the hotline fielded approximately 246,000 calls.

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[1] Lawyers' Committee files this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiæ*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

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INTRODUCTION

Defendant Douglass Mackey believed "the key" to winning the 2016 presidential election was "limit[ing] black turnout." SA73.[2] To accomplish that goal, he and co-conspirators carried out a scheme to trick Black people and other people of color into "voting" by text message so that they would not show up at the polls on election day. SA105-06. The scheme involved disseminating memes (combinations of pictures and text) designed to appeal to Black people and other people of color, including one that depicted a Black woman holding an "African Americans for Hillary" sign and one that was written in Spanish. SA64-65. The memes told voters, for example, to "Avoid the line. Vote from home. Text 'Hillary' to 59925[.] Vote for Hillary and be a part of history." A371; SA65. Tens of thousands of voters likely received these memes, and several thousand of them followed the instructions in the memes. *See* Appellee's Br. at 83 (citing GA396-557); SA5, 60. There is no way of knowing precisely how many of them fell prey to Mackey's scheme and lost their opportunity to vote as a result, but it is possible that thousands of them did.

Mackey cannot now hide behind the First Amendment to avoid accountability. Fooling voters into believing they have voted when in fact they have unknowingly

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[2] References to Defendant-Appellant's Appendix, Defendant-Appellant's Special Appendix, and the Government's Appendix are formatted as "A__", "SA__", and "GA__".

given up their right to vote is not, as Mackey argues, "political speech" protected by the First Amendment. *See* Appellant's Br. at 25-32. Mackey himself concedes this point: "To be clear, none of this necessarily forecloses a narrowly tailored law to combat knowingly false statements about the time, place, and manner of an election." *Id.* at 30. But that is directly what Mackey did. His memes were demonstrable falsehoods, fraudulently telling people that they could vote by texting. He is entitled to no First Amendment protection for these lies.

The ramifications of holding that Mackey's pernicious conduct was protected speech are potentially catastrophic. The tools and technology that Mackey employed allow individuals to create disinformation that is impossible to differentiate from truth, target populations whose votes have been historically subjected to suppressive tactics, and rapidly disseminate their messages to have the greatest possible impact. More recent generative AI tools enable individuals like Mackey to impersonate and deceive with frighteningly scientific precision. As one court explained, because "modern technology" allows bad actors to reach "vastly greater population[s] . . . with false and dreadful information, contemporary means of voter intimidation may be more detrimental to free elections than the approaches taken for that purpose in past eras, and hence call for swift and effective judicial relief." *Nat'l Coal. on Black Civic Participation v. Wohl* (*NCBCP I*), 498 F. Supp. 3d 457, 464 (S.D.N.Y. 2020). Acceptance of Mackey's argument would encourage others—

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perhaps even better organized and financed—similarly intent on suppressing the votes of targeted communities to continue to hone and deploy these tools with far-reaching and devastating impact on the rights of such voters. Further, a ruling in this case that the First Amendment shields such conduct could compromise other laws beyond 18 U.S.C. § 241 ("Section 241"), including the Ku Klux Klan Act of 1871, Voting Rights Act of 1965, and Civil Rights Act of 1957, all of which litigants have relied upon to combat voter suppression campaigns of disinformation.

Weapons of mass disenfranchisement, such as those employed by Mackey, are an existential threat to the right of voters to cast their ballot. The Court should hold that the First Amendment does not protect Mackey's voter suppression efforts.

ARGUMENT

I. **Mackey's Efforts to Suppress the Votes of Black People and Other People of Color Are Not Protected Speech.**

Mackey asserts that his memes constitute protected "political speech," supposedly shielded from government regulation. Appellant's Br. at 10. But his necessary concession that the government has the right to prohibit knowingly false statements about the time, place, and manner of elections, *id.* at 30, ineluctably undercuts his assertion. Mackey's memes bear no resemblance to the truthful interchange on matters of public concern that defines "political speech." They are, instead, unlawful lies about the means of voting that deserve no special First Amendment protection. Indeed, because Mackey's memes caused cognizable legal

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injury in voters' loss of their right to vote, his memes are not entitled to any First Amendment protection at all.

A. Mackey's Memes Are Not Political Speech

The First Amendment's protection of political speech is based on the overarching theory that the Constitution "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)). It is the "unfettered interchange of ideas for the bringing about of political and social changes" that the Constitution protects. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Thus, the Court has invalidated laws that inhibit "the discussion of political policy generally or advocacy of the passage or defeat of legislation," *id.* at 422-23, 428 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)), or impose "restrictions on advocacy of the election or defeat of political candidates," *Buckley*, 424 U.S. at 50.

