

ASSEMBLY THIRD READING

AB 972 (Berman)

As Introduced February 18, 2021

Majority vote

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.

Major Provisions**COMMENTS**

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 of 2019 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.

The First Amendment to the United States (U.S.) 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 U.S. and California constitutions. Although certain types of false speech—including defamation and perjury—are not protected by the First Amendment, the U.S. 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 U.S. 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 U.S. 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 U.S. Supreme Court's First Amendment jurisprudence. In a letter of support to one version of AB 730, Dean Chemerinsky wrote, "the [U.S. 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.

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."

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."

Arguments in Opposition

None received.

FISCAL COMMENTS

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

VOTES

ASM ELECTIONS: 6-0-1

YES: Bryan, Bennett, Low, Cervantes, Mullin, Blanca Rubio

ABS, ABST OR NV: Seyarto

UPDATED

VERSION: February 18, 2021

CONSULTANT: Ethan Jones / ELECTIONS / (916) 319-2094

FN: 0002063