

Date of Hearing: April 10, 2024

ASSEMBLY COMMITTEE ON ELECTIONS
Gail Pellerin, Chair
AB 2355 (Wendy Carrillo) – As Introduced February 12, 2024

SUBJECT: Political advertisements: artificial intelligence.

SUMMARY: Requires any political advertisement, as specified, that is generated in whole or in part using artificial intelligence (AI), to include a disclaimer stating that fact. Specifically, **this bill:**

- 1) Requires a person, political committee, or other entity that creates, originally publishes, or originally distributes a qualified political advertisement, as defined, to include the following disclaimer in the advertisement in a clear and conspicuous manner: “This [audio/image/video] has been generated, in whole or in part, using artificial intelligence.”

Requires this disclaimer to comply with the following:

- a) In the case of visual media, requires the text of the disclaimer to appear in a size that is easily readable, as specified.
 - b) In the case of a video, requires the disclaimer to appear for the duration of the video.
 - c) In the case of media that consists of audio only, requires the disclaimer to be read in a manner that can be easily heard by the average listener at both the beginning and the end of the audio. For audio that is longer than two minutes, the disclaimer must also be included during the audio at intervals of not more than two minutes each.
- 2) Provides that this bill does not alter or negate any rights, obligations, or immunities of an interactive service provider under Section 230 of the federal Communications Decency Act.
 - 3) Provides that this bill does not apply to any of the following:
 - a) A radio or television broadcasting station, as specified, in either of the following circumstances:
 - i) When it broadcasts a qualified political advertisement as part of bona fide news coverage if the broadcast clearly acknowledges that the advertisement may have been generated using AI, as specified.
 - ii) When it is paid to broadcast a qualified political advertisement.
 - b) An internet website, or a regularly published newspaper, magazine, or other periodical of general circulation, including an internet or electronic publication, that routinely carries news and commentary of general interest, and that publishes a qualified political advertisement, if the publication clearly states that the advertisement may have been

generated using AI.

- c) A qualified political advertisement that constitutes satire or parody.
- 4) Permits a superior court, in a case brought before it by a registered voter, to issue a temporary or permanent restraining order or injunction against the publication, printing, circulation, posting, or distribution of a qualified political advertisement in violation of this bill. Provides that all cases of this nature shall be in a preferred position for purposes of trial and appeal.
- 5) Defines the following terms, for the purpose of this bill:
 - a) “Artificial intelligence” to mean a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments, and that uses machine and human-based inputs to do all of the following:
 - i) Perceive real and virtual environments.
 - ii) Abstract such perceptions into models through analysis in an automated manner.
 - iii) Use model inference to formulate options for information or action.
 - b) “Qualified political advertisement” to mean any paid advertisement, including search engine marketing, display advertisements, video advertisements, native advertisements, issue advertisements, printed advertisements, messaging service advertisements, mobile application advertisements, prerecorded telephone message advertisements, or sponsorships, relating to a candidate for federal, state, or local office, any election to federal, state, or local office, a ballot measure, or a bond issue, that contains any image, audio, or video that is generated, in whole or in part, using AI.

EXISTING STATE LAW:

- 1) Prohibits a person, committee, or other entity, until January 1, 2027, from distributing with actual malice, within 60 days of an election at which a candidate for elective office will appear on the ballot, materially deceptive audio or visual media of a candidate with the intent to injure the candidate’s reputation or to deceive a voter into voting for or against the candidate.
 - a) Defines “materially deceptive audio or visual media,” for these purposes, as an image or an audio or visual recording of a candidate’s appearance, speech or conduct that has been intentionally manipulated in a manner that both of the following are true about the image or audio or video recording:
 - i) It would falsely appear to a reasonable person to be authentic; and,
 - ii) It would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content of the image or audio or video recording than

- the person would have if the person were hearing or seeing the unaltered, original version of the image or audio or video recording.
- b) Provides that this prohibition does not apply if the audio or visual media includes a disclaimer stating “This (image/video/audio) has been manipulated,” and the disclaimer complies with specified requirements.
 - c) Permits a candidate whose voice or likeness appears in deceptive audio or visual media distributed in violation of this provision to seek the following relief:
 - i) Injunctive or other equitable relief prohibiting the distribution of the materially deceptive audio or visual media in violation of this bill. Provides that such an action is entitled to precedence in court, as specified.
 - ii) General or special damages against the person, committee, or other entity that distributed that audio or visual media. Permits the court to award reasonable attorney’s fees and costs to a prevailing party in such an action.
 - d) Provides that in any civil action brought pursuant to these provisions, the plaintiff bears the burden of establishing the violation through clear and convincing evidence.
 - e) Provides that this prohibition shall not be construed to alter or negate any rights, obligations, or immunities of an interactive service provider under Section 230 of the federal Communications Decency Act.
 - f) Provides that this prohibition does not apply to any of the following:
 - i) A radio or television broadcasting station, as specified, in either of the following circumstances:
 - (1) When it broadcasts materially deceptive audio or visual media as part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of bona fide news events, if the broadcast clearly acknowledges through content or disclosure that there are questions about the authenticity of the audio or visual media, as specified.
 - (2) When it is paid to broadcast materially deceptive audio or visual media.
 - ii) An internet website, or a regularly published newspaper, magazine, or other periodical of general circulation, including an internet or electronic publication, that routinely carries news and commentary of general interest, and that publishes materially deceptive audio or visual media covered by this prohibition, if the publication clearly states that the media does not accurately represent the speech or conduct of the candidate.
 - iii) Materially deceptive audio or visual media that constitute satire or parody. (Elections Code §20010, as amended by Section 3 of Chapter 745 of the Statutes of 2022)

