Date of Hearing: April 23, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
AB 2355 (Wendy Carrillo) – As Amended April 18, 2024

SUBJECT: Political advertisements: artificial intelligence

SYNOPSIS

The creation of audio and visual media by generative artificial intelligence (AI) has the potential to change the world by automating repetitive tasks and fostering creativity. When employed by bad actors, however, these capabilities have the potential to destroy lives and destabilize societies. In the context of election campaigns, such deepfakes can be weaponized to deceive voters into thinking that a candidate said or did something the candidate did not. In an attempt to prevent deepfakes from altering the outcome of an election in this way, California enacted laws in 2019 that restrict the use of deepfakes within 60 days of an election and that provide impacted candidates with a legal mechanism for trying to prevent deepfakes from circulating during that time period.

Since that time, the capabilities of generative AI have advanced dramatically. The author argues that "[s]ince 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."

This author-sponsored measure would require specified disclosures in political advertisements that are either wholly generated by AI and falsely appear to be authentic, or that are deceptively manipulated by AI. Because the bill was recently narrowed, stakeholders have not had an opportunity to register updated positions. However, this analysis details some of their positions on the prior iteration of the bill.

This bill was passed by the Elections Committee on a 7-1 vote. If it passes this Committee, it will next be heard in the Judiciary Committee.

SUMMARY: Requires an entity that creates, originally publishes, or originally distributes a political advertisement that was generated or substantially altered using AI to include a clear and conspicuous disclosure stating this fact. Enables registered voters to go to superior court to seek a temporary or permanent restraining order against the publication, printing, circulation, posting, or distribution of any such political advertisement that does not comply with the disclosure requirement. Specifically, **this bill**:

1) Requires any entity that creates, originally publishes, or originally distributes a "qualified political advertisement"—any paid advertisement, relating to a candidate for elective office or a ballot message, that is "generated or substantially altered using artificial intelligence"—to include, in a clear and conspicuous manner, the following disclosure: "This (audio, image, or video, as applicable) has been generated or substantially altered using artificial intelligence."

2) Defines "generated or substantially altered using artificial intelligence" as visual or audio media that is either of the following:

    a. Entirely created using artificial intelligence and would falsely appear to a reasonable person to be authentic.

    b. Materially altered by artificial intelligence such that the alteration would cause a reasonable person to have a fundamentally different understanding of the altered media when comparing it to an unaltered version.

3) Specifies the form of the disclosure depending on whether the qualified political advertisement is in visual or audio media.

4) Provides that the bill does not alter or negate any rights, obligations, or immunities of an interactive service provider under Section 230 of Title 47 of the United States Code.

5) Excludes from the disclosure requirement the following:

    a. Radio or television broadcasting stations that broadcast a qualified political advertisement as part of a bona fide news communication or for compensation.

    b. Internet websites and periodicals that routinely carry news and commentary that publishes a qualified political advertisement as part of a bona fide news communication.

    c. Qualified political advertisements that constitute satire or parody.

6) Enables registered voters to go to superior court to seek a temporary or permanent restraining order against the publication, printing, circulation, posting, or distribution of any qualified political advertisement that does not comply with the disclosure requirement set forth above. Requires that cases of this nature be in a preferred position for purposes of trial and appeal, so as to assure speedy disposition of cases of this nature.

7) Defines other key terms, including "artificial intelligence," which means an engineered or machine-based system that varies in its level of autonomy and that can, for explicit or implicit objectives, infer from the input it receives how to generate outputs that can influence physical or virtual environments.

EXISTING 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.)

FISCAL EFFECT: As currently in print, the bill is keyed nonfiscal.

COMMENTS:

1) **Political deepfakes.** AI technology is being used around the world to spread disinformation and propaganda. 2024 is a major election year in democracies around the globe: at least 64 countries will hold elections, representing close to 49% of the world's population. It is also likely to be the first of many election years in which AI plays a pivotal role, as the technology becomes more widely available and easier to use. This has already been observed in Slovakia, where AI-generated audio influenced an election in 2023:

> Days before a pivotal election in Slovakia to determine who would lead the country, a damning audio recording spread online in which one of the top candidates seemingly boasted about how he'd rigged the election. And if that wasn't bad enough, his voice could be heard on another recording talking about raising the cost of beer. The recordings immediately went viral on social media, and the candidate, who is pro-NATO and aligned with Western interests, was defeated in September by an opponent who supported closer ties to Moscow and Russian President Vladimir Putin.[1]

Similar technologies have now been deployed in the United States in advance of the 2024 presidential election. In late January, between 5,000 and 20,000 New Hampshire residents received AI-generated phone calls impersonating President Biden that told them not to vote in the state's primary.[2] The call told voters: "It's important that you save your vote for the November election." Concern about this call has led at least 14 states to introduce legislation targeting AI-powered disinformation. It is still unclear how many people might not have voted based on these calls.