The truthful interchange of ideas is nowhere found in Mackey's memes. They are not remotely similar, as Mackey would have it, to "political misinformation" or lies "about a candidate's background, endorsements, or policies." Appellant's Br. at 21-22; *cf. id.* at 29 (citing cases in which courts invalidated laws that prohibited persons from disseminating false information about political candidates, *see Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 469-70 (6th Cir. 2016); *Commonwealth*

v. Lucas, 34 N.E.3d 1242, 1244-45 (Mass. 2015); *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826, 826-27 (Wash. 2007), or ballot information, *see 281 Care Comm. v. Arneson*, 766 F.3d 774, 778 (8th Cir. 2014)). They do not, for example, inhibit the discussion of political policy or advocacy of the election or defeat of political candidates. *Cf. Meyer*, 486 U.S. at 422-23, 428; *Buckley*, 424 U.S. at 50. Rather they are lies as to how a person, mechanically, can exercise their right to vote.

As noted above, Mackey has conceded that the government can lawfully prohibit fraudulent statements about the time, place, and manner of voting. Appellant's Br. at 30 ("To be clear, none of this necessarily forecloses a narrowly tailored law to combat knowingly false statements about the time, place, and manner of an election."). Indeed, the Supreme Court has expressly differentiated between true and protected political speech and unprotected speech relating to elections similar to Mackey's memes on this very basis. In *Minnesota Voters Alliance v. Mansky*, 585 U.S. ___, 138 S. Ct. 1876 (2018), the Court was confronted with Minnesota's ban on the wearing of political apparel inside a polling place on election day. In holding that the political apparel ban was not capable of reasoned application and thus violated the First Amendment, the Court specifically explained that speech that confused voters how to vote was not protected:

> The State also maintains that the 'Please I.D. Me' buttons were properly banned because the buttons were designed to confuse other voters about whether they needed photo identification to vote. ***We do not doubt that the State may***

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> ***prohibit messages intended to mislead voters about voting requirements and procedures.*** But that interest does not align with the State's construction of 'political' to refer to messages 'about the electoral choices at issue in [the] polling place.'

138 S. Ct. at 1889 n.4. (emphasis added) (citation omitted).

Mackey's memes cannot be described as anything other than "messages intended to mislead voters about voting requirements and procedures." Mackey attempted to interfere with electors' "right to exercise the franchise in a free and unimpaired manner" by trying to fool them into believing they could vote by text message. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (internal quotation omitted). Mackey and his co-conspirators spent months devising methods to disenfranchise voters. *See* SA60-67, 104-07. Mackey specifically contemplated "limit[ing] black turnout." SA73. He tweeted a meme of "a Black woman holding a sign that read[] 'African Americans for Hillary,'" SA64, and transposed text that read, "Avoid the line. Vote from home. Text 'Hillary' to 59925[.] Vote for Hillary and be a part of history." SA64-65; A371. It contained fine print that said, "Must be 18 or older to vote. One vote per person. Must be a legal citizen of the United States. Voting by text not available in Guam, Puerto Rico, Alaska or Hawaii. Paid for by Hillary Clinton for President 2016." A371. It included the hashtag "#GoHillary" and one of Hillary Clinton's slogans. *Id.* He then tweeted another meme containing a similar message but written in Spanish. SA65-66; *see also* A372. His co-conspirators

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also posted memes falsely telling people they could vote using a hashtag. *See, e.g.*, SA64, 106; A314 ("Remember @HillaryClinton voters, on Nov 8th, you can vote from home by #Tweeting '#Hillary', this is only set up for @HillaryClinton voters."). Such speech bears absolutely no similarity to statements such as "Barack Obama was born abroad, Donald Trump is a secret Russian agent, or Hunter Biden sold access to the President." Appellant's Br. at 28.

Mackey's other examples are useful in differentiating between political speech and lies about voting qualifications and procedures. Falsely telling voters that rain is likely on election day or that the polls predict a landslide for a candidate, Appellant's Br. at 28, does not "mislead voters about voting requirements and procedures," *Mansky*, 138 S. Ct. at 1889 n.4. Falsely telling voters that they are not eligible to vote if they have unpaid parking tickets, Appellant's Br. at 28, does "mislead voters about voting requirements and procedures," *Mansky*, 138 S. Ct. at 1889 n.4.