- 2) Prohibits a person, firm, association, corporation, campaign committee, or organization, beginning January 1, 2027, with actual malice, from producing, distributing, publishing, or broadcasting campaign material, as defined, that contains either of the following types of pictures or photographs, as specified, unless the campaign material includes a disclaimer that the picture is not an accurate representation of fact:
 - a) A picture or photograph of a person or persons into which the image of a candidate for public office is superimposed.
 - b) A picture or photograph of a candidate for public office into which the image of another person or persons is superimposed. (Elections Code §20010, as amended by Section 4 of Chapter 745 of the Statutes of 2022)

EXISTING FEDERAL LAW provides, pursuant to Section 230 of the federal Communications Decency Act, that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. §230)

FISCAL EFFECT: None. As currently in-print, this bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

Since the broad public release of generative AI applications to create sound, video, photos, and text since 2022, we have seen widespread adoption of and noticeable technological improvements in these tools. In a world where fabricated material is easier to create than ever before, protections are needed to ensure that content created by digital tools is properly labelled. Sensible regulation of this type of digital content balances free speech protections with the need to protect and uphold faith in our electoral democracy.

- 2) **Broad Application and Suggested Amendments:** As currently drafted, this bill requires *every* qualified political advertisement that contains any audio, image, or video that was *in any way* created or altered by AI to contain a disclaimer on the advertisement. Even in situations where the alterations made by AI were not misleading, and did not fundamentally change a reasonable person's understanding of the content, this bill would require the advertisement to include a disclaimer that it was generated using AI.

The definition of the term AI in this bill appears to be broad enough to apply to a large number of common tools that are regularly used without any deceptive intent or effect. For example, the cameras on smartphones typically include tools that automatically make adjustments to the images captured by those cameras, including changes like color correction and adjustments to contrast and lighting. Even an autofocus feature on a camera appears to fall within this bill's definition of AI.

While the definition of the term AI is outside the scope of this committee's jurisdiction,

given this broad application, it is possible that this bill could require a disclaimer to appear on virtually every campaign advertisement that contains any audio, photo, or video that was generated and captured in the last few years. In many of these cases, the person who captured the audio, photo, or video may not necessarily know that the media was generated in whole or in part using AI.

To the extent that this bill requires a large percentage of campaign advertisements to include disclaimers that they were generated using AI, the value of those disclaimers is unclear. While disclaimers can provide the public with important information, if the effect of this bill is to require disclaimers to appear on virtually every campaign advertisement, it is less clear whether the public will pay attention to those disclaimers or attach any significance to their inclusion on a campaign advertisement. Alternately, the widespread inclusion of disclaimers on political advertisements stating that those advertisements were generated in whole or in part using AI could cause voters to distrust political advertisements that they receive even when there is no basis for that distrust. If the only way that AI is used in the creation of a political advertisement is with standard photo processing tools like autofocus and minor lighting adjustments, will a disclaimer that the advertisement was generated or altered using AI be useful and meaningful information for the viewer, or is it more likely to give that viewer an inaccurate impression that the advertisement has been altered in more substantive ways?

Unlike other legislation that is being heard in this committee today dealing with campaign communications that have been altered using digital tools including AI, nothing in this bill limits its application to materials that have been altered in ways that are deceptive or that otherwise leave a viewer with a materially different understanding of the content when compared to the unaltered material. While the author has expressed concern about AI being used to mislead voters or to suppress participation in elections, nothing in this bill limits the disclaimer requirement to applications of AI that are likely to have those effects.

According to background information provided by the author's office, this bill is modeled after legislation that was recently enacted in Michigan. That bill – House Bill (HB) 5141 – is indeed similar to the text of this bill. There is, however, a significant difference between this bill and Michigan's HB 5141. While this bill requires a disclaimer on a political advertisement that contains an image, audio, or video that is generated in whole *or in part* using AI, Michigan's law applies only if an image, audio, or video was generated in whole *or substantially* with the use of AI. While Michigan's law does not appear to define the term "substantially," that difference could have significant implications for the types of communications that are (or are not) required to include disclaimers. In particular, there is a strong argument that Michigan's bill does not require the inclusion of a disclaimer on a political advertisement where AI was responsible for only minor alterations to an image, audio, or video, and where those alterations did not materially change a viewer's understanding when compared to the unaltered media.