Deepfakes are not only being deployed by third parties; they can be used by the candidates themselves, either to improve their own self-images or to detract from their opponents. In mid-2023, former Republican presidential candidate Governor Ron DeSantis used AI to add fighter jets to one of his campaign videos.[3] Around the same time, Governor DeSantis' super PAC released an ad containing an AI-generated speech by former president Donald Trump.[4] The Republican National Committee also released a 30-second ad that displayed images of disorder and destruction, with a voiceover that described the "consequences" of re-electing President Biden.[5] None of the images in this ad were real.

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[1] Curt Devine, Donie O'Sullivan, Sean Lyngass, "A fake recording of a candidate saying he'd rigged the election went viral. Experts say it's only the beginning," *CNN*, Feb. 1, 2024, www.cnn.com/2024/02/01/politics/election-deepfake-threats-invs/index.html.
[2] Cat Zakrzewski and Pranshu Verma, "New Hampshire opens criminal probe into AI calls impersonating Biden," *Washington Post*, Feb. 6, 2024, www.washingtonpost.com/technology/2024/02/06/nh-robocalls-ai-biden/.
[3] Ana Faguy, "New DeSantis Ad Superimposes Fighter Jets In AI-Altered Video Of Speech," Forbes, May 25, 2023, www.forbes.com/sites/anafaguy/2023/05/25/new-desantis-ad-superimposes-fighter-jets-in-ai-altered-video-ofspeech/.
[4] Alex Isenstadt, "DeSantis PAC uses AI-generated Trump voice in ad attacking ex-president," Politico, July 17, 2023, www.politico.com/news/2023/07/17/desantis-pac-ai-generated-trump-in-ad-00106695.
[5] GOP, "Beat Biden," April 25, 2023, https://www.youtube.com/watch?v=kLMMxgtxQ1Y.

2) **Author's statement.** 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.

3) **Comparison with existing elections deepfake laws.** AB 730 (Berman, Ch. 493, Stats. 2019) added Elections Code section 20010 to target political deepfakes that manipulate original media of a candidate for elective office in the run-up to an election. That section prohibits distribution of "materially deceptive audio or visual media" within 60 days of an election when done with actual malice and intent to deceive a voter into voting for or against a candidate.[6] This prohibition, however, does not apply if the media includes a disclosure stating that it has been manipulated.[7] "Materially deceptive audio or visual media" means an image or audio recording of a candidate's appearance, speech, or conduct that has been *intentionally* manipulated such that it would falsely appear to a reasonable person to be authentic *and* would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content of the recording, as compared to the original version.[8] That section enables candidates whose likeness appears in deepfakes to seek injunctive relief and recover damages.[9]

Whereas section 20010 narrowly focuses on manipulated imagery that is essentially defamatory, this bill more broadly focuses on any content that is generated by AI. In several additional respects it exceeds the scope of its predecessor. First, it applies to "qualified political advertisements" about not just candidates but ballot measures as well. Second, the original creator or publisher of the content need not have "actual malice" nor intend to induce voters to vote differently. Third, the bill applies to advertisements that, regardless of the intent of the creator, would falsely appear to a reasonable person to be authentic *or* would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content of the recording, as compared to the original version. Fourth, section 20010 applies only within 60 days of an election. This bill has no such time limitations. Fifth, it enables any registered voter—not just an affected candidate—to seek injunctive relief. The bill does not, however, provide for civil damages.

In its support letter on a prior iteration of the bill that appears to be broadly applicable to the policy focus of the revised bill, Oakland Privacy wrote:

> 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

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[6] *Id.* at (a).
[7] *Id.* at (b).
[8] *Id.* at (e).
[9] *Id.* at (c).

> havoc on a voter's ability to research what is true and what is not and make their decisions accordingly.
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> 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.

4) **Who is subject to enforcement?** Section 230 of the federal Communications Decency Act of 1996 states that "[n]o 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."[10] That section also provides that "[n]o cause of action may be brought *and* no liability may be imposed under any State or local law that is inconsistent with this section."[11] This bill does not subject online platforms to damages for republication of a qualified political advertisement that lacks a disclosure; rather it simply enables voters to obtain injunctive relieve—that is, a temporary or permanent restraining order—to remove the offending content.

However, section 230 still immunizes such intermediaries from such injunctive relief. As the California Supreme Court stated in 2018: "For almost two decades, courts have been relying on section 230 to deny plaintiffs injunctive relief when their claims inherently treat an Internet intermediary as a publisher or speaker of third party conduct. . . . Yet Congress has declined to amend section 230 to authorize injunctive relief against mere republishers, even as it has limited immunity in other ways."[12] The broad language of section 230 "conveys an intent to shield Internet intermediaries from the burdens associated with defending against state law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief that . . . assign them the legal role and responsibilities of a publisher *qua* publisher."[13] The court concluded, "Section 230 allows these litigation burdens to be imposed upon the originators of online speech. But the unique position of Internet intermediaries convinced Congress to spare republishers of online content, in a situation such as the one here, from this sort of ongoing entanglement with the courts."[14] As such, section 230 appears to immunize online republishers from suits to remove noncompliant advertisements under this bill.