Mackey's memes are not political speech and thus deserve no special protection under the First Amendment.

B. Mackey's False Speech Loses First Amendment Protection Because It Caused Cognizable Injury and Was Fraudulent

Mackey argues that "[t]he First Amendment's protection of *free* speech includes protection of *false* speech." Appellant's Br. at 25. Though this may be the case in other contexts such as those mentioned above, it is not the case here.

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Although lies may not, as Mackey claims, "categorically lack constitutional cover," *id.*, lies *do* lose First Amendment protection when a person intentionally uses them to cause cognizable harm or commit fraud. This is just such a case. Mackey intentionally caused cognizable harm by attacking individuals' right to the franchise, and in doing so he committed fraud. Therefore, he is not entitled to First Amendment protection.

In *United States v. Alvarez*, the Court considered the constitutionality of the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals regardless of whether that falsity caused legally cognizable harm. 567 U.S. 709, 715-16 (2012) (plurality opinion). The Court, through a plurality opinion from Justice Kennedy and concurrence from Justice Breyer, struck down the Act as overbroad under the First Amendment. *Id.* at 730, 739. The plurality and Justice Breyer disagreed on the level of scrutiny that applied to laws like the Stolen Valor Act that "target[] falsity and nothing more." *Id.* at 719. The plurality would (and did) apply strict scrutiny, *id.* at 724-29, but Justice Breyer would have applied intermediate scrutiny because the Act concerned "false statements about easily verifiable facts that do not concern [philosophy, religion, history, the social sciences, the arts, and the like]." *Id.* at 732 (Breyer, J., concurring).[3] The three

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[3] Strict scrutiny requires proof that a restriction on speech is narrowly tailored to serve compelling state interests. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Intermediate scrutiny only requires proof that a restriction on speech is

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dissenting justices took the position that false statements of fact are generally not entitled to constitutional protection. *Id.* at 748-49 (Alito, J., dissenting) ("[F]alse statements of fact merit no First Amendment protection in their own right.").

But as other circuit courts have recognized, the plurality and concurrence converged on a narrow holding that controls the outcome in this case: both agreed that the First Amendment does not shield false speech that also results in legally cognizable harm.[4] *See id.* at 719 (plurality opinion); *id.* at 734-36 (Breyer, J., concurring); *see also, e.g.*, *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1232 (10th Cir. 2021) ("Both opinions [from *Alvarez*] also agree restrictions on false factual statements that cause legally cognizable harm tend not to offend the Constitution."); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021) (holding prohibition on use of lies to trespass was permissible because it only reached lies associated with legally cognizable harm). To the *Alvarez* plurality, the reason the Act was subject to strict scrutiny but defamation and fraud received "no First Amendment protection" was because defamation and fraud resulted in "some other legally cognizable harm associated with a false statement." *Alvarez*, 567 U.S. at

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"narrowly tailored to serve a significant governmental interest." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[4] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (cleaned up).

719.[5] Justice Breyer similarly distinguished statutes that merely prohibited false speech from those with additional requirements, like proof of injury or harm, which he considered to be constitutional. *See id.* at 734-36. He noted that "a more finely tailored statute" that required "a showing that the false statement caused specific harm" or "focus[ed] its coverage on lies most likely to be harmful" would pass muster. *Id.* at 738. Both opinions also recognized that not all legally cognizable harm consisted of "actual financial or property loss resulting from the deception." *Id.* at 721 (plurality opinion) (cleaned up); *see id.* at 735 (Breyer, J., concurring) (noting with approval perjury statutes and laws prohibiting false claims of terrorist attacks and the impersonation of a public official).

Pursuant to the plurality and Justice Breyer's holding in *Alvarez*, the First Amendment does not protect Mackey's speech, as there is no doubt that Mackey used false speech and caused legally cognizable harm. Several thousand unique telephone numbers texted "Hillary" or some variation to the phone number Mackey included in his memes, *see* Appellee's Br. at 38; GA396-557; A116-18; SA5, duped into believing they were exercising their right to vote. Few things are more valuable than that right. It is, as the Supreme Court has reminded us, "preservative of other basic civil and political rights." *Kramer*, 395 U.S. at 626 (internal quotation

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[5] The plurality also would require proof of a knowing or reckless falsehood. *Id.* at 719. In this case, Mackey's intent is undeniable. *See infra* p.13.

