

Date of Hearing: September 13, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 730 (Berman) – As Amended September 10, 2019

CONCURRENCE IN SENATE AMENDMENTS

SUBJECT: Elections: deceptive audio or visual media.

SUMMARY: Prohibits the distribution of materially deceptive audio or visual media with actual malice with the intent to injure a candidate’s reputation or to deceive a voter into voting for or against a candidate, unless the materially deceptive audio or visual media includes a disclosure that it has been manipulated.

The Senate Amendments delete the Assembly-approved version of the bill, and instead:

- 1) Repeal the existing “Truth in Political Advertising Act,” and replace it with the provisions of this bill.
- 2) Define “materially deceptive audio or visual media,” for the purposes of this bill, 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:
 - a) It would falsely appear to a reasonable person to be authentic; and,
 - b) 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.
- 3) Prohibit a person, committee, or other entity 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 with the intent to injure the candidate’s reputation or to deceive a voter into voting for or against the candidate.
- 4) Provide that the prohibition on distributing materially deceptive audio or visual media does not apply if the audio or visual media includes a disclosure stating “This (image/video/audio) has been manipulated.” Require this disclosure to comply with the following:
 - a) In the case of visual media, requires the text of the disclosure to appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media, if the visual media includes other text.
 - b) In the case of visual media that is a video, requires the disclosure to appear for the duration of the video.
 - c) In the case of media that consists of audio only, requires the disclosure to be read in a clearly spoken manner and in a pitch that can be easily heard by the average listener at both the beginning and the end of the audio. In the case of audio that is greater than two

minutes in length, requires the disclosure additionally to be interspersed within the audio at intervals of not more than two minutes each.

- 5) Permit a candidate whose voice or likeness appears in deceptive audio or visual media distributed in violation of this bill to seek the following relief:
 - a) 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.
 - b) General or special damages against the person, committee, or other entity that distributed that audio or visual media. Permits the court to award attorney's fees and costs to a prevailing party in such an action.
- 6) Provide that in any civil action brought under this bill, the plaintiff bears the burden of establishing the violation through clear and convincing evidence.
- 7) Provide that the provisions of this bill 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.
- 8) Provide 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 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.
 - ii) When it is paid to broadcast materially deceptive audio or visual media.
 - 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 materially deceptive audio or visual media prohibited by this bill, if the publication clearly states that the media does not accurately represent the speech or conduct of the candidate.
 - c) Materially deceptive audio or visual media that constitute satire or parody.
- 9) Add a severability clause.
- 10) Add a January 1, 2023 sunset date.

EXISTING STATE LAW:

- 1) Prohibits, pursuant to the “Truth in Political Advertising Act,” a person, firm, association, corporation, campaign committee, or organization, with actual malice, from producing, distributing, publishing, or broadcasting campaign material, as defined, that contains either of the following, as specified, unless the campaign material includes a specified disclosure:
 - 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.
- 2) Permits any registered voter to seek a temporary restraining order and an injunction prohibiting the publication, distribution, or broadcasting of any campaign material that violates 1), above.
- 3) Permits a candidate for public office whose likeness appears in a picture or photograph prohibited by 1), above, to bring a civil action against any person, firm, association, corporation, campaign committee, or organization that produced, distributed, published, or broadcast the picture or photograph at issue and authorizes the court to award damages in an amount equal to the cost of producing, distributing, publishing, or broadcasting the campaign material that violated the Truth in Political Advertising Act, in addition to reasonable attorney’s fees and costs.
- 4) Exempts both of the following from the prohibition on publishing material prohibited in 1), above:
 - a) A holder of a license granted pursuant to the federal Communications Act of 1934 in the performance of the functions for which the license is granted.
 - b) The publisher or an employee of a newspaper, magazine, or other periodical that is published on a regular basis for any material published in that newspaper, magazine, or other periodical.

EXISTING FEDERAL LAW:

- 1) 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.
- 2) Provides, pursuant to the federal Communications Act of 1934, for the federal regulation of telephone, telegraph, television, and radio communications.

FISCAL EFFECT: None. This bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS:

- 1) **Prior Committee Consideration of This Bill:** As approved by the Assembly earlier this year, this bill would have provided that the affidavit of registration of a pre-registered person

who is not yet a registered voter is confidential, and prohibited its disclosure to any person without exception. Subsequent to the Assembly's approval of this measure, it was amended in the Senate to delete the Assembly-approved provisions of the bill, and to add the current provisions. As a result, this bill has been re-referred to this committee for further consideration pursuant to Assembly Rule 77.2.

