Date of Hearing: January 12, 2022

ASSEMBLY COMMITTEE ON ELECTIONS
Isaac G. Bryan, Chair
AB 972 (Berman) – As Introduced February 18, 2021

**SUBJECT**: Elections: deceptive audio or visual media.

**SUMMARY**: Extends the sunset date—from January 1, 2023 to January 1, 2027—on a provision of law that 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.

**EXISTING STATE LAW**:

1) Prohibits a person, committee, or other entity, until January 1, 2023, 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 disclosure stating “This (image/video/audio) has been manipulated,” and the disclosure 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 prohibited 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.

2) Prohibits a person, firm, association, corporation, campaign committee, or organization, beginning January 1, 2023, 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 disclosure 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.

**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) **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 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. Moreover, the Carnegie Endowment for International Peace notes that deepfakes have the potential to incite violence, alter election outcomes, and undermine diplomacy. In response, California enacted legislation in 2019 to protect voters from being tricked and influenced by manipulated videos, audio recordings, or images before the 2020 General Election. AB 972 would extend the sunset date of the law from January 1, 2023 to January 1, 2027, thereby ensuring that California law continues to dissuade the creation and distribution of nefarious election-related deepfakes and other manipulated content.

2) **Deepfakes Background and Previous Legislation**: 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.

   In response to concerns that deepfakes could be used to spread misinformation in campaigns, in 2019, the Legislature approved and Governor Newsom signed AB 730 (Berman), Chapter 493, Statutes of 2019. AB 730 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. AB 730 does not apply exclusively to deepfakes, but rather 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, the increasing availability and advancing capability of deepfake technology was the immediate impetus for that bill.

   AB 730 was designed as an update to California's "Truth in Political Advertising Act," a law enacted in 1998 (through the passage of AB 1233 (Leach), Chapter 718, Statutes of 1998) that 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. The Truth in Political Advertising Act was introduced in response to the use of photoshopped pictures in campaign materials, and accordingly was designed to target the manipulation of photographs in campaign materials. In the 20 years following its passage, however, it was never amended to update the law to address more modern techniques of manipulating campaign materials in a manner that can mislead voters. AB 730 replaced 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. The changes made thorough the passage of AB 730 are scheduled to sunset on January 1, 2023. If that sunset date is not repealed or extended, the original Truth in Political Advertising Act as enacted by AB 1233 of 1998 would go back into effect.

3) **Joint Informational Hearing on Election Cybersecurity**: In 2018, the Assembly Elections & Redistricting 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 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 then a 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.

4) **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 the provisions of AB 730—which this bill proposes to extend in operation until 2027—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. Although certain types of false speech—including defamation and perjury—are not protected by the First Amendment, the US Supreme Court has ruled that false statements can be a form of protected speech (*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.

   When AB 730 was considered by the Legislature in 2019, the author, supporters, and opponents of the bill all generally agreed 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). AB 730 included a number of amendments that were designed to address concerns that the bill could infringe upon the right to freedom of speech. Those amendments including requiring that deceptive audio or video be distributed with "actual malice" in order to be subject to the restrictions of the bill, requiring an elevated level of proof to prevail in a lawsuit brought under the bill, and limiting the bill's reach to *materially* deceptive audio or visual media to ensure that the bill did not cover commonplace and minor alterations to audio or visual media (such as modifications to visual media to whiten a person's teeth), among others.

Nonetheless, supporters and opponents reached different conclusions about the constitutionality of the restrictions on materially deceptive audio or visual media that were proposed by that bill. Proponents of AB 730—including Erwin Chemerinsky, the Dean of the School of Law at the University of California, Berkeley—argued that it is consistent with the US Supreme Court's First Amendment jurisprudence. In a letter of support to one version of AB 730, Dean Chemerinsky wrote, "the [US Supreme] 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." By contrast, opponents to AB 730 argued that its provisions were not narrowly tailored, and thus concluded that it was unlikely to survive a constitutional challenge. In a letter in opposition to one of the versions of AB 730, the California News Publishers Association (CNPA) wrote, "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."

Committee staff is unaware of any cases having been brought under the provisions of AB 730 since its enactment, nor is committee staff aware of any challenges to the constitutionality of that bill.

5) **Legislation in Other States and Federal Legislation**: In 2019, 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 law is a misdemeanor, punishable by up to a year in jail, a fine of up to $4,000, or both.

   Legislation similar to AB 730 is currently pending in Illinois, New Jersey, and Pennsylvania. Additionally, at the federal level, H.R. 1, H.R. 5314, S. 1, and S. 2093 all contain provisions that are substantially similar to AB 730, among other provisions.

6) **Arguments in Support**: In support of this bill, the Silicon Valley Community Foundation (SVCF) writes, "SVCF believes 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. We support policies

> to build a fair democratic system that improves public engagement on local issues and believe AB 972 is an important step in strengthening towards that goal."

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

Silicon Valley Community Foundation

**Opposition**

None on file.

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