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omitted); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (holding "the political franchise of voting" is "a fundamental political right, because [it is] preservative of all rights"). Even to describe the loss of that right as "legally cognizable harm" is a gross understatement. In addition to the loss of the right to vote, Mackey's actions caused confusion among voters and other organizations to spend resources countering his message. *See* SA68-69, 90 (describing response by Clinton campaign and by company that leased phone number used by Mackey); *see also* GA99.2 (Mackey testifying that he used Clinton campaign hashtags in memes so that "they would have to spend time dealing with it rather than focus on their campaign.")

But even apart from *Alvarez*, Mackey's memes lose First Amendment protection because they fall under the well-recognized First Amendment exception for fraud. Fraud is a prototypical type of speech that historically has been excluded from First Amendment protection. *United States v. Stevens*, 559 U.S. 460, 468 (2010); *see also, e.g.*, *Alvarez*, 567 U.S. at 717 (plurality opinion); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (collecting cases). Thus, the First Amendment is no shield for a defendant where "the gravamen" of their actions was "particular representations made with intent to mislead." *Id.* at 602-03. In New York, the "elements of a common law fraud claim are a material false representation, an intent to defraud thereby, and reasonable reliance on the

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representation, causing damage." *United States v. Mackey*, 652 F. Supp. 3d 309, 348 (E.D.N.Y. 2023) (internal quotation omitted).

Mackey's memes were completely fraudulent attempts to dupe voters into thinking they had voted when they had not. Mackey's memes contained multiple material false representations, including that individuals could vote by text and that the memes were "[p]aid for by Hillary for President 2016." A371. Mackey intended to defraud the recipients, particularly Black voters. Mackey was a member of multiple chat groups in which participants discussed how best to deceive voters with election disinformation. SA60-61, 63-64, 105; Appellee's Br. at 8-9. Mackey publicly expressed his belief that women, "single mothers," "immigrants," "the children of immigrants," and "[n]aturalized citizens" should not have the right to vote, and that "the only thing standing in Trump's path is [redacted] black voters." Appellee's Br. at 18 (second alteration in original). Shortly after posting his memes, Mackey tweeted, "Obviously, we can win Pennsylvania. The key is to drive up turnout with non-college whites, and limit black turnout." GA208; SA73. There was reasonable reliance—several thousand unique telephone numbers texted "Hillary" or something similar to the number that Mackey included in his meme. *See* Appellee's Br. at 38; GA396-557; A116-18; SA5. And to the extent Mackey caused confusion among the electorate about how to vote, forced organizations to spend

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resources to combat his disinformation, or tricked individuals into not submitting a valid vote, Mackey caused damage.

For both these reasons, Mackey is not entitled to First Amendment protection.

II. Providing Protection to Mackey's Efforts to Suppress Votes May Have Far-Reaching Consequences Beyond this Case.

Mackey's memes specifically targeted Black and Latino people with false information, designed to have them forfeit their right to vote. Such tactics aimed at communities of color are, unfortunately, nothing new, but the technologies enabling those tactics are. Acceptance of Mackey's arguments could encourage others to employ those new technologies with more devastating consequences and leave litigants with fewer avenues of relief.

Black people and other people of color frequently are the targets of disinformation campaigns designed to suppress their votes. *See generally* Sylvia Albert et al., *As a Matter of Fact: The Harms Caused by Election Disinformation*, Common Cause Educ. Fund 12-29 (Oct. 2021);[6] Ian Vandewalker, *Digital Disinformation and Voter Suppression*, Brennan Ctr. for Just. (Sept. 2, 2020).[7] Recent disinformation campaigns include spreading falsehoods that "told [voters] it was dangerous to vote . . . [because] the government would record who people voted

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[6] https://www.commoncause.org/wp-content/uploads/2021/10/CC_AsaMatterofFact_FINAL_10.27.21.pdf.