2) **Purpose of the Bill:** According to the author:

Deepfakes – fabricated photos and recordings of someone appearing to say or do something they did not – are a powerful and dangerous new technology with the potential to sow misinformation and discord among an already hyper-partisan electorate. Deepfakes distort the truth, making it difficult to distinguish between legitimate and fake media and more likely that people will accept content that aligns with their views. By blurring truth and fiction, deepfakes also make it easier to pass off fake events as real as well as dismiss real events as fake – a phenomenon dubbed “the liar’s dividend.” Moreover, the Carnegie Endowment for International Peace notes that deepfakes have the potential to incite violence, alter election outcomes, and undermine diplomacy. AB 730 seeks to protect voters from being tricked and influenced by manipulated videos, audio recordings, or images before an election.

3) **Deepfakes Background:** Deepfake technology refers to software capable of producing a realistic looking video of someone saying or doing something that they did not, in fact, say or do. This technology has advanced rapidly in recent years thanks to the use of artificial intelligence to help train the software. Software applications that enable a user to make deepfake videos are now available for easy download.

This bill does not apply exclusively to deepfakes. It applies to any intentional manipulation of audio or visual images that results in a version that a reasonable observer would believe to be authentic. Nonetheless, it is the increasing availability and advancing capability of deepfake technology that provides the immediate impetus for this bill.

4) **Joint Informational Hearing on Election Cybersecurity:** Last year, this committee held a Joint Informational Hearing with the Senate Committee on Elections & Constitutional Amendments on the topic of Cybersecurity and California Elections. In light of the increased focus on election security since the 2016 elections, the purpose of the hearing was to explore California's policies for protecting the security of our elections systems in an environment where the number and sophistication of threats to our election infrastructure continues to increase.

One of the witnesses at the hearing was Andrew Grotto, a former Senior Director for Cybersecurity Policy for The White House and current Research Fellow at the Hoover Institution at Stanford University. Mr. Grotto provided recommendations for how candidates seeking office can help reaffirm the public’s confidence in the electoral system. One of the recommendations focused on fake videos and deepfakes. Mr. Grotto recommended that leaders and candidates for office should establish a clear norm of restraint around fake videos and deepfakes. In addition, Mr. Grotto stressed that candidates seeking office should also mutually agree to not produce, promote, or otherwise distribute fake videos or deepfakes, and to call out groups that defy this type of policy.

- 5) **Truth in Political Advertising Act:** AB 1233 (Leach), Chapter 718, Statutes of 1998, enacted the “Truth in Political Advertising Act,” which prohibited campaign material that contains a picture of a person into which a candidate's image is superimposed, or contains a picture of a candidate into which another person's image is superimposed, except if a specified disclaimer was included. AB 1233 sought to address concerns surrounding the use of photoshopped pictures in campaign materials. It was introduced in response to a 1997 campaign brochure in a campaign for the Illinois State Legislature in which a candidate superimposed his face over the face of another person in order to make it appear as if the candidate took part in a bill signing ceremony.

Despite the fact that more than 20 years has passed since AB 1233 was enacted, the Truth in Political Advertising Act has never been amended to update the law to address more modern techniques of manipulating campaign materials in a manner that can mislead voters. This bill seeks to replace the Truth in Political Advertising Act with a law that regulates not only altered photographs in campaign materials, but also audio and video media that have been altered in a materially deceptive manner.

- 6) **Free Speech Considerations:** The First Amendment to the United States (US) Constitution, made applicable to the states by the Due Process Clause of 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." Because this bill seeks to regulate the distribution of media that includes the intentionally manipulated appearance, speech, or conduct of a candidate under certain circumstances, a question could be raised as to whether this bill's provisions are consistent with the right to freedom of speech that is guaranteed by the US and California constitutions. The US Supreme Court has ruled that even false statements are protected by the First Amendment (*United States v. Alvarez* (2012), 567 U.S. 709). When a law burdens core political speech, the restrictions on speech generally must be "narrowly tailored to serve an overriding state interest," *McIntyre v. Ohio Elections Commission* (1995), 514 US 334.

The author, supporters, and opponents of this bill all generally agree that the protection of the integrity of elections is an overriding (or compelling) government interest, a conclusion that is consistent with US Supreme Court jurisprudence (*Id.* at 349; *Burson v. Freeman* (1992) 504 U.S. 191, 199). Nonetheless, supporters and opponents reach different conclusions about the constitutionality of the restrictions on materially deceptive audio or visual media that are proposed by this bill.