To address these concerns, committee staff recommends that this bill be amended to apply not to images, audio, and video that were generated in whole or *in part* using AI, but instead to apply to images, audio, and video that were generated in whole or *substantially* using AI. Committee staff further recommends that the bill be amended to provide that media is

considered to have been generated substantially using AI only if the media was created or materially altered using AI, and that an image, audio, or video is not substantially generated using AI if it has only minor alterations.

- 3) **Free Speech Considerations:** The First Amendment to the United States (US) Constitution, which also applies to states under the Fourteenth Amendment, provides in relevant part “Congress shall make no law...abridging the freedom of speech...” Similarly, Section 2 of Article I of the California Constitution provides in relevant part “Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”

Courts have consistently recognized that laws that compel speech can impact free speech rights, because the associated burden and penalties for noncompliance may discourage people from speaking altogether. In *Citizens United v. FEC*, the Supreme Court applied exacting scrutiny to requirements that certain political advertisements include disclaimers, and described exacting scrutiny as requiring a “‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest” *Citizens United v. FEC* (2010), 558 US 310, 366-367.

Whether the disclaimer requirement that this bill imposes would be susceptible to a potential constitutional challenge is a question that falls more squarely within the jurisdiction of the Assembly Judiciary Committee. However, as discussed in greater detail above, the current version of this bill appears to require disclaimers to appear on political advertisements that contain media that was generated using AI even when the alterations to the media made by AI were minor, and did not fundamentally change the expressive content of the media. Limiting the disclaimer requirement to situations where political advertisements include media that was *materially* altered by AI, as proposed above, may help strengthen the argument that the disclaimer requirements in this bill are tailored to address the potential harms posed by misleading and deceptive campaign materials.

- 4) **Bond Issues and Suggested Amendments:** The definition of “qualified political advertisement” that appears in this bill includes advertisements that relate to ballot measures and bond issues. To the extent that a bond issue is appearing on the ballot for the voters’ consideration, however, that bond issue is already considered a ballot measure under existing law. As such, the inclusion of bond issues within the definition of “qualified political advertisement” seems duplicative and unnecessary. Accordingly, committee staff recommends that this bill be amended to delete all references to bond issues.
- 5) **Technical Amendment:** Committee staff recommends the following technical amendment to this bill: On page 4, line 13 of the bill, delete one of the duplicative uses of the word “means.”
- 6) **Arguments in Support:** In support of this bill, Oakland Privacy writes:

Generative artificial intelligence can now create fake (i.e. artificial) content that can seem to decisively indicate that someone said something they didn’t say, was at a location they never visited or that statistics and other factual material that impacts policy are not accurate when they are. Unlike mere “claims” that can be

rebutted; generative AI can provide what seems like dispositive evidence of truth or falsity, but is a mere computer projection of bits and bytes. This can wreak havoc on a voter's ability to research what is true and what is not and make their decisions accordingly.

Assembly Bill 2355 seeks to help voters in this position by simply requiring that synthetic content be labeled as such, so it is therefore harder to use generative AI election content as evidence of truth or falsity. This provision is literally structured in the same manner as long-standing California election law that requires the labeling of paid political advertisements. As such, the requirement is straightforward, understandable to those that would have to abide by it, doesn't depend on unreliable technologies like watermarking, and shouldn't confuse voters or require them to understand a lot about AI to benefit from the legislation.

- 7) **Arguments in Opposition:** The Electronic Frontier Foundation writes in opposition to this bill:

We respectfully oppose A.B. 2355, authored by Assemblymember Carrillo, which not only requires that political advertisements generated through artificial intelligence have a disclosure stating so, but requires those who republish such advertisements to publish a vague and conditional disclaimer, even if they played no role in the creation of the advertisement or had any knowledge of its inauthenticity. We recognize the complex issues raised by potentially harmful artificially generated election ads. However, this bill's "exceptions" for only some re-publishers, and by requiring them to assert that the ad "may have been generated by artificial intelligence," does not reflect the full First Amendment protection due the republication of speech pertaining to matters of public interest by those not connected with the creation of the offending material.

The First Amendment requires this distinction between those who create synthetic media and those not directly involved in it. The Fourth Circuit relied on this distinction in striking down a Maryland law that extended the reach of campaign finance law to include 'online platforms,' thus imposing disclosure requirements on them when they ran online ads. AB 2355, as written, suffers from the same constitutional defect.

- 8) **Related Legislation:** AB 2655 (Berman), which is also being heard in this committee today, requires large online platforms to block the posting or sending of materially deceptive and digitally modified or created content related to elections, or to label that content, during specified periods before and after an election.

AB 2839 (Pellerin), which is also being heard in this committee today, prohibits the distribution of campaign advertisements and other election communications that are materially deceptive and digitally altered or created, except as specified.

- 9) **Triple-Referral:** This bill has also been referred to the Assembly Privacy & Consumer Protection Committee and the Assembly Judiciary Committee. This committee analysis

focuses primarily on issues that fall within the jurisdiction of the Assembly Elections Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Chamber of Commerce (if amended)

Computer and Communications Industry Association (if amended)

Oakland Privacy

Software & Information Industry Association (if amended)

TechNet (if amended)

Opposition

Chamber of Progress (unless amended)

Electronic Frontier Foundation

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