[7] https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression.

for and they might face consequences," Ashley Nerbovig, *Michigan's Immigrant Communities Hit With Misinformation on Closed Platforms*, Detroit Free Press (Nov. 27, 2020);[8] that immigration officers would monitor voting, Blake Peterson, *ICE, Dispelling Rumors, Says It Won't Patrol Polling Places*, ProPublica (Nov. 2, 2018);[9] that scantron ballots had "swapped sensors," so that "[i]f you are intending on voting for Joe Biden, you must bubble in Trump and vice versa," *id*.; and numerous others.[10]

While the goal of suppressing the rights of voters of color to vote is not new, the means of achieving this goal have changed—and not in a good way. Technology has made it easier for those who would suppress the right to vote to target with greater specificity voters of color and to impact exponentially greater numbers of them. In fact, the use of social media to suppress Black votes was a pillar of Russia's strategy to interfere in the 2016 presidential election. *See* S. Rep. No. 116-290, at 105, 108 (2020) ("No single group of Americans was targeted by [the Internet

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[8] https://www.freep.com/story/news/politics/elections/2020/11/27/michigan-election-misinformation-immigrant-whatsapp/6393693002/.

[9] https://www.propublica.org/article/ice-dispelling-rumors-says-it-wont-patrol-polling-places.

[10] *See, e.g.*, Tiffany Hsu, *Misinformation Swirls in Non-English Languages Ahead of Midterms*, N.Y. Times (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/business/media/midterms-foreign-language-misinformation.html (Spanish-language disinformation rampant in the 2022 election season); Kimmy Yam, *Right-Wing Disinformation Ramps Up on WeChat Ahead of Midterms, Report Finds*, NBC News (Oct. 3, 2022), https://www.nbcnews.com/news/asian-america/right-wing-disinformation-ramps-wechat-ahead-midterms-report-fin ds-rcna50539 (disinformation targeted at Chinese Americans).

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Research Agency (IRA)] information operatives more than African-Americans.").[11] The IRA—the private troll factory carrying out the disinformation campaign—used Instagram accounts with names like "@Blackstagram_," which gained over 100,000 followers, and Twitter and Facebook accounts targeted at Black voters that disseminated messages like "Don't Vote at All," "Why Would We Be Voting," or "Our Votes Don't Matter." *Id.* at 92, 105, 119.

The threat of "electoral terror" to Black people, other people of color, and to democratic institutions has grown since 2016. *NCBCP I*, 498 F. Supp. 3d at 464. New tools allow individuals to create and spread more viral and convincing election disinformation, cheaper and faster. There are now widely available "generative AI" products like chatbots that "can write poems, tell jokes, and churn out essays that look like a human created them." Kim Martineau, *What Is Generative AI?*, IBM Rsch. (Apr. 20, 2023).[12] Whereas prior disinformation campaigns "were often pockmarked with obvious errors and missteps," new AI tools "could blunt those flaws by erasing or mitigating glitchy visuals, mistranslations, grammatical faux pas, and bungled idioms so deceptions do not attract as much suspicion." Mekela Panditharatne & Noah Giansiracusa, *How AI Puts Elections at Risk — And the*

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[11] https://www.congress.gov/116/crpt/srpt290/CRPT-116srpt290.pdf.
[12] https://research.ibm.com/blog/what-is-generative-AI.

Needed Safeguards, Brennan Ctr. for Just. (July 21, 2023).[13] They can create human-seeming chatbots to converse with voters as well as "facilitate entire misinformation-filled fake news sites." *Id.*

Malicious actors are already using these tools to create and spread "deepfake" images, videos, and audio. Deepfakes are AI-generated or modified content that depict things that never happened—images or videos of events that never occurred and recordings of people saying things they never said. *See* Todd C. Helmus, *Artificial Intelligence, Deepfakes, and Disinformation: A Primer*, RAND Corp. (July 2022).[14] They can be so convincing that they can fool a person's family and bank. Joanna Stern, *I Cloned Myself With AI. She Fooled My Bank and My Family.*, Wall St. J. (Apr. 28, 2023);[15] Emily Flitter & Stacy Cowley, *Voice Deepfakes Are Coming for Your Bank Balance*, N.Y. Times (Aug. 30, 2023).[16] They are easy and cheap to create—a professor created a deepfake of himself in only eight minutes and for eleven dollars. Shannon Bond, *It Takes a Few Dollars and 8 Minutes to Create a Deepfake. And That's Only the Start*, NPR (Mar. 23, 2023).[17]

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[13] https://www.brennancenter.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards.

[14] https://www.rand.org/pubs/perspectives/PEA1043-1.html.

[15] https://www.wsj.com/articles/i-cloned-myself-with-ai-she-fooled-my-bank-and-my-family-356bd1a3.

[16] https://www.nytimes.com/2023/08/30/business/voice-deepfakes-bank-scams.html.

[17] https://www.npr.org/2023/03/23/1165146797/it-takes-a-few-dollars-and-8-minutes-to-create-a-deepfake-and-thats-only-the-sta.