Writing in support of a prior version of this bill, Erwin Chemerinsky, the Dean of the School of Law at the University of California, Berkeley argues that this bill is consistent with the US Supreme Court's First Amendment jurisprudence. In his letter, Dean Chemerinsky wrote:

The Supreme Court often has explained that freedom of speech is protected as a fundamental right to further the marketplace of ideas. Rather than have the government determine what ideas can be expressed, the alternative is for all views to be capable of expression. But deep fakes add nothing to the marketplace of ideas and indeed detract from it. Showing a political candidate saying things that

never were uttered offers nothing useful to public discourse. At the same time, deep fakes can cause great harm to reputation and to the democratic process... Although this bill would regulate speech, its prohibition of deep fakes would not violate the First Amendment. False speech, at times, is protected, but often the government is allowed to prohibit it without running afoul of the Constitution. For example, lying in court under oath – perjury – is not protected by the First Amendment even though it is speech. The Supreme Court has been clear that false and deceptive advertising has no constitutional protection.

Most importantly, the Court has said that speech which is defamatory of public officials and public figures has no First Amendment protection if the speaker knows the statements are false or acts with reckless disregard of the truth. The Court has explained that the importance of preventing wrongful harm to reputation and of protecting the marketplace of ideas justifies the liability for the false speech.

AB 730 serves these purposes and uses exactly this legal standard. It prohibits deep fakes in the political realm, applies only where the false images were knowingly or recklessly created and disseminated.

By contrast, opponents to this bill argue that its provisions are not narrowly tailored, and thus conclude that the bill is unlikely to survive a constitutional challenge. In a letter in opposition to a prior version of this bill, the California News Publishers Association (CNPA) enumerated a number of reasons why they believe that the bill is not narrowly tailored. While recent amendments sought to address some of those enumerated reasons, other points raised in the letter of opposition are still pertinent to the current version of the bill, including the following:

AB 730 fails to pass constitutional muster for the same reason that other laws prohibiting false statements made during elections have been struck down by the courts: it is not narrowly tailored.

In 2016, the Sixth Circuit Court of Appeals struck down Ohio's law prohibiting the dissemination of false information about a candidate if the speaker knew the information to be false or acted with reckless disregard of whether it was false, if the statement was designed to promote the election, nomination, or defeat of the candidate. In that case, *Susan B. Anthony List v. Driehaus* (6th Cir. 2016) 814 F.3d 466, the court found that the law was unconstitutional because it was not narrowly tailored for several reasons...

In *Driehaus* the court found that the timing of the Ohio law was not narrowly tailored because it provided no guarantee that claims brought under the law would be resolved prior to the election, even if the [expedited] hearing procedure provided for by the law was used. AB 730 suffers from the same flaw. Because the bill does not guarantee resolution of claims before election day, it does not necessarily promote fair elections. Allowing a candidate to recover a large amount of damages after an election does not make elections fairer. Even in the case of claims for injunctive relief, which are given [priority], there is no guarantee that the court could resolve the claim prior to election day. Thus, AB 730 is not

narrowly tailored in its timing.

- 7) **Texas Law Regulating Deepfakes in Campaigns:** Earlier this year, the Texas Legislature passed and the Governor signed SB 751, which makes it a criminal offense to create a deep fake video, and to cause that video to be published or distributed within 30 days of an election, with the intent to injure a candidate or to influence the result of an election. For the purposes of this law, the term “deep fake video” is defined to mean a video created with the intent to deceive, that appears to depict a real person performing an action that did not occur in reality. A violation of the bill is a misdemeanor, punishable by up to a year in jail, a fine of up to \$4,000, or both. SB 751 took effect on September 1, 2019.
- 8) **Arguments in Support:** In support of this bill, the Silicon Valley Community Foundation writes, “We believe that a healthy democracy is dependent upon all community members being able to participate in the public policy process without being deceived or influenced by manipulated audio, video, or images prior to an election.”
- 9) **Arguments in Opposition:** In a letter in opposition to a prior version of this bill, a coalition of groups including the American Civil Liberties Union of California and the California Cable and Telecommunications Association argued that this bill does the following:

Creates a false expectation that voters can trust images and videos unless they are labeled as manipulated, when in fact the bill only applies to a fraction of the misleading images and recordings that could influence an election...

Least likely to apply where voters are most likely to encounter deepfakes: Due to federal law, the bill is preempted and cannot apply to manipulated images and recordings shared on social media and many political ads on television.

Since courts will not be able to resolve claims before Election Day, the bill’s procedures can be weaponized to add legitimacy to claims that real images and recordings that are “fake news.”

REGISTERED SUPPORT / OPPOSITION:

Support

Silicon Valley Community Foundation
1 individual (prior version)

Opposition

American Civil Liberties Union of California (prior version)
California Cable & Telecommunications Association (prior version)
California News Publishers Association (prior version)
Electronic Frontier Foundation (prior version)

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