Moreover, although some stakeholders suggest that the bill could be construed to apply to GenAI systems that are used by content creators who create advertisements, injunctive relief is only available against "publication, printing, circulation, posting, or distribution"—not the creation of such advertisements. Nevertheless, the author may wish to continue to work with stakeholders to fully clarify the scope of the bill.

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[10] 47 U.S.C. § 230(c)(1).
[11] *Id.* at (e)(3), emphasis added.
[12] *Hassell v. Bird* (2018) 5 Cal.5th 522, 547.
[13] *Id.* at p. 544.
[14] *Id.* at p. 545.

5) **First Amendment considerations.** The United States and California Constitutions prohibit abridging, among other fundamental rights, freedom of speech.[15] This bill implicates speech in two ways.

First, the bill compels speech by requiring a disclaimer on a political advertisement containing AI-generated media. Because the right to speak encompasses the right not to speak, this provision implicates the First Amendment.[16] Because the disclaimer does not "'alter[] the content'"[17] of the actual message of a political advertisement, it is content neutral. As such it would be subject to the "intermediate scrutiny" test, which requires that the law "be 'narrowly tailored to serve a significant government interest.'"[18] In other words, the law "'need not be the least restrictive or least intrusive means of' serving the government's interests," but "'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"[19]

Second, the bill restricts speech by enabling registered voters to seek a temporary or permanent injunction against the publication, printing, circulation, posting, or distribution of any qualified political advertisement that does not contain a required disclosure. Because it pertains to a particular subject matter—political advertisements relating to candidates or ballot measures—the restriction is specific to a type of content.[20] Content-based restrictions on protected speech are subject to "strict scrutiny" and thus are presumptively unconstitutional, valid only if the government proves they are narrowly tailored to further a compelling interest—meaning the law must use the least restrictive means available to further that interest.[21]

Here, the disclosure requirement is intended to advance the author's goal of making the public aware of when it encounters political advertisements with synthetic content, much of which could be deeply misleading. Such labeling will also help the public differentiate authentic content, enabling voters to confidently make choices informed through an accurate understanding of the provenance of what they're seeing and hearing in political advertisements—a compelling government interest.

As to the means of serving that interest, the introduced version of the bill would have covered virtually any content that was at least partially generated by AI. This not only risked diluting the effectiveness of the disclosure requirement but likely ran afoul of the First Amendment by burdening portions of speech beyond that necessary to achieve the author's goals. The bill has since been substantially narrowed to encompass those circumstances in which the content was generated entirely by AI and falsely appears to be authentic, or those in which the content has been manipulated such that it would cause a reasonable person to experience the expressive conduct in a fundamentally different way. Nevertheless, given the exacting standard this bill must meet, the author is encouraged to continue seeking ways of tightening the scope of the bill

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[15] U.S. Const., 1st and 14th Amends; Cal. Const. art. I, § 2.
[16] *U.S. v. United Foods, Inc.* (2001) 533 U.S. 405, 410.
[17] *Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2371.
[18] *Packingham v. North Carolina* (2017) 582 U.S. 98, 98.
[19] *McCullen v. Coakley* (2014) 573 U.S. 464, 486.
[20] See FCC v. League of Women Voters (1984) 468 U.S. 364, 383.
[21] *Sable Communications of Cal. v. FCC* (1989) 492 U.S. 115, 126.; *Ashcroft v. ACLU* (2004) 542 U.S. 656, 670; see *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 222; *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

to insulate it from constitutional challenge. These issues will continue to be addressed in the Assembly Judiciary Committee.

6) **Related Legislation.** AB 2655 (Berman, 2024) 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. The bill is pending in the Assembly Judiciary Committee.

AB 2839 (Pellerin, 2024) prohibits the distribution of campaign advertisements and other election communications that are materially deceptive and digitally altered or created, except as specified. The bill is pending in the Assembly Judiciary Committee.

AB 972 (Berman, Ch. 745, Stats. 2020) extended the sunset date on AB 730 to 2027.

AB 730 (Berman, Ch. 493, Stats. 2019) was identical to this bill except that its sunset provision repeals the statute it enacted effective January 1, 2023.

ARGUMENTS IN SUPPORT:

The City of Pico Rivera writes that "[w]ith the proliferation of AI technologies, it is essential to ensure that constituents are aware of the tools employed in political advertising. By requiring the disclosure that an advertisement was generated using AI, AB 2355 empowers voters to understand the technology behind ad creation, thus enhancing transparency in our electoral process."

REGISTERED SUPPORT / OPPOSITION:

Support

City of Pico Rivera
Oakland Privacy

Support If Amended

California Chamber of Commerce
Computer and Communications Industry Association
Software & Information Industry Association
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Opposition

None on file.

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