People are already using generative AI to target Black people with disinformation, *see* Kat Tenbarge, *Fake News YouTube Creators Target Black Celebrities With AI-Generated Misinformation*, NBC News (Jan. 30, 2024),[18] and to spread election disinformation, *see, e.g.*, Ali Swenson & Will Weissert, *New Hampshire Investigating Fake Biden Robocall Meant to Discourage Voters Ahead of Primary*, AP News (Jan. 22, 2024);[19] Daniel I. Weiner & Lawrence Norden, *Regulating AI Deepfakes and Synthetic Media in the Political Arena*, Brennan Ctr. for Just. (Dec. 5, 2023) (describing how deepfake audio recordings were spread before Slovakia's October 2023 election);[20] Nicholas Nehamas, *DeSantis Campaign Uses Apparently Fake Images to Attack Trump on Twitter*, N.Y. Times (June 8, 2023).[21]

A ruling providing protection to Mackey's memes under the First Amendment would not just make Section 241 impotent against these kinds of voter suppression conspiracies. It could also weaken laws like the Ku Klux Klan Act of 1871, Voting Rights Act of 1965, and Civil Rights Act of 1957 in their protection of Black people

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[18] https://www.nbcnews.com/tech/misinformation/ai-deepfake-fake-news-youtube-black-celebrities-rcna133368.

[19] https://apnews.com/article/new-hampshire-primary-biden-ai-deepfake-robocall-f3469ceb6dd613079092287994663db5.

[20] https://www.brennancenter.org/our-work/research-reports/regulating-ai-deepfakes-and-synthetic-media-political-arena.

[21] https://www.nytimes.com/2023/06/08/us/politics/desantis-deepfakes-trump-fauci.html.

and other people of color from future voter suppression efforts. *See* 42 U.S.C. § 1985; 52 U.S.C. § 10307(b); 52 U.S.C. § 10101. Indeed, in *National Coalition on Black Civic Participation v. Wohl* (*NCBCP III)*, 661 F. Supp. 3d 78, 111, 117-18 (S.D.N.Y. 2023), the litigants' ability to rely on those statutes to seek relief for injuries arising from the voter suppression campaign directed at them depended in part on the court's recognition that the defendants' disinformation-based voter suppression efforts were not entitled to First Amendment protection.

In *NCBCP*, two individuals used an online platform to send 85,000 robocalls targeted to Black people in an attempt to scare them from voting by mail in the 2020 election. *See NCBCP III*, 661 F. Supp. 3d at 111, 113-15. The robocalls told listeners that if they voted by mail, the police would try to track them down, debt collectors would come after them, or the Centers for Disease Control and Prevention would try to use their information to forcibly vaccinate them. *Id.* at 92. Recipients of the robocalls sued the senders of the robocalls under Section 11(b) of the Voting Rights Act of 1965, Section 2 of the Ku Klux Klan Act of 1871, and Section 131(b) of the Civil Rights Act of 1957. *Id.* at 90. In opposing summary judgement on liability, the defendants contended that their conduct was protected by the First Amendment. The district court granted summary judgment on liability against the defendants, holding that the speech contained in the robocalls was not protected by the First Amendment

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in part because "false factual statements that cause legally cognizable harm tend not to offend the Constitution." *Id.* at 120 (internal quotation omitted).

In *NCBCP*, as here, the defendants' accountability depended in part on the court's recognition that their disinformation-fueled voter suppression efforts were not entitled to First Amendment protection. The Court's First Amendment ruling in this case thus has the potential to affect future voters' ability to use these statutes for relief when they are subjected to similar voter suppression campaigns.

* * *

The "right to exercise the franchise in a free and unimpaired manner" merits such diligent safeguarding because "voting is of the most fundamental significance under our constitutional structure." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). If legally permitted, there is no doubt that people will use these increasingly sophisticated weapons of mass disenfranchisement against Black people and other people of color. Holding that the First Amendment permitted Mackey's voter suppression efforts would encourage others to engage in the same conduct at much larger scales and may leave injured electors with little recourse.

CONCLUSION

For the foregoing reasons, the Court should hold that the First Amendment does not protect Mackey's voter suppression efforts.

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Dated: February 12, 2024.   Respectfully submitted,

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I certify that the foregoing brief was filed through the Court's ACMS system and will be served electronically upon all registered participants identified on the Notice of Electronic Filing.

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